

# **‘It doesn’t happen... and I’ve never thought it was necessary for it to happen’: Barriers to vulnerable defendants giving evidence by live link in Crown Court trials**

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**By Samantha Fairclough**

ESRC funded PhD student, Birmingham Law School

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# **‘It doesn’t happen....and I’ve never thought it was necessary for it to happen’: Barriers to vulnerable defendants giving evidence by live link in Crown Court trials**

## **Abstract**

*Witnesses and defendants are able to give evidence by live link provided that they meet the vulnerability criteria set out in the Youth Justice and Criminal Evidence Act (1999). The vulnerability criteria include, in brief, the defendant or witness being young and/or suffering from a physical, mental or learning disability. Findings from interviews undertaken with 18 criminal practitioners indicate that, even when a defendant is sufficiently vulnerable to qualify for the use of live link, the provision is rarely invoked. Drawing on this data, this article identifies a series of barriers which contribute heavily to the inaccessibility of the live link provision to vulnerable defendants giving evidence in their trials.*

## **Keywords**

Vulnerable defendant, special measures, live link, Crown court, legal profession\*

## **Introduction**

The availability of special measures under the Youth Justice and Criminal Evidence Act 1999 (YJCEA), designed to assist the vulnerable to give evidence, remains far more advanced for non-defendants than for defendants. Vulnerable non-defendant witnesses can have their evidence pre-recorded; give it from behind a screen, via live link or with the court cleared of the public; they can benefit from the removal of wigs and gowns; and can seek the assistance of an intermediary and/or communication aids.<sup>1</sup> The provision for live link is the only special measure which is available to defendants by statute<sup>2</sup> that is in force.<sup>3</sup> Its existence is viewed as a progressive step towards improving the support available to vulnerable defendants.<sup>4</sup> In this article I argue that the step taken is actually rather a faltering

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\* [s.fairclough@bham.ac.uk](mailto:s.fairclough@bham.ac.uk)

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<sup>1</sup> See: YJCEA, s23-30.

<sup>2</sup> YJCEA, s33A.

<sup>3</sup> Coroners and Justice Act (2009), s47 inserted s33A and s33BB into the YJCEA for vulnerable defendants to give evidence through an intermediary. These provisions are not yet in force (though intermediaries are available to vulnerable defendants on a limited basis via the common law, see: *C v Sevenoaks Youth Court* [2009] EWHC 3088; Cooper P and Wurtzel D. A day late and a dollar short: In search of an intermediary scheme for vulnerable defendants in England and Wales. CLR 2013;1:4-22.

<sup>4</sup> Jacobson J and Talbot J. Vulnerable defendants in the Criminal Courts: a review of provision for adults and children. Prison Reform Trust 2009 p. 15 & 50; Wigzell A, Kirby A and Jacobson J. *The Youth Proceedings Advocacy Review: Final Report*. Institute for Criminal Policy Research, 2015, p.6.

one. I present an insight into the operation of the law, derived from 18 interviews with members of the legal profession. This data reveals that even defendants who are sufficiently vulnerable to qualify for the live link may face various other barriers to its use in practice. It is argued that these barriers serve to inhibit applications being made for, and ultimately limit the use of, the live link by vulnerable defendants giving evidence in their trials.

## Legal background and context

The live link provision enables live evidence to be obtained from a witness from outside of the courtroom while still being seen and heard by the judge, jury and legal representatives in court.<sup>5</sup> The provision was initially introduced for children giving evidence for the prosecution<sup>6</sup> in response to difficulties encountered eliciting their evidence at trial.<sup>7</sup> Such difficulties may result from a combination of the child's inherent vulnerability, the oral nature of criminal proceedings,<sup>8</sup> the various rules of criminal evidence,<sup>9</sup> and the presence of the accused. Permitting evidence to be given remotely sought to minimise these difficulties by removing the witness from court and so making them feel more at ease. The 1999 Act extended the availability of this provision, and other special measures,<sup>10</sup> to all non-defendant witnesses. Thus, as well as being available to children, the live link provision is now available to adult witnesses, including those for the defence, whose quality of evidence is likely to be diminished as a result of their vulnerability or fear/distress relating to testifying.<sup>11</sup> The defendant was explicitly excluded from the Act's scope until the insertion of s33A in 2006.<sup>12</sup> This permitted the use of the live link for vulnerable defendant witnesses when giving evidence.

Prior to the enactment of the defendant provision for live link, there had been both academic<sup>13</sup> and judicial<sup>14</sup> criticism regarding the limited support to vulnerable defendant

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<sup>5</sup> YJCEA, s24(8).

<sup>6</sup> Criminal Justice Act 1988, s32 (although its use was limited to cases involving violent, cruel or sexual offences)

<sup>7</sup> See: Pigot T. *Pigot Report of the Advisory Group on Video Evidence*. London: Home Office, 1989; Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, *Speaking up for Justice*. London: Home Office, 1998.

<sup>8</sup> Ellison L. *The Adversarial Process and the Vulnerable Witness*. Oxford: OUP, 2001.

<sup>9</sup> The rules of evidence relating to child witnesses are referred to by Spencer as the 'adversarial package.' See: Spencer J & Lamb M (eds). *Children and cross-examination: Time to change the rules?* Oxford: Hart Publishing, 2012, p.9-16.

<sup>10</sup> See: YJCEA, s23-30.

<sup>11</sup> YJCEA, s16 and s17.

<sup>12</sup> As inserted by Police and Justice Act 2006, s47, which came into force 15<sup>th</sup> January 2007 (see: <http://www.legislation.gov.uk/ukxi/2006/3364/article/2/made>).

