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VULNERABLE WITNESSES

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INTRODUCTION

[1] My general thesis is that balanced, reasonable and discretionary measures for vulnerable witnesses, determined and supervised exclusively by the court, have an important part to play in the administration of justice. The simple rationale is that litigation should be determined following the court's consideration of all relevant and admissible evidence, presented In the most satisfactory, coherent and intelligible manner possible.. In cases where all relevant and admissible evidence has not been received, or has been received in unsatisfactory fashion, there is a risk that the interests of justice will not be furthered. The furtherance of the interests of justice must entail the creation of conditions – fair, balanced and proportionate – under which parties and witnesses have the opportunity to give their best evidence.

[2] Due emphasis and reflection on the rule of law has become noticeably fashionable during recent times. In his landmark treatise, Lord Bingham, reflecting on the principle of the rule of law, stated:

> "*The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future* ***and publicly administered in the courts***".[1]

This is the over-riding principle which, I suggest, must guide and dominate the work of all lawyers and judges. I have highlighted the latter part of Lord Bingham's formulation, as it is especially apposite in the present context.

[3] It is a truism of some longevity that every civilised society is measured according to how it treats its weaker and less advantaged members. It is probably correct to say that most members of society do not have to attend a court at any stage of their lifetime, much less give evidence in any form of legal proceedings. Almost seventy years ago, an Italian author described courtrooms as "*grey hospitals of human corruption*".[2] Further, Lord Bingham has observed:

> "*Few would choose to set foot in a court at any time in their lives if they could avoid it …*".[3]

Those on whom this burden and challenge fall constitute a relatively small minority of the population. Within this small minority, there is a significant percentage of witnesses who, by virtue of their youth, emotional or physical wellbeing or some other factor are vulnerable. We are governed by a legal system in which sworn oral testimony dominates. This is the mechanism

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[1] The Rule of Law (Allen Lane Publishing), p. 8.
[2] Piero Calamandrei, **A Eulogy of Judges** (Princeton University Press, 1942: Chapter XII, p. 95).
[3] The Rule of Law (Allen Lane Publishing), p. 9.

whereby the court seeks out the truth, it being the primary task of most courts to establish the facts upon which their decisions are to be based. Accordingly, it would be plainly inimical to the rule of law if the truth does not emerge and, therefore, the material facts are not established as a result of witnesses being afflicted by fear, intimidation or some emotional or physical incapacity. Justice would be threatened and injustice would flourish. Moreover, society would rightly be held to account for failing to take basic measures to protect some of its weakest members.

Criminal Proceedings

[4] The phenomenon of special measures for witnesses in *criminal proceedings* is well established in Northern Ireland. The legislation is contained in the Criminal Evidence (Northern Ireland) Order 1999 ("*the 1999 Order*"). This introduced the concept of "*vulnerable and intimidated witnesses*".[4] A witness is, in principle, eligible for some form of special measures if either of two conditions is satisfied. The first is that the witness is aged under seventeen years at the time of the hearing. The second is substantially broader:

> "*If the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any* [specified] *circumstances …*".[5]

There are two specified circumstances. The first is that the witness is suffering from mental disorder within the meaning of the Mental Health (NI) Order 1986 *or* otherwise has a significant impairment of intelligence and social functioning. The second is that the witness has a physical disability or is suffering from a physical disorder. The legislation also expands on the concept of the quality of a witness's evidence, defining this as –

> "*... quality in terms of completeness, coherence and accuracy; and for this purpose 'coherence' refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively*".[6]

[5] Special measures are also in principle available for a further category of witnesses, the qualifying condition being:

> "*… if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings*".[7]

[4] In Part II. As amended by The Justice (NI) Act 2010, Royal Assent imminent.
[5] Article 4(1)(b).
[6] Article 4(3).
[7] Article 5(1).

