Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Consultation Paper Vulnerable Witnesses in Civil Proceedings

NILC 4 (2010)

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CONSULTATION PAPER

VULNERABLE WITNESSES IN CIVIL PROCEEDINGS

NILC 4 (2010)

Northern Ireland Law Commission
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NORTHERN IRELAND LAW COMMISSION

BACKGROUND

The Northern Ireland Law Commission ("the Commission") was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act requires the Commission to consider any proposals for the reform of the law of Northern Ireland that are referred to it. The Commission must also submit to the Secretary of State for Northern Ireland programmes for the examination of different branches of the law with a view to reform. The Secretary of State must consult with the Lord Chancellor, the First Minister and Deputy First Minister and the Attorney General for Northern Ireland before approving any programme submitted by the Commission.

MEMBERSHIP

The Commission consists of a Chairman, who must hold the office of judge of the High Court, and four Commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis. There is also a Chief Executive, who is appointed from the legal professions.

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RESPONDING TO THIS CONSULTATION

This consultation seeks views on whether special protections should be made available for certain witnesses who have to give evidence in civil proceedings.

Interested parties are invited to comment on the questions raised in this consultation paper. As well as being available in hard copy, this consultation paper is available on the Commission's website: www.nilawcommission.gov.uk.

This document can be made available in an alternative format or language. Please contact us to discuss how we can best provide a copy of this consultation paper that meets your needs.

The closing date for responses to this consultation paper is 30th June 2010.

Responses should be sent to:

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CONSULTATION PROCESS

1. Consultation Criteria

This consultation is being conducted in line with the following seven consultation principles contained in the "Code of Practice on Consultation" which has been adopted across government:

- Formal consultation should take place at a stage when there is scope to influence the policy outcome.
- Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- Consultation documents should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- Keeping the burden of consultation to the minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Further information on these consultation criteria is available at www.bre.berr.gov.uk.

If you have any queries about the manner in which this consultation has been carried out, please contact the Commission at the following address:

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Website: www.nilawcommission.gov.uk

2. Consultation responses: Confidentiality and Freedom of Information

Freedom of Information Act 2000

The Freedom of Information Act 2000 gives the public a right of access to any information held by a public authority: in this case the Commission. The right of access to information includes information provided in response to a consultation. The Commission will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and may attribute comments and include a list of all respondents' names in any final report.

If you wish to submit a confidential response, you should clearly mark your submission as "confidential". The Commission cannot automatically consider as confidential information supplied to it by you in response to a consultation.

Please note that the Commission will disregard automatic confidentiality statements generated by an IT system.

The Vulnerable Witnesses in Civil Proceedings project forms part of the Northern Ireland Law Commission's First Programme of Law Reform, a copy of which is available on www.nilawcommission.gov.uk.

Initial work on this project had been commenced by the Commission's predecessor, the Law Reform Advisory Committee for Northern Ireland ("LRACNI"). The work of the LRACNI, and subsequently the Commission, has been greatly assisted and informed by the extensive research work which was commissioned by the LRACNI from Dr Jonathan Doak of Nottingham Trent University, formerly of Sheffield University. The Commission would like to offer its thanks to Dr Doak, whose work has provided an invaluable basis for this project.

The Commission would also like to extend its gratitude to those who participated in number of pre-consultation events which were held throughout Northern Ireland: Belfast on 14th January 2009; Londonderry on 8th October 2009; and Dungannon on 16th October 2009. The views of those participants, together with the views expressed by consultees in response to this consultation paper, will be incorporated into an analysis of responses which will be published on the Commission's website.

THE NORTHERN IRELAND LAW COMMISSION

VULNERABLE WITNESSES IN CIVIL PROCEEDINGS

CONTENTS

GLOSSARY OF LEGISLATION

NORTHERN IRELAND

Anti-social Behaviour (Northern Ireland) Order 2004
(SI 2004/1988 (NI 12))

Children and Young Persons Act (Northern Ireland) 1968 (c. 34)

Children (Northern Ireland) Order 1995 (SI 1995/755 (NI 2))

Children's Evidence (Northern Ireland) Order 1995
(SI 1995/757 (NI 3))

Civil Evidence (Northern Ireland) Order 1997
(SI 1997/2983 (NI 21))

County Courts (Northern Ireland) Order 1980 (SI 1980/397 (NI 3))

Criminal Evidence (Northern Ireland) Order 1999
(SI 1999/2789 (NI 8))

Criminal Justice (Children) (Northern Ireland) Order 1998
(SI 1998/1504 (NI 9))

Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988
(SI 1988/1847 (NI 17))

Criminal Justice (Northern Ireland) Order 2003
(SI 2003/1247 (NI 13))

Criminal Justice (Northern Ireland) Order 2004
(SI 2004/1216 (NI 1))

Criminal Justice (Northern Ireland) Order 2005
(SI 2005/1965 (NI 15))

Criminal Justice (Northern Ireland) Order 2008
(SI 2008/1216 (NI 1))

Disability Discrimination Act 1995 (c. 50)

Domestic Proceedings (Northern Ireland) Order 1980
(SI 1980/563 (NI 5))

Education and Libraries (Northern Ireland) Order 1986
(SI 1986/594 (NI 3))

Enduring Powers of Attorney (Northern Ireland) Order 1987
(SI 1987/1627 (NI 16))

Evidence Act 1851 (c. 99)

Evidence Act (Northern Ireland) 1939 (c. 12)

Family Homes and Domestic Violence (Northern Ireland) Order 1998
(SI 1998/1071 (NI 6))

Family Law (Northern Ireland) Order 1993 (SI 1993/1576 (NI 6))

Judicature Act 1978 (c. 23)

Justice (Northern Ireland) Act 2002 (c. 26)

Magistrates' Courts (Northern Ireland) Order 1981 (SI 1981/1675
(NI 26))

Marriage (Northern Ireland) Order 2003 (SI 2003/413 (NI 3))

Mental Health (Northern Ireland) Order 1986 (SI 1986/595 (NI 4))

Northern Ireland Act 1998 (c. 47)

Police and Criminal Evidence (Northern Ireland) Order 1989
(SI 1999/1341 (NI 12))

ENGLAND AND WALES

Children Act 2004 (c. 31)

Constitutional Reform Act 2005 (c. 4)

Coroners and Justice Act 2009 (c. 25)

Criminal Evidence (Witness Anonymity) Act 2008 (c. 15)

Criminal Justice Act 1988 (c. 33)

Criminal Justice Act 1991 (c. 53)

Criminal Justice Act 2003 (c. 44)

Mental Health Act 1983 (c. 20)

Mental Health Act 2007 (c. 12)

Police and Justice Act 2006 (c. 48)

Representation of the People Act 1983 (c. 2)

Youth Justice and Criminal Evidence Act 1999 (c. 23)

SCOTLAND

Children (Scotland) Act 1995 (c. 36)

Criminal Procedure (Scotland) Act 1995 (c. 46)

Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)

Vulnerable Witnesses (Scotland) Act 2004 (asp 3)

REPUBLIC OF IRELAND

Children Act 1997 (No. 40/1997)

NEW ZEALAND

Evidence Act 2006 (No. 69)

GLOSSARY OF TERMS

Affidavit	A written statement by a person who has voluntarily signed it and sworn that it is true.
Child	In this paper, the term “child” is used because it is the term adopted by legislation in this field, however, it should be read as including “young people”.
Common law	Law established by judicial decisions.
Cross-examination	The process of questioning by a party or his representatives which enables the evidence of a witness called by another party to be tested.
Deposition	The statement of a witness, taken down in writing by a judicial officer, which is made on oath and signed by the witness and the judicial officer.
Examination-in-chief	The process by which evidence is obtained from a witness by his own legal representatives.
Indictable offence	A criminal offence which is dealt with by the Crown Court.
Re-examination	The process by which a witness can explain or contradict any false impressions which have arisen as a result of cross-examination.
Originating summons	A method of commencing proceedings in which the main issue is the construction of a document, such as legislation, a will or contract.

Petition	A method of commencing proceedings where a written statement is addressed to the court requesting a remedy from particular stated facts.
Prorogue	To discontinue the meetings of a legislative body without dissolving it.
Summary offence	A criminal offence which is dealt with by the Magistrates' courts.
Writ	A method of commencing proceedings where a document, made under the seal of the court, commands a person to whom it is addressed to carry out or stop carrying out an act.

EXECUTIVE SUMMARY

CHAPTER 1

The principle of orality states that witnesses are required to give their evidence in proceedings orally, in person and before a forum (the court) which is open to the public. Chapter 1 explains the main issue explored in the consultation paper: whether there should be a departure from "the principle of orality" for certain witnesses who are required to give evidence in civil proceedings.

A number of departures have been made from the principle of orality in order to offer protection to certain witnesses who may experience particular difficulties giving evidence in court. The most significant departures have taken place in the criminal law, with "special measures" being made available to children, witnesses with a mental disorder or a significant impairment of intelligence and social functioning, a physical disability or disorder; and those who are suffering fear and distress in connection with giving their evidence to the court. Special measures, such as the use of screens and live television link, offer protection to eligible witnesses, allowing them to give their best evidence to the court.

In Chapter 1, the Commission explains the principle of orality and its importance in both the criminal and civil law. The Commission also describes the evolution of the departures from the principle in the criminal law, identifying how the protections which were acknowledged as necessary for child witnesses were extended to certain adults, with the eventual creation of special measures. The Commission also identifies recent legislative amendments in the criminal law which affect special measures. Having set the context for further discussion, the Commission asks whether the law and practice in Northern Ireland for witnesses in civil proceedings is adequate, or whether a more radical departure, such as the one taken in the criminal law, is required to offer protection to witnesses.

CHAPTER 2

In Chapter 2, the Commission details the departures from the principle of orality which have taken place in the criminal law in Northern Ireland. In criminal proceedings, departures which affect children, adults and the accused are specifically examined. The most

significant departure from the principle of orality is the creation of "special measures". Certain vulnerable and intimidated witnesses are permitted to give evidence with the assistance of various measures such as the use of screens; giving evidence by live television link; giving evidence in private; video-recording the evidence-in-chief; video-recording cross-examination and re-examination; using an intermediary to examine the witness; and using aids to communication. Fewer measures are available to the accused, although certain accused persons can give their evidence by way of live television link and recent legislative provisions allow for the use of intermediaries to assist certain accused persons.

CHAPTER 3

In Chapter 3, departures from the principle of orality in civil proceedings are explored. A variety of departures have taken place because of legislation, Rules of Court and the inherent jurisdiction of the court. The Commission examines each departure and concludes that there does not appear to be a co-ordinated and consistent approach towards offering protection to witnesses in civil proceedings. It also concludes that the current law relating to giving evidence in civil proceedings is not easily accessible, nor understandable, for the average court user. For these reasons, the Commission provisionally concludes that a coherent legal regime which offers protection for witnesses in civil proceedings would be a useful addition to the law of Northern Ireland.

CHAPTER 4

In chapter 4, the Commission considers whether lessons can be learned from the experiences of other jurisdictions. Scotland and New Zealand are particularly interesting, as both jurisdictions have chosen to legislate to provide schemes which offer protection to witnesses whilst they give evidence in civil proceedings.

In Scotland, special measures are available for children and adults whose evidence may be diminished due to a mental disorder or fear and distress in connection with giving evidence. The range of special measures available to vulnerable witnesses in Scotland includes the use of live television link, screening and the use of a supporter.

In New Zealand, legislation allows certain witnesses to give evidence in an alternative way (rather than orally, in a courtroom and in the presence of the judge, jury, parties to the proceedings and members of the public). The decision to allow evidence to be given in an alternative way is justified on a number of grounds, including the age and maturity of the witness; the witness's physical, intellectual, psychological or psychiatric impairment; the witness's fear of intimidation and the linguistic or cultural background or beliefs of the witness.

The Commission concludes that although the Scottish and New Zealand approaches differ, they share the premise that witnesses in civil proceedings should have access to special measures or alternative ways of giving evidence. The differences in approach relate to criteria for eligibility for special measures (which is explored in chapter 5) and the types of measure available to eligible witnesses (chapter 6).

CHAPTER 5

Chapter 5 looks at the specific issue of eligibility for special measures. Two issues are examined: first, who is a "witness" and second, what criteria should govern a witness's eligibility for protection whilst giving evidence in civil proceedings.

The Commission provisionally believes that all parties to civil proceedings and witnesses involved in those proceedings should be able to access special measures if they are eligible to do so.

In relation to the criteria for eligibility for special measures, the Commission considers the current criminal law in Northern Ireland which identifies two groups of factors which may influence whether a witness may feel stress or anxiety whilst giving evidence during court proceedings. The first group relates to a particular characteristic of the witness, such as age, mental disorder, physical disability or physical disorder. The second group consists of factors which may influence the extent to which a person experiences fear or distress about giving evidence to a court. The Chapter discusses the approach taken currently in the criminal law in Northern Ireland compared with the approaches taken in Scotland and New Zealand. The views of consultees in relation to these approaches is sought.

CHAPTER 6

In chapter 6, the Commission considers the types of special measure which would be appropriate for witnesses who are required to give evidence in civil proceedings. The merits and difficulties of each special measure are discussed. Consultees are invited to give their views on the suitability of each type of special measure for adoption in civil proceedings.

The Commission considers that many of the special measures would be of use in civil proceedings but acknowledges the difficulties posed in implementing certain special measures, such as pre-recorded examination-in-chief and pre-recorded cross-examination and re-examination.

CHAPTER 7

Chapter 7 contains a consideration of issues which are related to eligible witnesses giving evidence in civil proceedings. These issues are witness anonymity; taking evidence from children who are living in secure accommodation; and the competence of witnesses to give evidence in civil proceedings.

Witness anonymity is a controversial form of protection for witnesses. The criminal law has recently undergone significant change, following a House of Lords judgment. The Commission considers the issue of witness anonymity in the civil law and asks consultees whether there is a need to reconsider the law in light of the changes in the criminal law.

During its consultation on the First Programme of Law Reform, the Commission was alerted to an issue in relation to the attendance at court of children who are living in secure accommodation because they have a history of absconding from care. It had been suggested that children should be allowed to give their evidence to the court by way of live television link from the secure accommodation venue, a facility which is not currently available in Northern Ireland. The Commission considers the issue and concludes that if special measures for witnesses in civil proceedings are introduced, the issue becomes one of funding to provide the appropriate technology.

The Commission also considers the issue of competence of witnesses to give evidence in civil proceedings. Putting in place special provision to assist and encourage certain witnesses to give evidence does not sit well with provisions which may then exclude them for lacking competence to give evidence. The Commission explores the options taken in the criminal law in Northern Ireland and in civil proceedings in Scotland and asks consultees for their views.

CHAPTER 8

In chapter 8, the Commission carries out an initial equality impact assessment in relation to its provisional policy proposals. Consultees are invited to comment on this initial assessment.

CHAPTER 9

Chapter 9 contains a list of the questions contained in this consultation paper.

CHAPTER 1. INTRODUCTION

1.1 Traditionally, witnesses in both civil and criminal proceedings have been expected to give their evidence in person before a public forum: the court. This is known as the “principle of orality”. The principle of orality has been a cornerstone of the trial process as it helps to ensure that a person accused of a crime or a party involved in civil proceedings has a fair hearing. The principle helps to achieve fairness by requiring witnesses to be seen openly in court, allowing their evidence to be tested. Their reactions to that testing can then be analysed for the purposes of assessing credibility and reliability, therefore allowing the truth to be determined.

1.2 The principle of orality has been considered to be of the utmost of importance in the justice system, yet the principle has been tempered to a degree by various interventions, most significantly in the criminal law. These departures from the principle of orality seek to afford witnesses and victims involved in criminal proceedings some level of protection when giving evidence before the courts.

1.3 There appear to be two main motivations behind the impetus for departing from the principle of orality. The first was a recognition that some witnesses, namely children and adults living with mental disorders or significant impairments of intellectual and social functioning and physical disabilities or disorders have specific needs which must be met to allow them to give their best evidence in court. The second was a recognition of the need to protect witnesses from intimidation connected with giving evidence in criminal proceedings.

CHILDREN AND VULNERABLE ADULTS IN CRIMINAL PROCEEDINGS

1.4 The principle of orality does not sit particularly easily with the needs and experiences of children who are required to give evidence in criminal proceedings. The stresses of giving evidence, including the robust questioning and the

formal atmosphere of the court can cause children to feel intimidated and anxious. Earlier statutes had contained provisions which departed from the principle of orality and offered protection to children,[1] however, the Criminal Justice Act 1988, which applied to England and Wales[2] was particularly significant. This statute put in place provisions allowing child witnesses under the age of fourteen in certain cases to give evidence from outside the courtroom by way of live television link.[3]

1.5 During the passage of the Criminal Justice Act 1988 through its Parliamentary stages, proposals were made which would allow video-recorded interviews between police officers or social workers and child witnesses to be admissible in evidence in criminal proceedings. In the course of the debates in both Houses of Parliament, it became clear that there were widely varying views on the appropriateness of using video-taped evidence. In particular, concern was raised as to whether such a measure would increase stress for the child witness. It was also queried whether existing interviewing techniques employed by social workers and the police to interview children were capable of satisfying evidential needs. The debate raised important issues regarding the mode of taking children's evidence and it was decided that an Advisory Group, to be chaired by Judge Pigot, be set up to look at how children should give their evidence in court and how video technology might assist other vulnerable witnesses to give evidence. The Advisory Group reported in 1989[4] and made a number of recommendations.

1.6 The Pigot Report noted that children giving evidence in criminal proceedings found the process harmful and oppressive and they often suffered trauma. The main factors contributing to this negative experience of court were: the confrontation with the accused; the stress and embarrassment of speaking in public especially in relation to sexual matters; the urgent demands of cross-

1. For examples, see chapter 2.
2. In Northern Ireland, these provisions were contained in Article 81 of the Police and Criminal Evidence (Northern Ireland) Order 1989.
3. Section 32.
4. Home Office, *Report of the Advisory Group on Video Evidence* (December 1989).

examination; courtroom formalities; and a sense of insecurity and uncertainty which was caused by delays in the progress of the trial. The Pigot Report also noted that children are less able than adults to understand the reason for the demands that were being placed on them by the court proceedings and that their intellectual and emotional resources were less likely to help them cope with those demands as compared with adults who were placed in the same situation.

1.7 The Pigot Report recommended that video-recorded evidence would relieve some of the difficulties faced by child witnesses and would promote child welfare in criminal proceedings. The Report also recommended that the accused should not be allowed to cross-examine a child witness as it was potentially damaging to the child and therefore not in the interests of justice. The Pigot Report went further and recommended that once the changes to child evidence measures had been introduced, those measures should also be extended to "vulnerable" adult witnesses. The Report suggested creating a test for eligibility for vulnerable adults, based on their age, physical or mental condition; the nature and seriousness of the offence and the nature of the evidence which the witness was to give.

1.8 The recommendations of the Pigot Report, in relation to video recordings of children's evidence, were implemented in England and Wales[5] by the Criminal Justice Act 1991. However, the recommendations in relation to the evidence of vulnerable adults were not implemented at that stage.

INTIMIDATED WITNESSES IN CRIMINAL PROCEEDINGS

1.9 The issue of intimidated witnesses in criminal cases arose acutely in Northern Ireland in the early 1970s. Despite the difficulties faced in the jurisdiction at the time due to the serious civil unrest which had erupted in the late 1960s, compliance with the traditional view of the principle of orality in criminal proceedings continued. Compliance with the

5. These changes were also implemented in Northern Ireland. Article 5 of the Children's Evidence (Northern Ireland) Order 1995 inserted Article 81A into the Police and Criminal Evidence (Northern Ireland) Order 1989.

principle can be demonstrated by comments that are contained in the *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland,*[6] a report which resulted in significant modifications to the operation of the criminal justice system in Northern Ireland.

1.10 Chaired by Lord Diplock, the Commission on Legal Procedures to deal with terrorist activities in Northern Ireland ("the Diplock Commission") was set up following a statement on security policy by the Northern Ireland Office on 22nd September 1972, and was formally announced by a further statement on 18th October 1972. The Diplock Commission was appointed to consider:

> what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations.[7]

The Diplock Commission reported its recommendations to government in December 1972.

1.11 The Diplock Commission looked at a variety of areas, including mode of trial, bail and young terrorists but for the purposes of this consultation paper one area, the view of the Diplock Commission in relation to the conduct of trials in light of intimidation of witnesses, is of particular interest.

1.12 In 1972, Northern Ireland was in the grip of serious civil unrest. During that year, the bloodiest of all the years that made up "The Troubles", a total of 479 people lost their lives[8]. On 24th March 1972, due to the severity of the unrest, the Northern Ireland Parliament was prorogued and Direct Rule from Parliament in Westminster was introduced.

6. (December 1972) Cmnd. 5185.
7. (December 1972) Cmnd. 5185 page 1.
8. Sutton, *Bear in mind the dead….an index of deaths from the conflict in Ireland 1969-1993* (1994).

Within this context, the Diplock Commission was set up to urgently consider the criminal justice system's response to the violence. For the purposes of this project, it is particularly interesting to note the comments of the Diplock Commission in relation to potential witnesses who may be required to give evidence in criminal trials. It was acknowledged that the effects of intimidation against potential witnesses was real, with "the fear of revenge upon "informers" omnipresent".[9] The Diplock Commission considered possible methods of protection for witnesses, such as hearings *in camera;* keeping the identity of witnesses hidden by the use of screens; withholding names and addresses; excluding the press and public from the courtroom; and the exclusion of the accused from the court process. However, these methods were rejected as impracticable as the Diplock Commission was anxious that Article 6 of the European Convention on Human Rights[10] should be adhered to as a minimum standard in criminal trials.[11]

1.13 The issue of intimidated witnesses was not just a problem faced in Northern Ireland. For example, by the early 1990s, concern had began to grow within the criminal justice system in England and Wales over the effect of witness intimidation. The issue was the subject of a Home Office research study in 1994,[12] whilst the first National Witness Satisfaction Survey carried out in 2000 revealed that 26% of witnesses felt intimidated by a particular individual during criminal proceedings.[13] Additionally, academic research began to emerge that suggested that "live" evidence is not always the most appropriate method of obtaining best evidence. Research noted that:

> confrontation, in the sense of making the accuser give evidence in the presence of the accused, is not only worse than useless as a truth-producer; it is also a lie detector of very uncertain value.[14]

9. (1972) Cmnd. 5185 page 9 paragraph 17.
10. Otherwise known as the right to a fair trial.
11. (1972) Cmnd. 5185 page 10 paragraph 20.
12. Maynard, *Witness Intimidation Strategies for Prevention* Police Research Group Crime Detection and Prevention Series Paper 55 (1994).
13. Whitehead, *Witness Satisfaction: findings from the witness satisfaction survey 2000* (2001).
14. Spencer and Flin, *The evidence of children* (1993) page 278.

GOVERNMENT'S RESPONSE TO THE DIFFICULTIES FACED BY WITNESSES – SPECIAL MEASURES

1.14 In 1997, the difficulties faced by some witnesses whilst giving evidence received prominence with the publication of the Labour Party manifesto, which contained a commitment that:

> greater protection will be provided for victims in rape and serious sexual offence trials and for those subject to intimidation, including witnesses.[15]

1.15 The manifesto commitment was taken forward by the Labour Government in *Speaking Up for Justice,*[16] a report of a Working Group set up to consider the issue. In this Report, it was acknowledged that some individuals, such as children, adults living with a mental disorder or significant impairment of intelligence or social functioning, adults living with a physical disability or disorder and people who are suffering fear or distress because they have to give evidence, experience particular difficulties whilst giving evidence in court. These difficulties may discourage these individuals from participating in the court proceedings, or may cause the court to fail to hear their "best evidence".[17] In order to assist these individuals to attend court and give their best evidence, the Report made far-reaching recommendations which detailed how protections for these witnesses could be introduced into the criminal (and civil) justice system. Amongst these recommendations was the use of "special measures": methods of giving evidence in court which move away from traditional mode of giving oral evidence. The types of special measure which were proposed by the Report included:

- the use of live television link to allow a witness to give evidence without having to appear in court in person;[18]

15. www.labour-party.org.uk/manifestos/1997.
16. Home Office, *Speaking Up for Justice* Report on the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (June 1998).
17. See footnote 16 at page 2.
18. Recommendation 36 (paragraph 8.7).

- allowing a witness to be accompanied by a supporter when giving evidence by live television link;[19]

- creating a statutory basis for the use of screens in court proceedings;[20]

- giving the court power to restrict the press from reporting details of a case;[21]

- allowing for video-recordings of a witness's evidence-in-chief;[22]

- allowing for video-recorded cross-examination in appropriate cases;[23]

- the use of methods to assist the witness to communicate whilst in court, including interpreters, communication aids and techniques and intermediaries;[24] and

- creating a statutory basis for the court to have the power to require the removal of wigs and gowns in appropriate circumstances.[25]

1.16 In relation to criminal proceedings, these measures were introduced in England and Wales by the Youth Justice and Criminal Evidence Act 1999. In Northern Ireland, the provisions of the England and Wales Act were replicated in the Criminal Evidence (Northern Ireland) Order 1999. The recommendations in relation to protections in civil proceedings have yet to be taken forward in either England and Wales or Northern Ireland.