<sup>13</sup> For example, see: Birch D. A better deal for vulnerable witnesses. CLR 2000:223-249; Hoyano L. Striking a balance between the rights of defendants and vulnerable witnesses: Will special measures directions contravene guarantees of a fair trial? CLR 2001:948-969 Doak J. Case Comment: Youth Court: Whether legislative provision requiring special measures direction to be given in relation to child witness in need of special protection in manner compatible with convention requirement for a fair trial. CLR 2005:497-500.

<sup>14</sup> See also: *R (on the application of DPP) v Redbridge Youth Court* [2001] EWHC Admin 209; *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin); *R v Camberwell Green Youth Court* [2005] UKHL 4.

witnesses relative to that available to vulnerable non-defendant witnesses. For example, Curen, the now Deputy CEO of the charity Respond, which aims to support individuals with learning disabilities,<sup>15</sup> argued that ‘a person’s vulnerability should not be ignored when they become a defendant.’<sup>16</sup> He drew an analogy to their exclusion from special measures being akin to a denying a disabled defendant access to court via a wheelchair ramp, merely for being the defendant.<sup>17</sup> Interestingly, Burton et al highlighted evidence that practitioners were approaching the question of special measures on the basis of a ‘parity principle.’ This meant that they were disinclined to invoke measures for vulnerable non-defendants when comparable support was not also available to vulnerable defendants, due to a perceived fairness issue relating to the equality of arms.<sup>18</sup>

Furthermore, the absence of assistance for vulnerable defendants, especially child defendants,<sup>19</sup> raised a concern regarding their ability to effectively participate in their trials,<sup>20</sup> as required by Article 6 of the European Convention of Human Rights (ECHR). The European Court of Human Rights ruled in *SC v UK*<sup>21</sup> that an 11 year old defendant with limited intellectual ability, learning difficulties, and a poor attention span could not effectively participate in the trial process.<sup>22</sup> It was following this decision that the live link provision for defendants was inserted into the YJCEA.

The current law makes the live link provision available to both child and adult defendants who meet the criteria set out under s33A when it is considered to be ‘in the interests of justice.’<sup>23</sup> For child defendants, their ability to participate effectively as a witness must be compromised by their level of intellectual ability or social functioning,<sup>24</sup> and the use of the live link must consequently improve their effective participation.<sup>25</sup> Adult defendants must suffer from a mental disorder (as per the Mental Health Act 1983), or a significant impairment of intelligence and social function.<sup>26</sup> This must result in their inability to participate effectively as a witness,<sup>27</sup> and, again, the use of the live-link needs to be considered to enable more effective participation.<sup>28</sup>

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<sup>15</sup> See: <http://www.respond.org.uk/who-we-are/>.

<sup>16</sup> Curen R. Vulnerable adults and the criminal justice system in England and Wales: Some proposals for reform. *Criminal Lawyer* 2005:3-5, p.4.

<sup>17</sup> *ibid.*

<sup>18</sup> See: Burton M, Evans R and Sanders A. Protecting children in criminal proceedings: Parity for child witnesses and child defendants. *CFLQ* 2006; 18(3):397-406.

<sup>19</sup> *T and V v UK* (1999) 30 EHRR 121; *SC v UK* [2005] 40 EHRR 10.

<sup>20</sup> Ellison L. Case Comment on *R (on the application of D) v Camberwell Green Youth Court*. *CLR* 2005:479-500; Doak J. Child witnesses: Do special measures directions prejudice the accused’s right to a fair hearing? *IJEP* 2005;9(4):291-5.

<sup>21</sup> 40 EHRR 10.

<sup>22</sup> *ibid.* at [36].

<sup>23</sup> YJCEA, s33A(2)(b).

<sup>24</sup> YJCEA, s33A(4)(a).

<sup>25</sup> YJCEA, s33A(4)(b).

<sup>26</sup> YJCEA, s33A(5)(a).

<sup>27</sup> YJCEA, s33A(5)(b).

<sup>28</sup> YJCEA, s33A(5)(c).

The provision for defendants differs to the provision for non-defendant witnesses. Child defendants are left on a particularly unequal footing with child witnesses. Non-defendant witnesses under 18 are considered to be inherently vulnerable by way of age, and automatically qualify for the use of special measures, including the live link. For child defendants, they must also show that their inability to participate effectively is a result of their level of intellectual ability/social functioning. Furthermore, all vulnerable defendants, including children, are required to satisfy the additional 'interests of justice' test<sup>29</sup> to secure the use of the live link. This means that child defendants in particular have more statutory hurdles to overcome than child witnesses to invoke the use of this measure. This is viewed by the Royal College of Psychiatrists as 'anomalous and unacceptable.'<sup>30</sup>

Other differences in eligibility for the use of the live link stem from to whom the provision is available. Non-defendant witnesses suffering from physical disabilities or disorders are considered as vulnerable for the purposes of obtaining use of the live link,<sup>31</sup> whereas such defendant witnesses are not. Furthermore, the live link provision is additionally available to non-defendant witnesses who are suffering from intimidation or are in fear or distress in connection with testifying in the proceedings.<sup>32</sup> There is no comparable provision for defendants wishing to give evidence in their trial. The only criterion on which they can apply for the live link is vulnerability.

The more restrictive defendant vulnerability threshold continues to arouse concern.<sup>33</sup> It limits by definition the number of defendants who are deemed to be sufficiently vulnerable to qualify for the use of the live link. It follows that defendant witnesses are unable to invoke the provision as frequently as non-defendant witnesses. The assumption underlying the legislation seems to be that defendants are inherently less vulnerable than non-defendants, but there is no empirical basis for such a belief. Jacobson and Talbot's extensive review of the literature surrounding defendant vulnerability evidences the high prevalence of mental health problems and learning difficulties among both adult and child defendants.<sup>34</sup> Child defendants, they argue, can be deemed 'doubly vulnerable',<sup>35</sup> due to a combination of their young age and other mental, intellectual and emotional problems from which they may suffer.<sup>36</sup> This is further evidenced in the recent Children's Commissioner

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<sup>29</sup> YJCEA, s33A(2)(b).

