The Vulnerable and Intimidated witness; a socio-legal analysis of Special Measures

Rob Ewin

University of Cumbria

Abstract

The Youth Justice and Criminal Evidence Act (YJCEA; 1999) concerns *vulnerable* and *intimidated* witnesses (VIW); literature suggests these are not identified in the early stages of most criminal investigations, and trials. This is often detrimental to the trial outcome, attracts significant financial cost, and leaves victims to flounder (Burton et al., 2006; Cook et al., 2004; ONS 2011; HIJJI, 2012). Cooper and Roberts (2005) identified that investigators only identify approximately fifty percent of all witnesses eligible for *Special Measures;* there is recurrent misidentification between those who are vulnerable and intimidated within the 1999 act. This limits the measures available to some witnesses. This review examined the issues through three lenses, firstly: evidential and legal, secondly: a reflection of risk and harm, thirdly: ethics and power. Traditional applications of giving evidence are shown to be at odds with the relatively newer concepts such as Visually Recorded Evidence (VRE), under the Criminal Justice Act (CJA; 2003) s.137, and *'Special Measures'* under the YJCEA (Murphy & Glover, 2010) which are vastly underused. Despite international efforts to improve the provisions for VIW's (Tinsley & McDonald, 2011; Cooke et al., 2002; Baldry et al., 2013) there is still room for improvement which would benefit victims, witnesses and criminal justice agencies (Clark, 2012; De Than, 2003; De Wilde, 2013; Starmer, 2014; Harris, 1993). The estimated cost of misidentification along with inadequate prosecution file preparation (HMCJJI, 2009; HMIC, HMCPSI, 2013) is approximately £18 million per annum (ONS, 2014).

Keywords: vulnerable witnesses, criminal investigation, policing vulnerable populations

Evidential principles and the Vulnerable, Intimidated Witness

The Youth Justice and Criminal Evidence Act (YJCEA; 1999) was largely enacted on evidence from the *Pigot Report* (1989) and the 1999 Home Office report: *'speaking up for justice'* (Baber, 1999). The proposed and enacted measures under the YJCEA were: screening from the defendant (s.23), evidence by live link (s.24), evidence given in private (s.25), removal of wigs and gowns (s.26), video recorded evidence in chief (s.27), video recorded cross-examination[1] or re-examination (s.28), examination of witness through intermediary (s.29), and lastly aids to communication (s.30; Dennis, 2013). It was purported in the 1999 House of Commons Green Paper that the implementation of *Special Measures* was at odds with the *'principle of orality'*[2]. A Home Office working group intended the outcome of the 1999 act was to deal with *vulnerable* and *intimidated* witnesses (VIW); specifically, redressing a balance between protecting the principles of a fair trial, and ensuring that witnesses, particularly those in sexual cases, were not unduly disadvantaged (Baber, 1999). A disadvantage may arise should a VIW be required to give evidence orally; for example, without the assistance of intermediaries, aids to communication, or the benefits of a video recorded interview (Baber, 1999; Edwards, 1989; Carson, 2006). The YJCEA defined a witness, for the purposes of criminal proceedings as: *"any person called, or proposed to be called, to give evidence in the proceedings"* (s.63).

Cross-examination[3] remains the most prevalent mechanisms for testing and communicating orally testified evidence to a court, it is designed for establishing the truth, observing demeanour, and clarifying inconsistency (Roberts & Zuckerman, 2010). The YJCEA somewhat changed the approach to traditional forms of evidence and cross-examination (s.24, s.25, s.27, s.28; YJCEA, 1999); written statements could be replaced with

[1] This is the mechanism of calling a witness to answer questions on the evidence they have provided to a court. Often both defence and prosecution counsel will examine the witness through a series of carefully crafted questions Doak, J., McGourlay, C. And Doak, J., 2012. Evidence in context. Abingdon: Routledge, 2012; 3rd ed.

[2] The historical process of witnesses standing before the court to deliver their testimony is discussed further in Roberts, P. and Zuckerman, A.A.S., 2010. Criminal evidence. Oxford: Oxford University Press, 2010; 2nd ed.