1.17 Since 1999, work assessing the success of special measures has been undertaken by Government and others, including voluntary sector organisations such as the NSPCC.[26] In June 2007, the Government published a paper

19. Recommendation 37 (paragraph 8.10).
20. Recommendation 38 (paragraph 8.17).
21. Recommendation 39 (paragraph 8.24).
22. Recommendation 41 (paragraph 8.48).
23. Recommendation 45 (paragraph 8.59).
24. Recommendation 47 (paragraph 8.77).
25. Recommendation 49 (paragraph 8.80).
26. Plotnikoff and Woolfson, *Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (July 2009).

entitled *Improving the criminal trial process for young witnesses: a consultation paper*[27] which sought views from interested parties on improving special measures for child witnesses. The proposals in this consultation paper have formed the basis of amendments to the Youth Justice and Criminal Evidence Act 1999 which are contained in the Coroners and Justice Act 2009. The main changes contained in the Act include raising the age limit for eligibility for special measures for child witnesses to eighteen[28] and providing for a mechanism for child witnesses to opt out of the use of special measures.[29] The Coroners and Justice Act 2009 also makes alterations to various other aspects of special measures: witnesses who give their evidence by live television link will be able to be accompanied by supporters;[30] and accused persons will be able to be eligible for assistance by intermediaries in certain circumstances.[31] These reforms are discussed in more detail in later chapters of this consultation paper. In Northern Ireland, a consultation exercise *Special Measures: an evaluation and review* was published by the Northern Ireland Office in February 2009 in response to the reforms in England and Wales.

CIVIL PROCEEDINGS

1.18 The importance of the principle of orality and its role in the legal process in civil proceedings can be demonstrated by the Northern Ireland case of *Doherty v Ministry of Defence.*[32] In this case, which was heard by the Court of Appeal, the Ministry of Defence argued that military witnesses giving evidence in a civil action should be allowed to testify from behind a screen when in the witness box in order to protect their identities. Higgins J stated that, in his opinion:

> the exposure of witnesses, even when giving uncontroversial evidence, to the view of the lawyers in the case has been the invariable

27. Office of Criminal Justice Reform (June 2007).
28. Section 98.
29. Section 100.
30. Section 102.
31. Section 104 of the Coroners and Justice Act 2009.
32. Northern Ireland Court of Appeal (Civil Division) 5th February 1991 (unreported).

> practice in the Common Law system of administering justice. It has been one of the features which has contributed to the maintenance of public confidence in the administration of justice. To depart from it in any circumstance, unless there has been consent, would, I consider, diminish public confidence.

1.19 Despite the significant development of departures from the principle of orality which have afforded protective measures for witnesses in criminal proceedings, there have been relatively limited reforms for witnesses in civil cases. In Northern Ireland to date, a number of departures from the principle of orality have been introduced, either by way of legislation, Court Rules or by the inherent jurisdiction of the court itself, which will be explored in chapter 3. These departures, however, are modest and do not offer specific assistance to those who may need support in order to give their evidence to the court, such as children or adults who are living with mental disorder, a significant impairment of intelligence and social functioning or physical disability or disorder. Nor do the departures offer specific protection to people who may feel intimidated about giving evidence. In contrast, other jurisdictions, notably New Zealand and Scotland, have gone much further and have created specific frameworks which offer protection for certain categories of witnesses who might experience difficulties when giving evidence in civil proceedings. In this paper, the Commission considers whether the current law and practice in Northern Ireland offers adequate protections for witnesses who give evidence in civil proceedings or whether a more radical departure from the traditional mode of evidence-taking is required.

CHAPTER 2. CURRENT LAW AND PRACTICE IN NORTHERN IRELAND: THE CRIMINAL LAW

DEPARTURES FROM THE PRINCIPLE OF ORALITY

2.1 Since 1972, criminal justice has been an "excepted matter" in Northern Ireland. This means that the Northern Ireland Assembly cannot legislate in this area; it is the responsibility of Parliament in Westminster to pass legislation on criminal justice matters.[33] In practice, this approach has meant that Northern Ireland has tended to closely follow the criminal legislation that has been put in place in England and Wales. The law in Northern Ireland therefore mirrors that in England and Wales in relation to departures from the principle of orality in the criminal law.

2.2 In both jurisdictions, the statutory departures from the principle of orality in criminal proceedings have been in relation to the evidence of children, adults with particular "vulnerabilities" and "intimidated" witnesses.

Children

2.3 Children, because of their age and varying levels of maturity, have particular needs whilst giving evidence in court.[34] They may experience difficulty in understanding what is required of them in legal proceedings and may communicate their evidence in a different way to adults. Their attention span, especially in the case of younger children, may be shorter than that of most adults. Children cannot be expected to have the same resilience to adversarial questioning as most adults have and they may experience higher levels of stress as a result of giving evidence. In recognition of these particular needs, various legislative provisions which are described below have evolved to assist children to participate in court proceedings

33. See section 4(2) and Schedule 2 of the Northern Ireland Act 1998. At the date of publication, devolution of the policing and justice function is currently scheduled to take place on 12th April 2010.
34. See NSPCC and Victim Support, *In their own words: the experiences of 50 young witnesses in criminal proceedings* (2004) and Plotnikoff and Woolfson, *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (July 2009).

whilst offering them protections from the rigours of the adversarial criminal trial process.

Statements in writing

2.4 Section 58 of the Children and Young Persons Act (Northern Ireland) 1968 was an early attempt to address the particular needs of child witnesses. Section 58 provided that a statement in writing by or taken from a child who was a prosecution witness was admissible in evidence in any proceedings in a magistrates' court which was conducting a preliminary investigation into a sexual offence which would later be dealt with by the Crown Court. Consequently, the child did not have to appear in person as a witness. However, section 58 was limited in effect as it was not available in a number of circumstances including, importantly, if the defendant objected to that method of giving evidence or if the prosecution needed the child to give evidence establishing the identity of the accused. In addition, the provision also gave no protection to the child witness in the Crown Court during the criminal trial itself.

2.5 Section 58 was amended by Article 12 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988. The amendment made a number of significant alterations, including expanding the types of offence to which the provision applied and limiting the application of the provision to children under fourteen years of age. However, the protection continued to be limited in effect as the defence could still object and require the child to give evidence in person during the trial.

2.6 Section 58 was repealed by the Criminal Justice (Children) (Northern Ireland) Order 1998. Article 23 of the Criminal Justice (Children) (Northern Ireland) Order put in place new provisions for children giving evidence in a magistrates' court which is conducting a preliminary investigation into a sexual or violent offence. The new Article provides that a child shall not be called as a witness for the prosecution, but a statement made by or taken from him shall be admissible in evidence if, (had he given evidence orally), his oral testimony would have been admissible. The main

difference between this provision and its predecessors is that the defence can no longer object to the child giving evidence through a written statement. Additionally, although the protection remains available to children up to the age of fourteen in cases involving a violent offence, the protection is extended to children up to the age of seventeen in cases involving sexual offences.

Television links and video-recordings of testimony

2.7 The use of television links and video-recordings was first given statutory recognition by Articles 81 and 81A of the Police and Criminal Evidence (Northern Ireland) Order 1989. Article 81 allowed a child, with the permission of the court, to give evidence through a live television link in certain circumstances. The child had to be in Northern Ireland and had to be giving evidence in relation to a preliminary investigation or preliminary inquiry into a trial on indictment; a trial on indictment; an appeal to the Court of Appeal; proceedings in a magistrates' court; or an appeal from a decision of a magistrates' court. A child could benefit from this provision in a variety of situations, including where the offence involved was an assault or a sexual offence.

2.8 Under Article 81A of the Police and Criminal Evidence (Northern Ireland) Order,[35] a child witness under the age of fourteen (or under the age of seventeen in cases involving a sexual offence) who was not the accused was allowed to give evidence by way of a video recording of an interview between himself and an adult. The child was not permitted to give evidence by this method if:

(1) he was not available for cross examination;

(2) any rules about how the recording of the video had been carried out were not complied with to the satisfaction of the court; or

(3) the court considered that it was not in the interests of justice for the recording to be admitted.

35. As inserted by Article 5 of the Children's Evidence (Northern Ireland) Order 1995.

The Article also gave the court power to exclude any part of a video-recording which it considered should not be admitted in evidence because the prejudice caused to the accused would outweigh the desirability of showing the whole recorded interview. Despite the availability of video-recorded evidence, the child witness was not completely protected. His presence was still required in the witness box, although he would not be subjected to examination-in-chief on any matter which had been dealt with fully in his video-recorded evidence.

2.9 Articles 81[36] and 81A are no longer in force as they were repealed by the Criminal Evidence (Northern Ireland) Order 1999[37] which is discussed in further detail below. Article 10 of the Criminal Justice (Northern Ireland) Order 2004 now makes provision for the use of live television link in criminal proceedings generally.[38]

Power to clear court

2.10 Article 21 of the Criminal Justice (Children) (Northern Ireland) Order 1998 provides additional protection for children who are required to give evidence in court. In any criminal proceedings where the court considers that the child will be giving evidence in relation to a matter of an indecent or immoral nature, the court may direct that all persons (apart from officers of the court, parties to the case, legal representatives and persons otherwise directly involved in the case) are excluded from the courtroom.

Special measures

2.11 The Criminal Evidence (Northern Ireland) Order 1999 contains a variety of measures which assist a child witness to give evidence in criminal proceedings. These are called "special measures". They include screening the witness from the accused; giving evidence by live television link;

36. It should be noted that the repeal of Article 81 appears to be incomplete, possibly through an oversight, although it does appear that there was the intention to repeal it in its entirety. The difficulty arises with SR 2004 No. 468 and SR 2004 No. 531 which commence Article 5 of the 1999 Order (witnesses eligible for assistance on grounds of fear or distress about testifying) in relation to adults in summary proceedings and adults in county court proceedings respectively, however, the connected repeals of Article 81 insofar as they affect those adults have not been commenced.
37. Repeal effected by Article 40(3), Schedule 3.
38. In England and Wales, the relevant provision is Section 51 of the Criminal Justice Act 2003.

giving evidence in private; video-recording the evidence in chief; video-recording cross-examination and re-examination; using an intermediary to examine the witness; and using aids for communication. If special measures are used during a trial on indictment, the judge must give the jury (if there is one) such warning as the judge thinks is necessary to ensure that the fact that special measures were used does not prejudice the interests of the accused.[39]

2.12 When the court is considering whether a witness is eligible for special measures, it must apply a three part test contained in Article 7(2). That test requires the court to determine: first, whether the witness is eligible for special measures; second, whether any special measures would improve the quality of the witness's evidence; and if so, third, which special measure or measures would be likely to maximise, so far as practicable, the quality of the evidence that may be given by the witness.

2.13 Under Article 4(1)(a) of the Criminal Evidence (Northern Ireland) Order 1999, a child witness is eligible for special measures if he is less than seventeen years of age at the time of the hearing. Once it has been established that the child is eligible by virtue of his age, the court must then consider Article 9 which makes special provision in relation to child witnesses. This Article provides that in the case of a child witness, the court must give a special measures direction which complies with two requirements. The first requirement is that the special measures direction must allow for the child's evidence-in-chief to be in the form of a video-recording, unless the special measure is unavailable to the witness because:

(1) there are no arrangements in place to facilitate it;

(2) because the admission of video-recorded evidence is contrary to the interests of justice; or

(3) because the court does not consider that this method of evidence giving would maximise the quality of the witness's evidence as far as practicable.

39. Article 20.

The second requirement is that the special measures direction must provide that any evidence given by the child otherwise than by video-recording must be given by live television link, provided that the facilities are available and that the court considers that this method of giving evidence maximises the quality of the witness's evidence.

2.14 Article 9 also makes provision in relation to children in need of "special protection" (those giving evidence in cases involving sexual offences, violent offences, kidnapping, or false imprisonment). Such children must give their evidence-in-chief by video-recording and any other evidence by live television link, unless the facilities for doing so are unavailable or the admissibility of such evidence is contrary to the interests of justice. There is no need, however, to show that these special measures will maximise the quality of the child's evidence. Additionally, by virtue of Article 9(6), children in need of special protection, because they are giving evidence in sexual offences cases, must be able to avail of the special measure which allows them to give their evidence under cross-examination or re-examination by way of video-recording. This special measure will only have effect if facilities are available, and the child wants the special measure to be applied. Article 9(6), however, is yet to be commenced.

2.15 Once the court has considered whether it should give a direction in respect of the child witness for the special measures mentioned in Article 9, it is then required to reconsider the three part test in Article 7(2) which is described above. The quality of the evidence of the child witness may be maximised by the use of other special measures which are not available by virtue of Article 9, for example, the use of aids to communication. In considering whether these additional special measures would improve or, as far as practicable, maximise the quality of the evidence, the court is required to consider all the circumstances of the case. However, the court must take into account the views of the witness and it must consider whether the special measures might prevent the witness's evidence from being tested by any party during the proceedings.

Adults

2.16 Although there have been fewer legislative interventions for the protection of adult witnesses than for child witnesses in criminal proceedings, adult witnesses can benefit from certain protections provided by the law.

Live television links

2.17 The use of live television link for certain adults was first contained in Article 81 of the Police and Criminal Evidence (Northern Ireland) Order 1989. It was, however, limited in effect. The provision only offered live television link as a method of giving evidence to witnesses who were in Northern Ireland and who would not give evidence otherwise than by live television link because they were in fear.[40] The Criminal Justice (Northern Ireland) Order 2003 later extended the facility of live television link by inserting a new Article 80A into the Police and Criminal Evidence (Northern Ireland) Order 1989. This provision allows a witness (other than the accused)[41] who is outside the United Kingdom to give evidence by way of live television link.[42] Article 80A of the Police and Criminal Evidence (Northern Ireland) Order 1989 is still in force, whereas Article 81 has now been repealed.[43] Live television link is available for witnesses generally in criminal proceedings by virtue of Article 10 of the Criminal Justice (Northern Ireland) Order 2004.[44]

Special measures

2.18 Like children, adults may be eligible for special measures under the Criminal Evidence (Northern Ireland) Order 1999. However, adults are only eligible for special measures in two circumstances. First, under Article 4, witnesses other than the accused who suffer from a mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986 or otherwise have a significant impairment of intelligence and social functioning or who suffer from a

40. Article 81(1)(b).
41. This amendment was inserted by Article 24 of the Criminal Justice (Northern Ireland) Order 2005.
42. Article 80A(1).
43. See footnote 36.
44. This provision is equivalent to section 51 of the Criminal Justice Act 2003 which applies in England and Wales.

physical disability or a physical disorder may be eligible for special measures: "vulnerable" witnesses. The types of special measure that these adults may be eligible for are the same as for children, that is to say, screening the witness from the accused; giving evidence by live link; giving evidence in private; video-recording of evidence in chief; video-recording of cross-examination and re-examination; using an intermediary to examine the witness; and using aids to communication. Second, under Article 5, witnesses other than the accused whose evidence may be compromised by fear or distress caused by testifying in court ("intimidated" witnesses) may also seek special measures. These adults are eligible for all the types of special measure, apart from the use of intermediaries and the use of aids to communication. As in the case of children, under Article 20, on a trial on indictment, the judge must give the jury (if there is one) such warning as he thinks necessary to ensure that the fact that special measures were used does not prejudice the accused in any way.

Adults: "vulnerable" witnesses

2.19 In the case of adult "vulnerable" witnesses, the court, in order to determine whether it should direct that special measures should apply, must use the tests set out in Article 7 of the Criminal Evidence (Northern Ireland) Order 1999. It must determine: first, whether the adult is eligible for special measures,[45] second, whether any special measures would be likely to improve the quality of his evidence; and if so, third, which special measures would achieve that objective. When the final determination is made, the court may give a direction requiring the application of those special measures for the benefit of the witness. In making its determination regarding which special measures would maximise the quality of the witness's evidence, the court must also consider all the circumstances of the case including any views expressed by the witness and whether the special measures might inhibit the evidence being tested by any party to the proceedings.[46]

45. In other words, whether the witness suffers from a mental disorder, otherwise has a significant impairment of intelligence and social functioning or the witness has a physical disability or is suffering from a physical disorder.
46. Article 7(3).

Adults: "intimidated" witnesses

2.20 In order to be satisfied that a witness is eligible for special measures on the basis that the quality of his evidence given is likely to be diminished because of fear or distress in connection with testifying, the court must take into account a number of factors. These factors include:

(1) the nature and alleged circumstances of the offence to which the proceedings relate;

(2) the age of the witness;

(3) any relevant matters such as the social and cultural background and ethnic origin of the witness;

(4) the domestic and employment circumstances of the witness;

(5) any religious beliefs or political opinions of the witness;

(6) any behaviour towards the witness by the accused, members of his family or his associates or any other person who is likely to be an accused or a witness in the proceedings.[47]

A witness who is a complainant in a sexual offence case is automatically eligible for special measures unless he does not wish to avail of those protections.[48]

2.21 In reaching its conclusion, the court must also take into account any views which have been expressed by the witness.[49] Once eligibility for special measures has been determined, the court must determine which, if any special measures should be made available to the witness.

47. Article 5(2).
48. Article 5(4).
49. Article 5(3).

The Accused

2.22 When it was passed into law, the Criminal Evidence (Northern Ireland) Order 1999 and its counterpart in England and Wales, the Youth Justice and Criminal Evidence Act 1999, specifically provided that the accused could not benefit from any special measures. The rationale for this approach appeared to be based on the protections available to the accused persons to ensure that they had a fair trial and the right to legal representation,[50] for example the range of pre-trial protections which were available to the accused which are contained in the Police and Criminal Evidence (Northern Ireland) Order 1989. In the joined cases of *R v Camberwell Green Youth Court ex parte D; R v Camberwell Green Youth Court ex parte G,*[51] the House of Lords had to consider, amongst other issues, whether the ineligibility of the accused to apply for special measures under the Youth Justice and Criminal Evidence Act 1999 constituted a violation of Article 6(1) of the European Convention on Human Rights, that is to say, the right to a fair trial. In this case, the accused argued that their ineligibility for special measures violated Article 6(1) on the basis that there is no equality of arms, which requires every accused person to be afforded a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage as compared with the prosecution.[52]

2.23 The House of Lords found no violation of Article 6(1) of the European Convention on Human Rights. However, they expressed a degree of sympathy for the arguments of the accused, who were child defendants. Baroness Hale of Richmond recognised the difficulties that young defendants face in giving the best possible evidence. However, she concluded that the answer to those difficulties was not to deprive the court of the best possible evidence from other child witnesses. The obligation on the court was to ask what, if anything, could be done to ensure that the defendant is not at a substantial disadvantage compared to the prosecution. She noted that youth courts were already

50. This is the justification contained in the Home Office publication *Speaking up for Justice* (June 1998) paragraph 3.28.
51. [2005] UKHL 4.
52. See the cases of *De Haes and Gijsels v Belgium* (1998) 25 EHRR 1 and *Delcourt v Belgium* (1970) 1 EHRR 355.

under an obligation to make use of their inherent powers to assist the accused to give the best evidence possible and nothing in the legislation prevented those powers from being used. Any concerns surrounding the treatment of young defendants could not be used as a basis for depriving other child witnesses of the opportunity to use such measures simply on the grounds that the legislation did not apply to the accused.[53]

2.24 However, the European Court of Human Rights ("ECHR"), in the case of *S.C. v United Kingdom,*[54] decided that there had been a violation of Article 6 of the European Convention of Human Rights in the case of an eleven year old boy who had been convicted of a number of offences, including the attempted robbery of an elderly lady. Medical reports were obtained by the boy's legal representatives which indicated that the boy experienced behavioural disturbances and significant learning disabilities. The ECHR held that in this case, the boy had been unable to effectively participate in his trial as it considered that "effective participation" presupposed that the accused has a broad understanding of the nature of the trial process and of what the consequences of the trial meant for him. The ECHR considered that the accused should be able to understand the general thrust of what is said in court, with the assistance of an interpreter, lawyer, social worker or a friend, if necessary. In light of the evidence presented to the court in relation to the level of comprehension of the accused, the ECHR concluded that the boy was not capable of effectively participating in his trial.

2.25 In response to the judgment in *S.C. v United Kingdom,* section 47 of the Police and Justice Act 2006 inserted a new section 33A into the Youth Justice and Criminal Evidence Act 1999 which made provision to allow certain accused persons to give their evidence by way of live television link if it is in the interests of justice for them to do so.[55] Accused persons under the age of eighteen can give evidence by live television link if their ability to participate in the

53. [2005] UKHL 4 paragraphs 54 – 64.
54. E.C.H.R. Application no. 60958/00 15 June 2004.
55. Section 33A(2)(b).

proceedings is compromised by their level of intellectual ability or social functioning; or they would be able to participate more effectively in the proceedings if live television link was used.[56] An accused person over the age of eighteen may give evidence by way of live television link if he suffers from a mental disorder or otherwise has a significant impairment of intelligence or social functioning and cannot participate effectively in the proceedings; or the use of live television link would enable him to participate more effectively in the proceedings.[57] Article 82 of the Criminal Justice (Northern Ireland) Order 2008 inserted a new Article 21A into the Criminal Evidence (Northern Ireland) Order 1999 which contains the same provisions as those that apply in England and Wales.

2.26 Further provision has been made for the protection of the accused in England and Wales by the Coroners and Justice Act 2009. Section 104 of that Act inserts a new section 33BA into the Youth Justice and Criminal Evidence Act 1999 which allows for certain accused persons to give their evidence to the court with the assistance of an intermediary if that is necessary to ensure that the accused receives a fair trial.[58] For the purposes of this provision, "intermediary" is defined by section 33BA(4) as having the function of communicating questions to the accused and relaying the accused's answers to the questioner and to explain those questions or answers so that they can be understood. For accused persons under the age of eighteen, eligibility for assistance by an intermediary is determined by whether the accused's ability to participate effectively in the proceedings is compromised by his level of intellectual ability or social functioning.[59] For accused persons over the age of eighteen, an accused person is eligible for assistance from an intermediary if he suffers from a mental disorder or otherwise has a significant impairment of intelligence or social functioning and is therefore unable to participate effectively in the proceedings.[60] These provisions are yet to be replicated in Northern Ireland.

56. Section 33A(4)(a) and (b).
57. Section 33A(5).
58. Section 33BA(2)(b).
59. Section 33BA(5).
60. Section 33BA(6).

CHAPTER 3. CURRENT LAW AND PRACTICE IN NORTHERN IRELAND: THE CIVIL LAW

DEPARTURES FROM THE PRINCIPLE OF ORALITY: THE CIVIL LAW

3.1 Unlike the criminal law, there have been less radical departures from the principle of orality in the civil law. The departures which have taken place have been either legislative, as a result of Court Rules or as part of the court's inherent jurisdiction. The reason for these departures does not always appear to be for the sole purpose of protecting witnesses: the convenience of both the court and the witness appears to play a role as well.

Legislative departures

3.2 As a result of the Civil Evidence (Northern Ireland) Order 1997, a court will not exclude evidence on the ground that it is hearsay, that is to say, that the evidence is a statement which is not oral evidence given in court. However, where a party to the proceedings uses hearsay evidence, the other parties to the proceedings may, with the permission of the court, call the maker of the statement as a witness and cross-examine him. The court also has to consider whether the hearsay evidence is reliable. In doing so, there are a number of considerations that the court has to take into account, including whether the other parties to the proceedings were informed that hearsay evidence would be used; whether it would have been reasonable and practicable to produce the maker of the statement in court; whether the statement was made contemporaneously; and whether the maker of the statement had any motive to conceal or misrepresent matters.

3.3 By virtue of Article 6 of the Criminal Justice (Northern Ireland) Order 2005, which inserts Article 6C into the Anti-social Behaviour (Northern Ireland) Order 2004, special measures under the provisions of the Criminal Evidence (Northern Ireland) Order 1999 are available to witnesses in

proceedings to apply for, vary or discharge an anti-social behaviour order. However, since anti-social behaviour orders are civil law orders, the provisions of the Criminal Evidence (Northern Ireland) Order 1999 are slightly modified to take account of the differences between the civil and criminal systems. Any provisions in relation to sexual offences, children in need of special protection and warnings to the jury to ensure that the use of special measures does not prejudice the accused are not carried across to anti-social behaviour proceedings.[61]

3.4 Article 170(1) of the Children (Northern Ireland) Order 1995 provides that a court may exclude the public when a child under eighteen is giving evidence of an indecent nature. It also provides that care proceedings may be held in private.

Departures as a result of Court Rules

3.5 Whilst primary legislation sets in place the substantive law, practice and procedure in courts is determined by Court Rules – a type of secondary legislation. There are a number of tiers of court in Northern Ireland: the Court of Judicature of Northern Ireland,[62] the County Court and the Magistrates' Court. Section 55 of the Judicature Act 1978 allows for court rules to be made for the Court of Judicature of Northern Ireland; Article 48 of the County Courts (Northern Ireland) Order 1980 allows for rules to be made in relation to the County Courts; and Article 14 of the Magistrates' Courts (Northern Ireland) Order 1981 allows for court rules to be made for Magistrates' Courts. A further legislative provision, section 5(1) of the Evidence Act (Northern Ireland) 1939, provides that Rules of the Court of Judicature of Northern Ireland and County Court Rules may allow the court to order that specific facts may be proved during civil proceedings by affidavit, with or without the witness's attendance at court for cross-examination, notwithstanding that one party desires the attendance of the witness and the witness is free to attend court.

61. Article 6C(3).
62. As from 1st October 2009 by virtue of the Constitutional Reform Act 2005 (previously known as "the Supreme Court of Judicature of Northern Ireland").

Rules of the Court of Judicature of Northern Ireland

3.6 Under Order 38(1) of the Rules of the Court of Judicature of Northern Ireland ("the Rules"), there is a general rule that witnesses shall give evidence orally in any proceedings which is started by writ. However, the Rules contain a number of provisions which may assist vulnerable witnesses who have to give evidence in civil proceedings.