<sup>30</sup> Royal College of Psychiatrists. *Child Defendants*. Report no. London: OP56; 2006. p.55.

<sup>31</sup> YJCEA, s16(2)(b).

<sup>32</sup> YJCEA, s17.

<sup>33</sup> For example, see: Hoyano L. The child witness review: Much ado about too little. CLR 2007;849-65; Burton M, Evans R, and Sanders A. Vulnerable and intimidated witnesses and the adversarial process in England and Wales. IJEP 2007;11:1-23; Hoyano L. Coroners and Justice Act 2009: special measures directions take two: Entrenching unequal access to justice? CLR 2010;5:345-67; McEwan J. Vulnerable defendants and the fairness of trials. CLR 2013;2:100-113.

<sup>34</sup> Jacobson J and Talbot J. (n 4).

<sup>35</sup> Jacobson J and Talbot J. (n 4) p.37.

<sup>36</sup> See also: Wigzell A, Kirby A and Jacobson J. (n 4) p.4-5 for a summary of research findings on prevalence of mental health issues/learning disabilities in children in custody; Brooker C, et al. *An investigation into the prevalence of mental health disorder and patterns of health service access in a probation area*. Lincoln:

Report, which highlights that the prevalence of neurodisability in young people who offend is often significantly higher than it is among young people in the general population.<sup>37</sup>

The potential difficulties faced by child defendants have also been acknowledged by the judiciary. Baroness Hale recognised that ‘child defendants...are often the most disadvantaged and least able to give a good account of themselves.’<sup>38</sup> Further judicial recognition of defendant vulnerability is evident through the common law development of the intermediary provision.<sup>39</sup> The courts’ extension of eligibility to all vulnerable defendant witnesses, for the entirety of the trial if required and not only for the purposes of their testimony, seeks to safeguard the fairness of criminal trials.<sup>40</sup> Furthermore, the non-provision of a registered intermediary to a vulnerable defendant was the topic of a recent, successful challenge.<sup>41</sup> This demonstrates the appellate courts’ commitment to furthering the quality of the support available to vulnerable defendants giving evidence.<sup>42</sup>

Given these findings regarding defendant vulnerability, and for the range of reasons which follow,<sup>43</sup> it is important that the live link provision is both available and accessible to vulnerable defendants. The Equalities Act 2010 requires that ‘reasonable adjustments’ are made to existing processes<sup>44</sup> to accommodate those with disabilities who would otherwise

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Criminal Justice and Health Research Group. p.39-41 39% of probation population in Lincolnshire have a current mental illness, almost 50% have past/lifetime mental illness

<sup>37</sup> See: Hughes N, et al. Nobody made the connection: The prevalence of neurodisability in young people who offend. Children’s Commissioner Report: October 2012. p.23, table 1 displays research findings for prevalence of various neurodisabilities. It shows, for example, that 5-7% of the general population suffer from communication disorders versus 60-90% of offending population and that 0.6-1.2% general population suffer from autism, compared to 12% of offending population. See also: Hughes N. Understanding the influence of neurodevelopmental disorders on offending: utilizing developmental psychology in biosocial criminology. A Critical Journal of Crime, Law and Society 2015;28(1):39-60

<sup>38</sup> Baroness Hale in *R v Camberwell Green Youth Court* [2005] UKHL 4 at [56].

<sup>39</sup> *C v Sevenoaks Youth Court* (n 3) affirmed in *R(AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin). As highlighted in (n 3), statutory provisions for intermediaries have been inserted into the YJCEA, but are not yet in force.

<sup>40</sup> Though see: Cooper P and Wurtzel D (n 3) for a discussion of prevailing access and funding issues; including the non-provision of ‘registered intermediaries’ to defendants and their reliance instead on ‘non-registered intermediaries’ who do not work through a regulated scheme (p.18-21).

<sup>41</sup> *R (on the application of OP) v the Secretary of State for Justice and Others* [2014] EWHC 1944 (Admin).

<sup>42</sup> Though, as Laura Hoyano concedes (see: Hoyano L. Case Comment *R (on the application of OP) v Secretary of State for Justice: Intermediaries – claimant having learning difficulties – claimant charged with criminal offence*. CLR 2015;1:79-83, p.82), it is perhaps a ‘qualified victory,’ since Raferty LJ restricted her judgment in *R(OP)* to intermediary provision for the duration of a vulnerable defendant giving evidence, and not the entirety of the trial. The recent amendment to the Criminal Practice Directions seems to reflect this and to limit the provision of intermediaries to defendants more generally: ‘Directions to appoint an intermediary for a defendant’s evidence will thus be rare, but for the entire trial extremely rare.’ Instead, the updated Criminal Practice Directions redirect courts to adapt the trial process to address a defendant’s communication needs as per: *R v Cox* [2012] EWCA Crim 549. See: Criminal Practice Directions. October 2015 edition, amended April 2016. CPD I General Matters 3F: Intermediaries.

<sup>43</sup> Plus see also: Hoyano L. Reforming the adversarial trial for vulnerable witnesses and defendants. CLR 2015;2:107-129, p.127; Hallet LJ. *Equal Treatment Bench Book*. Children and Vulnerable Adults. Judicial College 2013, p.5.1-5.12

<sup>44</sup> Equalities Act 2010, s20(5).

be 'put at a substantial disadvantage ... in comparison with persons who are not disabled.'<sup>45</sup> For the purposes of this Act, a disability is defined as a 'physical or mental impairment.'<sup>46</sup> This directly overlaps with the vulnerability criteria in the YJCEA for the use of the live link (save for the omission of physical disabilities where defendants are concerned). It follows that, absent the ability to testify by live link, a vulnerable defendant wishing to give evidence could be at a substantial disadvantage to their able counterparts. Thus, this measure can and should be viewed as a 'reasonable adjustment' which ought to be readily available to anyone suffering from a disability who is giving evidence in criminal proceedings, including defendants.