[3] Further reading on the role of Judges in cross-examination is discussed in Henderson, E. (2014). Judges as cross-examiners: The starmer v grieve debate. *Archbold Review, 5*, 3-4.

video recorded witness evidence, which became orally testified evidence[4], and latterly the backbone of court examination. These measures, which were at odds with the *principle of orality* and arguably open court, were deemed necessary to provide VIW with access to justice by opening routes to evidence provision, allowing witnesses to participate in a way which is appropriate, considerate of need, and the case itself (Ericson & Perlman, 2001; Hoyano, 2005). Conflict between traditional orally testified evidence, the YJCEA, and cross-examination has developed over the years since enactment of the YJCEA in1999 despite a number of projects to improve the relationship (Baber, 1999; NAO & HMCPSI, 2012). Westera et al. (2013) highlights apprehension around the use of video recorded interviews as evidence by many prosecutors, although here it is specifically aimed at rape cases, this may explain why investigator uptake on the method remains low.

Not all witnesses are physiologically or psychologically[5] capable of performing under the guise of *'orality';* these include cases of extreme violence, interpersonal violence, events significantly distressing for witnesses, or cases of sexual violence (Hall, 2012; Brunel & Py, 2013). In these cases of *'vulnerability'*, the YJCEA has its most applicable position in criminal proceedings. To illustrate; in the case of *R v Iqbal (Imran) & anr [2011] EWCA Crim 1348,* the victim-witness[6] was not identified as being in need of specialist support during the initial Police evidence gathering phase. Some months later the victim-witness was required to give oral testimony under cross-examination in the Crown Court, having provided a written statement to the Police, following an incident where he was assaulted. The first Crown Court trial in 2010 was halted after the Judge became concerned about the victim-witnesses '*apparent learning and communication difficulties'*. It was submitted to a later Court that he had '*significant impairment of social functioning, intelligence and communication'*. The victim-witness therefore required screening from the defendant (YJCE,

[4] Further reading on the weight of oral testimony can be found in Mcdermott, Y., (2013). The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis. Leiden *Journal of International Law, 26*(4), 971-989.

[5] See Bogaard, G., Meijer, E. H., Vrij, A., Broers, N. J., & Merckelbach, H. (2014). Contextual bias in verbal credibility assessment: Criteria-Based content analysis, reality monitoring and scientific content analysis. *Applied Cognitive Psychology, 28*(1), 79-90.

[6] A term used to describe someone who is a '*victim'* of crime and a *witness* in their own case.

1999; s.23) and an intermediary[7] (YJCE, 1999; s.29) in order to effectively take part in the trial proceedings. The path of the traditional witness, speaking in open court, had been followed yet, the implications of this included distress to the victim-witness, and the financial implication of the cases postponement which could have been avoided had appropriate assessment been made earlier.

The key issue in the *R v Iqbal* case is the way in which the evidence was gathered. It is clear that the *vulnerability* of the victim-witness had not been addressed early enough in the investigatory process. The scene of this assault was near the victim-witnesses school, which catered for individuals with learning disabilities. This fact would be a matter for consideration when assessing the victim-witnesses ability to effectively participate in the evidence gathering process and any subsequent trial. There were missed opportunities surrounding the use of a specialist interviewer and the use of Visually Recorded Evidence[8] (VRE), a technique which may later advantage the witness should it be submitted as evidence in chief (s.27, YJCEA). These missed opportunities are further evidenced by the fact the victim-witness was called to give evidence in their own case without provisions under the YJCEA. This also gives a clear indication that assessment had not been made by the Crown for its case. Without doubt this would have been a humiliating affair for the victim-witness once stood in the witness box which brings into question the value of the written statement in this case. The Achieving Best Evidence (ABE) guidance indicates that specialist interview techniques, and a consideration for the witnesses ability and circumstance, should be referenced when obtaining evidence from a witness; in the *R v Iqbal* case this was a learning difficulty (MoJ, 2011; Doak et al., 2012 ; Beail, 2002).

[7] An intermediary may be able to help improve the quality of evidence of any vulnerable adult or child witness (as defined in Section 16 Youth Justice and Criminal Evidence Act 1999) who is unable to detect and cope with misunderstanding, or to clearly express their answers to questions, especially in the context of an interview or while giving evidence in court. Intermediaries are not available to 'intimidated' witnesses as defined by Section 17 Youth Justice and Criminal Evidence Act 1999 (unless they can also be categorised as 'vulnerable') or significant witnesses. Ministry of Justice, (2011). Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures (1st Ed). London: Ministry of Justice.

[8] Visually Recorded Evidence is generally gathered by the Police using specially trained officers with the interview itself being visually and audibly recorded Ministry of Justice (2011). Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures (1st Ed). London: Ministry of Justice.