3.7 Order 38, rule 2(1) of the Rules allows the court to order that evidence in proceedings begun by writ can be given by affidavit as an alternative to oral evidence if the court considers that that is reasonable in all the circumstances of the case. The court can also order that the witness giving evidence by affidavit should not be subject to cross-examination and is therefore not required to attend court. In his text *Civil Proceedings - The Supreme Court,*[63] Barry Valentine cites the cases of *Hegarty and others v Henry*[64] and *Cronin v Paul*[65] and suggests that an affidavit should not be used if oral evidence of the fact could be given and that crucial facts should be proved by oral testimony.[66] Order 38, Rule 2(3) of the Rules makes provision for proceedings which are begun by petition, originating summons or originating motion. In these cases, the court can also order that evidence is given by affidavit. However, the provision is of limited value to witnesses as the court may, on application of any party, order the attendance for cross-examination of a person whose evidence was received by affidavit. If the court has ordered that the witness must be cross-examined and the witness fails to attend court, his affidavit will not be used as evidence without the permission of the court.

3.8 Order 38, rule 3(2)(e) of the Rules[67] makes provision in relation to the manner in which evidence can be given to the court. The rule allows for evidence of a particular fact to be given by a variety of methods, such as by statement on oath, the production of documents or copies of documents

63. Valentine, *Civil Proceedings – The Supreme Court* (1997).
64. Unreported, Londonderry RC (Judge Hart QC) 24 May 1990.
65. (1881) 15 ILTR 121.
66. At page 227.
67. Inserted by rule 2 of the Rules of the Supreme Court (Northern Ireland) (Amendment No.2) 2005 (S.R. 2005 No. 163).

to the court and by the examination of witnesses orally by video link,[68] telephone or any other method of direct communication. Although it is a useful provision for the courts, this rule does not offer any guidance as regards which witnesses can avail of video link or why they might wish to do so. The rule leaves the court considerable discretion in deciding when video link should be used.

3.9 Order 39, rules 1-3 of the Rules makes provision for witnesses to give their evidence in a deposition, that is to say, on oath before a judge otherwise than in the courtroom where the proceedings are taking place. Order 39 rule 1(1) allows a witness to be examined on oath anywhere, for example, from his home, from a hospital or even from abroad. Order 39(8) provides that a witness giving evidence in this way is still subject to cross-examination and re-examination.

3.10 Civil proceedings can also be held *in camera,* that is to say, in private, either in the court room with the public excluded or in the judge's private room if "publicity may defeat justice" under Order 32, rule 17 of the Rules.

County Court Rules

3.11 Like the Rules of the Court of Judicature of Northern Ireland, the County Court Rules contain a general rule that evidence in the County Court should be given orally.[69] Order 24, rule (2)(1) states that even if the County Court Rules allow evidence to be given by affidavit, a judge can require that evidence to be given orally. Order 24, rule 2(2) goes on to state that a witness can give evidence through a video link or by any other method of direct communication,[70] but it does not give any indication as to the circumstances in which a witness may do so.

3.12 Order 24, rule 4 of the County Court Rules makes provision for a judge to order that evidence may be given by affidavit. Order 24, Rule 4(1) states that a judge may, at any time,

68. The term "video link" replaces "live television link" by virtue of rule 6 of the Rules of the Supreme Court (Northern Ireland) (Amendment) 2007 (S.R. 2007 No. 189).
69. Order 24, Rule 2(1).
70. Inserted by S.R. 2007 No. 500 with effect from 7 January 2008.

make an order that any fact or facts be proved by affidavit; that the affidavit of any witness can be read at hearing on such conditions as the judge thinks reasonable; or any witness whose attendance ought to be dispensed with be examined by interrogatories or before an examiner. Order 24, rule 4(2) provides that where the judge considers that any party, in good faith, desires the attendance of a witness for cross-examination and that witness can be produced without undue expense, then that witness will not be allowed to give evidence by affidavit. Order 24, rule 4(3) also limits the use of evidence taken by the alternative methods under Order 24, rule 4(1) by stating that the judge can refuse to admit that evidence if he thinks it is in the interests of justice to do so. This provision was considered in *Hegarty and others v Henry*.[71] In this case, the judge considered that it was not in the interests of justice to refuse to admit the affidavit of a deceased witness, despite the fact that the deceased had unnecessarily delayed commencing proceedings for two years and the affidavit had not been disclosed until after his death. The judge distinguished the case from previous cases where it had been held that it *was* in the interest of justice to refuse to admit the evidence as the witnesses were in a position to give oral evidence, but had chosen not to do so. Valentine offers a further interpretation of the effect of Order 24 rule 4:

> An order should not be made if the witness can conveniently be produced and the opponent desires [in good faith] to cross-examine…. or if his evidence is contentious. The judge may refuse to admit an affidavit…if he thinks fit, in the interests of justice. The opponent may serve a notice requiring the deponent to attend the hearing for cross- examination…where he desires to attack the deponent's credit. If the notice has been served, the witness must be produced for cross-examination, otherwise the affidavit cannot be used without leave [of the court].[72]

71. See footnote 64.
72. Valentine (see footnote 63) at page 234.

3.13 Order 24, rule 20(1) of the County Court Rules provides that a judge may make an order for any person to give evidence in a deposition anywhere in Northern Ireland. There is no provision to take evidence by deposition whilst the witness is abroad. The deposition is only admissible in evidence in limited circumstances. Order 24 rule 20(16) provides that the deposition is not admissible in evidence at the hearing unless: the witness is dead or outside Northern Ireland or unable from sickness or other infirmity to attend the court; the parties consent to the evidence being admitted; or the judge directs it to be admitted.

3.14 Order 25, rule 10 of the County Court Rules makes provision in relation to the cross-examination of witnesses. That Rule states that the judge may disallow any question put in cross-examination of any party or witness which appears to the judge to be vexatious and irrelevant.

3.15 Order 16, Rule 1 of the County Court Rules provides another relief for witnesses as it allows a judge to conduct court business in his private rooms as long as there is no detriment to the public interest.

Family Proceedings Rules

3.16 The Family Proceedings Rules (Northern Ireland) 1996[73] contain rules in relation to family proceedings[74] in the High Court and County Court. Rule 2.41 allows the court to order that evidence can be given by way of affidavit in certain proceedings, whilst rule 7.8A[75] provides that the court may allow a witness to give evidence through a video link or by any other method of direct communication.

Magistrates' Court Rules

3.17 There are a number of Rules which enable magistrates' courts to allow evidence to be given by live television link in

73. S.R. 1996 No. 322.
74. "Family proceedings" are defined by Article 12 of the Family Law (Northern Ireland) Order 1993 as being proceedings which are family business and any corresponding proceedings in a county court. "Family business" is further defined as meaning business assigned to the Family Division of the High Court and no other Division except for certain matters in relation to the estates of deceased persons and proceedings under Part VIII of the Mental Health (Northern Ireland) Order 1986 and proceedings under the Enduring Powers of Attorney (Northern Ireland) Order 1987.
75. As inserted by the Family Proceedings (Amendment) Rules (Northern Ireland) 2007 (S.R. 2007 No. 324).

family law matters. Rule 15A[76] of the Magistrates' Courts (Domestic Proceedings) Rules (Northern Ireland) 1996[77] provides that the court may allow a witness to give evidence through a video link or by any other method of direct communication. These Rules govern proceedings under the Domestic Proceedings (Northern Ireland) Order 1980, a statute which makes provision to allow parties to a marriage which has broken down, but which has not yet been dissolved, to apply to the court for financial provision. Where proceedings in magistrates' courts under the Children (Northern Ireland) Order 1995 are concerned, rule 18A[78] of the Magistrates' Courts (Children (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996[79] make provision for the court to allow a witness to give evidence through a video link or by any other method of direct communication.

Guidance on use of live television link in family cases

3.18 On 19th November 2007, the Honourable Mr Justice Weir issued a guidance note on the use of video link in family law cases.[80] According to the guidance note, its purpose was to facilitate uniform use of video link in proceedings before the family courts in Northern Ireland. In paragraph 1 of the note, video link was described as being:

> A cost effective and efficient means of facilitating evidence from witnesses who are in a "remote" location outside the courtroom where the case is being held. It is a convenient way of dealing with a number of categories of witnesses, inter alia: expert witnesses, prisoners, persons overseas, vulnerable adults and children.[81]

76. As inserted by the Magistrates' Courts (Domestic Proceedings) (Amendment) Rules (Northern Ireland) 2007 (S.R. 2007 No. 398).
77. S.R 1996 No. 324.
78. As inserted by rule 2 of the Magistrates' Courts (Children (Northern Ireland) Order 1995) (Amendment) Rules (Northern Ireland) 2007 (S.R. 207 No. 397).
79. S.R. 1996 No. 323.
80. This guidance note is available on the Northern Ireland Court Service website www.courtsni.gov.uk.
81. It should also be noted that the Children Order Advisory Committee – *Best Practice Guidance* (Version 1.0 July 2003) at paragraph 3.1.31 makes mention that "the concept of telephone and video conferencing should be introduced where possible for directions hearings to avoid the necessity of witnesses or solicitors travelling long distances for short hearings". Available at www.dhsspsni.gov.uk/child_advisory_bestpractice.pdf.

3.19 The guidance note concerns itself with the practicalities of using live television link, for example: covering the procedure for seeking the permission of the court to use the technology; requiring that the equipment in remote sites (i.e. sites outside of the court building but which are linked to the courtroom) is of sufficient quality for a successful link; ensuring that arrangements are made for a technical assistant to be present at the remote site; providing for the consent of all parties to the proceedings to be obtained; and outlining the procedures that should be followed whilst the live television link is operative. The guidance note does not, however, offer any assistance in identifying which adults or children may be deemed as "vulnerable", or indeed what "vulnerable" may mean.

Departures as a result of the court's inherent jurisdiction

3.20 As well as legislative intervention and the operation of Court Rules, superior courts have inherent powers which may be used to assist witnesses to give evidence: the "inherent jurisdiction" of the court. The inherent jurisdiction is a difficult concept to define, but has its basis in the very nature of the court as a superior court of record. Its function is to provide the courts with an array of powers which are necessary to protect their status and authority as superior courts.[82] Some attempts have been made to list the powers that a court may have by virtue of its inherent jurisdiction. In his article *The Inherent Jurisdiction of the Court,*[83] Mason identifies four primary functions of the inherent jurisdiction of the court:

(1) ensuring convenience and fairness in legal proceedings;

(2) preventing steps from being taken that would render judicial proceedings futile;

(3) preventing abuse of process; and

(4) acting in aid of superior courts and in aid or control of inferior courts and tribunals.

82. Lacey, *Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution* Federal Law Review (2003) page 23.
83. Mason, *The Inherent Jurisdiction of the Court* (1983) 57 Australian Law Journal 449 page 458.

3.21 In the context of civil proceedings in Northern Ireland, the court has exercised its inherent jurisdiction in a variety of ways to assist witnesses when they are giving evidence. Valentine[84] notes that it is not unusual for civil courts to order that screens be used to shield witnesses from view, including proceedings where children under the age of eighteen are giving evidence of an indecent nature. In *R v W*[85] a social worker was permitted to give anonymous evidence in care proceedings from behind a screen. On appeal, there was criticism of the decision to allow evidence to be given in this way, although the criticism appears to be directed at the wrongful application of the criteria for allowing witnesses to give evidence anonymously rather than at the screening itself.

3.22 It also appears that a court can use its inherent jurisdiction to order that a party is removed from the courtroom in civil proceedings. Spencer and Flin in their text *The Evidence of Children*[86] note that it is likely that in any civil case a court could order any person (other than a party to the proceedings) to leave if their presence was intimidating a witness, as part of its general power to control its proceedings in the interests of justice.

3.23 A court can direct that wigs and gowns are removed if the interests of justice require it. Spencer and Flin[87] comment that this action tends to be at the discretion of the judge. However, in May 2006, the Lord Chief Justice of Northern Ireland issued a Practice Direction[88] which stated that barristers appearing in proceedings in the Family Division and family care centres under the Children (Northern Ireland) Order 1995, the Adoption (Northern Ireland) Order 1987 and the Hague Convention on the Civil Aspects of International Child Abduction would no longer be required to wear wigs or gowns, unless the judge otherwise directs. The Practice Direction states that in these cases, judges will not wear their robes, unless, exceptionally, the nature of the proceedings requires them to do so.

84. Valentine (see footnote 63) at page 269.
85. [2003] 1FLR 329.
86. Spencer and Flin, *The Evidence of Children* (1993) at page 111.
87. At page 116.
88. Practice Direction 4 of 2006 11th May 2006.

3.24 Cross-examination can be controlled in civil proceedings as judges are under a duty to intervene to prevent unduly oppressive, offensive, vexatious or irrelevant questioning. In *Mechanical and General Inventions Ltd and Lehwess v Austin and Austin Motor Co. Ltd*[89] Lord Sankey stated:

> Cross-examination is a powerful weapon entrusted to counsel and should be conducted with restraint and a measure of courtesy and consideration which a witness is entitled to expect in a court of law.[90]

However, this power to curb excessive cross-examination should be exercised sparingly[91] and only as a last resort if barristers abuse the restraint expected of them.[92] Criminal case law exists which determines that judges may curb cross-examination if the witness becomes too ill,[93] or distressed,[94] to continue.

A CASE FOR REFORM?

3.25 There are a number of possible reasons why protections in civil proceedings have not evolved to the same extent as those available in criminal proceedings. Very often civil proceedings are brought to a conclusion by negotiation between the parties and the witnesses are not required to give their evidence in court. Hearsay evidence is more readily admissible in civil proceedings, therefore some witnesses may avoid the need to attend court. Civil proceedings may also be less adversarial in nature than criminal proceedings, possibly given the comparatively less serious consequences of civil proceedings: although individuals may lose significant assets or suffer loss in matters which are greatly important to them, they are unlikely to lose their liberty.

3.26 However, despite the differences between criminal and civil proceedings, a fundamental similarity exists: witnesses will

89. [1935] AC 346.
90. At page 359.
91. Undue restriction of cross examination may be regarded as a serious procedural irregularity which justifies re-trial of the proceedings *Hayes v Transco PLC* [2003] EWCA Civ 1261.
92. *Wakeley v R* (1990) 64 ALJR 321.
93. *R v Stretton and McCallion* (1988) 86 Cr App Rep 7.
94. *R v Wyatt* [1990] Crim LR 343.

be giving evidence to the court. It is entirely probable that witnesses in civil proceedings will display the same characteristics which would make them eligible for special measures in criminal proceedings, such as mental disorder or physical disability or disorder. Statistics published by the Northern Ireland Statistics and Research Agency[95] reveal that in 2006/07, 18% of all people living in private households in Northern Ireland experience some degree of disability,[96] whilst 21% of adults and 6% of children in Northern Ireland are disabled. As Northern Ireland has a population of around 1.75 million,[97] it seems likely that significant numbers of people with a disability will use the civil courts at some stage in their lives and some may wish to avail of special measures, if these were made available. From time to time, children are also required to give evidence in civil proceedings. They may occasionally be required to give evidence in family cases and personal injury cases, for example. It is also possible that witnesses in civil proceedings relating to family matters, particularly involving domestic violence, or other types of civil proceedings (such as proceedings to evict a tenant) could suffer from intimidation connected to their testifying in court since intimidation usually occurs when one party does not want another party to say or do something which will have unwanted consequences for the first party. However, to the knowledge of the Commission, no studies on witness intimidation in civil proceedings exist, so it is difficult to gauge the incidence of intimidation in proceedings of this nature.

3.27 The current law and practice in Northern Ireland appears to give limited protection to witnesses who may experience difficulties in giving evidence in civil proceedings in the normal way. It is fair to say that most protections that do exist have not evolved as a result of a coherent and considered plan to offer protection to witnesses. Additionally, a number of existing protections are only

95. Northern Ireland Statistics and Research Agency *The Prevalence of Disability and Activity Limitations amongst adults and children living in private households in Northern Ireland* Bulletin 1 July 2007.
96. For the purposes of the study, the Northern Ireland Statistics and Research Agency based its definition of "disability" on the concepts of the International Classification of Functioning, Disability and Health (ICF) which was developed and endorsed by the World Health Organisation. In this context, "disability" is determined if a health condition prevents or limits an individual from taking part in society.
97. Northern Ireland Statistics and Research Agency *Population and Migration Estimates Northern Ireland (2008) – Statistical Report* – (30 July 2009).

available through the exercise of discretion by the court, as can be seen in family law cases where court rules facilitate the use of live television link. Court rules may allow for the use of live television link or may permit other alternative forms of giving evidence, but they do not and cannot prescribe for substantive issues such as which categories or types of witnesses are eligible for these forms of evidence-giving. Furthermore, it is difficult to describe the arrangements that already exist as having derived from a transparent system of law-making, neither are they particularly accessible nor easily understandable to the average court user. For these reasons, **the Commission provisionally considers that a more co-ordinated, consistent and accessible legal regime for allowing witnesses to give evidence in civil proceedings otherwise than by oral evidence would be a useful addition to the law of Northern Ireland. Do consultees agree?**

CHAPTER 4. CURRENT LAW AND AND PRACTICE IN OTHER JURISDICTIONS

INTRODUCTION

4.1 Chapter 2 of this consultation paper examines the protections available to witnesses who are required to give evidence in criminal proceedings in Northern Ireland, whilst chapter 3 compares the position with the protections which are available in the civil law. Although some relief does presently exist, it does not appear to have been developed to specifically offer protection to witnesses, nor are the current arrangements particularly accessible or easily understandable to most of the general public. The Commission recognises that the law in some other jurisdictions has been specifically developed to be more favourable to witnesses in civil proceedings. For example, in the Republic of Ireland, by virtue of section 21 of the Children Act 1997, children can give evidence by live television link in civil proceedings whilst section 22 provides that they can also be assisted by intermediaries. Adults who are experiencing mental disabilities are also offered protection to a certain extent by section 20 of the same Act: they can give their evidence by live television link or be assisted by intermediaries in proceedings concerning their welfare. These particular protections are undoubtedly useful, however, they appear limited in respect of the witnesses who can benefit from them and the types of proceedings to which they relate. Scotland and New Zealand also have statutory interventions to assist certain witnesses which appear to be more inclusive.

SCOTLAND

4.2 The Labour Party's Scottish manifesto for the 1997 General Election, like its counterpart for England and Wales, promised to ensure protection for victims in rape and serious offence trials and for those subject to intimidation. As a result of that commitment, following the victory of the Labour Party in the 1997 General Election, a working group was set up in Scotland to review Scottish law, procedure and practice in relation to witnesses in need of special protection.

4.3 The remit of the group covered vulnerable witnesses in both criminal and civil proceedings. The recommendations of the group were published in November 1998 in a paper entitled *Towards a Just Conclusion*.[98] The group made a number of recommendations in relation to witnesses in civil proceedings. These recommendations were:

- That those responsible for support and care of vulnerable or intimidated witnesses in civil cases should consider the use of special measures such as the use of CCTV or the taking of evidence on commission for delivery of evidence.

- That all those involved in civil cases (particularly concerning anti-social behaviour) where intimidation may be attempted should have access to alternative kinds of evidence (particularly hearsay and written evidence) which may avoid the need for the witness to attend court.

- That all those concerned in the civil legal process should be conscious of the duties not only of practitioners but also of the courts with regard to the protection of witnesses from insulting, annoying, vexatious or oppressive cross-examination and should seek to minimise the extent to which witnesses are subjected to such treatment.

4.4 The recommendations in *Towards a Just Conclusion* were criticised by consultees for being insufficiently developed.[99] Further work was undertaken, with more detailed proposals forming part of a consultation paper entitled *Vital Voices: Helping Vulnerable Witnesses Give Evidence*.[100] The results of that consultation were published as a policy statement of the Scottish Executive Justice Department in 2003: *Vital Voices: Helping Vulnerable Witnesses Give Evidence Policy Statement.*[101]

98. Scottish Office (November 1998).
99. Scottish Executive, *Towards a Just Conclusion Action Plan* (2000).
100. Scottish Office (1st May 2002).
101. www.scotland.gov.uk/library5/justice/vvps.pdf.

4.5 The proposals contained in the 2003 paper included the conclusion that vulnerable witnesses in civil proceedings should be able to use special measures to give evidence. It was considered that there were many reasons why witnesses may be vulnerable in civil proceedings. Some children and mentally ill people could be vulnerable in *any* court case. Others may be vulnerable due to the nature of the evidence they have to give or because they have experienced distress due to harassment or discrimination. As it was considered that these people needed assistance to give their best evidence to the court, the recommendations were taken forward legislatively and entrenched in law through the Vulnerable Witnesses (Scotland) Act 2004. The key features of this enactment are described below.

Vulnerable Witnesses (Scotland) Act 2004

4.6 Section 11 of the Vulnerable Witnesses (Scotland) Act 2004 ("the 2004 Act") contains provision for the evidence of children and other vulnerable witnesses in civil proceedings to give their evidence with the aid of special measures. Under the 2004 Act, a witness in civil proceedings is automatically deemed to be vulnerable if he is under the age of sixteen. If the witness is an adult, he is vulnerable if there is a significant risk that the quality of his evidence, in terms of its completeness, coherence and accuracy will be diminished by reason of a mental disorder or fear and distress in connection with the giving of his evidence.

Child witnesses

4.7 Section 12 of the 2004 Act provides that when a child is giving evidence in civil proceedings, the court must make an order authorising the use of such special measures as it thinks are most appropriate for taking the child's evidence. The court can also make an order stating that the child should give evidence without the benefit of special measures.

4.8 The party intending to call a child witness must lodge a notice with the court specifying the special measure or

measures which that party considers to be the most appropriate for the purposes of taking the child's evidence. If the notice specifies that the child would benefit from the use of a live television link, a screen or a supporter, the court shall accept that special measure as being the most appropriate method for taking the child's evidence. The notice may also state that the child should give evidence without the use of any special measures. However, the court will only make an order that no special measures will be used if it is satisfied that the child has expressed a wish to give evidence without special measures and that it is appropriate for him to testify in that manner. The court may also make an order that no special measures will be used if the use of those measures would result in a significant risk of prejudice to the fairness of the proceedings or to the interests of justice and that such a risk significantly outweighs the risk of prejudice to the interests of the child in making an order.

4.9 The Act provides an additional safeguard for witnesses. A party lodging a notice and the court making an order must have regard to the best interests of the child, any views expressed by the child (having regard to his age and maturity), and to the views of anyone who has parental responsibility for the child.

Other vulnerable witnesses

4.10 A party intending to call a witness who is vulnerable for reasons other than age may make an application to the court for special measures. The court has to be satisfied that the witness is indeed vulnerable. In deciding whether an adult witness is vulnerable, the court must take into account a number of considerations. These are:

(1) the nature and circumstances of the alleged matter to which the proceedings relate;

(2) the nature of the evidence which the person is likely to give;

(3) the relationship between the person and any of the parties to the proceedings;

(4) the person's age and maturity;

(5) any behaviour towards the person on the part of any party to the proceedings, members of the family or associates of any party to the proceedings and any other party who is likely to be a party to the proceedings or a witness in the proceedings; and

(6) any other matters which the court considers to be relevant, including the social and cultural background and ethnic origin of the person, the person's sexual orientation, the domestic and employment circumstances of the person, any religious beliefs or political opinions held by the person or any physical disability or other physical impairment.

4.11 If the court is satisfied that the witness is vulnerable, it may make an order authorising the use of such special measures as it considers appropriate for the purposes of taking that witness's evidence. In making the order, the court is required to take into account any possible effects that the witness may suffer if required to give evidence without special measures and whether it is likely that the witness would be better able to give evidence with the assistance of special measures. Additionally, a party making an application for special measures for a witness, or the court when deciding whether to make an order for special measures for that witness, must consider the best interests of the witness and must take account of the views expressed by the witness.

Special measures available to a witness

4.12 The range of special measures which are available to eligible vulnerable witnesses are set out in section 18(1) of the 2004 Act. These special measures are: the taking of evidence by a commissioner; use of a live television link; use of a screen; use of a supporter; and such other measures as the Scottish government may prescribe in secondary legislation.

4.13 The sections of the 2004 Act which deal with civil proceedings came into effect on 1st November 2007.[102] Although a substantial body of work has been carried out in evaluating the effectiveness of the 2004 Act in relation to special measures in criminal proceedings, no such evaluations have, to the knowledge of the Commission, been carried out for special measures in civil proceedings. The Commission, however, understands that work of this nature may be considered in the near future and it will continue to keep in contact with the Scottish Department with responsibility for the implementation of the 2004 Act.

NEW ZEALAND

4.14 The New Zealand Law Commission ("the NZLC") was asked by the New Zealand government to carry out a fundamental review of all the aspects of the law of evidence in that jurisdiction in August 1989. The NZLC was asked to make recommendations that would ensure that the law was as clear, simple and accessible as possible and would facilitate the fair, just and speedy judicial resolution of disputes. As part of that body of work, in October 1996, the New Zealand Law Commission published a consultation paper entitled *The Evidence of Children and Other Vulnerable Witnesses*.[103] This paper looked at alternative ways for witnesses to give evidence so that fuller and more reliable evidence would be available to the fact-finder. The results of that consultation exercise were published in August 1999 in two reports.[104] The reports made recommendations for the introduction of alternative ways of giving evidence for all witnesses, including the defendant, in criminal proceedings. These recommendations reflected the view that these "alternative ways" would assist witnesses in appropriate cases to present their evidence and that fuller and more reliable evidence would normally be made available to the court as a result of the use of special measures. Additionally, a witness's trauma and distress may be reduced, his recovery from traumatic events may be promoted, and the witness would have

102. The Vulnerable Witnesses (Scotland) Act 2004 (Commencement No. 6, Savings and Transitional Provisions) Order 2007 (SSI 2007 No. 447 (c. 36)).
103. NZLC pp26.
104. *Evidence. Volume 1: Reform of the Law* NZLC R 55: *Evidence. Volume 2: Evidence Code and Commentary* NZLC R 55. See www.lawcom.govt.nz.

increased control over the proceedings. Following the recommendations contained in these reports, the Evidence Act 2006 was enacted by the New Zealand legislature.