The failure to adequately legislate for the giving of evidence by live link by vulnerable defendants may have several potentially severe consequences. First, it may mean that a defendant proceeds to give evidence in court, but does so poorly due to the existence of their vulnerability and a lack of support. This may result in them making a bad impression on the jury, thus unfairly affecting their chances of acquittal. It may also result in them making a bad impression on the judge; resulting in a harsher sentence if convicted. Second, vulnerable defendants who cannot use the live link may, as a consequence, choose not to testify at all.<sup>47</sup> Absent a judicial direction to the effect that hearing from the defendant directly would have been undesirable,<sup>48</sup> the jury is at liberty to draw adverse inferences from the defendant's failure to testify.<sup>49</sup> Again, this may unfairly affect their chances of acquittal.

Third, and finally, the limited accessibility of the live link provision may cause some vulnerable defendants to plead guilty. At a time when the live link was not available to defendants, McConville et al.'s research on criminal defence work highlighted that barristers may use fear to put pressure on clients to plead.<sup>50</sup> This was demonstrated through an exchange as observed between a barrister and 13 year old (and thus potentially vulnerable) client, Wayne. The barrister told Wayne that the criminal trial is 'pretty scary,' in a 'vast court' and that he would be asked questions and called 'a liar.'<sup>51</sup> An absence of support to such defendants may mean that some defendants want to plead guilty, and may leave others susceptible to pressure from their lawyer to do so. By pleading guilty, the vulnerable defendant is able to avoid the ordeal of testifying (or avoid adverse inferences being drawn by the jury when they do not testify), while also securing a sentence discount.<sup>52</sup> A plea of guilty tendered in such circumstances is most obviously problematic if the defendant is factually innocent. Even if the defendant is factually guilty, however, the lack of support

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<sup>45</sup> *ibid.*

<sup>46</sup> Equalities Act 2010, s6(1)(a).

<sup>47</sup> YJCEA, s53(4) defendants are not compellable witnesses.

<sup>48</sup> Criminal Justice and Public Order Act 1994, s35(1)(b).

<sup>49</sup> Criminal Justice and Public Order Act 1994, s34-s37 provides examples of where adverse inferences can be drawn from a suspect/defendant.

<sup>50</sup> McConville M, et al. *Standing Accused*. Clarendon Press, 1994, p.258.

<sup>51</sup> *ibid.*

<sup>52</sup> Criminal Justice Act 2003, s144.

available to vulnerable defendants should not result in them feeling situationally compelled to enter a guilty plea. A defendant, vulnerable or not, guilty or not, has a right to have the State prove their guilt beyond reasonable doubt.

There are, then, substantial reasons for concern about the current legislative framework surrounding the giving of evidence by live link. There has been much less discussion in the literature, however, about how that framework is operating in practice. Statistics on the use of the live link facility by vulnerable individuals testifying in Crown Court trials are not centrally collected by the Ministry of Justice, or recorded locally by individual court centres. Studies have been undertaken which examine the use of special measures, including the live link, by vulnerable non-defendant witnesses,<sup>53</sup> but to date there has been no attempt to uncover defendant use. The present contribution makes a start on filling that lacuna. The research was carried out as part of a more broad-ranging doctoral inquiry which was funded by the Economic and Social Research Council (ESRC).<sup>54</sup> Ethical clearance was obtained from the University of Birmingham.

## Methods

I conducted 18 semi-structured, qualitative interviews with members of the legal profession from two large cities in England. These cities were selected on a practical basis, as they were the two in which I had contacts from networking at events previously. On average, the interviews lasted around 1 hour. The longest interview lasted 1 hour 55 minutes and the shortest 42 minutes. Similarly to Jennifer Temkin's research on prosecuting and defending rape, this research does not 'aim or claim' to be quantitatively representative.<sup>55</sup> Despite this, it remains 'sufficient to reveal a number of important issues'<sup>56</sup> about the use of the live link by vulnerable defendants in Crown Court trials. In much the same way as Garland and McEwan's research on the operation of the overriding objective in criminal trials, the interviews that have been conducted for this research provide a mere 'snapshot of...practitioners' experiences'<sup>57</sup> of defendant use of live link, which highlight areas of

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<sup>53</sup> For example, see: Davies G and Noon E. *An evaluation of the live link for child witnesses*. Home Office, 1991; Hamlyn B, et al. Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses. Home Office Research Study 283, June 2004; Roberts P, Cooper D and Judge S. Monitoring success, accounting for failure: The outcome of prosecutors' applications for special measures directions under the Youth Justice and Criminal Evidence Act 1999. *IJEP* 2005;9:269-290; Burton M, Evans R, and Sanders A. (n 33); Hall M. Children giving evidence through special measures in the criminal courts: progress and problems. *CFLQ* 2009;21(1):65-86; Plotnikoff J and Woolfson R. *Measuring up? Evaluating implementation of government commitments to young witnesses in criminal proceedings*. London, NSPCC and Nuffield Foundation, 2009. Chapter 8 The Trial, p.85-106; Charles C. *Special measures for vulnerable and intimidated witnesses: Research exploring the decisions and actions taken by prosecutors in a sample of CPS case files*. Crown Prosecution Service, 2012.