Dealing with the complexity of *orality* and VRE is not a new dilemma. Pigot (1989) discussed in the early days of implementing this new approach to evidence delivery there would be inherent problems when trying to act as a gatekeeper to any assessment of VRE and traditional evidence gathering approaches (Edwards, 1989; Landström, et al., 2005). VRE was developed to assist VIWs to give evidence and forms part of some *Special Measures* (MOJ, 2011). The precise definition of *vulnerable* is a key element to addressing the early investigative and trial needs of victims and witnesses, who require assistance under the YJCEA; this often goes hand-in-hand with VRE (MoJ, 2011; O'Mahony et al., 2011). Witnesses often lack choice depending on, for example, the availability of specially trained officers, or just the sheer lack of training in identifying who should, and should not, have their evidence visually recorded or indeed receive *Special Measures* (Haber & Haber, 1998; McDermott, 2013; MoJ, 2011; O'Mahony et al., 2011). This leads to a decrease in the number of options available to that witness under the YJCEA, such as s. 27 where VRE is given as evidence in chief[9]. Whilst identification is one specific issue, the term VIW was born during an expansion in the YJCEA legislation to include *intimidation* as a requisite for *Special Measures*, (Baber, 1999; Healey, 1995). The act of the investigator as a gatekeeper is a fundamental role, both within the initial identification, and then subsequent identification of any later intimidation, should it arise within the build up to a trial or once the initial evidence gathering process has begun.

The original 1999 YJCEA defined *vulnerable* in terms of age, in being under 17[10] at the time of the hearing, where the diminishment of evidential quality is by reason of the witness suffering from mental disorder[11], a significant impairment of intelligence and social functioning[12], physical disability, or suffering from a physical disorder (Roberts & Zuckerman, 2010). Principally, there is a legal presumption that all witnesses are *competent* to give testimony unless information is presented to suggest they are not (YJCE, s.53). This

[9] The evidence that a witness gives in response to examination on behalf of the party who has brought the person forward as a witness (MOJ, 2011; Doak, McGourlay & Doak, 2012)

[10] Although this limit was amended by the Corners and Justice Act (2009) s. 98 to 18.

[11] Within the meaning of the M1Mental Health Act 1983

[12] As seen in *R v Iqbal (Imran) & anr [2011] EWCA Crim 1348*

therefore requires the presenting information to support *Special Measures,* which must first be identified within the initial investigation as a specified need (Brookoff et al., 1997; Williams & Goodwin-Chong, 2009). The s.53 position supports the *'principles of orality'* as described by Roberts and Zuckerman (2010) because unlike other areas of law there is an *'opt-in'* element which must be fulfilled if the YJCEA is to be applied. The initial evidence gathering process is however a pre-requisite to the *Special Measures* application and Burton, Evans and Sanders (2006) purport: *"*...there are large numbers of VIWs, vulnerability is ranged along a spectrum, and needs and wishes need to be ascertained, not assumed*"* (p.14). The significance of early identification in cases where victims and witnesses, who would benefit from Special Measures or VRE, is an area of criminal investigation which requires significant improvement; however, there is a relationship between the methods used to gather evidence, the identification of VIWs, and later effects on court proceedings, with much of the existing focus being on the defendant and the situational vulnerability of the witness (Bull, 2010; Burton, Evans & Sanders, 2006; O'Mahony et al., 2011). To consider the *R v Iqbal* case as a single event would perhaps not merit further inquiry; critically, this case does not sit alone in drawing reference to the issue of vulnerability identification as research suggests around fifty percent of all witnesses who would benefit from some form of Special Measure are not identified; although, once identified a high percentage are granted (Miller, 2012; HMIC 2013; Cooper & Roberts, 2005; Roberts, Cooper & Judge, 2005).

In *R v PR [2010] EWCA Crim 2741* it was recorded that one victim-witness of historic familial rape was permitted *Special Measures* under the gateway of fear and distress of testifying (YJCE 1999, s.17). Crucially, it was not identified that the victim-witness also had a learning disability resulting in an inability to comprehend complex questions. In order to facilitate this victim-witnesses participation an intermediary was required. As highlighted an intermediary cannot be afforded under s.17 of the YJCEA (MOJ, 2011). Whilst a matter of law for the court to determine a witnesses competence[13] (YJCE 1999, s.53 & s.54) the

[13] In determining the competence of witnesses courts use, in amongst other legal principals, the measure that the witness must understand questions put to him as a witness, and (b) give answers to them which can be understood- Doak, J., McGourlay, C. & Doak, J., 2012. Evidence in context. (3rd Ed)Abingdon: Routledge.. See also; Willner, P. (2011). Assessment of capacity to participate in court proceedings: A selective critique and some recommendations. *Psychology, Crime & Law, 17*(2), 117-131.