4.15 Section 83 of the New Zealand Evidence Act 2006 states that the ordinary way for a witness to give evidence in civil or criminal proceedings is orally, in a courtroom, in the presence of the Judge and the jury (if there is one), the parties to the proceedings, legal representatives and any member of the public who wishes to be present, unless the Judge orders that the public be excluded. Evidence can also be given in an affidavit or read aloud in the courtroom from a written statement. However, an affidavit or written statement can only be given in evidence if it is the personal statement of the maker and does not contain statements which are inadmissible for whatever reason under the New Zealand Evidence Act 2006.

4.16 As well as stating the ordinary way of giving evidence, the New Zealand Evidence Act 2006 allows for witnesses to give evidence in alternative ways. Section 103 states that in civil or criminal proceedings, on the application of a party to the proceedings or on his own initiative, the judge may direct that a witness may give evidence in the ordinary way or by an alternative means. The decision to allow the witness to give evidence by an alternative means may be based on any of a number of grounds:

- The age or maturity of the witness;
- The physical, intellectual, psychological or psychiatric impairment of the witness;
- The trauma suffered by the witness;
- The witness's fear of intimidation;
- The linguistic or cultural background or beliefs of the witness;
- The nature of the proceedings;

- The nature of the evidence that the witness is expected to give;

- The relationship of the witness to any party in the proceedings;

- The absence or likely absence of the witness from New Zealand;

- Any other ground likely to promote the purpose of the New Zealand Evidence Act 2006.

Before the judge makes a direction that the witness can give evidence in an alternative way in civil proceedings, he must consider the need to ensure the fairness of the proceedings; the views of the witness; the need to minimise the stress on the witness; and any other factor that is "relevant to the just determination of the proceedings".

4.17 The alternative ways for a witness to give evidence are as follows. The witness can give evidence while in the courtroom, but in such a way that he is shielded from the defendant or some other specified person. The witness can also give his evidence from outside the courtroom, whether or not that place is in New Zealand or elsewhere. The witness can give evidence by video-recording. The judge may direct that where the evidence of a witness is to be given in an alternative way, all appropriate or practical means may be used to enable the Judge, the jury (if any) and any lawyers to see and hear the witness giving evidence. The legislation does not specifically mention screens or live television link, but those methods of giving evidence are clearly acceptable. As the NZLC had doubts as to the effectiveness of intermediaries in improving the quality of the evidence,[105] the use of intermediaries is rejected by the legislation. However, witnesses are allowed, with the permission of the judge, to have supporters present in court.[106] Witnesses are also allowed to have communication assistance where it is needed.[107]

105. New Zealand Law Commission (1999) pages 100-101.
106. Section 79.
107. Section 80.

4.18 The New Zealand Evidence Act 2006 contains a number of further provisions which are helpful to witnesses when giving evidence in civil proceedings. Section 85 gives a judge the power to disallow any question that the judge considers improper, unfair, misleading, needlessly repetitive or which is expressed in language that is too complicated for the witness to understand. There are also restrictions on a party personally cross-examining the witness.[108] A judge may order that cross-examination in this way should not take place having regard to:

(a) the witness's age or maturity;

(b) any physical, intellectual, psychological or psychiatric impairment suffered by the witness;

(c) the linguistic or cultural background or religious beliefs of the witness;

(d) the nature of the proceedings;

(e) the relationship of the witness to the cross-examining party; or

(f) any other grounds likely to promote the purpose of the legislation.

When deciding whether to make an order, the judge has to consider the need to ensure the fairness of the proceedings, the need to minimise stress on the witness, and any other factor that is relevant "to the just determination of the proceedings".

4.19 Like the Scottish model, the effectiveness and operational success of the New Zealand model has not been assessed yet. Section 202 of the New Zealand Evidence Act 2006 requires the NZLC to monitor the operation of the Act approximately every five years. The first report is due in 2012.[109] The Commission will continue to monitor developments in that regard so that any lessons learned from

108. Section 95(2).
109. www.lawcom.govt.nz/projectslist.aspx.

such an evaluation could beneficially inform any recommendations made by the Commission in its final report.

CONCLUSION

4.20 Despite the lack of an evaluation of the models in Scotland and New Zealand, the Commission considers that the models appear to offer sensible approaches that assist witnesses who have to give evidence in civil proceedings. However, the Scotland and New Zealand models differ from each other and from the criminal law model of special measures which is currently operating in Northern Ireland, England and Wales in two significant respects. First, each model takes different approaches in relation to the criteria for eligibility for special measures or alternative methods of giving evidence. Second, each model differs in the types of measures or alternative methods which they offer to eligible witnesses. It is therefore necessary to explore which approach is preferable. In chapter 5, the Commission considers the options for determining the eligibility of witnesses for special measures, whilst the types of special measure that should be made available to witnesses are discussed in chapter 6.

CHAPTER 5. SPECIFIC ISSUES: ELIGIBILITY FOR SPECIAL MEASURES

INTRODUCTION

5.1 If it is accepted that there is a need for some witnesses in civil proceedings to benefit from special measures, consideration must be given to the circumstances in which a witness is eligible for those special measures. In considering eligibility of witnesses, two questions arise. First, what do we mean by "witness" and second, what criteria should govern a witness's eligibility for those special measures.

WHO IS A "WITNESS"?

5.2 In criminal proceedings in Northern Ireland, England and Wales, "witness" does not include an accused person for the purposes of eligibility for special measures, although vulnerable accused persons have protections available to them.[110] Civil proceedings, however, are quite distinct from criminal proceedings. Rather than there being an accused person being tried before a judge and (usually) a jury, with a variety of witnesses giving evidence for both the defence and prosecution, civil proceedings will usually involve a number of parties giving evidence to the court in support of their respective cases. Witnesses for each of those parties may be called to give factual evidence which may support the parties' cases.

5.3 The Commission has considered the issue of who should be deemed "witnesses" for the purposes of the matters raised in this consultation paper and has concluded that the only sensible approach appears to be to allow all parties and witnesses in civil proceedings to avail of special measures. There seems to be no way of differentiating between the parties in civil proceedings: it appears to be impossible to make an argument for why one party to civil proceedings should be more deserving of special measures than another:

110. See chapter 2 paragraphs 22 to 26 for a discussion of the protections available to accused persons.

all parties come before the court on even terms, seeking to successfully argue their case. If parties fulfil the eligibility criteria for special measures it seems sensible to allow them to give their evidence by a method which will result in the best evidence being presented to the court. In civil proceedings, there seems to be no justification for differentiating between parties and witnesses. In criminal proceedings, the accused was initially prevented from accessing special measures because of the protections which were afforded to him to ensure that he has a fair trial and his right to legal representation.[111] However, changes to the law have taken place as a result of *S.C. v The United Kingdom*,[112] as a result of a recognition that measures should be created to assist certain accused persons to give evidence.

5.4 It is interesting to note that in Scotland and New Zealand, the definitions of "witness" in the legislation which provides for protections whilst giving evidence in civil proceedings focuses on the fact of giving evidence, rather than any role that the evidence giver may be playing in the proceedings. In Scotland, "any person who is giving or is to give evidence"[113] has the potential to be eligible for special measures if certain criteria are met. In New Zealand, "witness" is defined as being "a person who gives evidence and is able to be cross-examined in a proceeding".[114] The Commission considers that this approach is sensible and fair, and allows all parties to proceedings as well as witnesses to access protections, where necessary, to improve the quality of their evidence. **Do consultees agree that all parties to civil proceedings and witnesses involved in the case should be able to avail of special measures if they are eligible to do so?**

DEFINING ELIGIBILITY

5.5 Few witnesses are likely to enjoy the experience of giving evidence in court. For the vast majority of witnesses, the courtroom will be an unfamiliar environment. Many people

111. This is the justification given in the Home Office publication *Speaking up for Justice* (June 1998) paragraph 3.28.
112. E.C.H.R. Application no. 60958/00 (15 June 2004). See discussion in chapter 2, paragraph 24.
113. Section 11 of the Vulnerable Witnesses (Scotland) Act 2004.
114. Section 4 of the Evidence Act 2006.

will form their views on the court process solely or largely through their experience of watching court room scenes on television or in films. The reality of the courtroom, with its formality of procedure, an imposing judge and busy lawyers is likely to contribute to a general sense of awe and unease. Being closely questioned and having one's answers scrutinised by strangers is not an enjoyable experience for anyone. However, for some people, it is clear that the experience of giving evidence goes beyond general feelings of nervousness and unease and crosses over into a level of stress and anxiety which far exceeds the emotions which are normally associated with giving evidence in adversarial proceedings.

5.6 A variety of factors can be said to influence whether a witness will feel undue stress and anxiety in relation to giving evidence. In the criminal law model under the Criminal Evidence (Northern Ireland) Order 1999, and the Youth Justice and Criminal Evidence Act 1999 such factors are classified into two main groups: factors that stem from a particular characteristic of the witness which may make him more likely to be "vulnerable" when giving evidence; and factors that may contribute to a witness suffering from fear and distress in relation to giving evidence in court proceedings. This classification also applies to the Scottish civil law model contained in section 11 of the Vulnerable Witnesses (Scotland) Act 2004. The New Zealand model which is contained in section 103 of the Evidence Act 2006 is different. Instead of adopting this classification, it creates a set of grounds which justify a witness giving their evidence by alternative means. Many of the factors which may determine whether the quality of a witness's evidence would be diminished by reason of fear and distress in connection with giving evidence in Northern Ireland, Scotland, England and Wales are free-standing grounds for accessing alternative methods of giving evidence in New Zealand. For example, a person's cultural background may be just one factor which may diminish the quality of his evidence in Northern Ireland, Scotland, England and Wales because it contributes to a witness's fear and distress in connection with giving evidence. However, in New Zealand, cultural background is by itself a ground for obtaining an alternative

method of giving evidence: there is no need to show fear and distress.

5.7 There is a need to make a judgment as to which approach is best suited to the needs of witnesses in civil proceedings in Northern Ireland. This chapter will therefore examine the issues surrounding each approach, looking at characteristics which may suggest "vulnerability", fear and distress and consider whether the New Zealand approach is a preferable model than the one currently in use in Northern Ireland, Scotland, England and Wales.

Particular characteristics which may suggest "vulnerability"

5.8 It is important to understand that "vulnerability" is a difficult concept to understand and define. In *Speaking up for Justice*,[115] two views on the nature of vulnerability were mentioned. In its paper *Mentally Incapacitated and Other Vulnerable Adults, Public Law Protection* the Law Commission for England and Wales had commented that:

> Vulnerable people are, of course, not a homogenous group and arriving at a definition of vulnerability which is neither under nor over inclusive presents some difficulties. Vulnerability is, in practice, a combination of the characteristics of the person concerned and the risks to which he is exposed by his particular circumstances.[116]

5.9 The charity MENCAP had also stressed the subjective and definitionally elusive nature of vulnerability:

> Vulnerability is an individual thing, related to one or more of age, sex, experience, social and emotional maturity, disability, communication difficulties, dependence on those you are minded to criticise, misunderstanding of what is at issue, anxiety to please, a misplaced sense of guilt, general fears of unknown

115. Home Office, *Speaking up for Justice* (June 1998) paragraph 3.9.
116. Law Commission, Consultation Paper 130 (1993) paragraph 7.2.

consequences, lack of experience of anyone wanting your opinion, cognitive disability, etc.[117]

5.10 In Northern Ireland,[118] Scotland,[119] England and Wales,[120] the applicable legislation identifies a number of groups who may be eligible for assistance when giving evidence in court on the basis of a particular characteristic which may suggest "vulnerability":

- child witnesses; and
- people whose quality of evidence is likely to be diminished because they suffer from a mental disorder.

In Northern Ireland,[121] England and Wales,[122] people who have a physical disability or are suffering from a physical disorder are also identified as potentially eligible for special measures.

Child witnesses

5.11 A body of work exists which indicates that children giving oral evidence in court during proceedings find the experience distressing. One such study undertaken by the Judicial Studies Board of England and Wales[123] observed that children may come to court feeling under pressure to say the right thing; say as little as possible; not to be caught out; not break down; not upset or offend anyone, especially a parent or family member; win or keep the respect of their peers; make things better or at least not make them worse; or agree with everything. Research on children giving evidence on sexual assaults in criminal proceedings has shown that they tend to experience considerable anxiety in the lead-up to trial, as well as "secondary victimisation" whilst giving evidence. In a study of a sample of 218 children

117. MENCAP, *Submission to Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998).
118. Article 4 of the Criminal Evidence (Northern Ireland) Order 1999.
119. In criminal proceedings, section 271 of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004. In civil proceedings, section 11(1)(a)(b)(i) of the Vulnerable Witnesses (Scotland) Act 2004.
120. Section 16 of the Youth Justice and Criminal Evidence Act 1999.
121. See footnote 118.
122. See footnote 120.
123. Judicial Studies Board of England and Wales, *Equal Treatment Bench Book* (2004).

carried out in 1992, the level of behavioural disturbances among those who testified and those who did not was analysed.[124] Those who testified reported that confronting their attacker in court brought back traumatic memories, caused sleep disturbance and exacerbated feelings of pain, hurt and helplessness. In civil cases, however, a child is unlikely to have to give evidence of sexual abuse: for example, in care proceedings children are unlikely to appear at all, their evidence to the court being supplied by social workers, medical experts and psychologists.

5.12 Various other aspects of court proceedings can cause difficulties for children who are participating in court proceedings. For example, the language used in court can be unfamiliar to young children. The use of complex sentence structures and complicated vocabulary can undoubtedly cause confusion to a child.[125] Questions such as "Did this happen on Friday?" are easier for a child to answer than "Now, this happened on a Friday, did it not?". A survey carried out in 2004 on behalf of the NSPCC found that over half of 50 children interviewed said that they did not understand some words or found some questions confusing.[126] No one can give a court their best evidence if they do not understand what is being asked of them. Additionally, the formal nature of court proceedings may also be intimidating for some children.[127] In a recent study, 49% of 172 children who were studied reported that they found defence advocates to be sarcastic, rude, aggressive or cross.[128]

5.13 The Commission considers that children should be afforded protection during civil proceedings because they have specific needs that must be met by the court process. It is not appropriate to expect children, especially young children, to participate in any court proceedings in the same way as adults. It is not appropriate to expect children to have the same resilience to questioning and to the formal nature of

124. Goodman, Taub, Jones, England, Port, Rudy and Prado, *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* (1992).
125. See, for example, Plotnikoff and Woolfson, *Measuring up? Evaluating the implementation of government commitments to young witnesses in criminal proceedings* (July 2009) page 6.
126. Plotnikoff and Woolfson, *In Their Own Words: the Experiences of 50 Young Witnesses in Criminal Proceedings* (2004).
127. See, for example, Cunningham and Hurley, *Using special accommodations and testimonial aids to facilitate the testimony of children; Book 4: video-recorded evidence* (2007).
128. Plotnikoff and Woolfson, (see footnote 125) at page 10.

court proceedings as an adult may have. The Commission considers that it is important to facilitate the participation of children in the court process when it is necessary for them to give evidence. **In order to assist children to give their best evidence in civil proceedings, the Commission considers that child witnesses should be eligible for special measures. Do consultees agree?**

5.14 If it is accepted that children merit eligibility for special measures, then three further issues must be considered. The upper age limit for eligibility must be considered, as well as whether children should automatically be eligible for special measures or whether the extension of special measures should be at the discretion of the court. A question also arises in relation to whether children can choose to "opt out" of using special measures and choose to give their evidence orally in court in the traditional way.

Upper age limit

5.15 Feelings of stress and anxiety about giving evidence in court may vary according to the child's age and level of maturity. Special measures in criminal proceedings in Northern Ireland are currently available to a child under the age of seventeen.[129] In criminal proceedings in Scotland, protections are available to a child who is under the age of sixteen at the date of commencement of the proceedings.[130] The same age limit applies to child witnesses in civil proceedings.[131] In England and Wales, the Coroners and Justice Act 2009 extends the age limit for special measures from seventeen to eighteen. More generally, some legislation governing important aspects of children's lives define "child" according to differing age limits. For example, aspects of the Children (Northern Ireland) Order 1995 apply to children under the age of eighteen, whilst other aspects of the same Order apply to a different age group (residence and contact orders, for example, cannot be made for a child over sixteen, unless there are exceptional circumstances).

129. Article 4(1)(a) of the Criminal Evidence (Northern Ireland) Order 1999.
130. Section 271 of the Criminal Procedure (Scotland) Act 1995 (c.46) as inserted by section 1(1) of the Vulnerable Witnesses (Scotland) Act 2004.
131. Section 11(1)(a) of the Vulnerable Witnesses (Scotland) Act 2004.

Other legislation recognises the capability of children to make decisions affecting their lives but the age limits for this decision-making set in these provisions vary according to subject-matter. For example, it is possible to be married at the age of sixteen, with parental consent.[132] There is no statutory compulsion to stay in school beyond the year in which a child turns sixteen.[133] Those who desire to smoke tobacco must wait until they are eighteen,[134] as must those who wish to vote in parliamentary elections.[135] It is evident, therefore, that the definition of who is a "child" can vary according to the circumstances which the law in question is seeking to regulate. If protective special measures are to be available to witnesses in civil proceedings, it is important that those measures are available to those who may have need of them. Limiting the definition of "child" to those of the age of sixteen or seventeen will have the effect of removing the protection for some young people who may be in need of those protections whilst giving their evidence in court. **The Commission is anxious that protective measures are available to the maximum number of children and provisionally considers that any special measures should be available to children under the age of eighteen. Do consultees agree?**

Automatic protection or choice?

5.16 Currently, in criminal proceedings in Northern Ireland, England and Wales, children are automatically entitled to certain special measures when giving their evidence in court, subject to the availability of those special measures and also the condition that the admission of video-recorded evidence-in-chief would be in the interests of justice. The Coroners and Justice Act 2009 alters the position of children in criminal proceedings in England and Wales, by giving them the option of foregoing the use of video- recorded evidence and live television link, provided that the court is satisfied that the quality of the child's evidence will not be diminished. If the child does "opt out" of using the automatic special measures which are available to him, he must give

132. Article 22 of the Marriage (Northern Ireland) Order 2003.
133. Article 46 of the Education and Libraries (Northern Ireland) Order 1986.
134. The Children and Young Persons (Sale of Tobacco etc.) Regulations (Northern Ireland) 2008 (S.R. 2008 No. 306).
135. Section 1 of the Representation of the People Act 1983.

his evidence from behind a screen, though this does not apply where the court considers that giving evidence in this way will not maximise the quality of the evidence. The child also has an option to opt out of giving his evidence from behind a screen, with the agreement of the court. When deciding whether a child should opt out of giving video-recorded evidence, using live television link or giving evidence from behind a screen, the court must take into account a number of considerations: the age and maturity of the witness; the witness's ability to understand the consequences of giving live evidence in court; any relationship between the witness and the accused; the witness's social and cultural background and ethnic origins; the nature and circumstances of the offence being tried as well as any other factors that the court considers to be relevant.[136]

5.17 In criminal proceedings in Scotland, children are entitled to avail of special measures, but may opt not to use them.[137] Likewise, in civil proceedings in Scotland, children are entitled to use special measures when giving evidence, but do not have to do so.[138] A child may give evidence without special measures only if the court is satisfied that the child has expressed a wish to give evidence without the benefit of any special measure and it is appropriate for him to do so. The court will also dispense with special measures if it is demonstrated that their use would give rise to a significant risk of prejudice to the fairness of the proceedings or to the interests of justice and that risk significantly outweighs any risk to the interests of the child. The court must also take account of the views of the child witness when making an order to allow the child witness to avail of special measures. As part of this decision making process, the court must also take into account the best interests of the witness and the views of the child's parent or someone with parental responsibility for the child.[139]

136. Section 100 of the Coroners and Justice Act 2009.
137. Section 271A of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004.
138. Section 12 of the Vulnerable Witnesses (Scotland) Act 2004.
139. Section 271E of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004 (criminal proceedings) and section 15 of the Vulnerable Witnesses (Scotland) Act 2004 (civil proceedings).

5.18 The approach taken in the Coroners and Justice Act 2009 represents a change from a more paternalistic treatment of the child towards a recognition of the importance of considering a child's wishes in decisions which affect him. The change in the law in England and Wales, once commenced, will create a position closer to the Scottish approach which is taken in both civil and criminal proceedings in that jurisdiction. It seems sensible therefore that any recommendation made by the Commission in relation to children's eligibility for special measures in civil proceedings should follow the approach set in our neighbouring jurisdictions by containing an element of choice for the child, albeit one coupled with safeguards. The Commission is attracted to the approach proposed in the Coroners and Justice Act 2009 on the basis that it offers a choice to a child to give evidence otherwise than by video-recording or live television link, yet offers the child an option of the safeguard of a screen if evidence is to be given in open court. This approach also has the benefit of giving the court a specific checklist of factors which it must take into account when considering whether to allow a child witness to opt out of using special measures. The Commission is also attracted to the Scottish approach of considering the child's best interests when determining whether to dispense with the use of special measures. **(a) Do consultees agree that children should be able to opt out of using special measures when required to give evidence in civil proceedings provided that there are safeguards in place to ensure the welfare of the child? (b) Do consultees see merit in devising a checklist of factors for the court to take into account when deciding whether to allow a child to "opt out" of using special measures? Do consultees consider that the checklist of factors contained in the Coroners and Justice Act 2009 is appropriate? (c) Do consultees consider that the Scottish approach of taking into account the best interests of the child witness, together with both the views of the child witness and his parent (or persons with parental responsibility for the child) when considering whether to grant special measures, is appropriate?**

Mental disorder and significant impairment of intelligence and social functioning

5.19 In criminal proceedings in Northern Ireland, witnesses are eligible for special measures if the court considers that the quality of their evidence will be diminished because they are suffering from a mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986, or are otherwise suffering a significant impairment of intelligence and social functioning.[140] In England and Wales, the same criteria apply, albeit under corresponding mental health legislation applicable within that jurisdiction. In criminal[141] and civil[142] proceedings in Scotland, a witness will be deemed to be vulnerable if his evidence will be diminished as a result of him suffering from a mental disorder as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

5.20 The definitions of "mental disorder" in each jurisdiction vary. In England and Wales, "mental disorder" means any disability of the mind.[143] Section 2(2) of the Mental Health Act 2007 inserts a definition of "learning disability" into the Mental Health Act 1983 which states that a "learning disability" means a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning. However, a person with a learning disability is not considered to be suffering from a mental disorder for a variety of purposes including detention in a hospital or admission for treatment unless the disability is associated with abnormally aggressive or seriously irresponsible conduct.[144] For the purposes of special measures in criminal proceedings in England and Wales, a person with a learning disability will be included within the definition of "mental disorder" and will be able to make an application to the court for the protective measures.

140. Article 4 of the Criminal Evidence (Northern Ireland) Order 1999.
141. Section 271 of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1of the Vulnerable Witnesses (Scotland) Act 2004.
142. Section 11 of the Vulnerable Witnesses (Scotland) Act 2004.
143. Section 1(2) of the Mental Health Act 1983 as inserted by section 1(2) of the Mental Health Act 2007.
144. Section 1(2A) of the Mental Health Act 1983 as inserted by section 2(2) of the Mental Health Act 2007.

5.21 In Scotland, both the criminal and civil law which provides for special measures states that these measures may be available to people where there is a significant risk that their evidence will be diminished by reason of mental disorder. In Scotland, the definition of "mental disorder" is contained in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. In this Act, "mental disorder" means a mental illness, a personality disorder or a learning disability. These terms are purposely not defined in legislation as it was considered that the preferable method of defining these conditions is by the professional diagnostic criteria contained in the *International Classification of Disease,* volume 10[145] or the *Diagnostic and Statistical Manual,* volume 4.[146]

5.22 In Northern Ireland, "mental disorder" means mental illness, mental handicap and any other disorder or disability of the mind,[147] but does not include personality disorders. Mental health legislation is currently under reform in Northern Ireland, following the independent Bamford Review of Mental Health and Learning Disability ("the Bamford Review") which was initiated in 2002. The Bamford Review produced a series of 10 reports between June 2005 and August 2007, which together represent recommendations for radical reform and modernisation of mental health and learning disability law, policy and services. The Northern Ireland Executive has accepted the bulk of the recommendations[148] and the Department for Health, Social Services and Public Safety ("DHSSPS") issued an Action Plan for the implementation of the proposals in October 2009.[149] In addition, the Minister has agreed to bring forward a single piece of legislation which will introduce, for the first time, mental capacity legislation which will empower a person with capacity to make and act on decisions regarding treatment, care, welfare, finances and assets and provide for mechanisms in relation to substitute decision-making for individuals who lack capacity to make decisions for themselves. This legislation will include mental health provisions which will also be capacity based.

145. Also known as ICD10.
146. Also known as DSMIV.
147. Article 3 of the Mental Health (Northern Ireland) Order 1986.
148. DHSSPS, *Delivering the Bamford Vision* (June 2008).
149. DHSSPS, *Delivering the Bamford Vision – the response of the Northern Ireland Executive to the Bamford Review of Mental Health and Learning Disability – Action Plan 2009-2011* (October 2009).