In deciding whether this qualifying condition is satisfied, the court is obliged to take certain factors into account. These are the nature and alleged circumstances of the subject offence; the age of the witness; any behaviour directed to the witness on the part of the accused or his family members or associates or any other potential accused person or potential witness; and, where relevant, the social and cultural background and ethnic origins of the witness, the domestic and employment circumstances of the witness and any related beliefs or political opinions of the witness. In determining eligibility under Article 5, the court must consider any views expressed by the witness. There is a notable special provision in relation to sexual offences:

> "*Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this paragraph unless the witness has informed the court of the witness's wish not to be so eligible by virtue of this paragraph*".[8]

[6] The mechanism for facilitating and assisting qualifying witnesses is a *special measures direction*. There are two methods whereby such a direction may be made by the court. The first is on application by the witness concerned. The second is of the court's own motion.[9] Where eligibility is established, a special measures direction does not follow as a matter of course. Rather, the court must satisfy itself that one of the available special measures would be likely to improve the quality of the witness's evidence. The formation of this judgment requires the court to consider all the circumstances of the case, including in particular any views expressed by the witness and whether the contemplated measure "*… might tend to inhibit such evidence being effectively tested by a party to the proceedings*".[10] Herein one finds the first explicit reference in the legislation to the rights of the accused. The court is empowered to discharge or vary or further vary a special measures direction "*… if it appears to the court to be in the interests of justice to do so …*".[11] Where this power is exercised, the judge must articulate his reasons in open court. The available special measures are the following:[12]

- Screening of the witness from the accused.
- Evidence by live link.
- Evidence given in private.
- The removal of the judge's and barristers' wigs and/or gowns.
- The video recording of the witness's evidence-in-chief.
- The video recording of the witness's cross-examination or re-examination.

[8] Article 5(4).
[9] Article 7(1).
[10] Article 7(3)(b).
[11] Article 8(1).
[12] Articles 11-18.

- The examination of a witness through an intermediary.
- The authorisation of the witness utilising an aid to communication.

[7] Special provision is made for child witnesses viz. those aged under seventeen years at the time of the hearing.[13] For such witnesses, there is a further category of "*in need of special protection*". This applies where the relevant offence is a sexual offence, a violent offence, kidnapping, false imprisonment, child abduction or an assault upon or injury or threat of injury to any person.[14] This part of the legislation establishes a "*primary rule*".[15] The effect of this primary rule is to limit the court's discretion:

> "*The primary rule in the case of a child witness is that the court **must** give a special measures direction in relation to the witness which complies with the following requirements –*
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> *(a) it **must** provide for any relevant recording to be admitted under Article 15 (video recorded evidence-in-chief); and*
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> *(b) it **must** provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in-chief or otherwise) to be given by means of a live link in accordance with Article 15.*"

[my emphasis]

The primary rule is subject to certain specified limitations. In particular, it does not apply where the court is satisfied that maximisation of the quality of the child witness's evidence would not result.[16] However, this limitation does not apply where the child witness belongs to the "*in need of special protection*" category.[17] In short, elaborate provision is made for child witnesses in criminal proceedings.[18] This includes a separate regime for a witness who *was* aged under seventeen when a video recording of his interview was made with a view to its admission as the witness's evidence-in-chief at the trial.[19]

[8] In broad terms, the Northern Ireland legislation in this sphere is materially indistinguishable from its English counterpart. The legislation does not affect the court's power to exclude evidence in its discretion.[20]

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[13] See Articles 9 and 10.
[14] See Articles 9(b) and 23(3).
[15] See Article 9(3).
[16] See Article 9(4)(c).
[17] See Article 9(5).
[18] See also Article 9(6) – (9).
[19] See Article 10.
[20] Per Article 2(3).

Vulnerable Witnesses in Civil Proceedings: Proposed Law Reform

[9] The Northern Ireland Law Commission has just submitted to Government its report "Vulnerable Witnesses in Civil Proceedings".[21] In compiling this report, the Commission has sought to address the identified mischiefs and deficiencies in the current law as imaginatively and thoroughly as possible, giving effect to its statutory duty to simplify and modernise the law. We believe that this report and accompanying draft legislation provide a vehicle whereby these aims can be achieved in a fair, proportionate, realistic and efficient manner. The sweep of this project is extensive: it examines in some depth the principle of orality; the reforms which have been introduced in criminal proceedings, particularly through the mechanism of special measures; exceptions to the principle of orality; the law and practice in other jurisdictions; the criteria which should govern the identification of witnesses qualifying for special treatment; the type of special measures which would be appropriate in civil proceedings; and the challenging issue of witness anonymity.