presence of a learning disability would have allowed a Special Measure gateway under s.16[14] (YJCEA), in order to fulfil the most basic principle of communication with the court (Baber, 1999). Therefore submitting a witness' evidence to a court under s.17 YJCEA will equally disadvantage witnesses who would otherwise have benefitted from measures available under s.16 YJCEA. However, unlike *R v Iqbal* the misidentification centred on the specific dimension of the learning disability as an area of *vulnerability* in itself. The *R v Iqbal* and *R v PR* cases are critical in representing the two key problem areas in the *Special Measures* debate; the first being initial *identification* of a witness who is *vulnerable* and therefore eligible under the 1999 act, and the second being the misidentification of witnesses between the two strands of the act (s.16 & s.17, YJCEA 1999). This goes hand in hand with research around missed opportunities for VRE; however, this area is largely underdeveloped (O'Mahony et al., 2011; Burton et al., 2007).

The approach taken to define the term vulnerable should have meaning both in terms of legal definition and in the eyes of law enforcement professionals (Perloff, 1983; Spencer, 2008). Defining vulnerability so as to allow the appropriate gateway into Special Measures is therefore a dilemma between defining the nature of the vulnerability, the requirement of the YJCEA, against often biased and untrained assumption (Burton, Evans & Sanders, 2006). For example, the 2009 Coroners and Justice Act, Ch.3, amends the upper age limit for YJCEA eligibility, taking the limit from 17 to 18 years for automatic YJCEA eligibility. This would have had an effect on *R v Iqbal* as the victim-witness was 17 at the time of the offence but 18 at the time of trial (YJCEA, s.16 ss.1). Therefore eligibility in the sense of age was applicable, but not an absolute bar as other areas of the legislation could have been applied due to an element of vulnerability. This brings into some context the earlier statement of Burton, Evans and Sanders (2006) where they highlight the need to consider the 'spectrum of vulnerability'; not simply determine the consideration of Special Measures on factors such as age. Where vulnerability and Special Measures are correctly identified there is a positive impact on criminal proceedings concerning VIWs. This is seen in the case of an 81 year old female who was repeatedly raped (*Sed v R [2004] EWCA Crim 1294).* Medical evidence corroborated the offence taking place, it was found during the initial stages that the victim-

[14] A witness in this section is a vulnerable witness unlike that under s.17 YJCEA which describes witnesses who are vulnerable due to *fear and distress in testifying* (Routledge, 2012)

witness was suffering from dementia. Specialist VRE was obtained and whilst clearly not applicable under the gateway of age, the Special Measures direction was applicable under s16 (2) YJCEA – *intellectual impairment*. Without doubt the *Sed v R* case involves a vulnerable victim-witness; crucially the vulnerability was defined early in the investigatory process and dealt with under the appropriate YJCEA gateway. Surgenor (2012) purports that this early identification and appropriate evidence gathering is 'best practice' when dealing with vulnerability, it steers trial processes without which witnesses would not receive appropriate support, and the cost of the process increased.

Critically, unlike s.16 YJCEA, the arguably more open gateway into Special Measures is that of s.17 YJCEA[15] which details the required applications for fear and distress about testifying under which vulnerability, and more appropriately intimidated witnesses, are dealt with (Roberts & Zuckerman, 2010). The s.17 assessment must not be confused with that of s.16 YJCEA, as was discussed in the *R v PR* case. The s.17 gateway allows witnesses to receive Special Measures on grounds of the social, cultural, ethnic origin, domestic and employment circumstance, religious beliefs, political opinions or on behaviour towards the witness by the accused, their family, associates, or that they are the complainant in a 'sexual' case (Doak, McGourlay & Doak, 2012). In the case of *R v Forster (Dennis) [2012] EWCA Crim 2178,* fear and distress about testifying and intimidation from the accused's family and associates was a very prevalent and important factor. This was a case of sexual violence; the accused had threatened and manipulated witnesses throughout the case. There was concern that once the evidence gathered for the initial offence had been submitted, attention was not paid to new intimidation offences (Criminal Justice and Public Order Act, 1994; s.51) with the requisite application of Special Measures and VRE procedures. This is an area where intimidated witnesses are especially left to flounder; this forms part of the overall picture when discussing identification, not only is this an issue in the initial investigatory phases, but later on in court proceedings, and even after a decision has been reached by the court; however, the area is largely under researched due to inaccurate recording of many intimidation offences (Burton et al., 2006; CJJI, 2009; Cooper, 2003).