5.23 In relation to the "Vulnerable Witnesses in Civil Proceedings" project, the Commission notes that it is important that any suggested reforms in this area take account of the proposal to legislate in the areas of mental capacity and mental health. It is likely that the proposed mental capacity and mental health legislation will update the current definition of "mental disorder"; will create a definition of "learning disability" and will deal with the omission of "personality disorders" from the definition of "mental disorder" under the Mental Health (Northern Ireland) Order 1986. It is obviously difficult to predict the content of proposed legislation which will undergo legislative scrutiny and change, however, the Commission is anxious that those with a mental disorder (including personality disorder) and those with a learning disability should be able to avail of protections when giving their evidence in civil proceedings.

5.24 The Commission is of the preliminary view that, if people experiencing a mental disorder or a significant impairment of intelligence and social functioning can avail of protection in criminal proceedings in Northern Ireland, it seems only fair and sensible to offer protection to them if they are required to give evidence in civil proceedings. Research shows that some people experiencing learning disabilities find participating in court particularly challenging. Their memory may be impaired, communication skills may be limited and they may attempt to offer answers to questions that they think should be given in order to pacify the questioner.[150] Further research reveals that lawyers do not tend to alter their questioning style to take account of learning disabilities and judges do not intervene any more frequently during questioning.[151] However, it is important to avoid assumptions that every person who is experiencing a mental disorder or who has an impairment of intelligence and social functioning will need or want to avail of special measures. Many people will be able to give good quality evidence unaided. However, the presence of these measures offers valuable protection to those who feel that they need assistance to give evidence and to help them communicate their evidence to the court.

150. Sanders, Creaton, Bird and Webster, *Witnesses with learning disabilities* (1996).
151. Kebbell, Hatton and Johnson, *Witnesses with intellectual disabilities in court: what questions are asked and what influence do they have?* (2004) Legal and Criminological Psychology 23.

The availability of special measures may serve as an opportunity for individuals to access justice who otherwise may feel discouraged about the prospects of giving evidence in court. **Do consultees agree that people with a "mental disorder" as defined by section 4 of the Mental Health (Northern Ireland) Order 1986 and people living with a significant impairment of intelligence and social functioning should be eligible for protections to enable them to give their best evidence in civil proceedings?**

Physical disability or physical disorder

5.25 In England and Wales and in Northern Ireland, witnesses with a physical disability or a physical disorder may be eligible for special measures if the court considers that the quality of their evidence is likely to be diminished because of their disability or disorder. Not every physical disability or disorder will necessarily affect a person's ability to give evidence. However, a witness may need assistance to communicate that evidence to the court. For example, a deaf witness may require an interpreter who is skilled in sign language. However, there are some physical disabilities or disorders which may affect the witness's ability to give evidence particularly if the physical disability or disorder is in relation to the brain (for example, a witness's memory or ability to communicate may be impaired by a stroke or brain injury).

5.26 In Scotland, a different approach was taken to special measures for people with a physical disability. Physical disability or disorder is not considered to be a criterion which is deemed to have a direct effect on the quality of evidence given by the witness. Rather, by virtue of section 11(2) of the Vulnerable Witnesses (Scotland) Act 2004, physical disability or other physical impairment is only one of a number of factors which a court is required to consider when looking at the question of whether a person is eligible for special measures by reason of a mental disorder or because they are suffering fear and distress in connection with giving evidence.

5.27 Having considered the Scottish approach in relation to physical disability or disorder, the Commission provisionally favours the approach taken by the criminal law in Northern Ireland, England and Wales. Many physical disabilities or disorders will not affect a person's ability to give evidence, but some, particularly those relating to the function of the brain, may do so. **In order to maximise protection for witnesses and to offer the court maximum flexibility to assist witnesses who may have a physical disability or disorder, the Commission provisionally believes that physical disability or disorder should be an eligibility criterion for special measures in civil proceedings. Do consultees agree?**

Factors which may contribute to fear and distress in relation to giving evidence

5.28 Adult witnesses whose evidence may be diminished in quality because they are suffering fear or distress in connection with giving evidence in court are eligible to apply for special measures in criminal proceedings in Northern Ireland,[152] Scotland,[153] England and Wales.[154] Likewise, they are eligible to apply for special measures in civil proceedings in Scotland.[155] In order to help the court consider whether special measures should be granted to aid the witness giving evidence, the legislation provides a checklist of factors that the court must take into account when making its decision. In Northern Ireland, and in England and Wales, the factors are as follows:

- the nature and alleged circumstances of the offence to which the proceedings relate;
- the age of the witness;
- if relevant, the social and cultural background and ethnic origins of the witness;

152. Article 5(1) of the Criminal Evidence (Northern Ireland) Order 1999.
153. Section 271(1)(b)(ii) of the Criminal Procedure (Scotland) Act 1995 as inserted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004.
154. Section 17(1) of the Youth Justice and Criminal Evidence Act 1999.
155. Section 11(1)(b)(ii) of the Vulnerable Witnesses (Scotland) Act 2004.

- if relevant, the domestic and employment circumstances of the witness;

- if relevant, any religious beliefs or political opinions of the witness;

- any behaviour towards the witness on the part of the accused, members of the accused's family or associates or any other person who is likely to be an accused or a witness in the proceedings; and

- the views of the witness.

5.29 The aforementioned list of factors appears to be sensible and, apart from the factor in relation to the "nature of the offence" could be easily adopted in a civil law context. However, there may be more factors which the court should take into account when making its decision. In Scotland, the factors that the court is required to consider are similar to those contained in the legislation in Northern Ireland, and England and Wales, but include significant differences. In both criminal and civil proceedings, the court must take into account additional factors, namely, the nature of the evidence which the person is likely to give; the relationship of the witness to any party to the proceedings; the person's age *and maturity* (emphasis added); the witness's sexual orientation and any physical disability or impairment, if that is considered relevant. Additionally, the Scottish approach allows the court to take into account any other matter which it considers relevant, which is a more flexible approach than that taken in Northern Ireland, and England and Wales.

5.30 The Commission believes that there may be merit in adopting the additional elements contained in the Scottish approach in setting the relevant factors for the court to take into account when determining eligibility for special measures on the basis of fear and distress in relation to giving evidence. **(a) Do consultees agree that the additional factors that the court must take into account when considering whether a witness is eligible for special measures on the basis of fear and distress that are contained in the Scottish model should be adopted**

for witnesses in civil proceedings? (b) Do consultees consider that any other factors should be relevant in deciding whether a witness is eligible for special measures on the basis of fear and distress in relation to giving evidence in civil proceedings?

OTHER CRITERIA FOR DETERMINING ELIGIBILITY FOR SPECIAL MEASURES IN CIVIL PROCEEDINGS?

5.31 In New Zealand, section 103 of the Evidence Act 2006 allows for other criteria for allowing witnesses to give their evidence by other methods than by orally in a courtroom before a judge, jury and the parties to proceedings. These criteria are:

1. the trauma suffered by the witness;

2. the linguistic or cultural background or beliefs of the witness;

3. the nature of the proceedings;

4. the nature of the evidence that the witness is expected to give;

5. the relationship of the witness to any party in the proceedings; and

6. the absence or likely absence of the witness from the jurisdiction.

The Commission is inclined to consider that criteria 1, 3, 4 and 5 tend to imply that the witness is experiencing fear and distress in relation to giving their evidence in court. This would suggest that these criteria are better dealt with as factors which may diminish the quality of a witness's evidence because the witness is experiencing fear and distress in connection with giving evidence to the court, which is the approach taken in Northern Ireland, Scotland, England and Wales.

5.32 Criterion 6 appears to be concerned with administrative arrangements for the convenience of the court, which Court Rules in Northern Ireland already deal with adequately.[156] However, the Commission would wish to seek the views of consultees in relation to criterion 2, the linguistic and cultural background or beliefs of the witness.

5.33 The rationale for adopting this criterion is contained in the New Zealand Law Commission discussion paper *The Evidence of Children and other Vulnerable Witnesses*.[157] In the paper, at paragraph 128, the New Zealand Law Commission considered that due to the complexities of the translation process or the difficulties of obtaining an interpreter, it may be preferable for people who have English as a second language to give their evidence in English. In order to do so successfully, the New Zealand Law Commission considered that the witness must be relatively unpressured and therefore may be best served by giving their evidence outside the court room environment or by videotaped interview. The Commission is not attracted by this rationale: courts in Northern Ireland are well equipped to offer interpreters and the Commission is unaware of any criticism of the process of interpretation. The Commission would be interested to hear the views of consultees in relation to whether they consider that someone's linguistic or cultural background should be a criteria for eligibility for special measures, rather than a factor which may contribute to fear and distress in connection with giving evidence.

5.34 The Commission would also like to hear the views of consultees in relation to whether the inclusion of any further criteria for the eligibility of witnesses for special measures in civil proceedings would be appropriate. For example, the Commission notes that people living with Autism Spectrum Disorder do not necessarily have a learning disability or mental disorder, but do have an impairment of their social, communicative and imaginative development.[158] An issue

156. See Chapter 3 for detailed discussion.
157. New Zealand Law Commission, *Preliminary Paper 26* (October 2006).
158. This internationally recognised definition is contained in Wing and Gould, *Severe impairments of social interaction and associated abnormalities in children: epidemiology and classifications* (1979) Journal of Autism and Developmental Disorders 9 pages 11-29 and is the definition used by the Northern Ireland Department of Health, Social Services and Public Safety in *Autism Spectrum Disorder (ASD) Strategic Action Plan 2008/09 – 2010/11* (June 2009).

also potentially arises in relation to age: as well as children, should older people be offered protection even if they are not suffering from fear and distress in relation to giving evidence?[159] **Do consultees consider that there are any other relevant criteria for determining the eligibility of witnesses for special measures in civil proceedings?**

159. In New Zealand, section 103 of the Evidence Act 2006 provides for "age" to be a ground for applying for evidence to be given by alternative means. This provision is not limited to child witnesses.

CHAPTER 6. SPECIFIC ISSUES: TYPES OF MEASURE

INTRODUCTION

6.1 If special measures should be made available to certain groups of witnesses in civil proceedings, thought must be given to *which* special measures would be appropriate for witnesses in such proceedings.

6.2 The types of special measure available to witnesses differ across the jurisdictions which are considered in this consultation paper. The Criminal Evidence (Northern Ireland) Order 1999 provides for a range of special measures, namely:

- Screening of the witness from the accused;
- Giving evidence by live television link;
- Giving evidence in private;
- The removal of wigs and gowns by judges and barristers;
- Video-recording of the witness's evidence-in-chief;
- Video-recording of the witness's cross-examination or re-examination;
- The examination of the witness through an intermediary; and
- The provision of aids to communication.

SCREENING

6.3 Formal approval for the use of screens in criminal cases in England and Wales was given by the Court of Appeal in the case of *R v X, Y and Z*[160] in 1989. In this case, the issue

160. (1989) 91 Cr App R 36.

was whether screens should be used to offer protection to child witnesses. It was held that in deciding whether to allow the use of screens, the court should take into account the age of the child and the nature of the allegation; any concern expressed by the police or other agency about the ability for the child to give cogent evidence in the presence of the accused; and the justification for screening the witness, particularly in the case of an older child, where the child is a bystander witness and has no clear connection with the defendants. In the later case of *R v Cooper and Schaub*,[161] which dealt with the screening of adult witnesses, it was held that the protection should only be made available to adult witnesses in exceptional circumstances. Since then, the screening of witnesses in criminal proceedings has been given a statutory basis in England and Wales and Northern Ireland by virtue of the Youth Justice and Criminal Evidence Act 1999 and the Criminal Evidence (Northern Ireland) Order 1999 respectively and the criteria for deciding whether to grant the use of screens have altered.[162]

6.4 The practicalities of using screens in court proceedings are very straightforward. Whilst giving evidence, the witness is still seated in the courtroom, but will sit behind an erected screen, hiding him from view from everyone but the judge and lawyers (and the jury in criminal trials). The only difficulty that may arise in criminal proceedings is if the witness is asked to identify the accused in court. Screens are easy to use, relatively inexpensive and their use has a minimal disruptive effect on the court proceedings. The Commission considers that there is certainly merit in including the use of screens by eligible witnesses in a list of special measures to be adopted in civil proceedings. Additionally, the Commission provisionally considers that all witnesses who meet the criteria for eligibility should be able to apply to the court to give their evidence from behind a screen. Screens are a type of special measure which should be potentially available to all eligible witnesses. **Do consultees agree with the Commission's view that**

161. [1994] Crim LR 531.
162. The criteria for using screens is the same criteria for any other type of special measure. See chapter 2 for more detailed discussion.

there is merit in including the use of screens in a list of special measures to be adopted in civil proceedings? Furthermore, do consultees consider that all eligible witnesses should be allowed to apply to the court to give their evidence from behind a screen?

LIVE TELEVISION LINK

6.5 Live television link is a mechanism which employs technology to allow witnesses to give their evidence outside the courtroom whilst seeing and being seen by the court. A witness is seated in a separate but nearby room with a designated supporter. Large television monitors, linked to cameras, are placed in the court so that the accused (in criminal proceedings), the lawyers, the judge and the jury can see the witness. A two-way microphone link connects the room to the court so that the witness, the lawyers and the judge can communicate with each other.

6.6 Evaluations of the use of live television link in relation to child witnesses have been carried out in England and Wales by Davies and Noon[163] and jointly by Victim Support and the National Society for the Prevention of Cruelty to Children (NSPCC)[164] and in Scotland by Murray.[165] This research indicates that live television link has undoubted benefits. Davies and Noon report that the mechanism resulted in reduced levels of stress for children, who gave longer and more detailed answers to questions as a consequence.[166] Murray found that children who had used a live television link were more likely to say that they had been "fairly treated".[167] The Victim Support and NSPCC research concluded that special measures (particularly live television link) had encouraged children to give evidence who would have otherwise been reluctant to do so. More recently in June 2007, the Office for Criminal Justice Reform in England and Wales published a consultation paper entitled *Improving the Criminal Trial Process for Young Witnesses*.[168] In this consultation, views were sought

163. Davies and Noon, *An evaluation of the Live Link for Child Witnesses* (1991).
164. Victim Support and NSPCC, *In Their Own Words* (October 2004).
165. Murray, *Live Television Link – An Evaluation of its use by Child Witnesses in Scottish Criminal Trials* (1995).
166. See footnote 163 at page 133.
167. See footnote 165 at page 23.
168. Office for Criminal Justice Reform Ref: 282215 (June 2007).

from consultees in relation to their experiences of the use of live television link and the advantages and disadvantages of witnesses giving their evidence in this way. A response to consultees' views was published by the Ministry of Justice on 25 February 2009.[169] In this response, the Ministry of Justice noted the main advantages of live television link which had been put forward by consultees. These were said to be helping witnesses achieve their best evidence; reducing the stress of the evidence-giving process; allowing witnesses to give evidence in a more supportive, responsive and safe environment and increasing the likelihood of witness attendance. The main disadvantages outlined by consultees were: cost; difficulties for the jury in judging the demeanour and body language of the witness; question marks over the handling of exhibit evidence; poor sound and image quality of the recording; failure of equipment; additional training needs; and the creation of an impression that prosecution witnesses are "protected" by the criminal justice system. The Government response recognised that live television links were well regarded by the witnesses who use them and that this method of giving evidence makes witnesses feel safer and more secure. Government was not persuaded by the views of consultees that giving evidence by live link detracts from the quality of evidence given by the witness or the weight juries attach to it. Indeed, Government detailed its intention to devote further resources to live television link technology, having allocated £2m in 2008/2009 for replacing old equipment in 39 Crown courtrooms and 25 Magistrates' courtrooms across England and Wales.

6.7 Evaluations on the use of live television link have also been carried out in jurisdictions outside the United Kingdom. The Australian Law Reform Commission's evaluation of the use of television live link by children in the Australian Capital Territory[170] revealed that children who knew they could use a live television link when they wanted to do so were less anxious and more effective in giving evidence than those who did not use the system even though they wished to do

169. Ministry of Justice, *Government Response to the Improving the Criminal Trial Process for Young Witnesses consultation* (25 February 2009).
170. Australian Law Reform Commission, *Children's Evidence: Closed Circuit Television* Report 63 (1992).

so. The findings also indicated that emotional outbursts from the child were less likely to occur when they were giving evidence over a live television link. All the professionals involved in the children's cases and the parents of those children claimed that the use of a live television link reduced stress on children, whilst some also believed that the availability of live television link encouraged prosecutions that may not have otherwise been taken forward.

6.8 Although the majority of research has been in relation to children, adults can benefit from live television link too. However, in order to maximise the benefits to children and adults, it is important that the technology works without flaws so that the proceedings run smoothly and without delay. Not only is delay costly to the court system, it also is another factor in causing further distress to vulnerable witnesses. Technology must also be advanced enough to ensure that quality recordings are obtained. There is also a cost factor to be considered in relation to this special measure. Court rooms obviously have to be fitted out with the infrastructure for such technology and a room or rooms in court buildings have to be set aside for the witness.

6.9 Northern Ireland is divided up into seven County Court Divisions: Antrim, Ards, Armagh and South Down, Belfast, Craigavon, Fermanagh and Tyrone and Londonderry. The County Court Divisions include a number of petty sessions districts as shown in the following table.

County Court Division	**Petty Sessions Districts (venues in brackets)**
Antrim	Antrim, Ballymena, North Antrim (Coleraine) and Larne
Ards	North Down (Bangor), Down (Downpatrick), Castlereagh (Newtownards), and Ards (Newtownards)
Armagh and South Down	Armagh, Banbridge and Newry & Mourne (Newry)
Belfast	Belfast & Newtownabbey (Laganside)
Craigavon	Craigavon and Lisburn
Fermanagh and Tyrone	East Tyrone (Dungannon), Fermanagh (Enniskillen), Omagh and Strabane
Londonderry	Limavady, Londonderry and Magherafelt

6.10 Live television link facilities for special measures in criminal proceedings have been rolled out across Northern Ireland by the Northern Ireland Court Service. The following table shows the availability of video link facilities in court rooms across Northern Ireland.

VENUE	LIVE TELEVISION LINK FOR SPECIAL MEASURES CASES
Belfast	5 courtrooms
Ballymena	1 courtroom
Antrim	3 courtrooms (only 2 can operate at the same time as there are only 2 witness rooms)
Coleraine	2 courtrooms
Larne	No availability
Omagh	1 courtroom
Dungannon	2 courtrooms
Enniskillen	1 courtroom
Strabane	No availability
Londonderry	3 courtrooms (only 2 can operate at same time as there are only 2 lines)
Magherafelt	No availability
Limavady	No availability
Newtownards	1 courtroom
Bangor	No availability
Downpatrick	1 courtroom
Craigavon	2 courtrooms (but only 1 room for children)
Lisburn	No availability
Newry	1 courtroom
Armagh	1 courtroom
Banbridge	No availability
Royal Courts of Justice	2 courtrooms

6.11 The current provision for live television link equipment in courts in Northern Ireland is adequate for witnesses giving evidence by way of this special measure in criminal proceedings. Obviously, if this special measure is extended to witnesses giving evidence in civil proceedings, there will be more demand for the equipment already installed in courts across Northern Ireland. It is difficult to assess how many civil cases would require the use of live television link equipment, and it may be possible that existing equipment could meet the demand by a careful listing of cases in a court at a time when the equipment would be available. Otherwise, further investment in equipping courts would have to be undertaken if special measures were to be made available in, for example, employment tribunals.

6.12 Having considered all the relevant issues discussed above, and in particular the evaluations carried out in England and Wales, Scotland and jurisdictions outside the United Kingdom, the Commission considers that there is merit in including live television link as a special measure for vulnerable and intimidated witnesses in civil proceedings. The Commission notes the disadvantages of live television link which have been raised by consultees in various consultation exercises. However, the Commission considers that the use of modern technology does much to alleviate concerns in relation to quality of recordings and technical difficulties. The Commission also notes the points raised by consultees in other evaluations of live link television which suggest that evidence given by this method makes it more remote and therefore more difficult to draw conclusions from the demeanour and reactions of the witness. However, it is the view of the Commission that this argument against live link television is really an argument against the use of any method of giving evidence other than by the traditional mode of direct, oral testimony in court. **The Commission therefore provisionally believes that all witnesses in civil proceedings who are eligible for special measures should be allowed to apply to court for permission to give their evidence by live television link. Do consultees agree?**

EVIDENCE GIVEN IN PRIVATE

6.13 The Criminal Evidence (Northern Ireland) Order 1999 contains a specific provision to allow a judge to order that the courtroom be cleared of people who do not need to be present while a witness gives evidence. In criminal cases, the accused, their legal representatives and any interpreter or other person appointed to assist the witness must be allowed to stay in court whilst the evidence is given. The court must allow at least one member of the press to remain in court where such a person has been nominated by the relevant press organisations. The measure is of limited availability in the context of vulnerable witnesses as it only applies in a case involving a sexual offence or when it appears to the court that there are reasonable grounds to believe that someone other than the accused has tried, or is likely to try, to intimidate the witness.

6.14 At first sight, this special measure does not appear to have as much relevance to civil proceedings as it does in criminal trials. Unlike criminal trials, most civil proceedings are unlikely to attract an audience which is made up of members of the general public. Civil proceedings are also unlikely to deal with evidence in relation to sexual offences, unless the proceedings are in relation to compensation for criminal injuries for such offences or the proceedings are in relation to family matters. Where cases involving children are concerned, many cases are already held in private in Northern Ireland: Article 170(1) of the Children (Northern Ireland) Order 1995 enables court rules to make provision for courts to sit in private, whilst Article 170(2) creates an offence of publishing any information or addresses that are intended or likely to lead to the identification of the child involved in the case. Article 170(4), however, allows the court to dispense with Article 170(2) if it is satisfied that the welfare of the child requires it to do so. Rule 4.2 of the Family Proceedings Rules (Northern Ireland) 1996[171] provides for proceedings under the Children (Northern Ireland) Order 1995 in the High Court and County Courts to be heard by the judge in chambers. The position is slightly different in Magistrates' Courts, as Article 89 of the Magistrates' Courts

171. SR 1996 No. 322.

(Northern Ireland) Order 1981 allows representatives of newspapers and news agencies to attend court, however, they are subject to the publishing restrictions contained in Article 170(2) of the Children (Northern Ireland) Order 1995 and further restrictions contained in Article 90 of the Magistrates' Courts (Northern Ireland) Order 1981. Article 89 also provides that the court can allow any other person to attend proceedings if it appears to the court that they have adequate grounds to attend.

6.15 In England and Wales there have been moves away from privacy in family proceedings. The judgment of Mr Justice Munby in *Re B (a child) (disclosure)*[172] raised concerns about disclosure of information in family proceedings cases heard in private involving children. The judgment identified restrictions on a party disclosing details of their case to any other person who was not directly involved in the case. Parties were not able to discuss their case with friends and family, a Member of Parliament, or anyone else whose advice and support they had sought or were likely to seek. In *Re G (Litigants in Person)*[173] the Court of Appeal had also highlighted shortcomings regarding disclosure of court papers to voluntary support services assisting litigants in person. These deficiencies were addressed by section 62 of the Children Act 2004 which applies only in England and Wales. Section 62 allows court rules to be made which enable information relating to family proceedings concerning children to be disclosed in certain circumstances to individuals or organisations (but not to the general public or the media) without a criminal offence or contempt of court being committed. The Commission understands that consideration is being given to taking forward equivalent rule-making powers in Northern Ireland.

6.16 Since 2004, further work on the issue of disclosure of information has continued, influenced to an extent by the activities of "Fathers for Justice", a group which alleged that family courts were unjust and discriminated against fathers. During 2003 and 2004, Fathers for Justice had commenced a media campaign to highlight their views. In December

172. [2004] EWHC 411.
173. [2003] 2 FLR 963.

2004, the Department for Constitutional Affairs in England and Wales (now the Ministry of Justice) issued a consultation paper to further explore the issues surrounding disclosure of information in family courts,[174] whilst in March 2005, the House of Commons Select Constitutional Affairs Committee reported that it advised a "greater degree of transparency is required in the family courts."[175]

6.17 In July 2006, the Department of Constitutional Affairs issued another consultation paper[176] proposing additional reforms. This consultation exercise proved inconclusive as strong views were expressed for both retaining privacy and improving transparency. In June 2007,[177] a further consultation exercise was conducted, which also resulted in divided opinions amongst consultees. On 16 December 2008, a response to these consultation exercises was published.[178] In the response, commitments were given to amend the law to allow greater transparency in family courts by allowing the media to attend family proceedings; creating powers for the court to put reporting restrictions in place; and clarifying issues surrounding the sharing of information about the case by parties. Family Proceedings (Amendment) (No.2) Rules 2009[179] were put in place to provide a scheme for the sharing of information in family proceedings, together with regulation for the attendance of the media. These Rules were supported by a Practice Direction issued by the President of the Family Division.[180] The commitments given in December 2008 in relation to reporting restrictions are contained in the Children, Schools and Families Bill which is currently before Parliament.