<sup>54</sup> [Grant number: 1367263]

<sup>55</sup> Temkin J. Prosecuting and defending rape: Perspectives from the Bar. *JLS* 2000;27(2):219-48, p.221.

<sup>56</sup> *ibid.*

<sup>57</sup> Garland F and McEwan J. Embracing the overriding objective: difficulties and dilemmas in the new criminal climate. *IJEP* 2012;16(3):233-262, p.239.

potential significance. The findings from this research, therefore, are not generalisable to all court centres and those working within them. Nevertheless, this ‘exploratory study’<sup>58</sup> does provide valuable insights into some of the factors which may be affecting the use of the live link provision by vulnerable defendants in practice.

The sample consisted of five trial judges, eight barristers (four of whom also sit part time as judges, known as recorders), and five solicitors.<sup>59</sup> The respondents had a mixture of defence and prosecutorial experience. Collectively they had over 400 years of post-qualified experience (PQE). This ranged from six to 39 years’ PQE, with all but two respondents’ experience exceeding 10 years. Access to the respondents was facilitated by two gate-keepers; a barrister/recorder from a local city chambers [R-1], and a colleague from Birmingham Law School with links to those working in the profession. I was able to ask these gate-keepers to select respondents with a sufficient amount of experience of preparation and advocacy in Crown Court trials so as to make the interviews worthwhile. The gate-keepers approached and introduced my research to the colleagues or contacts they considered suitable, and then passed on the details of these prospective respondents to me. I then contacted them directly by email, officially confirmed their willingness to participate, and arranged a mutually convenient time and place to conduct the interview.

When designing the interview guide I worked closely with R-1.<sup>60</sup> This helped to ensure that I asked questions relevant to criminal practitioners’ experiences and used appropriate language throughout the interview so that I could elicit valuable responses. I was keen to ask as many questions on the interview guide as possible, but was also careful to allow the respondents the time to raise issues which they felt were relevant. Where appropriate, I adapted the interview guide between interviews so that I could incorporate and develop new insights and ideas obtained from previous respondents. Within the interviews, I encouraged the respondents to draw on their own practices, as well as their direct and anecdotal experiences throughout their professional lives. Given the vastness of the respondents’ collective PQE, this approach has enabled me to obtain an insight which goes beyond the personal working practices of the 18 criminal practitioners interviewed.

The interviews were recorded, and I transcribed them myself within two working days of each being conducted. I was careful to remove any references to specific court centres, colleagues, and names of clients or witnesses in order to keep the identities of the respondents, and those involved in their cases, confidential. It was agreed that identifiers such as ‘B-1’ would be used to quote from or refer to specific interviews. Since the respondents discussed, often in some depth, their experiences in court, it is possible that they remain identifiable by their colleagues. This was discussed with the respondents prior to them taking part, and they consented to give an interview on this basis. I organised and

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<sup>58</sup> Similar, again, to that of Darbyshire P. Judicial case management in ten Crown courts. CLR 2014;1:30-50.

<sup>59</sup> In order that the respondents’ roles can be identified and their comments/standpoint can be assessed accordingly, the following identifiers are used: J for trial judge, B for barrister, R for recorder/barristers, PS for CPS solicitor and DS for defence solicitor.

<sup>60</sup> The interview guide is available on request: [s.fairclough@bham.ac.uk](mailto:s.fairclough@bham.ac.uk)

coded the data using computer-assisted qualitative data analysis software, NVivo. I used thematic analysis in order to identify issues and practices of interest.<sup>61</sup>

## Findings

While my findings cannot be generalised across the country, it does appear that in the two cities where my interviewees worked it was almost unheard of for defendants to give evidence by live link. This was unequivocally expressed by one respondent with 38 years of PQE:

‘It doesn’t happen. I’ve never had a case where it has happened and I’ve never thought it was necessary for it to happen...’ [J-1]

I asked each respondent if they had been involved in any trials where the defendant had given evidence in this way, or whether they had heard of this happening in other trials. Two of the respondents, B-1 and B-4, recounted successfully applying for and using the live link provision with vulnerable defendants on one occasion each. B-1’s experience was more unusual than a simple application for live link. The application, initiated by him as counsel for the prosecution, was for the defendant to attend the entire trial via live link,<sup>62</sup> due to his ill health and otherwise inability to stand trial at all. The application was ultimately successful (though it became a defence application) and the defendant also gave his evidence in this way. Two further respondents had anecdotal experience of a colleague obtaining use of the live link for a vulnerable defendant. One had heard about B-1’s trial, and another recalled a trial where a vulnerable defendant used the live link to testify against a co-defendant. Of the 18 respondents, therefore, just three separate incidents of the live link being invoked were recalled, one of which (B-1’s) was more complex than a simple application for live link. By contrast, all of the respondents had multiple personal and anecdotal experiences of a vulnerable non-defendant witness giving evidence via the live link. This raises the question of why the use of live link for defendants is so rare.

The more restrictive statutory criteria pertaining to defendant witnesses were expected to be, and were cited in interview as, one reason for the lower uptake of the provision for defendants. As well as this, other practical differences between the defendant and non-defendant witnesses are relevant. First, unlike non-defendants, defendants are not compellable as witnesses. This is of potential significance since, as noted above, it may be the case that vulnerable defendants choose not to testify.<sup>63</sup> This would result in a reduction in the size of the cohort of defendants giving evidence whom are vulnerable and thus eligible to apply for the assistance of the live link. Additionally, it is likely, generally, that

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<sup>61</sup> See: Braun V and Clarke V. Using thematic analysis in psychology. *Qualitative Research in Psychology* 2006;3:77-101.

<sup>62</sup> Authority for which comes from *R v Ukpabio* [2007] EWCA Crim 2108.