[15] Note also the amendment under s.99 Coroners and Justice Act 2009 to include offences involving weapons.

The identification of intimidated witnesses, eligible under the s.17 YJCEA gateway, is an area where vulnerability misidentification can have disastrous consequences; this is plainly clear in *Van Colle and another v Chief Constable of Hertfordshire Police - [2006] 3 All ER 963* where one witness was shot dead only days before giving evidence. It was later identified that the witness had suffered days of intimidation and feared giving evidence; despite this being raised no protective measures were ever implemented. Doak et al. (2012) highlighted a thirty percent rise in cases of perverting the course of justice (which includes witness intimidation) between 2000 and 2005; a time period where the YJCEA was in force. There was however no increase in Special Measures during this time. This gives a clear indication that this is a factor in many criminal investigations, with the most prevalent group in the intimidated category being those from poor socio-economic backgrounds, victims of domestic or sexual violence, and those who are witnesses in serious and organised crime (Doak et al., 2012). Witnesses in these categories would also be eligible in certain cases under s.17 YJCEA. However, in some cases, intimidation, although not identified in the initial evidence gathering, but forming leading up to the point of trial, presents a complex avenue in terms of identification (Cooper, 2010; Neild et al., 2003; Hamlyn, 2004). Within this identification phase, and despite measures within the YJCEA to allow VIW to receive Special Measures, there have always been concerns around the type of intimidated witness to receive Special Measures, and, how those witnesses would be identified once the Police had passed on responsibility to the CPS or other witness support agencies and prosecutors (Pigot 1989; Burton et al., 2006).

To easily define the term vulnerable, encompassing the notion of ‘intimidation’, to match that of gateways within the YJCEA, where VIW would be admitted, is a complex issue (Pigot, 1989; Charles, 2012). As indicated, where Special Measures are applied along with VRE, there is observable merit in terms of allowing fair testimony from that witness (Tinsley & McDonald, 2011; Bull 2010; Finch 2005). There is lastly a process which takes place before the commencement of trial - the Pre Trial Witness Interview - as a break between the Investigator, Prosecutor and witness ‘box’, and out-with any witness support in the interim by other agencies (e.g. Victim Support). Whilst this has not been discussed in this review, there is evidence to suggest that an attempt to identify vulnerability at this stage is arguably too late in the investigative process (Roberts & Saunders, 2010; NAO, 2002) and a report has

indicated that the CPS only meets with three percent of VIW before trial (Cooper & Roberts, 2005). As highlighted, the two areas of concern still remain. Those being the initial identification of witnesses, and then misidentification between those who are vulnerable or intimidated and which measures should be applied. Distinguishing between who then becomes vulnerable and who should receive Special Measures as a wholly adequate requisite within the initial evidence gathering and trial process is part of the dilemma (Cooper, 2003; Burton, et al., 2006; CJJI, 2009; Miller, 2013).

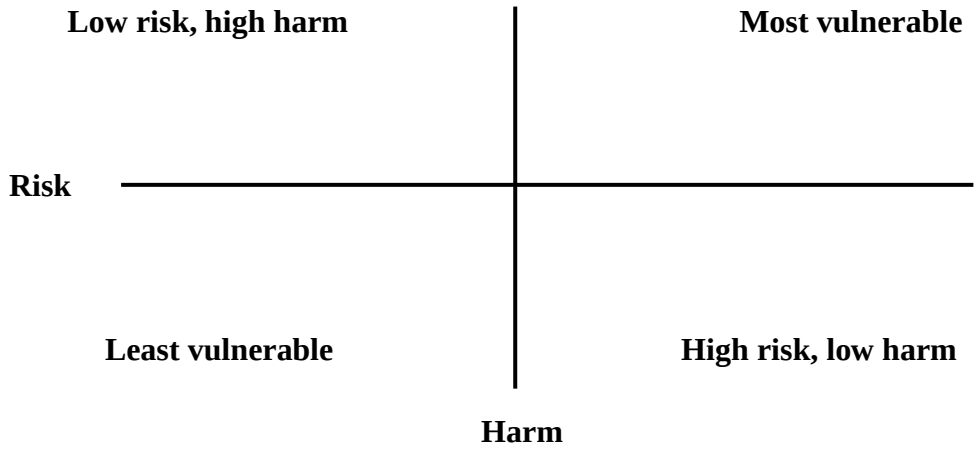
Avenues of risk and harm in vulnerability