6.18 Although privacy in family proceedings is already covered by existing legislation, the Commission believes that it may be useful to have a special measure which allows evidence

174. Department of Constitutional Affairs, *Disclosure of information in family proceedings cases involving children* (16 December 2004).
175. House of Commons Constitutional Affairs Committee, *Family Justice: the operation of the family courts* Fourth Report of Session 2004-2005, Volume 1 page 40. See also House of Commons Constitutional Affairs Committee, *Family Justice: the operation of the family courts revisited* Sixth Report of Session 2005-2006.
176. Department of Constitutional Affairs, *Confidence and confidentiality: improving transparency and privacy in family courts* (July 2006).
177. Ministry of Justice, *Confidence and confidentiality: openness in family courts – a new approach* (20 June 2007).
178. Ministry of Justice, *Family Justice in View* (December 2008).
179. SI 2009 No. 857 (L.8). These Rules amended Rules contained in SI 2005 No. 1976 which were made following the consultation exercise carried out in December 2004 by the Department of Constitutional Affairs (See footnote 174).
180. *Practice Direction: Attendance of Media Representatives at Hearings in Family Proceedings* (20th April 2009).

to be given in private in these proceedings. A special measure of this nature would supplement the existing court powers regarding privacy and would also have the benefit of placing privacy in the context of a specific scheme which is designed to offer protection to witnesses who may need assistance whilst giving evidence. A special measure allowing for privacy could also cover other types of civil proceedings. **Do consultees consider that a special measure to clear the courtroom is required in civil proceedings?**

THE REMOVAL OF WIGS AND GOWNS

6.19 The removal of wigs and gowns by the judge and legal representatives during the giving of the witness's evidence is a measure intended to reduce the intimidating formality of the proceedings and to put the witness at greater ease. A special measure of this nature can often be of benefit to children who may feel overawed by the unusual spectacle of formality. In family proceedings in Northern Ireland, wigs and gowns are dispensed with as a matter of course. Practice Direction 4 of 2006[181] states that from 5 September 2006, barristers appearing in proceedings in the Family Division of the High Court and family care centres in the County Court under the Children (Northern Ireland) Order 1995, the Adoption (Northern Ireland) Order 1987 and the Hague Convention on the Civil Aspects of International Child Abduction are no longer required to wear wigs or gowns, unless the case is so exceptional that the judge in charge of the proceedings directs otherwise. The Practice Direction also states that judges will not wear their robes in these cases, unless the case is so exceptional that they consider that robes are appropriate. In addition to this Practice Direction, the Lord Chief Justice of Northern Ireland, the Honourable Sir Declan Morgan, in an effort to simplify judicial working dress, has recently stated that High Court judges and Court of Appeal judges in civil cases are no longer required to wear wigs. He also asked other tiers of court to consider adopting a similar dress code.[182] There is, however, a body of feeling that some witnesses prefer

181. 11 May 2006.
182. Reported on BBC news website on Friday 23 October 2009.

the formal atmosphere of the court setting and consider that the wearing of wigs and gowns during the case gives them comfort that the process is being taken seriously.[183] Research has also suggested that some witnesses have pre-determined expectations of the court process and may be startled by the lack of formality that the removal of wigs and gowns brings to the proceedings.[184] On balance, however, the Commission believes that removal of wigs and gowns may be a simple method of putting witnesses at ease as it has the effect of removing some of the pomp and ceremony of the court process and the intimidating nature of the court setting. **Do consultees consider that all witnesses eligible for special measures in civil proceedings should be able to apply to the court for a special measure which requires the removal of wigs, gowns and robes?**

PRE-RECORDED EVIDENCE-IN-CHIEF

6.20 Another special measure available in criminal proceedings in Northern Ireland, England and Wales is the facility to pre-record the evidence-in-chief of a witness. An interview with a witness carried out by trained interviewers is recorded and later used in court as the witness's evidence-in-chief. This technique of pre-recording interviews dates back to the recommendations of the Pigot Report in December 1989,[185] whilst the interview process itself has been informed both by the Pigot Report and the *Report of the Inquiry into Child Abuse in Cleveland* which followed an inquiry by the Right Honourable Lady Justice Butler-Sloss in 1988.[186]

6.21 In order to mitigate against poor interviewing techniques in pre-recorded video evidence, the Home Office and the Department of Health issued guidance in the form of a Memorandum of Good Practice in 1992.[187] This guidance was replaced in 2002 by *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses, including children*[188] and a further

183. *The Guardian* (17 January 2003).
184. See, for example, Ellison, *The Adversarial Process and the Vulnerable Witness* (2001).
185. See chapter 1, paragraphs 1.5 to 1.7.
186. (July 1988) Cmnd. 412 *Report of the Inquiry into Child Abuse in Cleveland.*
187. Home Office, *Memorandum of Good Practice on Video-recorded Interviews with Child Witnesses for Criminal Proceedings* (1992).
188. Home Office (2002).

edition of that document entitled *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Using Special Measures*[189] was issued more recently. A Memorandum was issued for use in Northern Ireland by the Northern Ireland Office and the Department of Health and Social Services (as it was then called) following the coming into operation of the Children's Evidence (Northern Ireland) Order 1995.[190] Like its counterpart in England and Wales, it aimed at assisting interviewers who would normally carry out the pre-recorded interviewing, providing them with guidelines covering technical considerations, child welfare, interview procedures and safe-keeping of the video. The Memorandum was not legally binding, being merely intended to offer guidance, but it provided advice in relation to questioning which has the effect of promoting consistency of approach. The Memorandum was replaced in Northern Ireland by *Achieving Best Evidence in Criminal Proceedings (Northern Ireland): Guidance for Vulnerable or Intimidated Witnesses, including Children*[191] which was adapted by the Victims, Vulnerable and Intimidated Witnesses Steering Group[192] from the version published by the Home Office in England and Wales in 2002. The guidance includes advice for interviewing children and vulnerable or intimidated adults.

Interviewing children

6.22 *Achieving Best Evidence in Criminal Proceedings (Northern Ireland): Guidance for Vulnerable or Intimidated Witnesses, including Children* ("the Guidance") gives guidance in relation to a number of issues that should be considered before and whilst conducting an interview with a child. The interview should be planned and suitably prepared so that unsuccessful interviews and resulting harm to the interests of both the child and justice can be avoided. Proper thought should be given to who should be involved in the

189. Criminal Justice System (last updated 9 September 2008).
190. Northern Ireland Office and Department for Health and Social Services, *Memorandum of Good Practice on Video-recorded Interviews with Child Witnesses for Criminal Proceedings* (1997).
191. Northern Ireland Office (27 October 2003).
192. This group consisted of representatives from the Northern Ireland Office, Police Service of Northern Ireland, Department of Health, Social Services and Public Safety, Vulnerable Adults Forum, Department for the Director of Public Prosecutions (as it then was) and Northern Ireland Court Service.

interviewing process. In criminal proceedings, social services, interpreters and intermediaries may need to be involved, as well as interview supporters who may be needed to give emotional support. It is suggested that it might also be useful to have a second interviewer who can ensure that the interview is conducted in a professional manner, who can identify any gaps in the child's account and who can ensure that the child's needs are kept paramount. Other factors which must be considered include the child's age; his race, culture, ethnicity and first language; his religion; his gender and sexuality; any physical or learning difficulties that he might be suffering from; any specialist health needs that he may have; and his overall emotional state. The cognitive, social and emotional developmental stage that the child has reached must also be considered as should the possibility that the child has experienced neglect or abuse. These factors are significant when making decisions regarding the structure, style, duration and pace of the interview. Another important consideration is the child's linguistic development as the interviewer needs to plan how to best communicate with the child. The interviewer must be a person who has or is likely to have rapport with the child, who understands how to effectively communicate with the child and who has knowledge of the basic rules of evidence and the elements of criminal offences.

6.23 When conducting the interview itself, the basic aim of the interviewer should be to obtain a truthful account of events from the child in a way which is fair, in the child's interests, and which is acceptable to the court. The guidance sets out a recommended procedure for interviewers to follow and suggests that the interviews should not last longer than one hour, depending upon the actual or developmental age of the child. There are technical considerations to take into account when interviewing: the child's voice should be clear and of consistent audible quality and the video must contain clear pictures of the head and face of the child, and if possible, the rest of the body so that reactions to the questions can be clearly seen. Interviewers are requested to follow a four-phase structure to the interview, beginning with a "rapport" phase during which the interviewer seeks to

build a rapport with the child. The aim is to help the child relax and feel as comfortable as possible in the interview situation. The interviewer is required to carry out a number of tasks during this phase, including explaining the reason for the interview, exploring the child's understanding of truth and lies, reassuring the child that he has done nothing wrong and explaining the grounds for discussion. The second phase is "free-narrative account", during which the interviewer adopts an "active listening" approach designed to encourage the child to tell his story in his own words. Every effort must be used to ensure that information from the child is given spontaneously and free from the influence of the interviewer. The interviewer should then move on to the third phase, the "questioning phase" where open-ended or specific questions are put to the child so that he can provide more information. However, this must be carried out in a way which does not put pressure on the child. Interviewers are requested to avoid the use of suggestion and leading questions which imply the answer or assume facts which are likely to be disputed in court. The final stage is closing the interview. The interviewer must make every effort to ensure that the child is not left in a distressed state, but leaves the interview in a positive frame of mind. The interviewer must also review the account with the child to ensure that there is a clear understanding of the information which the child has provided.

Interviewing other vulnerable and intimidated witnesses

6.24 The Guidance also contains advice in relation to conducting pre-recorded interviews with other vulnerable and intimidated witnesses. The Guidance notes the difficulties that may be faced when identifying that a witness may be vulnerable or intimidated and suggests that when in doubt and where practicable, consideration should be given to having the witness assessed by an expert, such as a clinical psychologist, a speech and language therapist or a psychiatrist, to avoid compromising any evidence obtained during an interview.

6.25 The planning phase of the interview must take into account the needs of the witness as a result of their particular vulnerability. For instance, witnesses who display behaviours on the autism spectrum may require the interviewer to be calm, controlled and non-expressive; they will find that a consistent and stable environment is desirable. The Guidance gives an example of ensuring that if there is more than one interview, the people involved in that interview should keep to the same positions within the room. The Guidance also contains advice in relation to witnesses with learning difficulties who also have language difficulties which require an alternative form of communication. It is therefore important that the interviewer understands the witness's method of communication.

6.26 As in the case of children, the interviews should be carried out in four phases: rapport phase; free narrative recall phase; questioning phase; and closure. The pace of the interview should be determined by the needs of the witness. The Guidance makes it clear that there are particular risks with interviewing some vulnerable witnesses, as they are more likely to be eager to please and therefore may tell the interviewer what they think he wants to hear. The witness may also be afraid of authority figures, therefore it is important that the interviewer does not appear too authoritative. Some witnesses may also say that they understand a question when they actually do not, for fear of implying that they or the interviewer is at fault. The Guidance suggests that giving the witness more control over the interview may alleviate these difficulties. During the free narrative phase, particular care must be taken as many vulnerable people, because of fear, stress or learning disability, have difficulties accessing their own memory as is required by free narrative recall. These witnesses will benefit greatly by being asked appropriate questions which will assist their memories. Questions should be simple, should avoid jargon and abstract words or ideas and should not contain double negatives. During the closure phase, the interviewer should check with the witness that the interviewer has correctly understood the evidentially important parts of the interview. This should be done using what the witness has communicated, rather than by a

summary provided by the interviewer. As in the case of children, it is important to end the interview with the witness in a positive frame of mind. Even if the witness has provided little or no information, he should not be made to feel that he has failed or disappointed the interviewer; however, praise or congratulations for the provision of information should not be given either.

6.27 The attitudes of practitioners towards pre-recorded interviews have been mixed. A Home Office study on the effect of the Criminal Justice Act 1991 and the *Memorandum of Good Practice on Video Recorded Interviews for Child Witnesses*, ("the Memorandum") carried out over a twenty-seven month period[193] from February 1993 found that 93% of judges and 41% of barristers in England and Wales were found to be in favour of the principle of videotaped interviews.[194] Thirty-seven percent of barristers and 53% of judges considered that the admissibility of a video-recording would serve the interests of justice or the interests of a child in the proceedings, while 20% of judges and 50% of barristers thought that use of the technology might make it more difficult to detect false allegations. A significant percentage of the judiciary (41%) were concerned about the possibility of poor interview techniques. The research looked at a sample of 40 tapes in order to establish the degree to which interviewers followed the Memorandum. It was found that the recommended phased approach was generally followed, with the interviewer building up rapport, questioning the child and signalling a clear end to the interview. However, the free narrative phase in which the child is allowed to tell his story in his own words was frequently omitted and some children were rushed into the questioning phase. The technical quality of the recording was found to be generally satisfactory, though some children were found to be inaudible. Evidential quality was also satisfactory in 75% of the tapes and in 80% of the tapes, the interview was well structured. However, the study also found that some interviews contained material which was clearly in breach of the Memorandum.

193. Davies, Wilson, Mitchell and Milsom, *Videotaping Children's Evidence: An Evaluation* (1995).
194. See footnote 193 at page 11.

6.28 Pre-recorded interviews have been very useful in criminal proceedings, particularly for children and people who are giving evidence in cases involving sexual offences.[195] However, it is clear that a great deal of guidance and training is required for interviewers. In criminal proceedings, the interviewers in question are social workers or police officers, who are supported in this difficult role by their respective organisations. Civil proceedings are different from criminal proceedings in that they will not, for the most part, have police or social worker involvement, though some proceedings under the Children (Northern Ireland) Order 1995 will have social worker involvement. In theory, there appears to be two options for arranging video-taped evidence in civil proceedings. First, it could fall upon the representatives of the parties to the proceedings to make arrangements for the video-taping of a witness's evidence. This would require solicitors to be fully trained in accepted interviewing techniques and also to have access to appropriate video-taping equipment. Since the vast majority of solicitors firms in Northern Ireland deal with civil matters of some description, potentially any training would have to be rolled out to some or all solicitors in these firms. Unless a centrally organised scheme of some nature was devised, an evaluation of interviewing standards would be difficult to assess amongst such a wide pool of individuals. A further difficulty would be identifying responsibility for highlighting deficiencies and needs for further training of individuals. Second, video-taping of the witness's evidence could be arranged by another source, but it is not immediately obvious as to which organisation could appropriately provide such a service.

6.29 The Commission considers that although video-taped evidence has undoubted benefits, it is concerned that the infra-structure (including training) required to support the use of such a special measure in civil proceedings may not exist and may be impracticable to implement. **The Commission seeks the views of consultees on whether it is considered that video-taped evidence should be available as a special measure in civil proceedings.**

195. See, for example, Hamlyn, Phelps, Turtle and Sattar, *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses* (June 2004) page 67 reports that 91% of witnesses studied found this special measure helpful.

VIDEO-RECORDED CROSS-EXAMINATION AND RE-EXAMINATION

6.30 Article 16 of the Criminal Evidence (Northern Ireland) Order 1999 makes provision for certain witnesses to have their cross-examination or re-examination carried out by means of video-recording. This facility is only available to witnesses who have given their evidence-in-chief by way of video-recording. This provision has never been brought into force in Northern Ireland, nor has the corresponding provision in England and Wales.[196] However, in England and Wales, the government has given a commitment to implement video-recorded cross-examination and re-examination subject to the successful development of rules of procedure and practitioner guidance.[197] Video-recorded cross-examination or re-examination is not included as a special measure in either Scotland or New Zealand.

6.31 In criminal proceedings, since this measure is dependant on the special measure which allows for evidence-in-chief to be pre-recorded, the Commission would prefer to be informed by consultees responses on the pre-recording of evidence-in-chief before it draws any provisional conclusions. If consultees have particular experience or opinions in relation to pre-recorded cross-examination, the Commission would welcome their views.

USE OF INTERMEDIARIES

6.32 An intermediary is a third party who may act as a "go-between" to facilitate communication between a vulnerable witness and the court.[198] Generally speaking, an intermediary will "translate" questions which are put to the witness, perhaps using simpler language that the witness understands, with the intermediary then "translating" the witness's answers so that the court understands what the witness wishes to say. The use of intermediaries in court is an issue which has proved to be controversial in a number of jurisdictions, with differing approaches being taken.

196. Section 28 of the Youth Justice and Criminal Evidence Act 1999.
197. Ministry of Justice, *Government response to the improving the criminal trial process for young witnesses consultation* (25 February 2009).
198. This definition is taken from the Scottish Government's *Consultation on the use of intermediaries for vulnerable witnesses in Scotland* (15 October 2007) at page 1.

6.33 Rejected in New Zealand because of the divided views expressed by the legal professions and concerns about their effectiveness in correctly communicating a witness's answers,[199] the use of intermediaries was included as a special measure in criminal proceedings in Northern Ireland,[200] England and Wales.[201] However, the provisions of the legislation allowing for this special measure in Northern Ireland have not, as yet, been brought into force.

6.34 In England and Wales, pilot projects were carried out in six areas in order to examine the operation of the use of intermediaries in criminal proceedings. An evaluation of these pilot projects[202] revealed that:

- Implementation suffered initially from insufficient national and local leadership across criminal justice organisations;

- Few problems were encountered with recruitment of intermediaries, although some skill-gaps were identified;

- It was not possible to determine what influence the use of intermediaries had on case outcomes, however, respondents to the evaluation considered that at least half of the cases in the pilot project would not have reached trial stage without the use of an intermediary;

- Respondents considered that intermediaries' contribution at the investigative stage was greatest when they had adequate time for witness assessment and for assisting the police in planning;

- The number of requests for intermediaries was lower than expected. Reasons for a lack of usage included: poor levels of awareness; misinterpretation of eligibility criteria; over-estimation of advocates' competence; and under-estimation of the extent of communication difficulties;

199. New Zealand Law Commission, *Evidence Report 55 – Volume 1 Reform of the Law* (August 1999).
200. Article 17 of the Criminal Evidence (Northern Ireland) Order 1999.
201. Section 30 of the Youth Justice and Criminal Evidence Act 1999.
202. Plotnikoff and Woolfson, *The Go-Between: evaluation of intermediary pathfinder projects* (June 2007).

- The pilot projects indicated positive contributions of the use of intermediaries in facilitating vulnerable witnesses to access justice and to furthering the government's objectives for the criminal justice system;

- Operational difficulties and cultural resistance were identified amongst some in the criminal justice system, requiring positive action to meet those challenges;

- It was not possible to assess the demand for intermediaries.[203]

6.35 In Scotland, although the use of intermediaries was not specifically included in the Vulnerable Witnesses (Scotland) Act 2004, the legislation allows for Scottish Ministers to make secondary legislation prescribing for additional special measures to be created.[204] The Scottish Government consulted on the possible use of intermediaries in Scotland in October 2007,[205] publishing its analysis of responses to the consultation in August 2008.[206] The analysis did not reveal any consensus amongst consultees and to date, no further action has been taken.

6.36 In England and Wales, further development of the use of intermediaries in criminal proceedings has taken place by virtue of the provisions of the Coroners and Justice Act 2009, with this facility being made available for certain vulnerable accused persons.[207] This provision has not, to date, been brought into force, nor has it been replicated in Northern Ireland as yet.

6.37 Whilst the use of intermediaries can provide assistance to witnesses in helping them understand the proceedings and to communicate with the court, a note of caution must be sounded. "Facilitated communication" is a method which

203. Full roll-out of intermediaries was achieved in 2008: Plotnikoff and Woolfson, *Measuring up? Evaluating implementation of government commitments to young witnesses in criminal proceedings* (July 2009) at page 14.
204. Section 1 of the Vulnerable Witnesses (Scotland) Act 2004 in relation to criminal proceedings: section 18(1)(e) in respect of civil proceedings.
205. Scottish Government, *Consultation on the use of intermediaries for vulnerable witnesses in Scotland* (15 October 2007).
206. 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).
207. See further discussion in chapter 2 paragraph 26.

was devised by an Australian, Rosemary Crossley, three decades ago. Crossley was an aide at an institution for severe multiple disabilities and she designed a process whereby she assisted a young woman with cerebral palsy to communicate by acting as her facilitator. Under the process, the facilitator assists the person by supporting their hand, wrist or arm while the person uses a communicator to spell out words, phrases or sentences. Crossley wrote a book on the subject[208] and later established the DEAL Communication Centre in Melbourne in 1986 which:

> provides services to people who are unable to talk, or talk clearly…. – anyone whose speech is not clear enough, fluent enough or reliable enough to allow them to get across everything they want to say.[209]

6.38 Facilitated communication has been the subject of a great deal of research and comment. In *Re D (Evidence: Facilitated Communication)*[210] a young man of 17 who suffered from severe autism and epilepsy and who had a cognitive age of not more than 2 years alleged, with the assistance of facilitated communication, that he had been sexually abused by his father. A social services and police investigation ensued, together with wardship proceedings (as the young man was 17 years of age, care proceedings under the Children Act 1989 were unavailable). The allegations of sexual abuse were discovered to be unfounded and during the course of proceedings to discharge the wardship, Dame Butler-Sloss commented on the use of facilitated communication. She noted the "Resolution on Facilitated Communication" by the American Psychological Association which was adopted on 14th August 1994. In her judgment, Dame Butler-Sloss quoted the final paragraph of the resolution:

> Facilitated communication is a process by which a facilitator supports the hand or arm of a communicatively impaired individual while using

208. Crossley & McDonald, *Annie's Coming Out* (1980).
209. www.deal.org.au.
210. [2001] 1 FLR 148.

> a keyboard or typing device. It has been claimed that this process enables persons with autism or mental retardation to communicate. Studies have repeatedly demonstrated that facilitated communication is not a scientifically valid technique for individuals with autism or mental retardation. In particular, information obtained via facilitated communication should not be used to confirm or deny allegations of abuse or to make diagnostic or treatment decisions. Therefore, be it resolved that the American Psychological Association adopts the position that facilitated communication is a controversial and unproved communicative procedure with no scientifically demonstrated support for its efficacy.[211]

6.39 The website of the National Autistic Society[212] provides a useful information sheet about facilitated communication. It reports that a number of studies have been carried out in relation to the effectiveness of facilitated communication. One study, carried out in 1992 by Crossley and Remington-Gurley[213] stated that, as a result of facilitated communication, many patients were now able to communicate and produce language of such complexity as to challenge commonly held beliefs about the language of people diagnosed as autistic or significantly intellectually impaired. Other studies did not support this view. In 1997, Howlin[214] reviewed 45 controlled trials of facilitated communication involving over 350 subjects and found confirmation of independent communication in only 6% of subjects. In more than 90% of cases, the responses were found to be unwittingly influenced by the facilitators. In 1996, Bebko, Perry and Bryson[215] found some evidence of independent communication in 9 out of 20 subjects. However, among students who could communicate independently, their responses were worse under facilitated

211. See footnote 210 at page 151.
212. www.nas.org.uk.
213. Crossley and Remington-Gurley, *Getting the words out: facilitated communication training* (1992) Topics in Language Disorders 12(4) pages 29-45.
214. Howlin, *Prognosis in Autism: Do specialist treatments affect long term outcome?* (1997) European Child and Adolescent Psychiatry 6, 2, pages 55-72.
215. Bebko, Perry and Bryson, *Multiple Method validation study of facilitated communication: individual differences and sub-group results* (1996) Journal of Autism and Developmental Disorders 26(1) pages 19-42.

conditions than they were whilst being unsupported. The National Autistic Society further reports that five major national bodies in the United States of America have now adopted a formal position of opposing the acceptance of facilitated communication as a valid mode of enhancing expression for people with disabilities: including, the American Association on Mental Retardation, the American Academy of Child & Adolescent Psychiatry and the American Speech-Language-Hearing Association.

6.40 Facilitated communication is undoubtedly a controversial issue, with its supporters and detractors. The Commission considers that whilst the use of intermediaries can have great importance in the trial process in allowing people with communication difficulties to access justice, care must be taken to ensure that methods employed by intermediaries are efficacious and have a sound basis in scientific evidence. The Commission also notes that recommending the facility of intermediaries in civil proceedings has the potential for costs to the public purse in terms of identification of individuals, training of those individuals and payment for their time in court. **The Commission seeks the views of consultees in relation to the use of intermediaries as a special measure in civil proceedings.**

AIDS TO COMMUNICATION

6.41 Under Article 18 of the Criminal Evidence (Northern Ireland) Order 1999, the court may authorise the use of communication aids to help witnesses overcome difficulties with being asked or answering questions. Aids to communication are available to witnesses who are seeking special measures under Article 4, that is to say, those living with a mental disorder or a significant impairment of intelligence and social functioning or a physical disability or disorder.[216] Witnesses suffering from fear or distress are not eligible for applying for aids to communication. This appears to be a reasonable approach: aids to communication are

216. For example, a hearing impairment, a voice disorder or asphasia. Asphasia (also known as dysphasia) is a condition which makes communication difficult because an individual has trouble with language whilst talking or listening. It occurs when the communication areas of the brain are damaged, for example by stroke, head injury or tumours (source: www.speechdisorder.co.uk).

designed to assist those who have difficulty in communicating orally.

6.42 Individuals may have difficulties in communicating verbally and need to rely on other methods of communication. "Augmentative communication" includes methods which support verbal speech whilst "alternative communication" takes the place of speech. Augmentative communication may include, for example, sign language when used to augment speech or gestures and body language, such as nodding and pointing.[217] Alternative communication may include the use of sign boards or special computers which will enable a witness, for example, to make use of an artificial voice in cases where he has lost the power of speech.[218] *The Times* recently reported a criminal case in which a man was convicted of sexually abusing severely disabled residents in a care home upon the evidence of residents who communicated by blinking or by indicating symbols on a computer.[219] In this case, one resident blinked her eyes in response to yes or no questions put to her by lawyers, whilst another victim used a pointer on a computer screen, (operated by a joystick on her wheelchair), to identify the accused and to indicate what he had done to her by using symbols of body parts.

6.43 The Commission provisionally believes that a statutory scheme for permitting the use of aids to communication should be recommended. **Do consultees agree that aids to communication should be included as a special measure in civil proceedings for witnesses who may need them?**

OTHER POSSIBLE SPECIAL MEASURES - SUPPORTERS

6.44 The relevant legislation from both Scotland[220] and New Zealand[221] allows for "supporters" to attend court with the witness to lend support.[222] In England and Wales, section

217. See www.speechdisorder.co.uk, a website formed to offer a reference point for people with speech disorders; www.isaac-online.org, the International Society for Augmentative and Alternative Communication; and www.communicationmatters.org.uk, the UK chapter of ISAAC.
218. Dennis, *The Law of Evidence* (2002).
219. Friday November 6 2009.
220. Section 22 of the Vulnerable Witnesses (Scotland) Act 2004.
221. Section 79(2) Evidence Act 2006.
222. It should be noted that "supporters" are distinct from "McKenzie Friends": assistants who attend court with a party who is legally unrepresented.