[10] The law reform proposals contained in the Commission's report and reflected in the accompanying draft legislation are the product of an extensive and robust consultation exercise. The Law Commission has taken steps to ensure that all potentially interested and affected citizens, groups, organisations and professions have had the opportunity to ventilate their views and suggestions and, hence, influence the shape and content of this report. This should provide significant reassurance to the local legislators who will make final decisions. Throughout the process culminating in this report, care has been taken to ensure that the executive has been periodically informed of the progress of the project, its evolving orientation and its possible outcomes. Thus the report will not take legislators by surprise.

[11] In compiling its report and formulating its recommendations to Government, the Commission has considered, *inter alia*, the Scottish legislation and the New Zealand legislation.[22] In summary, the Commission has concluded that the current law and practice in Northern Ireland fall well short of giving sufficient protection to certain categories of witness in civil proceedings. The consultees who responded were virtually unanimous in supporting the Commission's view that special measures should be extended to civil proceedings. Some of the responses highlighted provisions such as Section 75 of the Northern Ireland Act 1998[23] and Article 13 of the UN Convention on the Rights of Persons with Disabilities. The Commission is proposing, broadly, the introduction of a new statutory model of special measures for vulnerable witnesses in civil proceedings closely comparable to the existing criminal proceedings model.

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[21] NILC 3 (2011).
[22] The Vulnerable Witnesses (Scotland) Act 2004, Section 11 and the Evidence Act 2006, Section 4.
[23] The duty imposed on public authorities to have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation, men and women, persons with or without a disability and persons with or without dependants.

[12] The Law Commission's report to Government examines extensively the subject of special measures for vulnerable and intimidated witnesses in civil proceedings. Its researches, analyses, recommendations and conclusions have focussed on, *inter alia*, three particular issues of importance. The first is the use of intermediaries in civil proceedings. The second is the use of supporters and like measures. The third is witness anonymity. I propose to reflect on each of these discrete issues in a little detail.

The Use of Intermediaries

[13] An intermediary is a third party who may act as a "go-between" to facilitate communication between a vulnerable witness and the court.[24] In broad terms, it is the function of an intermediary to explain questions which are put to the witness, perhaps using simpler language which the witness is able to understand. The intermediary may then communicate the witness's answers to the court, so that the information which the witness wants to relay is understood. In the consultation paper,[25] the Commission examined the controversies which surround the issue of intermediaries. In New Zealand, intermediaries were rejected as a result of divided views expressed by the legal professions and concerns about the effectiveness of communicating a witness's answers. However, in criminal proceedings in Northern Ireland,[26] England and Wales,[27] the use of intermediaries was included as a possible special measure for eligible witnesses, although the relevant provision in Northern Ireland is yet to be commenced. In Scotland, intermediaries was not specifically included in the Vulnerable Witnesses (Scotland) Act 2004, but that legislation allows for Scottish Ministers to make secondary legislation for the creation of additional special measures.[28] The Scottish Government consulted on the possible use of intermediaries in Scotland in October 2007,[29] and published its analysis of consultation responses in August 2008.[30] The analysis did not reveal any consensus amongst consultees and no further action has been taken to date.

[14] The Commission has concluded, on balance, that the use of intermediaries in civil proceedings would be of benefit to certain witnesses who require specialist assistance to understand and to be understood during court proceedings. However, it is recognised that care must be taken to ensure that intermediaries are fully trained and that their methods are

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[24] Definition taken from the Scottish Government's *Consultation on the use of intermediaries for vulnerable witnesses in Scotland* (15 October 2007) at page 1.
[25] At paragraphs 6.32 to 6.40.
[26] Article 17 of the Criminal Evidence (Northern Ireland) Order 1999.
[27] Section 30 of the Youth Justice and Criminal Evidence Act 1999.
[28] Section 271 H of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004 in relation to criminal proceedings: section 18(1)(e) in respect of civil proceedings.
[29] Scottish Government, *Consulting on intermediaries as a special measure for vulnerable witnesses in Scotland* (15 October 2007).
[30] Scottish Government, *Consulting on intermediaries as a special measure for vulnerable witnesses: the use of intermediaries for vulnerable witnesses in Scotland: report on the analysis of responses to the consultation* (August 2008).