When working towards a definition there is clear evidence that there is a failure to identify witnesses as vulnerable or intimidated[16] (Cooper & Roberts, 2005). The term 'key and significant witness' does not appear within the YJCEA but the interpretation of this lexicon came within the guidance on Achieving Best Evidence (ABE; MoJ, 2011).
The YJCEA did not go so far as defining vulnerable or intimidated; although it did set certain parameters as have already been discussed. It is moreover for a court to decide on the competence of a witness and the meaning of this term is given definition under s.54 (2) of the 1999 act as: 'to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings'. In further analysis s.53 (3; YJCEA) states that a person is competent if they 'understand questions put to him as a witness, and give answers to them which can be understood'. This is a very simple definition, crucially it is for investigators to identify vulnerability at the earliest possible opportunity so as to direct specialist support, as this then directs the evidence gathering process and ultimately the application for Special Measures (Cooper & Roberts, 2005; MoJ, 2011). The term competent is at odds with the terms vulnerable and intimidated; a witness may be competent to give evidence, within the s.54 definition, however, they may not be free from vulnerability or fear and distress about testifying as requisite under the YJCEA gateways (s.16 & 17). There are millions of potential witnesses in the criminal justice system and developing a strategy to deal with those who are vulnerable or intimidated has been a key aim of many governments and witness policies (Hall, 2012).

[16] A phrase often used to describe s.17 YJCEA 1999 as those eligible for assistance on grounds of fear or distress about testifying.

The ability of a witness to provide and then recount the fullest explanation of what they may have witnessed, which is free from humanistic error, is an unrealistic expectation (Kebbell & Wagstaff, 1997; Harris, 1993; Gudjonsson et al., 2000). Often a witness will be unable to give a precise account, due to features of memory, the length of time since the witnessing the events, and the time taken to provide evidence or bring the case to trial. This factor was present in *R v Iqbal,* as it was around one year between the incident taking place and the matter coming to trial (Haber & Haber, 1998; Kebbell & Wagstaff, 1997; Caughey, 2007). This is, in part, dealt with by s.139 of the Criminal Justice Act (2003) which allows witnesses to read a document made at an earlier time[17]. However, literacy cannot be assumed for all witnesses, and requiring aids to communication, or an intermediary would be something to be accommodated as a Special Measure therefore requiring appropriate assessment under the YJCEA (Gudjonsson et al., 2000). This assessment should be a standard for all witnesses but evidence suggests otherwise. Defining vulnerability and the factors of fear and distress is another key element in determining eligibility for Special Measures. There is concern amongst academics that vulnerability is socially constructed to serve political and economic interests (Green, 2007). However, there is also conflict in that determining the social or environmental vulnerability of a victim does not necessarily cover that of a witness, who may equally add value to an investigation. Killeas (1990) describes vulnerability as a condition of existence, which is shaped by biographical, environmental or cultural factors, with the existence of two measures, those being risk and harm (Walklate, 2011).
When plotted on an axis they can conceivably represent elements of vulnerability and likewise intimidation. If the two elements were plotted on an axis it would look like this:

[17] i.e. a written statement to the Police (MG11).



(Fig 1.1 Killeas scale of vulnerability divided into risk and harm; Walklate, 2011).

Conceivably, using *Killeas* scale to plot the humanistic factors described by Kebbell and Wagstaff (2007) may result in some high risk and low harm categories dependant on intellect, disability, social factors, and ability. A witness with a learning difficulty or language impairment (biographical) might be at high risk if Special Measures were not applied and high harm should they not be provided and the case collapse resulting in no recidivism, recompense or justice. Those most heavily victimised are often those vulnerable to circumstance such as young males who frequently socialise and consume alcohol, females in violent domestic relationships, children at risk of sexual exploitation, and elderly victims at risk of socio-economic crime (Green, 2007). The risks associated with vulnerability in these categories are high, and often in domestic violence cases the harm done is often calculable, not by physical injury, but psychological distress. In terms of giving evidence and requiring Special Measures the harm element may remain low according to the requisite measures applied under the YJCEA, but the risk, for example of intimidation may remain high. There is however a greater consideration; if having separated vulnerability into elements of risk and harm, then making an assessment under the YJCEA, there should have an equal scale to measure risk and harm alongside outcome and effect. The intervention with the latter value representative of the effect a particular Special Measure would have on suppressing the remaining factors of risk (Sanders & Jones, 2007; Green, 2007). Using such a scale to plot

these factors may assist investigators to forecast the potential use of Special Measures and VRE.