<sup>63</sup> The respondents were asked in interview whether they as defence lawyers did, or anecdotally knew whether defence lawyers would, advise vulnerable clients not to give evidence. The responses were mixed, suggesting that some lawyers may advise clients against giving evidence and some may encourage clients to do so.

there are a greater number of non-defendant witnesses than defendants in many trials. As a consequence, it is probable that more non-defendant witnesses will qualify for and use the live link provision, as there is a bigger pool of them from which to begin.

Despite the above variables, one might have expected, given the prevalence of vulnerability among defendants, that all of the respondents would have had at least some experience of vulnerable defendants giving their evidence by live link. All but one<sup>64</sup> of the respondents had been in practice since the provision for defendants to give evidence by live link came into force some eight years prior to the interviews taking place. Additionally, all Crown Court centres have the facilities available to accommodate its use<sup>65</sup> and thus this provision is one which can be invoked at no extra financial cost.<sup>66</sup> The substantial disparity experienced by the respondents in the use of the live link provision by vulnerable participants giving evidence would seem, therefore, to require an explanation extending beyond the relatively narrow legal provision that has been made for vulnerable defendants. My interviews provide the basis for such an explanation. They reveal three main barriers which inhibit a consideration of and application for the live link for vulnerable defendant witnesses. The first is what appears to be a widespread lack of awareness of the very existence of the provision enabling vulnerable defendants to give evidence by live link. The second is the poor identification of defendant vulnerability within the criminal justice system, and particularly by criminal defence lawyers. The third barrier identified is a perception among the legal profession that to permit evidence to be given via live link is of neither a practical nor tactical benefit to vulnerable defendants on trial.

### ***Barrier 1: Lack of awareness of the defendant provision***

It became evident throughout the interviews that some criminal practitioners are not aware of the legal authority permitting the live link provision to be invoked for vulnerable defendant witnesses. This occasionally resulted in slightly awkward interview exchanges, as it became necessary to explain the existence of this authority in order to elicit views about it. The following extract from an interview with a barrister with 21 years' PQE exemplifies this:

R: 'I think the live link should be available [to defendants]...'

Q: 'There is a provision that's already been inserted into the YJCEA for defendants to use the live-link...'

R: 'Oh, is there?'

Q: 'Yes, s33A. It's more restrictive than the provision for non-defendants though still.'

R: 'And when was that brought in?'

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<sup>64</sup> PS-2 had been in practice for six years.

<sup>65</sup> See: Law Commission, Unfitness to Plead Report – Appendix B: Impact Assessment (2016) London: LAWCOM0043, p.63.

<sup>66</sup> Unlike intermediaries, for example see: Cooper P and Wurtzel D. (n 3).

Q: 'The Police and Justice Act 2006 legislated for it.'

R: 'Oh, ok.'

Q: 'I wonder...well, it doesn't seem to be well known about or used?'

R: 'No, it's not.'

**[B-4]**

This exchange is revealing in two ways. First, and most apparently, this respondent was unaware of the existence of the statutory provision for defendants to give their evidence by live link. She was not alone in this regard. Other respondents also revealed their lack of awareness of the provision throughout the course of the interview:

'It's certainly a provision which I was really unaware of to be honest.' **[PS-2]**

'I didn't think [special measures] were available [to defendants]?' **[DS-2]**

The second way in which the above exchange, involving B-4, is revealing is that this barrister was one of the two respondents who reported having successfully secured the use of the live link for her client to give evidence. She had, therefore, done so without knowledge of the statutory provision allowing such. Instead, B-4 described how the vulnerable defendant in her case was authorised to give evidence via the live link by 'the judge us[ing] his inherent power to ensure a fair trial.' This demonstrates a lack of awareness of s33A by her and also the trial judge, who presumably felt compelled to rely on his inherent power to permit the use of the live link for the defendant rather than relying on the statutory provision.

B-1, the other barrister who secured the use of the live link for a vulnerable defendant, also recalled that 'it took [him] a long time to convince the judge that the power existed.' Quite what was meant by this is uncertain. It was in this case the live link was used for the duration of the trial, and not just for the defendant giving evidence. Perhaps, therefore, it was the decision in *R v Ukpabio*<sup>67</sup> that the judge was unfamiliar with, rather than s33A itself. Either way, it appears that the judge's awareness of the support available to a vulnerable defendant was limited.

When asked why the live link provision was so seldom used other respondents also attributed blame to a lack of awareness of its existence:

'It's not on their [defence counsel's] radar in my experience.' **[DS-2]**

'I don't think that they [defence counsel] would have even considered it. They may not even know that the law permits it, sadly to say.' **[J-1]**

'I think it would appear that most defence advocates are [unaware] too. I think if there was more of an awareness then it would be used more.' **[PS-2]**

'Solicitors and defence counsel are quite hot on things like intermediaries now...[but] in terms of basics [live-link] it always seems to pass people by.' **[B-3]**

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<sup>67</sup> See: (n 62). In exceptional circumstances a defendant may participate in their trial by live link.

It is difficult to derive from the interviews quite how many of the respondents knew of the provision's existence, since asking if they had experienced its use signified its existence to those who were otherwise unaware. Though some of the respondents openly admitted their lack of awareness, others perhaps concealed it. Having said this, it has been demonstrated that there were some criminal practitioners who did know that the live link provision is available to vulnerable defendant witnesses, but still had not sought out or witnessed its use. In order for the provision to be invoked, both defence advocates and the trial judge must additionally consider the defendant to be sufficiently vulnerable so as to qualify for its use.