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. Although there is not a similar legislative basis in Northern Ireland for either criminal or civil proceedings, it is interesting to note that the use of supporters is a feature of criminal proceedings in this jurisdiction. The Partnership Protocol between Victim Support Northern Ireland (VSNI), the National Society for the Prevention of Cruelty to Children (NSPCC) and Northern Ireland Court Service[223] states that the Lord Chief Justice of Northern Ireland has endorsed the practice of a trained member of VSNI or NSPCC accompanying a vulnerable or intimidated witness in criminal proceedings.

6.45 The use of supporters appears to be a useful method of assisting witnesses in civil proceedings, though it should be noted that there may be a financial impact in making a recommendation of this nature if supporters were to be provided by agencies or organisations. The Commission considers that the availability of a special measure of this kind could be of particular benefit to those who have to give evidence in proceedings relating to matters of family law, especially domestic violence. **(a) Do consultees agree with the Commission's provisional view that there is merit in including the use of supporters as another special measure for eligible witnesses in civil proceedings? (b) Do consultees consider that any other type of special measure should be made available to eligible witnesses in civil proceedings?**

223. *Partnership Protocol Victim Support, Witness Service NSPCC and Northern Ireland Court Service* (Revised June 2008) www.courtsni.gov.uk.

CHAPTER 7. RELATED ISSUES

INTRODUCTION

7.1 As part of this consultation process, the Commission is seeking the views of consultees in relation to a number of other issues which are related to witnesses giving evidence in civil proceedings. These issues are witness anonymity; the taking of evidence of children who are in secure accommodation; and the competence of witnesses to give evidence in court.

WITNESS ANONYMITY

7.2 Although giving evidence orally in court is the usual method of giving evidence in criminal proceedings, other methods have been devised to offer protection to certain witnesses so that they can offer their best evidence to the court, such as special 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 hide their identities whilst in court. There are no statistics as to the use of anonymity in criminal trials, however, it has been suggested that the practice is commonplace[224] and is used in more than half of all murder trials.[225] Other sources state that the use of anonymity occurs to a much lesser degree: only small proportions of cases will involve an anonymous witness.[226] Whatever the scale of the use of witness anonymity in the courts, it is clear that witness anonymity is a contentious issue which has been considered by both domestic courts in the United Kingdom and the European Court of Human Rights. Recently, witness anonymity in criminal proceedings has been the subject of "emergency" legislation, following the decision of the House of Lords in *R v Davis*[227] which was delivered on 18th June 2008.

224. Lord Neill of Bladen, HL Deb 26 June 2008 c1607.
225. The Independent, *How anonymous witnesses saw justice done* (25 June 2008): The Times, *The erosion of a basic right* (25 June 2008).
226. 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.
227. [2008] UKHL 36.

The law prior to *R v Davis*

7.3 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 their evidence. However, as is often the case, there are departures from the principle. One such departure arose in the case of *R v Murphy and another*[228] as a result of a trial of two defendants in Belfast, who had been accused and convicted of murdering two British army corporals. At trial, evidence for the prosecution was given from a number of television journalists who had, in the course of their work, filmed the scene of the killing. The trial judge had allowed these witnesses to give evidence without being identified by name and permitted them to give that evidence from behind a screen, out of view of the defendants or the public. On appeal against conviction, the Court of Appeal upheld the trial judge's decision. The House of Lords considered that the case was a small departure from the principle: the defence did not object to the anonymising of the witnesses, nor did it challenge the suggestion that the witnesses had feared for their safety. It was also considered that the evidence given by the journalists did not implicate the defendants in the commission of the crime and the credibility of the witnesses was not in issue.

7.4 Another departure from the principle occurred in *R v Brindle and Brindle*[229] where three witnesses were permitted to give evidence anonymously in a murder trial. The trial judge recognised that granting anonymity to the witnesses would inhibit the full and proper presentation of the defence to some degree, but considered that if the wider interests of justice made it necessary for the witnesses to be anonymised, then the interests of the defence had to take second place. The decision was not appealed, but the issue arose again in *R v Watford Magistrates' Court, ex parte Lenman*.[230] This case involved a group of youths who rampaged through Watford town centre, attacking a number of victims. Several witnesses, fearing for their safety if they

228. [1990] NI 306.
229. Unreported, 31 March 1992.
230. [1993] Crim LR 388.

were identified, made statements to the police under pseudonyms. An application was successfully made to the court to continue the use of pseudonyms during the trial. The defence objected and challenged the decision. In his judgment, Beldam LJ considered that it was well established that there may be occasions on which the interests of justice required that the identity of witnesses should be withheld.

7.5 In *R v Taylor and Crabb*,[231] the Court of Appeal attempted to provide greater guidance on the use of witness anonymity. It stated that there must be real grounds for the witness to be fearful of the consequences if the evidence was given openly and his identity revealed. Also, the evidence must be sufficiently relevant and important to make it unfair for the prosecution to proceed without it, though it was noted that the greater the importance of the evidence, the greater the potential unfairness to the defendant. The prosecution must also satisfy the court that the creditworthiness of the witness had been fully investigated and the results of the investigation disclosed to the defence in so far as the anonymity of the witness would allow. Additionally, the court must be satisfied that no undue influence is caused to the defendant. Finally, the court was required to balance the need for the protection of the witness against the unfairness or appearance of unfairness in the particular case.

7.6 The next relevant decision on witness anonymity was given by the House of Lords in *R(Al-Fawwaz) v Governor of Brixton Prison*.[232] The accused was defending an application to extradite him to the United States and at the extradition hearing, the magistrate had relied on anonymous affidavit evidence. The defendant complained about the use of that evidence, but that complaint was rejected by the House of Lords.

231. Unreported, 22 July 1994, Court of Criminal Appeal Division.
232. [2001] UKHL 69.

R v Davis

7.7 The case of *R v Davis* arose from the fatal shooting of two men at a New Year's Eve party in a flat at Hackney in 2002. The appellant, Davis, was convicted of both murders on 25th May 2004 and he subsequently appealed against his conviction. One of the grounds of his appeal was the use of witness anonymity in the proceedings, as the three witnesses who gave evidence which identified Davis as the gunman had been granted anonymity. The Court of Appeal dismissed his appeal,[233] the court holding 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 of the outcome of the trial. Davis appealed to the House of Lords. The main issue for the House of Lords to consider was 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.

7.8 During Davis's trial, the three witnesses each gave their evidence under a pseudonym and their addresses and personal details were withheld from Davis and his legal advisors. Davis's legal representatives 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 to be heard by the judge and jury, but Davis and his legal representatives could only hear the witnesses' voices after they had been mechanically distorted. The House of Lords was asked to consider whether these protective measures were lawful and what effect these measures had on the fairness of Davis's trial. The House of Lords unanimously decided that the conviction of Davis was unsound and allowed his appeal. The main concerns were the unsound development of domestic case-law in the area of anonymous witnesses and questions over its compatibility with the European Convention on Human Rights.

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

7.9 In his judgment in *Davis,* Lord Bingham of Cornhill challenged the argument that *R(Al-Fawwaz) v Governor of Brixton Prison* had any relevance to Davis's case, stating that the principle that an accused should be able to confront his accusers was not considered by the House of Lords in that case and the correctness of *R v Taylor and Crabb* was never challenged.[234] He held the view that the reasons given to support the decisions in the recent case-law on witness anonymity were unsound and the courts had arrived, by a series of small, largely unobjectionable steps, at a position which was irreconcilable with the longstanding principle of confrontation. Lord Rodger of Earlsferry considered that it was not open to the House of Lords in its judicial capacity to make "such a far-reaching inroad into the common law rights of a defendant"[235] and stated that Parliament was the proper body to decide whether such inroads should be taken and if so, how those changes should be effected, a view which was also endorsed by Lord Mance.

7.10 The use of anonymous evidence in criminal trials has also been the subject of a series of cases decided by the European Court of Human Rights ("ECHR"). In his judgment in *R v Davis*, Lord Mance identified that the starting point of the ECHR was that the admissibility of evidence is a matter for the national law in any Member State, but the court's task under the European Convention on Human Rights is to ascertain whether the proceedings as a whole, including the way in which the evidence was taken, was fair.[236]

7.11 The ECHR has repeatedly stated that the use of anonymous evidence is not under all circumstances incompatible with the European Convention on Human Rights. In *Doorson v The Netherlands*,[237] the ECHR stated that criminal proceedings should be organised so that the interests of witnesses are not unjustifiably imperilled and against this background, the principles of a fair trial requires that in appropriate cases the interests of the defence are

234. At paragraph 18.
235. At paragraph 44.
236. See *Doorson v The Netherlands* (Application No 20524/92) (1996) 22 EHRR 330, paragraph 67; *Van Mechelen v The Netherlands* (Application Nos 21363/93, 21364/93, 21427/93 and 22056/93) (1997) 25 EHRR 647, paragraph 50; and *PS v Germany* (Application No 33900/96)(2001) 36 EHRR 1139, paragraph 19.
237. At paragraph 70.

balanced against those of the witnesses. However, in that case, the ECHR went on to state that a finding of guilt should not be made either solely or to a decisive extent on the evidence of anonymous witnesses; the ECHR appears, however, to have retreated from this position to accept that there can be circumstances in which even decisive testimony may be given anonymously.[238] However, it is clear that where anonymity *is* allowed, there has to be counterbalancing procedures in place which would compensate the defence for the difficulties caused to it by the granting of anonymity to the witness.[239] *Van Mechelen v The Netherlands*[240] and *Krasniki v Czech Republic* also adopt this approach.

7.12 Lord Mance took the view that if the facts in *Davis* were before the ECHR, that court would not accept that the use of anonymous evidence in the case would satisfy the defendant's rights to a fair trial. He considered that the evidence given by the anonymous witnesses was the sole or decisive basis on which the defendant was convicted, and that there were no factors present to counterbalance the granting of anonymity to the witnesses. The defence's position was that the three witnesses were lying and giving a conspiratorial account of the killings at the New Year's party. He considered that effective cross-examination to test the motives of the witnesses was hampered by anonymity of the witnesses, the mechanical distortion of their voices and by their giving evidence behind screens.

Repercussions of *R v Davis*

7.13 The decision in *R v Davis* caused serious concerns as it effectively restricted the use of anonymous evidence in criminal proceedings. There appeared to be the real possibility that trials would collapse and appeals against conviction would succeed.[241] The media widely reported the judgment and speculated on its implications.[242] The Government recognised that the *Davis* judgment identified

238. *Krasniki v Czech Republic* (Application No 51277/99) (unreported) 28 February 2006 paragraphs 78-79.
239. *Doorson* (see footnote 236) at paragraph 76.
240. At paragraphs 55 and 56.
241. The Times, *Can justice afford witness anonymity? If there is no compromise, many killers will walk free* (23 June 2008).
242. For example The Telegraph, *Police Chief fears killers will go free* (21 June 2008): The Independent, *Threat to murder convictions forces ministers to rewrite law* (25 June 2008): Daily Star, *Cons could walk* (25 June 2008): The Sun, *Anarchy is unleashed: Outrage as crazy Law Lords ban anonymous trial witnesses* (25 June 2008).

a defect in the law and acted 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 the Act received Royal Assent on 21st July 2008, coming into force on that same date.

7.14 The Criminal Evidence (Witness Anonymity) Act 2008, which applies to England and Wales and Northern Ireland, effectively abolished the common law rules which relate to witness anonymity orders in criminal proceedings and replaced them with a statutory scheme which governs the use of anonymity. This effectively dealt with the decision in the *Davis* case that it was not appropriate for the common law to determine the law in this area. The Criminal Evidence (Witness Anonymity) Act 2008 dealt with future trials, trials which were ongoing when the Act came into force, and appeals against conviction in past cases where an anonymity order had been made by the court. For trials already in progress, the test was whether (if the witness had not already given evidence) an order could be made under the new law, or (if the witness had already given evidence), the trial has been made unfair as a result. For appeals against past convictions, the appeal court could not treat a conviction as unsafe solely on the ground that the trial court had no power to make an anonymity order, but had to do so if the order could not have been made if the new law could have been applied and that as a result of the anonymity order, the defendant did not receive a fair trial.

7.15 For future trials, the Criminal Evidence (Witness Anonymity) Act 2008 provided that a defendant or the prosecution could make an application to the court for a "witness anonymity order".[243] This order could include a variety of measures to protect the identity of the witness, namely; withholding the witness's name; removing the name from any materials used in the proceedings; specifying that the witness is not to be asked any questions which might identify him; use of a pseudonym; screening of the witness; and modifying the witness's voice. If voice modification was used, the judge, jury and any interpreters must be able to hear the witness's

243. Section 2.

natural voice. Likewise, if screening was used, the witness must be capable of being seen by the judge, jury and any interpreter.

7.16 The court could only make a witness anonymity order if it was satisfied that three conditions were met.[244] The first condition was that the measures to be included in the order were necessary to protect the safety of the witness or another person, or to prevent serious damage to property or in order to prevent real harm to the public interest. When considering whether the measures are necessary to protect the safety of the witness or another person, the court was required to particularly consider whether the witness has a reasonable fear that he or another person would suffer death or injury. The second condition was that the inclusion of those measures would be consistent with the defendant receiving a fair trial. The final condition was that it was necessary to make a witness anonymity order in the interests of justice because the court considered that it is important that the witness should give evidence and that the witness would not give evidence if the order was not made.

7.17 Section 5 of the Criminal Evidence (Witness Anonymity) Act 2008 contained a number of considerations which the court was required take into account whilst deciding whether the three conditions for making witness anonymity orders have been met. The court had to consider:

- the general right of a defendant in criminal proceedings to know the identity of the witness;
- the extent to which the credibility of the witness would be a relevant factor when the weight or value of his evidence comes to be assessed;
- whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
- whether the witness's evidence could be properly tested without his identity being disclosed;

244. Section 4.

- whether there is reason to believe that the witness has a tendency or has any motive to be dishonest (having regard to any previous convictions of the witness and any relationship he might have to the defendant or any associates of the defendant); and

- whether it would be reasonably practicable to protect the witness's identity by methods other than a witness anonymity order.

7.18 The Criminal Evidence (Witness Anonymity) Act 2008 was considered to be so controversial, due to its nature and the use of emergency legislation procedures through which it was brought on to the statute book, that the legislation stated that no witness anonymity order could be made under the Act after 31 December 2009, subject to possible extension by order of the Secretary of State.[245] This provision had the effect that Government was required to review and re-enact the law, giving Parliament an opportunity to consider the issues further. The Coroners and Justice Act 2009 re-enacts the Witness Anonymity Act with some modifications. These modifications mainly pick up technical deficiencies in the Criminal Evidence (Witness Anonymity) Act 2008, for example, putting in place provisions to allow discharge or variation of a witness anonymity order after the proceedings have finished and allowing an appeal court to vary or discharge the orders.[246] One substantive change proposed by the Coroners and Justice Act 2009 is to the third condition that the court has to be satisfied is met before it can make a witness anonymity order. Under the Criminal Evidence (Witness Anonymity) Act 2008, the court had to be satisfied that, in the interests of justice, it was necessary to make the witness anonymity order because of the importance of the witness's evidence and because the witness would not testify unless the order was made. Under the new provisions contained in the Coroners and Justice Act 2009,[247] the court has to be satisfied that the importance of the witness's evidence is such that, in the interests of

245. Section 14.
246. Sections 91 – 93.
247. Section 88.

justice, he ought to testify and he would not testify unless an order was made, or there would be real harm to the public interest if the witness was to testify without the witness anonymity order being made. This alteration makes it clear that the court must decide whether the inclusion of the testimony of the witness in the trial is in the interests of justice, rather than (as is suggested by the wording of the Criminal Evidence (Witness Anonymity) Act 2008) whether the making of the witness anonymity order is in the interests of justice. The new wording in section 88 of the Act also adds a public interest test to the decision making process.

7.19 Much activity has taken place in relation to witness anonymity in criminal proceedings since the *Davis* judgment was delivered on 18th June 2008. However, there has been no reaction to the issues raised in the case in relation to civil proceedings. Arguably, as a result of *Davis*, the common law relating to witness anonymity in civil proceedings faces some confusion. The case casts doubt on the ability of the common law to depart from the right to confront, except in minor circumstances. With a lack of statutory intervention for civil proceedings, it is likely that cases such as *R v Murphy*, where anonymity was not objected to and, in any event, the evidence did not implicate the defendants and *Julie Doherty (suing as personal representative of Daniel Doherty deceased) v Ministry of Defence*,[248] are the sources of the current law in this area. This position is removed from the current position in criminal proceedings and after *Davis*, it is unlikely that the common law relating to civil proceedings can evolve to breach the gap.

7.20 Although witness anonymity is unlikely to be sought in civil proceedings as often as it is sought in criminal proceedings, there is the possibility that it may be sought in a small number of cases. Whilst the introduction of special measures in civil proceedings may, to some degree, assist a witness who wishes to seek anonymity, special measures in civil proceedings cannot conceal that person's identity. In most civil proceedings, the identity of the parties to the

248. 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 trial and gives vital assistance to the due administration of justice.

proceedings and the witnesses will be known by the parties; however, there may be occasions when witnesses would prefer to remain anonymous, for example, in proceedings relating to anti-social behaviour.

7.21 Conceptually, there is undoubtedly an argument that the law on witness anonymity in civil proceedings is behind its criminal counterpart and its progress by way of case-law has effectively been curtailed by the decision in *Davis*. However, it is more difficult to assess whether there is an actual *need* for the civil law on witness anonymity to catch up with the criminal law. The Commission is therefore interested to hear the views of consultees in relation to this matter. **Do consultees consider that there is a need to reconsider the law relating to witness anonymity in civil proceedings?**

EVIDENCE OF CHILDREN LIVING IN SECURE ACCOMMODATION

7.22 A child who is in care as a result of proceedings under the Children (Northern Ireland) Order 1995 may be placed in "secure accommodation" for the purpose of restricting his liberty.[249] A child will only be placed in secure accommodation if he has a history of absconding from care and it appears that if he does abscond, he will suffer significant harm. A child may also be placed in secure accommodation if he is likely to injure himself or other people if he is allowed to live in some other form of accommodation.

7.23 During the consultation exercise on its First Programme of Law Reform, the Commission received a number of responses which indicated that it should consider the issue of children giving evidence in care proceedings whilst they were residing in secure accommodation.

7.24 The issue arose as a result of the decision of McLaughlin J in *WK (A CHILD),*[250] a judicial review of a decision of a Resident Magistrate and two lay assessors in proceedings relating to the making of a secure accommodation order

249. Article 44 of the Children (Northern Ireland) Order 1995.
250. [2004] NIQB 76.

under Article 44 of the Children (Northern Ireland) Order 1995. WK was a 14 year old boy whose relationship with his family had broken down and who was the subject of an interim care order. He had a history of committing serious assaults against his parents and the staff and inmates of the various facilities in which he had been accommodated. A number of short term secure accommodation orders had been made in respect of the boy prior to the order which formed the subject of the judicial review. This secure accommodation order was made without the boy being in court, because a risk assessment carried out by social services had concluded that their staff could not be exposed to the risk of escorting the boy to court, both in their interests and in the interests of the boy himself. No objections to this course of action were raised before the day of the hearing of the application for the secure accommodation order. However, on the day of the hearing itself, the boy's legal representatives sought an adjournment on the basis that the boy's absence from court constituted a breach of his human rights contrary to Articles 5 and 6 of the European Convention on Human Rights. The court refused the application on the basis that the boy, who the court considered met the criteria for a secure accommodation order, would have to be discharged from secure accommodation in circumstances where he had no home to go to and there was no suitable institution in Northern Ireland which could take him.

7.25 McLaughlin J concluded that there was no suggestion that the outcome of the hearing would have been any different had the boy been present in court and able to give direct oral evidence rather than have had his case presented on paper with the assistance of counsel and his guardian ad litem. He also considered that, although in cases of this nature which involved involuntary confinement it would be appropriate for the child in question to attend court in ordinary circumstances, other factors must be considered also. These factors include the age and understanding of the child; any distress or anxiety caused to the child by attending court and the inducement of further disruptive or even criminal behaviour. If any of these factors exist, McLaughlin J considered that the case against bringing the

child to court could become overwhelming. The facts in *WH* were distinguished from those in *North and West Health and Social Services Trust v DH*,[251] a case in which it had been concluded that the child should be in court when a secure accommodation order was made in relation to him.

7.26 The issues raised in the case were discussed by the Children Order Advisory Committee ("COAC"), the committee responsible for advising on the progress of cases under the Children (Northern Ireland) Order 1995, identifying difficulties, reducing unavoidable delay and promoting uniform practice and procedure in the family courts in Northern Ireland. During its discussions, COAC was supportive of live television links being introduced in cases of this nature to allow the child to give direct oral evidence in court and therefore avoid the situation which arose in *WK*.[252] To date, as far as the Commission is aware, no further action has been taken to implement the views of COAC.

7.27 The Commission believes that if special measures are introduced into the law to allow witnesses to give evidence in civil proceedings otherwise by way of direct oral evidence, proceedings for secure accommodation orders will be covered by that legislation. However, once the legislative framework is in place, an issue will then arise in relation to whether live television link should be made available from the court to remote locations such as a secure accommodation facility. The Commission does not believe that it is well placed to answer this question, as the answer appears to lie purely in practical, rather than legal, considerations: such as convenience to the parties involved in the case; the safety of the child; the staff of the facility and others; the practicalities of convening a court to sit in the facility; and the cost to the public purse. The Commission, therefore, does not propose to make any recommendations based on an analysis of these practical considerations.

251. [2001] NI 17.
252. Children Order Advisory Committee, *Use of Live Television Links and Alternative Venues on Applications for secure Accommodation Orders* (30 September 2005).

COMPETENCE OF WITNESSES IN CIVIL PROCEEDINGS

7.28 In order to give evidence in any court, a witness has to be competent to do so. "Competence" has different meanings in the context of civil and criminal proceedings. In criminal proceedings, by virtue of Article 31(1) of the Criminal Evidence (Northern Ireland) Order 1999, all persons (whatever their age) are competent to give evidence. However, a person is not competent to give evidence if it appears to the court that he cannot understand questions put to him as a witness and give answers to those questions which can be understood.[253] A person can give evidence on oath if he is fourteen years old or over and has sufficient appreciation of the solemnity of the occasion and the particular responsibility to tell the truth which is involved in taking an oath.[254] A person will be presumed to have sufficient appreciation if he can understand questions put to him and give understandable answers.[255] A person can give unsworn evidence if he is competent to give evidence, but does not meet the tests for giving sworn evidence, that is to say, he is under fourteen years of age and he does not have sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth that is involved in taking an oath. If a question of competence arises, the party who has called the witness must satisfy the court that, on the balance of probabilities, the witness is competent to give evidence.[256]

7.29 In civil proceedings, section 2 of the Evidence Act 1851 provides that any party and their witnesses shall be competent to give evidence. There are exceptions to this general principle. A child of such tender years that he has neither sufficient intelligence to testify nor a proper appreciation of the duty of speaking the truth is incompetent.[257] The competence of people experiencing mental disorder is determined by *R v Hill*,[258] which states that such people can give evidence if the judge is satisfied that the person is then of sufficient understanding to give

253. Article 31(3).
254. Article 33(2).
255. Article 33(8).
256. Article 32(2).
257. *R v Brasier* (1779) I Leach 199.
258. (1851) 2 Den 254, CCR.

rational evidence. A person who is deaf and cannot speak and who is unable to use signs in order to communicate or write is incompetent to give evidence.[259] Also, a person who does not appreciate the nature of an oath or affirmation is incompetent. The modern interpretation of this final exception is to focus on whether a witness has sufficient appreciation of the solemnity of the occasion and the importance to tell the truth, rather than on whether he is aware of the divine sanction of the oath.[260] In relation to children, Article 169(4) of the Children (Northern Ireland) Order 1995 allows a child to give evidence, even if, in the opinion of the court, he does not understand the nature of the oath as long as he understands that it is his duty to speak the truth and he has sufficient understanding to justify his evidence being heard. If a question in relation to competence arises, preliminary questioning or testing of the witness will take place to determine his competence to give evidence. If he has been sworn and has given evidence before a question of competence arises, his evidence can be objected to, tested and rejected.[261] This position is different to civil proceedings in Scotland: section 24 of the Vulnerable Witnesses (Scotland) Act 2004 totally abolishes testing for competence for all witnesses in civil and criminal proceedings. This effectively has the result that any witness can give evidence without his competence first being ascertained: the weight or significance of that evidence then has to be assessed by the judge and the jury (if there is one).

7.30 A further, statutory, provision in relation to civil proceedings exists which has relevance to this consultation paper. Section 6(2) of the Civil Evidence (Northern Ireland) Order 1997 provides that hearsay evidence of people suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings is inadmissible as evidence. If any reforms are to be recommended to the general law on competence, this provision must also be considered.

259. *Dickenson v Blisset* (1754) 1 Dick 268; *R v Whitehead* (1868) LR 1 CCR; *R v Imrie* (1917) 12 Cr App Rep 282.
260. *R v Hayes* [1977] 2 ALL ER 288; *R v Bellamy* (1986) 82 Cr App R 222.
261. *Jacobs v Layborn* (1843) 11 M & W 685; *R v Whitehead* (1866) LR 1 CCR 33.

Reform?