efficacious and based firmly on scientific evidence. In short, intermediaries must have appropriate training, qualifications and credentials. Although in the consultation paper[31] caution was sounded by the Commission in relation to a method known as "facilitated communication", particularly in light of comments made about the practice by Dame Butler-Sloss in *Re D (Evidence: Facilitated Communication)*,[32] the Commission is encouraged by the experience of the use of intermediaries in criminal proceedings in England and Wales. An evaluation was carried out between March 2004 and March 2006[33] on six "pathfinder" projects[34] which were established to examine the introduction of intermediaries in criminal courts, with the aim of establishing a model for national implementation. There were a number of difficulties identified with the implementation of the projects, namely:

- Difficulty in identifying eligible witnesses – the number of referrals for intermediaries were low and it was considered that this was not a reliable guide to potential demand;
- Misunderstanding of the intermediary role;
- Lack of planning - this may have diminished the intermediary's ability to facilitate communication at trial;
- Lack of appropriate intervention in questioning – intermediaries relatively narrow remit to intervene is confined to facilitating communication.

Despite these problems, a range of benefits was identified by the evaluation. It was reported that feedback from witnesses and carers in trial cases was uniformly enthusiastic. Carers felt that intermediaries not only facilitated communication but also helped witnesses cope with the stress of giving evidence. Appreciation of the role was also almost unanimous throughout the judiciary and other criminal justice personnel in 'pathfinder' cases.

[15] Other benefits were also apparent. These included:

- Potential assistance in bringing offenders to justice – 13 cases (involving 15 witnesses for whom intermediaries were appointed) ended in a conviction, five after trial;
- Increasing access to justice – participants in the pathfinder projects estimated that, in their opinion, at least half of 12 trial cases would not have reached trial without the involvement of an intermediary;
- Potential cost savings – it was considered that the use of an intermediary had the potential to save court time by keeping witnesses focused, thereby reducing the time that might otherwise be required to question them;
- Benefits at trial – participants reported a number of benefits during the trial stage, including: facilitating communication in a neutral way,

[31] At paragraphs 6.37 to 6.40.
[32] [2001] 1FLR 148.
[33] Plotnikoff and Woolfson, *The "Go-Between": evaluation of intermediary pathfinder projects* (June 2007).
[34] These pathfinder projects took place in Merseyside, West Midlands, Thames Valley, South Wales, Norfolk and Devon and Cornwall.

through informative reports and appropriate interventions; and ensuring that witnesses understood everything said to them, including explanations and instructions.

[16] On the basis of this evaluation, a decision was taken in England and Wales to roll-out the use of intermediaries on a national basis, although the evaluation recommended that a five-point agenda be followed to ensure that the pitfalls encountered during the pathfinder projects were avoided. It was suggested that:

- Central guidance should be provided, together with a clear allocation of local responsibility for implementation;
- Links between implementation of the special measure and other initiatives should be highlighted;
- Awareness and education are needed in the criminal justice community and, further, "mind-set" obstacles to intermediary use should be tackled;
- Eligible witnesses should be identified at the earliest opportunity; and
- Improvements should be made to pre-trial planning, including the formulation of ground rules for intermediaries' use before trial.

Full roll-out of the use of intermediaries in criminal proceedings in England and Wales was initiated in 2008.[35]

[17] The Commission is also encouraged by the knowledge that it is intended to do likewise in Northern Ireland in criminal proceedings, as well as extending the facility to vulnerable defendants.[36] It will be important to learn from the experience of introducing this special measure in criminal proceedings in Northern Ireland. If a suitable cadre of qualified practitioners is identified as suitable for criminal proceedings, this could be extended to civil proceedings. In order to provide greater clarity regarding the use of intermediaries, the Commission considers that there would be merit in creating a power to make secondary legislation which would govern the role and function of intermediaries. Such provision is made in the draft legislation attached to the Report.