### ***Barrier 2: Identification of defendant vulnerability***

Many research projects have revealed that the identification of vulnerable participants in the criminal justice system by those working within it is deficient, partly owing to a lack of systematic screening and training.<sup>68</sup> For some categories of witness this is not as problematic, since their vulnerability is easily recognised without screening. For example, witnesses aged under 18 are automatically classed as vulnerable under the YJCEA and thus their initial identification is simply one of age. The recognition of undiagnosed mental health issues or 'a significant impairment of intelligence or social function' for the purposes of the Act remains much more difficult. This is particularly so given that some such problems can be absent visual or behavioural cues and so remain somewhat hidden.<sup>69</sup> Furthermore, some individuals seek to conceal their vulnerability for fear of ridicule or embarrassment.<sup>70</sup> The combined result of these issues is that vulnerable participants often lack the support to which they are entitled. Much valuable work has been done over recent years in an attempt to combat this, by, for example, raising awareness of issues of vulnerability, (re)educating criminal practitioners, and highlighting examples of good practice.<sup>71</sup>

As part of the interviews conducted for this research project, the respondents were asked whether, in theory, they thought that a cohort of defendants exists who, while they are fit for trial, are unable to effectively participate in the proceedings. All of the respondents answered in the affirmative; conveying that, in their view, such a cohort of vulnerable defendants does, or is at least likely to, exist. They also agreed that special measures could help ensure that such vulnerable defendants can participate effectively. Despite these

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<sup>68</sup> See: Sanders A, et al. *Victims with Learning Disabilities*. University of Oxford: Oxford Centre for Criminological Research; 1997; Jacobson J. No-one Knows: Police Responses to Suspects Learning Disabilities and Difficulties – A Review of Policy and Practice. Prison Reform Trust 2008; p.27-28; Lord Bradley. The Bradley Report. Department of Health 2009; p.20; Jacobson J and Talbot J. (n 4) p.5-6, 13-14; Wigzell A, Kirby A and Jacobson J. (n 4) p.46.

<sup>69</sup> Wigzell A, Kirby A and Jacobson J. (n 4) p.34.

<sup>70</sup> Talbot J. Fair Access to Justice?: Support for Vulnerable Defendants in the Criminal Courts. Prison Reform Trust 2012; p.17; Wigzell A, Kirby A and Jacobson J. (n 4) p. 34.

<sup>71</sup> For example, see the toolkits produced by The Advocate's Gateway: <http://www.theadvocatesgateway.org/>

assertions, when asked to reflect on defendant vulnerability encountered in their own practice, some respondents seemed less able to recognise it:

‘People tend to prey on the vulnerable, so victims are more vulnerable than defendants generally.’ **[R-4]**

‘...I think we just have a preconception about defendants as being in a certain way and they won’t need them, do you know what I mean? But I suppose that might not necessarily be the case. You could have a vulnerable defendant...’ **[PS-2]**

These quotes indicate that, in practice, defendants may not always be viewed by practitioners as belonging to a group which is vulnerable. This is not to say that defendants are never viewed as vulnerable by the legal profession. Some respondents noted that more obvious and easily identifiable conditions of vulnerability are likely to lead to a defendant being recognised as such:

‘Obviously, I suppose, if it’s a very vulnerable defendant the chances are he won’t be tried. So I think the system weeds those out a little bit.’ **[J-3]**

‘The position is different if the defendant has an obvious vulnerability – if they’re very young or obviously not very smart.’ **[J-2]**

Further evidence that vulnerability is, at least sometimes, identified comes, of course, from the fact that a small number of the respondents in this research had some experience of the live link provision being successfully invoked for defendants. Furthermore, half of the respondents had been directly involved in trials where defendants had given evidence with the assistance of an intermediary.<sup>72</sup> An application for the use of an intermediary also requires an initial identification of vulnerability.

Having said this, some of the respondents commented on the generally poor identification of defendant vulnerability. It was attributed to a lack of consideration of vulnerability within the profession, and specifically by defence lawyers. In the following examples, the respondents discussed defendants who *ought* to have been identified as vulnerable:

‘...there’s a problem generally about defence lawyers properly assessing the capability of their clients to engage with the trial process. I think there’s a real issue there; particularly with youths, but not just youths.’ **[DS-2]**

‘I don’t think the defendant is given sufficient consideration; because frequently they are young, vulnerable or whatever.’ **[J-5]**

It is interesting that these examples included ‘youths’ or the ‘young,’ since, according to J-2 above, this group is part of a category of ‘obvious vulnerability.’ As has been discussed, defendants under 18 are categorised as being vulnerable and can use the live link if they are

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<sup>72</sup> And the limited available evidence suggests that intermediary use is becoming ever more common, see: Cooper P and Wurtzel D. (n 3) p.16; Plotnikoff P and Woolfson R. *Intermediaries in the criminal justice system: Improving communication for vulnerable witnesses and defendants*. Policy Press, 2015, p.249.

unable to participate effectively as a witness (and it is considered to be in the interests of justice). This finding suggests, therefore, that young defendants, despite the ease with which they can be identified, are not always considered by criminal practitioners as unable to participate without assistance where they perhaps should be. Support for this can be derived from the recent review on advocacy in youth proceedings. It was found that, even in these proceedings, which by definition only include defendants under the age of 18, there is deficient identification of the defendant's needs.<sup>73</sup> This evidence of advocates failing to recognise that child defendants are (potentially) vulnerable and unable to participate as per s33A is indicative that the chances of an adult defendant with undiagnosed mental health problems being identified are slim.

The routine screening of defendants is thus a much desired and needed intervention.<sup>74</sup> It cannot be said, however, that the use of the live link provision will necessarily increase as a result. Some respondents did identify that vulnerable defendants exist, revealing that they had direct experience with them:

'There are people vulnerable and you question whether they should even be there.'  
[B-2]

'I represent a very great number of very dim, disadvantaged, damaged defendants'  
[B-1]

Despite these assertions, however, neither of these quoted barristers had applied, on behalf of a defendant they were representing, for the use of the live link.<sup>75</sup> Knowledge of the law and awareness of a defendant's vulnerability may, therefore, be just a part of the picture. Practitioners are only likely to apply for the live link if they view the defendant giving evidence in this way as advantageous. A striking finding of this research is that practitioners rarely see things this way.