Developing a clear lens through which to view vulnerability, and include marginalised populations, is something which is broadly discussed but not given meaning or sense, it becomes a "dirty" topic, hypothetically yielding complexity and risk to operators (Tyler, 2013). Examining further the design and construction of harm within vulnerability is a multilayered dilemma (Tate, 2013). The set ideal for examining this area would be to draw together all of the factors which represent harm and mitigate them with equally opposing facets to reduce that element. The biographical elements (e.g. an obvious speech impediment or visible disability) which have more obvious vulnerability because they are arguably more visible, receiving more attention than others where the outward effect is limited such as in some cases of intimidation (Tate, 2013). Victims of rape and interpersonal violence were amongst the first to be recognised as vulnerable and this was perhaps an indication of the nature of the offences and relationship between the victim-witness, and the potential defendant (Hall, 2012). In placing these types of witnesses on *Killeas* scale it would be easy to interpret that they are witnesses at most harm and a higher risk of intimidation during the investigatory and trial process, due to their proximity to the suspect, the embedded nature of the interpersonal relationship, and seriousness of the crime (Hall, 2012; Healey, 1995). The vulnerability lens would therefore need to be wide enough to encompass these elements along with the risk of secondary victimisation through the process of giving evidence in the trial itself as this is often overlooked when determining witnesses' vulnerability (Williams & Chong, 2009; Hall, 2012; Baldry, et al.,2013; Felson, et al., 2009).

Again using *Killeas* scale to determine secondary victimisation through the very process of being a witness may place certain witnesses in the low harm but high risk category depending on the offence under examination. It is important to separate out the aspect of intimidation as a form of vulnerability. The prevalence of intimidation is highlighted by results from a 2002 survey that fifty six percent of witnesses were intimidated by the defendant's presence in the court room, more interestingly thirty five percent felt intimidated by official sources, including lawyers, Police, court staff, judges and magistrates (Hall, 2012). The latter does not exclusively fit within the YJCEA as intimidation, but can be discussed as an area of a 'power' relationship between investigator and witness. Considering experiences

of defining vulnerability within other sectors, Olive (2007) highlights the complex task of identification through analysis of intimate partner violence (IPV) victims in emergency departments. Olive (2007) describes the process of screening patients who do not present with acute trauma but have nonetheless experienced IPV. These patients are harder to detect through processes of screening often due to individual professional subjectivity around disclosures from, and the lack of continuity, in the care which is offered in an emergency setting.

Relating the research of Olive (2007) into discussions around the identification of vulnerability, inclusive of intimidation, within the justice setting allows for further emphasis and understanding that vulnerability is a continuum of risk which can be catalysed by misidentification and professional subjectivity. The definition and assessment of witnesses within an investigation or pre-trial process should, along with the initial identification, be continually and universally defined throughout any processes which the witness may pass through before the court process commences. Killeas (1990) describes vulnerability as having biographical, environmental or cultural elements and in understanding these there is a greater contextual analysis to any vulnerability lens; crucially, this understanding must be universally applied and have lateral definition. As a further health related reflection the protection of vulnerable people is about managing factors which may not at first appear relevant but later have an impact on the provision of care, support and welfare of the individual (Mandelstam, 2009); it is by managing these factors along with the elements of risk and harm that support the contextual analysis discussed by Killeas and it is these who are the vulnerable and intimidated witnesses.

Power and Vulnerability

Imagine the *vulnerability* of all witnesses, there seems to be a culture of abject revolt in dealing with the entanglement of social balance, where instigating justice through investigatory procedures and criminal trials, depends on the power to understand and promote the witness as a stable corner post in the hands of those who deal with the vulnerable (Tyler, 2013; Mandelstam, 2009; Charles, 2012; Ask, 2010). Hughes et al. (2011) encapsulates this position by synthesising the relationship between investigative bodies and those living with disabilities. Concerns around people with disabilities having the provision of specialist

materials provided for them in order to communicate are overtly inconvenient to many who work in the field (Hughes et al., 2011). It could therefore be argued that the thirty five percent of witnesses identified as intimidated by 'official sources' (Hall, 2012) lacked the freedom of consent or informed choice to make a decision about their own vulnerability or have it adequately assessed. In addressing this debate the role of the power relationship needs to be examined as a portal for addressing the vulnerability identification dilemma. The ultimate revolt, claims Tyler (2013), is the inability to see the world through the eyes of those whom we do not deem as vulnerable but who inherently are. Playing down systematic and contextual elements is merely a trait of the way in which society overall deals with the problem of vulnerable people (Tyler, 2013; Hughes et al., 2011).