[18] The Commission recognises that there will be cost implications for this type of special measure in civil proceedings in Northern Ireland. However, if a suitable group of qualified individuals is identified during the process of making this special measure available to eligible witnesses in criminal proceedings, then the costs of accrediting these individuals for civil cases will not be an issue. The main cost will be in relation to paying these experts for their time spent in preparation and in court. Although this cost is unlikely to be negligible, this must be balanced against the worthy aims and objectives

[35] Plotnikoff and Woolfson, *Measuring Up? Evaluating implementation of government commitments to young witnesses in criminal proceedings* (July 2009) at page 14.
[36] This measure is included in the Justice Act (Northern Ireland) 2010, which received Royal Assent on 4th May 2011. See also Department of Justice, *Equality Impact Assessment for a proposed Justice Bill (NI) 2010* (August 2010).

formulated in paragraph [1] above. It is impossible to assess exactly how many witnesses would seek the assistance of an intermediary in civil proceedings every year. However, it is anticipated that the numbers will be very low, particularly if witnesses can access other types of special measures which may prove to be effective in meeting their needs. In light of these considerations and subject to this measure being successfully implemented in criminal proceedings in Northern Ireland, the Commission is recommending that the use of intermediaries be introduced as a special measure in civil proceedings in Northern Ireland.

Supporters and Other Measures

[19] In Scotland[37] and New Zealand,[38] there is a statutory basis for the mechanism of "supporters". In England and Wales, Section 102 of the Coroners and Justice Act 2009 makes provision for witnesses to be accompanied by a supporter whilst giving their evidence by live television link in criminal proceedings. It is intended to replicate this provision for criminal proceedings in Northern Ireland,[39] thus putting on a statutory footing an element of the service which is currently being provided by Victim Support Northern Ireland and the National Society for the Prevention of Cruelty to Children by virtue of the Partnership Protocol between Victim Support Northern Ireland, the National Society for the Prevention of Cruelty to Children ("NSPCC") and the Northern Ireland Courts and Tribunals Service ("Courts Service").[40] Although the reforms contained in the newly enacted Justice Act[41] will provide a statutory basis for supporters being present in live television link rooms, these fall short of the mechanisms available in other jurisdictions. In Scotland, for example, supporters have a more wide-ranging role, extending beyond accompanying a witness in a live link room.

[20] In the Law Commission's Consultation Paper, consultees were asked whether they saw merit in including the use of supporters as a special measure in civil proceedings. All those who responded to this question considered that supporters should be made available to witnesses in civil proceedings, some suggesting that supporters would be of greatest use in cases involving children, anti-social behaviour or domestic violence. Moreover, a number of consultees envisaged that such a measure would be available not only to witnesses giving evidence by live television link, but extending to any witnesses who are required to attend court in much the same way as the support being currently provided by Victim Support, the NSPCC and Courts Service in the criminal courts in Northern Ireland.[42] In civil

[37] Section 22 of the Vulnerable Witnesses (Scotland) Act 2004.
[38] Section 79(2) of the Evidence Act 2006.
[39] Department of Justice, *Equality Impact Assessment for a proposed Justice Bill (NI) 2010*, chapter 8 paragraph 8.5 (August 2010). Royal Assent imminent. See also Department of Justice, *Summary of responses to the consultation on the statutory special measures to assist vulnerable and intimidated witnesses give their best evidence in criminal proceedings* (September 2010).
[40] *Partnership Protocol Victim Support, Witness Service NSPCC and Northern Ireland Court Service* (Revised June 2008) www.courtsni.gov.uk.
[41] Which received Royal Assent on 4th May 2011.
[42] See consultation paper paragraph 6.44 for further discussion.

proceedings no comparable scheme exists at present. Consultees also highlighted that the role of supporter, if introduced, is one which will require specific training and skills, a view with which the Commission would concur.

[21] The Commission considers that there is merit in recommending that suitably qualified supporters should be allowed to accompany witnesses who are giving evidence by way of live television link in civil proceedings. The Commission is also attracted to the idea of allowing supporters to offer a wider range of services, comparable to those offered in the criminal context by Victim Support, NSPCC and N.I. Courts Service. This would mean that a trained supporter would accompany a vulnerable or intimidated witness in court to assist him or her to deal with the experience of attending court and giving evidence. It would obviously be important that the conduct of supporters is carefully regulated. This would be easier to achieve if particular bodies or groups rather than individuals such as friends or family members were to provide the supporter service: the *Partnership Protocol Victim Support, Witness Service, NSPCC and Northern Ireland Court Service*[43] publication contains an excellent model of a code of conduct which covers a variety of areas, including the requirement to have undergone accredited training, conflicts of interest, confidentiality, conduct in court and the management of the relationship with the witness.