7.31 If special measures are to be adopted for witnesses who are required to give evidence in civil proceedings, then the law of competence to give that evidence must be addressed. Putting in place special provision to encourage and assist certain categories of witness to give evidence in court does not sit well with a body of law which may prevent that witness from giving evidence because he may not appreciate the importance of the oath or affirmation or the solemnity of the occasion due to a characteristic which made him eligible for special measures in the first instance. Additionally, requiring a witness to be tested in order to ascertain his competence before he gives evidence adds to the stress experienced during the court process.

7.32 It appears to the Commission that there are clear choices to make in relation to addressing the difficulties caused by the current law on competence of witnesses to give evidence in civil proceedings. It must be decided whether the law on competence should be amended. The Commission could recommend that the law is updated so that it reflects the criminal model in Northern Ireland which is based on the understanding of the witness and his ability to give understandable answers. Distinction could then be drawn between those witnesses who can give sworn evidence and those who can give unsworn evidence. For example, in the Republic of Ireland, children and adults living with a mental disability can give evidence in civil proceedings without being sworn if the court is satisfied that they can give an intelligible account of events relevant to the proceedings.[262] The Commission is attracted to amending the law as it ensures that court proceedings are more accessible to witnesses. Alternatively, the Commission could recommend that the testing of competence by the court in civil proceedings is abolished, which is the approach taken in Scotland. This would mean that witnesses are not subjected to questioning in relation to their competence before they give evidence, allowing the court to hear the evidence and assess the weight or importance to be attached to it.

262. Section 28 of the Children Act 1997.

However, the Commission is concerned that there may be some individuals who would benefit from a retention of a process of assessing competence as it would save them from being exposed to the rigours of giving evidence. The Commission seeks the views of consultees in relation to these issues. **(a) Do consultees consider that the law relating to competence to give evidence in civil proceedings should be altered? (b) Do consultees agree with the Scottish approach of abolishing the test of competence in its entirety and enabling everybody to give evidence?**

CHAPTER 8. CONSULTATION ON INITIAL EQUALITY IMPACT SCREENING

Section 75 of the Northern Ireland Act 1998 requires public authorities (in this instance, the Commission) to ensure that it carries out its functions having 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;
- between men and women generally;
- between persons with a disability and persons without; and
- between persons with dependants and persons without.

In addition, without prejudice to the obligations set out above, the Commission is also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. **The Commission has carried out an initial screening of its provisional policy views and consultees are invited to comment on its initial conclusions.**

1 Policy to be screened

1.1 Title of policy to be screened

The title of this policy is “Protections for witnesses giving evidence in civil proceedings”.

1.2 Description of the policy to be screened

Usually, witnesses appear in person in court and give their evidence orally. They are subject to examination-in-chief, cross-examination and re-examination. However, in the criminal law, under the provisions of the Criminal Evidence (Northern Ireland) Order 1999,

certain witnesses can avail of protections ("special measures") when giving evidence in court in particular circumstances. Children under the age of seventeen must give evidence by way of video-recorded evidence-in-chief, if the facility is available and it is in the interests of justice to do so. Witnesses who suffer from a mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986; those who otherwise have a significant impairment of intelligence and social functioning; and those with a physical disability or disorder may also apply for special measures to help them give their evidence. Witnesses are also eligible to apply for special measures on the grounds that they are suffering fear or distress about testifying and as a result the quality of their evidence will be diminished. Children, witnesses with a mental disorder or other significant impairment of intelligence and social functioning and those with a physical disability or disorder may be eligible for a variety of special measures, namely screening from the accused; giving evidence by live television link; giving evidence in private; having wigs and gowns removed by the judge and barristers in the case; video-recorded evidence-in-chief; video-recorded cross-examination or re-examination (not yet in force); examination through an intermediary (not yet in force) and the use of aids to communication. Witnesses suffering from fear and distress in connection with testifying can avail of all the above-mentioned special measures apart from the use of intermediaries and aids to communication.

Special measures in criminal proceedings have proved to be beneficial to witnesses in enabling them to give their best evidence to the court. The Commission is consulting on whether similar protections should be made available to witnesses in civil proceedings also.

1.3 Aims of the policy to be screened

The proposed policy aims to facilitate witnesses in civil proceedings to give their best evidence to the court, when otherwise they may find difficulties in presenting their evidence orally, in person, subject to examination-in-chief, cross-examination and re-examination.

1.4 On whom will the policy impact? Please specify

This proposed policy will potentially impact on all members of the general public who may be called upon to give evidence in civil

proceedings, but particularly children and those with a disability.

1.5 Who is responsible for (a) devising and (b) delivering the policy? What is the relationship and have they considered this issue and any equality issues?

The Commission is responsible for devising the policy and will send its recommendations in a Final Report to the Secretary of State for Northern Ireland and the Office of the First Minister and Deputy First Minister pursuant to section 52(1) of the Justice (Northern Ireland) Act 2002. The Northern Ireland Minister responsible for issues of this nature (currently the Minister for Finance and Personnel) will then consider whether the proposals should be taken forward. The Commission and the Department for Finance and Personnel have commenced discussions in relation to the project. After 12th April 2010, the Department of Justice will assume responsibility for this issue.

1.6 What linkages are there to other NI Departments/NDPBs in relation to this policy?

Northern Ireland Court Service have an interest in the proposed policy as it has responsibility for courts and court procedure in Northern Ireland.

1.7 What data is available to facilitate the screening of this policy?

The available data is mentioned below.

1.8 Is additional data required to facilitate screening? If so, give details of how and when it will be obtained?

As part of this consultation, consultees are invited to provide the Commission with any further data which they consider to be of relevance to this initial screening exercise and any further screening exercise or full EQIA.

2 Screening analysis

2.1 Is there any indication or evidence of higher or lower participation or uptake by the following section 75

groups or differential needs, experiences, issues and priorities in relation to this policy issue?

Religious belief

Northern Ireland Court Service produce statistics that are of interest in carrying out a screening analysis. Customer Exit Surveys are biennial surveys which are carried out on a number of court users over a period of time and are designed to give a snap shot of court users and their experiences. Two surveys are available for consideration. The Customer Exit Survey 2005, which was carried out across all courts in Northern Ireland from 5th September 2005 to 10th February 2006, sought information from 1772 respondents over three areas of experience – civil, family and criminal courts. Upon analysis, these statistics reveal that 45.5% of users of civil courts during this period were Catholic, 43.1% were Protestant and 26% did not specify their religion. Analysis of the statistics revealed that 50.7% of users of family courts were Catholic, 39.6% were Protestant and 9.7% did not specify their religion.

The Customer Exit Survey 2007/2008, which was carried out at the end of 2007 across all court locations resulted in 1883 responses. This survey reveals that 41.5% of users of civil courts were Catholic, 44.8% were Protestant, 0.8% specified another religion, 8.8% were no religion and 4.3% did not specify their religion. Of the respondents who indicated another religion, the religions specified included Orthodox, Church of England, Church of Scotland and mixed religion.

The Customer Exit Survey 2007/2008 revealed that 46.3% of family court users were Catholic, 41.2% were Protestant and other Christian religions, 0.3% were Buddhist, 0.3% were Muslim, 0.8% specified another religion, 6% were no religion and 5.1% did not specify a religion. Of the respondents who indicated another religion, the religions specified included Jehovah's Witness, Irish Traveller and spiritual.

Although these statistics offer an interesting insight into the religions of court users, the methodology has only been used for a relatively short period of time, which does not allow for detailed comparative work to be carried out. Care must therefore be taken in drawing firm conclusions.

In assessing whether the policy proposals contained in this consultation paper have a differential impact on people of different religions, the Commission considers that the categories of people who could be affected by the proposals to introduce special measures for witnesses in civil proceedings (children; people with a mental disorder or other significant impairment of intelligence or social functioning; those with a physical disability or disorder and those suffering from fear and distress) are likely to come from all religious backgrounds. The ability of an individual to apply for assistance from the court, or to successfully meet the criteria for special measures being granted is not affected by the religion of that person. If the criminal law model currently operating in Northern Ireland model is followed, when considering whether the witness's evidence will be diminished due to fear or distress about testifying, the court must take into account the person's religious beliefs, if it is considered relevant. The Commission does not consider that this provision confers any differential impact. Persons of different religions would be on an equal footing before the court when it is considering whether special measures should be granted. The test for eligibility for special measures would be the whether the evidence would be diminished due to fear or distress about testifying: religion is merely a reason as to why someone may experience fear or distress during the evidence-giving process and would only be taken into account if the court thought it a relevant consideration. The Commission is therefore of the view that the proposals contained in this consultation paper do not have a differential impact on people of different religious belief.

Political opinion

No statistics are available to indicate the political opinion of court users. However, the Commission considers that the proposals contained in this consultation paper do not have a differential impact on people of different political opinions on the basis that any individual who meets the criteria for eligibility for special measures will be able to avail of those protections, regardless of their political opinion. If the model contained in the Criminal Evidence (Northern Ireland) Order 1999 is followed, political opinion is one of the factors that the court, if it thinks it relevant, must take into account when considering whether the evidence of the witness is likely to be diminished by reason of fear or distress in connection with testifying in the proceedings. The Commission does not consider that this type

of provision creates a differential impact. Persons holding different political opinions would be on an equal footing before the court when it is considering whether special measures should be granted. In this instance, the test for whether a witness is eligible for special measures is whether that person's evidence will be diminished through fear and distress about testifying: political opinion is merely one of a range of factors which may explain why an individual fears the evidence-giving process and will only be taken into account if the court considers it relevant.

Racial group

The Northern Ireland Court Service Customer Exit Survey 2007/2008 indicates that 98.3% of civil court users are White, 0.5% Chinese, 0.3% Bangladeshi, 0.3% other Asian, 0.3% mixed ethnic group and 0.5% did not specify their racial group. Of family court users, 98.4% were White, 0.3% Chinese, 0.3% Irish Traveller, 0.3% indicated that they belonged to another racial group and 0.8% did not specify which ethnic group they belonged to. If the criminal model in Northern Ireland is followed, a witness's racial group is not a criterion for determining whether he is eligible for special measures. Rather, a witness's racial group is relevant only as a factor that the court must take into account when determining whether a person's evidence will be diminished because of fear and distress about testifying, if it thinks it is relevant. Witnesses from all racial groups will be on an equal footing before the court when it is considering whether or not to grant special measures in civil proceedings. However, if the model in New Zealand is followed, a person's racial (or cultural) origin is a criterion for determining eligibility for special measures. The Commission is seeking the views of consultees in relation to a preferred approach.

Age

The Northern Ireland Customer Exit Survey 2005 indicates that 14.5% of the civil court users surveyed were in the 16-24 age group, 26.7% were in the 25-34 age group, 24.2% were in the 35-44 age group, 28.1% were in the 45-59 age group, 5.4% were aged 60 or over and 1.1% of users did not specify their age. Of respondents attending court on family business, 9.2% were in the 16-24 age group, 30% were in the 25-34 age group, 33.2% were in the 35-44 age group, 21.2% were in the 45-59 age group, 3.8% were aged 60 and over and 2.6% did not specify their age.

The 2007/2008 Survey reveals the following statistics:

Age of respondent	Civil court users	Family court users
Below the age of 17	0.3%	1.1%
17-25	9.8%	14.4%
26-35	24.8%	31.2%
36-45	24.8%	29.5%
46-55	22.8%	14.1%
56-65	10.3%	4.6%
More than 65 years	4%	1.4%
Did not specify age	3.5%	3.8%

These statistics provide a useful picture of the age profile of court users and give an indication of the relatively low numbers of children who attend court, though care must be taken to avoid firm conclusions as the statistics are only available for recent years and are therefore are limited in value for comparison purposes.

Although children and adults can equally access the civil justice system, the Commission considers that the initial proposals contained in this paper have a differential impact on children as opposed to adults if it is proposed that children should be automatically eligible for special measures to help them give evidence in civil proceedings. (The Commission is seeking the views of consultees on whether children should be able to "opt out" of giving their evidence with the assistance of special measures, albeit with safeguards). The justification for such an approach is based on an analysis of evidence which demonstrates that children who are called upon to give evidence in criminal matters can be traumatised by the process. Although there is a dearth of evidence regarding the experience of children giving evidence in civil proceedings, the practice in family cases has been to ensure that the court hears the views of children, not through direct oral evidence, but through experts such as social workers or Guardians ad Litem. It seems fair to extrapolate the evidence which is available in relation to the criminal process to civil proceedings as both types of proceedings are adversarial in nature and are characterised by formality and ceremony. The Commission considers that any differential impact in this instance is justifiable as the proposed policy promotes the participation of children in civil proceedings, whilst taking account of

the need to protect them as much as is possible from a process which can be, at best, disconcerting and at worst, intimidating.

More generally, if the criminal model of special measures is adopted, age is one of the factors which the court must take into account when considering whether the quality of the evidence to be given by the witness is likely to be diminished due to fear or distress on the part of the witness in connection with testifying. A provision of this nature does not create a differential impact because the test for eligibility for special measures in this instance is fear and distress caused by testifying, rather than the age of the witness. Age is only to be taken into account as it may be a reason why an individual may be experiencing fear and distress about giving evidence to the court and will only be taken into account if the court considers it relevant. Persons of differing ages would be treated on an equal footing before the court.

Marital status

The Northern Ireland Court Service Customer Exit Survey 2007/2008 reveals that of court users who attended court on civil business during the period of the survey, 33.5% were single, 50.8% were married and living with a spouse, 0.8% were in a civil partnership, 4.8% were married but separated from their spouse, 6.5% were divorced, 1.5% were widowed and 2.3% did not specify their marital or civil partnership status. Of court users who attended court on family business, 40.4% were single, 30.9% were married and living with a spouse, 0.3% were in a civil partnership, 17.3% were married but separated from their spouse, 7.9% were divorced, 1.4% were widowed and 1.9% did not specify their marital or civil partnership status.

The Commission does not consider that the proposals in this paper have a differential impact on people of different marital or civil partnership status on the basis that applicants for special measures in civil proceedings will be able to avail of those protections regardless of whether they are married or in a civil partnership.

Sexual orientation

There does not appear to be any statistics in existence that indicate the sexual orientation of civil court users in Northern Ireland. The Commission does not consider that this policy creates any negative

differential impacts on the basis of sexual orientation. Sexual orientation is not a criteria upon which it is suggested that special measures can be granted. If the model in Scotland is followed, the sexual orientation of a witness may be a factor that the court must take into account when considering whether a witness's evidence may be diminished due to fear or distress about giving evidence. However, in this instance, sexual orientation is a reason why someone may be in fear or distress about testifying (for example, someone is threatening to "out" the person if they give evidence) but is not the test for determining eligibility for special measures.

Gender

The Northern Ireland Customer Exit Survey 2005 reveals that 60.5% of civil court users surveyed were male, whilst 38.9% were female and 0.9% did not indicate their gender. Males using family courts made up 35.5% of users, whilst 63.7% were female and 1% of respondents did not specify their gender. The Customer Exit Survey 2007/2008 reveals that 58.8% of civil court users were male, 40.8% were female, whilst 0.5% did not specify gender. Of respondents attending court for family business, 42.3% were male, 56.9% were female and 0.8% did not specify their gender.

Applications for relief from domestic violence under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 are perhaps one area in which a party to the proceedings may wish to avail of protective measures. Judicial Statistics, which are published every year by the Northern Ireland Court Service, provide information in relation to how many applications under the 1998 Order are made and disposed of each year, though the statistics do not break the numbers down by gender or any of the other section 75 categories. In the Family Division of the High Court, 51 applications under the 1998 Order were disposed of in 2008, 37 in 2007 and 51 in 2006. In Magistrates' courts, 4734 applications under the 1998 Order were disposed of in 2008, no statistics were available for 2007, and in 2006, 3334 applications for non-molestation orders were disposed of and 1068 combination non-molestation and occupation orders were disposed of. Setting these statistics alongside crime statistics produced yearly by the Police Service of Northern Ireland (PSNI Annual Statistical Reports), it is possible to form tentative views in relation to gender in applications for protections under the 1998 Order. However, it must be stressed that any views are formed on the

basis of extrapolation of general trends in crime statistics, rather than hard evidence from statistics gathered from court users. PSNI Annual Statistical Reports reveal the following information for recorded crimes with a domestic motivation:

Year	Females 17 and over	Males 17 and over	Children under 17	Gender/age unknown	Total Offences
2008/2009	59.0%	19.9%	8.4%	12.7%	9211
2007/2008	60.6%	19.1%	6.1%	14.3%	9283
2006/2007	61.5%	20.3%	5.7%	12.5%	10115
2005/2006	60.0%	19.7%	5.0%	15.3%	10768

Since recorded crimes with a domestic motivation in Northern Ireland affect women more often than men, it seems sensible to assume that the trend continues into court proceedings for civil remedies for domestic violence.

The Commission acknowledges that in civil proceedings for relief from domestic violence, because of the larger numbers of women applying to the court, it is more likely that women rather than men may seek protections when giving their evidence. However, the Commission does not consider that this fact in itself suggests a differential impact of the proposed policy in relation to gender. Potentially, greater numbers of women may apply for the proposed protections, but that is a result of the nature of domestic violence, rather than as a result of the out-workings of the proposed policy.

Disability

The Northern Ireland Court Service Customer Exit Survey 2007/2008 contains statistics in relation to the numbers of court users who consider that they have a disability, as defined by the Disability Discrimination Act 1995.[263] The statistics show that 7.5% of civil court users considered that they met the 1995 Act definition, 91.8% said that they did not meet the definition, whilst 0.8% did not respond to the question. Of family court users, 8.1% indicated that they met the 1995 Act definition of disability, 93.2% said that they did not and 1.9% did not respond to the question.

263. A person has a disability for the purposes of the 1995 Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

The Commission considers that the proposed policy creates a differential impact on the basis of a person's disability. It is envisaged that persons with a mental disorder, learning disability or a physical disability or disorder may be able to apply for special measures from the court to assist them to give their best evidence. The policy does not envisage automatic entitlement for special measures on the basis of disability: the majority of disabled people will be able to give their best evidence without any assistance. However, the Commission considers that acknowledging that some disabled people may need extra assistance when giving evidence in court is justified on the basis that it facilitates people, who may otherwise have difficulties communicating their evidence, to play a full role in their civil proceedings and to enable them to access justice.

Dependants

The Northern Ireland Court Service Customer Exit Survey 2007/2008 indicates that of users attending court on civil business during the period of the survey, 45% had dependant children, 52.8% did not have dependant children and 2.3% did not specify whether they did or did not have dependant children. Respondents were also asked whether they had adults who were dependant on them. Six and a half percent had dependant adults, whilst 92.3% did not and 1.3% did not specify whether they did or not. Of court users attending court on family business, 60.7% had dependant children, 37.1% did not have dependant children and 2.2% did not specify whether they did or not have dependant children. When asked whether they had adult dependants, 4.9% responded that they did, 93.2% responded that they did not and 1.9% did not indicate whether they did or not.

The Commission does not consider that the policy proposals contained in this consultation paper have a differential impact on persons with dependants and those without on the basis that the ability to apply for or have special measures granted to witnesses in civil proceedings is not influenced by whether a person does or does not have dependants.

2.2 Have consultations with the relevant groups, organisations or individuals within any of the section 75 categories indicated that policies of this type create problems specific to them?

Pre-consultation workshops have been carried out with stakeholders in Belfast, Londonderry and Dungannon. No issues have been raised with the Commission in relation to section 75 issues at these events. The Commission is inviting any relevant groups, organisations or individuals within any of the section 75 categories to comment on this initial screening exercise and to provide additional views or evidence.

2.3 Is there an opportunity to better promote equality of opportunity or good relations by altering the policy, or by working with others in Government or in the larger community in the context of this policy?

The policy proposals contained in this consultation paper represent the initial views of the Commission. The final recommendations made by the Commission will be informed by the views expressed by consultees during the consultation period.

2.4 It may be that a policy has a differential impact on a certain section 75 group, as the policy has been developed to address an existing or historical inequality or disadvantage. If this is the case, please give details below.

The section 75 groups which are affected by any differential impact of the policy proposals already have full access to civil justice, so are not currently suffering inequality or disadvantage in that regard. The policy proposals seek to assist certain people so that they can give their best evidence to a civil court.

2.5 Please consider if there is any way of adapting the policy to promote better equality of opportunity or good relations.

The policy proposals contained in this consultation paper represent the initial views of the Commission. The final recommendations made by the Commission will be informed by the views expressed by consultees during the consultation period.

3 EQIA recommendation

3.1 Full EQIA procedures should be carried out on policies considered to have significant implications for equality of opportunity. Please fill in the following grid in relation to the policy.

The impacts of the proposed policy in relation to social need, effect on people's daily lives, effects on economic, social and Human Rights and significance of the policy in terms of strategic importance and expenditure have been assessed as follows.

Prioritisation Factors	Significant impact	Moderate impact	Low impact	No impact
Social need				**yes**
Effect on people's daily lives			**yes**	
Effect on economic, social and Human Rights				**yes**
Significance of the policy in terms of strategic importance			**yes**	
Significance of the policy in terms of expenditure			**yes**	

3.2 In view of the considerations in sections 1 and 2, do you consider that this policy should be subject to a full EQIA?

The Commission will consider whether a full EQIA is required after the consultation responses have been received and analysed.

3.3 If an EQIA is considered necessary, please comment on the priority and timing in light of the factors in table 3.1.

See above.

3.4 If an EQIA is considered necessary, is any data required to carry it out or to ensure effective monitoring?

The Commission is continuing to gather data which may inform further consideration of section 75 obligations. Additionally, it is expected that the views of stake-holders on section 75 issues, obtained as a result of this consultation exercise, will further inform the Commission's deliberations.

CHAPTER 9. LIST OF QUESTIONS

CHAPTER 3. CURRENT LAW AND PRACTICE IN NORTHERN IRELAND: THE CIVIL LAW

The Commission provisionally considers that a more co-ordinated, consistent and accessible legal regime for allowing witnesses to give evidence in civil proceedings otherwise than by oral evidence would be a useful addition to the law of Northern Ireland. Do consultees agree?

CHAPTER 5. SPECIFIC ISSUES: ELIGIBILITY FOR SPECIAL MEASURES

1. Do consultees agree that all parties to civil proceedings and witnesses should be able to access special measures if they are eligible to do so?

2. In order to assist children to give their best evidence in civil proceedings, the Commission considers that child witnesses should be eligible for special measures. Do consultees agree?

3. The Commission is anxious that protective measures are available to the maximum number of children and young people and provisionally considers that any special measures should be available to children and young people under the age of eighteen. Do consultees agree?

4. Do consultees agree that children should be able to opt out of using special measures when required to give evidence in civil proceedings provided that there are safeguards in place to ensure the welfare of the child?

5. Do consultees see merit in devising a checklist of factors for the court to take into account when deciding whether to allow a child to "opt out" of using special measures? Do consultees consider that the checklist of factors contained in the Coroners and Justice Act 2009 is appropriate?

6. Do consultees consider that the Scottish approach of taking into account the best interests of the child witness, together with both the views of the child witness and his parent (or persons with parental responsibility for the child) when considering to grant special measures is appropriate?

7. Do consultees agree that people with a "mental disorder" as defined by section 4 of the Mental Health (Northern Ireland) Order 1986 and people living with a significant impairment of intelligence and social functioning should be eligible for protections to enable them to give their best evidence in civil proceedings?

8. In order to maximise protection for witnesses and to offer the court maximum flexibility to assist witnesses who may have a physical disability or disorder, the Commission provisionally believes that physical disability or disorder should be an eligibility criterion for special measures in civil proceedings. Do consultees agree?

9. Do consultees agree that the additional factors that the court must take into account when considering whether a witness is eligible for special measures on the basis of fear and distress that are contained in the Scottish model should be adopted for witnesses in civil proceedings?

10. Do consultees consider that any other factors should be relevant in deciding whether a witness is eligible for special measures on the basis of fear and distress in relation to giving evidence in civil proceedings?

11. Do consultees consider that there are any other relevant criteria for determining the eligibility of witnesses for special measures in civil proceedings?

CHAPTER 6. SPECIFIC ISSUES: TYPES OF MEASURE

1. Do consultees agree with the Commission's view that there is merit in including the use of screens in a list of special measures to be adopted in civil proceedings? Furthermore, do consultess consider that all eligible witnesses should be allowed to apply to the court to give their evidence from

behind a screen?

2. The Commission provisionally believes that all witnesses in civil proceedings who are eligible for special measures should be allowed to apply to the court for permission to give their evidence by live television link. Do consultees agree?

3. Do consultees consider that a special measure to clear the courtroom is required in civil proceedings?

4. Do consultees consider that all witnesses eligible for special measures in civil proceedings should be able to apply to the court for a special measure which requires the removal of wigs, gowns and robes?

5. The Commission seeks the views of consultees on whether it is considered that video-taped evidence should be available as a special measure in civil proceedings.

6. The Commission seeks the views of consultees in relation to the use of intermediaries as a special measure in civil proceedings.

7. Do consultees agree that aids to communication should be included as a special measure in civil proceedings for witnesses who may need them?

8. Do consultees agree with the Commission's provisional view that there is merit in including the use of supporters as another special measure for eligible witnesses in civil proceedings?

9. Do consultees consider that any other type of special measure should be made available to eligible witnesses in civil proceedings?

CHAPTER 7. RELATED ISSUES

1. Do consultees consider that there is a need to reconsider the law relating to witness anonymity in civil proceedings?

2. Do consultees consider that the law relating to competence to give evidence in civil proceedings should be altered?

3. Do consultees agree with the Scottish approach of abolishing the test of competence in its entirety and enabling everybody to give evidence?

CHAPTER 8. CONSULTATION ON INITIAL EQUALITY IMPACT SCREENING

The Commission has carried out an initial screening of its provisional policy views and consultees are invited to comment on its preliminary conclusions.

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