Capturing the social ontology of the debate around how investigators should approach the power relationship is as multifaceted as identifying vulnerability; on the one hand the investigator has the power to make decisions on the eligibility of the case for escalation, and how a witness' evidence will be collected and disseminated (Hall, 2012; Doak, McGourlay & Doak, 2012). The power of the witness to make a choice is therefore limited to what the investigator describes as being 'on offer' and available to them. The anthropological development of the investigator is something which has developed rapidly since the 1980's motions of justice for victims and enhanced victim led evidence recovery and interview techniques (Pigot, 1989; Baber, 1999; Brown, 2011; Edwards, 1989). The choices for victims have increased since the days of Pigot (1989). However, that choice still rests with the investigators ability to direct meaningful enquiry through ethical gateways (Hall, 2012).

Tyler's (2013) depiction of the socially underdeveloped and revolting topics of injustice are however as engrained in the anthropology of legal and investigative development as mainstream neoliberalism. Sidanius and Pratto (2000) reflect that social hierarchy exists in many socio-legally developed states. The idea that an investigator is masterful of the subordinate receives much attention and development in the Western world, perhaps with early connotations of development in the field of psychology. The power still remains in the investigators hands and like most well informed Western societies there is a stage for the marginalised groups to become misinformed about the decisions taken by those with higher stakes in the power relationship (Paul et al., 1995; Sidanius & Pratto, 2000). The decision of the informed victim to part-take in the investigative element of a criminal

investigation should be as a choice; in making that choice the contextual relationship between information, to make an informed decision about their own vulnerability, should offer as a basis for the assessment of the *vulnerable* context of that particular witness (Hall, 2012; Doak, McGourlay & Doak, 2012; Franklyn, 2012; Tate, 2013; Eldred, 2008).

The ethical dilemma of power can be viewed through the lens of teleological and deontological ethical principles (Irwin, 2009). In this dilemma the investigator is stuck between the morality of the action against the rule which is to be adhered or applied; such as those under the YJCEA. It maybe the investigators desire to treat the witness as *vulnerable* within the moral sense; however, where this meets with the rule of law, the power to influence this area is perhaps limited to the investigators understanding of the rule which is being applied (Tanner et al., 2008). Moral and social obligations of the Police are becoming more evidence based and the teleological over deontological argument is being balanced by examinations of Police and Prosecutor decisions where ethical and moral obligations outweigh the perceived rule (Neyroud & Beckley 2001; HMCPSI, 2013; HMIC, 2013; Hollings, 2013). There is still a relationship between power and vulnerability which specifically reflects in the Special Measures debate as one avenue which remains largely unexplained and ignored; the effect of this may be seen in the debates around dealing with VIW for years to come.

Conclusion

There are systematic failures to identify even the most basic vulnerabilities, such as those which are physically apparent and those which develop through the investigatory and trial process. Furthermore, the approach taken once an identification of vulnerability is made can be fragmented and inconsistent (Burton et al., 2006; Charles; 2012; HJJI, 2009). The failures can be placed into two groups, that of non-identification and that of misidentification between the two strands of the YJCEA. The role of the investigator to encompass a witness's vulnerability in their assessment informs the longer term evidential outcome and placing this in the context of risk and harm may help deliver a more defined view of vulnerability as the balance between identification and socio-legal contextualisation takes place. Using vulnerability as a trigger word when writing about social policy arguably generates the notion of risk, implying widespread and systemic vulnerable paradigm in populations where the only

risk implied is that which is created (Fawcett, 2009). The principles of live courtroom testimony, delivered orally by witnesses with first-hand knowledge of the matters in issue, are the paradigmatic form of evidence in English criminal trials; respect should be given to those who provide such evidence with a steer towards more accurate use of VRE and Special Measures. The 'principle of orality' is still seen as the most prevalent form of 'open justice', enshrining the century's old tradition of open Court Rooms allowing the public to scrutinise court processes, and a jury or magistrate to make a decision on the outcome of the proceedings based, in part, upon oral testimony (Roberts & Zuckerman, 2010). However, the needs of vulnerable and intimidated witnesses need to be taken into account and whilst the YJCEA provides the framework for this, there remains a dilemma between placing victims and witnesses under the protection of legislation, and leaving them to flounder because of failures in the processes of criminal evidence management.

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