[22] While the introduction of this wider role for supporters in civil proceedings would have an undoubted financial impact, it should be noted that the Victim Support Witness Service which operates within the criminal courts is provided by trained volunteers, whilst the NSPCC service for children is provided by social work staff and trained volunteers. It may well be that it is most cost effective to extend the current services to civil courts. In this respect, it is appropriate to highlight the role of the Guardian ad Litem in public law children's' cases and that of the Official Solicitor. The incumbents of these offices do not merely provide support to vulnerable parties. Rather, they provide active legal representation. The Commission does not consider that it is equipped to devise a suitable scheme for the delivery of a supporter service. Rather, this is best left for decision by those in government who may choose to implement the recommendations made in the report. The Commission therefore recommends that witnesses who are to give their evidence by way of live television link in civil proceedings should be able to avail of the services of a suitably trained supporter in the live television link room. The Commission also recommends that government should give consideration to creating a scheme which allows all vulnerable and intimidated witnesses in civil proceedings to utilise the services of supporters.

Witness Anonymity

[23] The discrete issue of witness anonymity places in sharp focus the well established principle of orality. Although giving evidence orally in court is standard practice in all court and tribunal proceedings, other methods have been devised to offer protection to certain witnesses - for example, the special

[43] Available on www.courtsni.gov.uk.

measures under the Criminal Evidence (Northern Ireland) Order 1999. However, there may be some witnesses who so greatly fear reprisals as a consequence of giving evidence that they seek to conceal their identities. The conferral of anonymity in court proceedings is highly contentious and has been the subject of a variety of cases brought before both the domestic courts in the United Kingdom and the European Court of Human Rights. Most recently, "emergency" legislation[44] was devised by the Westminster Parliament to deal with the outcome of one such case, *R v Davis*, which was decided by the House of Lords on 18th June 2008. It has been a long established principle of the common law that an accused person in a criminal trial should be able to confront his accusers so that he can cross-examine them and challenge the evidence that they bring against him. Part of this principle is the expectation that an accused person will know the identity of his accusers, as this often has great bearing on his ability to challenge the evidence. However, limited exceptions to this general principle have evolved. One of these exceptions can be traced to a case of some notoriety, *R v Murphy and another.*[45] This concerned the trial of two persons in Belfast, who were accused of murdering two army corporals. At trial, evidence for the prosecution was given by a number of television journalists who had, in the course of their work, filmed the scene of the killing. The trial judge allowed these witnesses to give evidence without being identified by name and, further, they were permitted to testify from behind a screen, out of the view of the Defendants and the public. On appeal against the resulting conviction, the Court of Appeal upheld the trial judge's decision. On further appeal, the House of Lord considered that this constituted only a modest departure from the principle. Furthermore, the defence had not objected to the anonymising of the witnesses, nor did it challenge the suggestion that the witnesses feared for their safety. The appellate courts further highlighted that the evidence given by the witnesses in question did not implicate the Defendants in the commission of the crime. The final material factor was that the credibility of the witnesses was not in issue.

[24] Other cases have also involved the anonymity of witnesses. [46] These include *R v Brindle and Brindle*,[47] *R v Watford Magistrates' Court, ex parte Lenman,*[48] *R v Taylor and Crabb*[49] and *R(Al-Fawwaz) v Governor of Brixton Prison*.[50] This issue has also been considered at length in the context of the provisions of the Inquiries Act 2005 ("*the 2005 Act*"), particularly in the case of *In re Officer L (Respondent) (Northern Ireland)*[51] which examined witness

[44] Criminal Evidence (Witness Anonymity) Act 2008, which was replaced by provisions contained in the Coroners and Justice Act 2009.
[45] [1990] NI 306.
[46] See consultation paper at paragraphs 7.4 – 7.6.
[47] Unreported, 31 March 1992.
[48] [1993] Crim LR 388.
[49] Unreported, 22 July 1994, Court of Criminal Appeal Division.
[50] [2001] UKHL 69.
[51] [2007] UKHL 36. These proceedings arose from the Robert Hamill Inquiry: an inquiry set up in November 2004 to examine the circumstances surrounding the death of Robert Hamill, who died on 8 May 1997 from injuries received during an affray in Portadown, County Armagh in the early hours of 27 April 1997. The remit of the Inquiry was to "inquire into the death of Robert Hamill with a view to determining whether any wrongful act or omission by or within

anonymity in light of common law principles and section 19 of the 2005 Act, which provides for the imposition of restrictions on public access to proceedings or the disclosure or publication of any evidence or documents. The case of *R v Davis* itself arose from the fatal shooting of two men at a New Year's Eve party in a flat in Hackney in 2002. Davis was convicted of both murders on 25th May 2004 and he subsequently appealed against the conviction. One of the grounds of his appeal was the conferral of witness anonymity at the trial. The three witnesses who gave evidence which identified Davis as the gunman were granted anonymity. Dismissing the appeal,[52] the Court of Appeal held that there was a clear jurisdiction at common law to admit incriminating evidence against a defendant tendered by anonymous witnesses and that a conviction was not unsafe simply because the evidence of an anonymous witness might be decisive in the outcome of the trial. The House of Lords therefore had to consider whether it was permissible for a defendant to be convicted in circumstances where the conviction was based solely or to a decisive extent upon the testimony of one or more anonymous witnesses.

[25] During Davis' trial, the three witnesses each gave their evidence under a pseudonym and their addresses and personal details were withheld from Davis and his legal representatives, who were not permitted to ask the witnesses any questions which might enable them to be identified. The witnesses also gave evidence behind screens so that they could be seen by the judge and jury, but not by Davis. Their natural voices were heard by the judge and jury, but Davis and his lawyers could only hear the witnesses after their voices had been mechanically distorted. It was incumbent on the House of Lords to decide on the propriety of these measures, in the context of the Defendant's right to a fair trial. In a landmark decision, their Lordships were unanimously of the opinion that the conviction of Davis was unsafe and allowed his appeal. Their main concerns centred around the unsound development of domestic case-law in the area of anonymous witnesses and its compatibility with the European Convention on Human Rights.[53] The decision in *R v Davis* caused significant concern in the criminal justice community as it effectively restricted the use of anonymous evidence in criminal proceedings. While there are no statistics available in relation to the use of anonymity in criminal trials, it has been suggested that the practice is commonplace[54] and is used in more than half of all murder trials.[55] According to other sources, the use of anonymity occurs to a much lesser degree.[56] Whatever the reality, the Government identified a defect in the law and acted

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the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of his death was carried out with due diligence; and to make recommendations."

[52] *R v Davis, R v Ellis and others* [2006] 1 W.L.R 3130.

[53] For further discussion, see consultation paper paragraphs 7.9 – 7.12.

[54] Lord Neill of Bladen, HL Deb 26 June 2008 c1607.

[55] The Independent, *How anonymous witnesses saw justice done* (25 June 2008): The Times, *The erosion of a basic right* (25 June 2008).

[56] Lord Hunt of King's Heath suggested that he suspected that only a small proportion of the 1.5 million cases that go through the courts every year are affected, HL Deb 26 June 2008 c1603.

quickly to rectify it by introducing the Criminal Evidence (Witness Anonymity) Bill on 3rd July 2008 under emergency procedures. The Bill was passed by Parliament and received Royal Assent on 21st July 2008, coming into force on that same date.[57]

[26] The provisions of the Criminal Evidence (Witness Anonymity) Act 2008 generated much controversy due to both their nature and the deployment of the emergency legislating procedures. Furthermore, the legislation was subject to a "sunset" clause: no witness anonymity order could be made under the Act after 31 December 2009, subject only to possible extension by the Secretary of State.[58] This provision had the effect of requiring the Government to review and re-enact the law, giving Parliament another opportunity to consider the issues. The Coroners and Justice Act 2009 re-enacted the statute with a number of modifications, which are mainly technical in nature.[59]Although *R v Davis* caused much concern in the criminal justice community and much urgency within Government and Parliament, there has been no such reaction to the repercussions of the case in relation to civil proceedings. In the consultation paper, the Commission noted that there is an arguable case that the common law relating to witness anonymity in civil proceedings, post *Davis*, may be in a state of some confusion. The decision casts doubt on the ability of the common law to depart from the general principle of the right to confront. . In the absence of statutory intervention, it is likely that the decisions in *R v Murphy* (where anonymity was not opposed) and *Doherty –v- Ministry of Defence*[60] remain the authoritative touchstones of the current law in civil proceedings in Northern Ireland.

[27] It is unlikely that witness anonymity will be sought with as much frequency in civil proceedings as in criminal proceedings. In most civil proceedings, the identity of the parties will be known by the parties, for example in family cases or in personal injury cases. However, there may be a small number of cases where it will be sought: it is not inconceivable, for example, that anonymity might be sought in some cases brought under the provisions of the Anti-Social Behaviour (Northern Ireland) Order 2004.[61] In the consultation paper, the Commission acknowledged that there was undoubtedly an argument that the law on witness anonymity in civil proceedings lags behind its criminal counterpart and its progress by way of evolution by case-law may have effectively been curtailed by *Davis*. The Commission, however, recognised that it is more difficult to assess whether there is an actual *need* for the civil law relating to witness anonymity to catch up with the criminal law. Consultees were asked for their views in relation to

[57] See consultation paper paragraphs 7.14 – 7.17 for further discussion of the content of the Criminal Evidence (Witness Anonymity) Act 2008.
[58] Section 14.
[59] See consultation paper paragraph 7.18 for further discussion.
[60] Unreported, Northern Ireland Court of Appeal (5 February 1999). In this case, there was an adherence to the principle that evidence that is directly detrimental to a party's case should not be given anonymously and that unimpeded cross-examination plays a vital role in the trail and gives vital assistance to the due administration of justice.
[61] It should be noted that Theresa May, Home Secretary and Minister for Women and Equality, announced a review of anti-social behaviour powers available to police in a speech *Moving Beyond the ASBO* which was delivered on 28 July 2010.

this matter. The majority of consultees considered that there was merit in reconsidering the law relating to witness anonymity in civil proceedings, expressing views that it may be necessary in cases involving anti-social behaviour and cases where personal information, such as sexual orientation, were at issue. However, no particularly strong or persuasive arguments were received as a result of the consultation exercise, nor was any evidence presented that there was an actual need to act to reform the law at the current time.

[28] The Commission has carefully considered its options in relation to making recommendations on witness anonymity in civil proceedings. There appear to be three main options available. First, the Commission could explore the possibility of replicating the criminal law regime in the civil context. Second, the Commission could recommend that no reform of the law is needed. Third, the Commission could adopt a "wait and see" approach, which would require no immediate action but would also necessitate the monitoring of the current law, both in the criminal and civil context, in order to ascertain whether any change is needed in the future. On balance, the Commission has concluded that the third approach is the correct one to take at the current time. The Commission is not persuaded that there is a pressing mischief to be remedied in the existing law and, given that the provisions contained in the Coroners and Justice Act 2009 are still in their infancy, it has concluded that any hurried replication of these principles at this juncture would be imprudent. The Commission considers that it is more prudent to allow the criminal law regime to settle in and for case-law to build up. It is also distinctly possible that the introduction of other special measures in criminal proceedings will obviate the need to seek witness anonymity.

Conclusion

[29] The Northern Ireland Law Commission's Report to Government also proposes legislation in relation to the discrete issues of child witnesses; the competence of witnesses to give evidence; whether evidence should be sworn or unsworn; and the creation of the offence of wilfully giving false unsworn evidence. The report and accompanying draft legislation are the product of comprehensive legal research, legal analysis, policy development and a thorough public consultation exercise. The report further benefits from the skills and expertise of the Law Commissioner concerned, the senior project lawyer and the legal researchers: Dr Venkat Iyer, Clare Irvine, Nicola Smith and Lisa McKibben. The accompanying draft legislation is a comprehensive and modern statutory model. The process of law reform in Northern Ireland will be barren indeed if reports of this nature do not culminate in legislation. The thorough and comprehensive process preceding this report should ensure that there will be no good reason for failing to legislate in its wake. The Law Commission looks forward to seeing the ensuing draft legislation on the agendae of the Executive Committee and the Northern Ireland Assembly in the very near future. The population of this country awaits, and deserves, the legislation which we earnestly recommend to Government.