### ***Barrier 3: The perception that live link is not beneficial to (vulnerable) defendant witnesses***

If advocates do not consider the live link for the defendant to be helpful, they are unlikely to be proactive in seeking its use.<sup>76</sup> Within this subsection I consider the perceptions highlighted by respondents regarding the usefulness of the live link provision for vulnerable

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<sup>73</sup> Wigzell A, Kirby A and Jacobson J. (n 4) p.47.

<sup>74</sup> A new Liaison and Diversion scheme is being trialled in 10 areas across England, with the potential for it to be rolled out nationally in 2017. See: NHS England's Liaison and Diversion Standard Service Specification 2015 (version 8C – in draft).

<sup>75</sup> Though B-1 had successfully applied for the use of an intermediary by a defendant.

<sup>76</sup> Especially given that the application needs to be made to the judge on paper, ahead of trial. It is perhaps particularly unlikely that defence advocates funded by legal aid will apply for a measure they do not view as beneficial, given their poor remuneration and the potential effect this has on the quality of their preparation of cases for trial. See: Newman D. *Legal Aid Lawyers and the Quest for Justice*. Oxford: Hart Publishing, 2013, p.18.

defendants. This is split into practical benefits, or rather non-benefits, and tactical non-benefits.

### *Practical (non)benefit*

The practical benefits of live link for vulnerable defendants might seem obvious in the abstract. Vulnerable defendants could, for example, be suffering from attention deficit hyperactivity disorder (ADHD) and thus be easily distracted by the multiple stimuli within a crowded court. Alternatively, they might have an anxiety disorder which is intensified by the requirement to give evidence in a courtroom filled largely with strangers. Aside from the two respondents who used the live link provision with vulnerable defendants, very few<sup>77</sup> of the respondents seemed able to identify the potential benefits of the live link provision for a defendant. As one put it:

‘If the defendant is going to be sitting there through the trial in the dock...just trying to think of a situation where, despite sitting there, he would feel more comfortable giving evidence by live link – I don’t know.’ **[J-3]**

The reference in this quote to the defendant ‘sitting there’ throughout the trial is important in understanding why defence lawyers see no practical benefit of the live link provision for their clients. In the context of discussions about non-defendant witnesses, the respondents described the greatest advantage of the live link provision as the enabling of a non-defendant witness to give live evidence without ever entering the courtroom.<sup>78</sup> This motivation for applying for live link for non-defendants appears to have resonated with many legal practitioners, resulting in them having difficulty seeing what point it might have for defendants. In short, the defendant’s presence in court throughout the trial is regarded as nullifying the potential value of live link:

‘[They] never [give evidence] over live link because they’re in court for the entirety of the proceedings anyway...’ **[R-2]**

‘If they are there anyway then something like live link would be irrelevant.’ **[B-3]**

‘...when the defendant won’t be giving his evidence until at least half way through a trial...he’s had to sit and have the family...making sure they get the best seats to stare at him, and so when he gets to the witness box...it’s almost a given that by then he will be used to all the staring, etc. The tomatoes have been thrown for three weeks; one more isn’t going to matter.’ **[R-3]**

‘...it is different because they are there throughout. By the time it is their time to give evidence they are familiar with how it all works...’ **[J-5]**

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<sup>77</sup> One CPS solicitor [PS-1] shared the following in interview: ‘I couldn’t help thinking when looking at one of the defendants; he would be much more at ease if he could have given his evidence from somewhere that wasn’t in open court.’

<sup>78</sup> Mirroring research findings from: Hall M. (n 53) p.67.

Despite the claims made by the respondents in this research, a vulnerable defendant's presence in the courtroom does not mean that they will then be able to give evidence effectively in this environment. It may be that an assumption that the defendant is a repeat-player in the Crown Court underpins their assertions, since a one-time defendant would probably not become 'familiar' with the court procedures by sitting through the first half of a trial, as is suggested by R-5. However, even for a defendant well-versed in Crown Court proceedings it is likely that there remains a marked difference between sitting passively through the prosecution case and actually being able to give evidence in the court themselves.<sup>79</sup> It is probable that this difference is magnified if the defendant is also vulnerable. This, in the majority of the respondents' experience, is a difference not considered within the profession.

### *Tactical (non)benefit*

In addition to overlooking the potential benefits of live link for vulnerable defendants, the respondents tended to regard this evidential device as, if anything, tactically detrimental. They felt that jurors would not understand why a defendant would leave court to give evidence in this way and that this would arouse their suspicions:

'It's going to look odd if at trial you have a defendant sitting in the dock who then goes out of court to give evidence to the jury. **[R-1]**

'...the jury would be thinking "why on Earth has he done that?"' **[B-2]**

'If they're watching you over a TV screen and they've seen you in court all week, I think the attitude would be 'well what's he playing at, what's going on?' **[J-3]**

'They're in court the whole time anyway so it would be strange to want live-link'

**[R-3]**

Given the central role of the jury in Crown Court trials, their view of those giving evidence has always been considered as something of paramount importance.<sup>80</sup> Counsel thus wishes to avoid any behaviour which ignites distrust or misunderstanding concerning their witnesses or defendant(s). The prevalent belief among those interviewed that it would be damaging for the defendant to leave court to give their evidence remotely thus makes it unlikely that this approach will be sought.

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<sup>79</sup> Interestingly, once prompted to think about how the live link may benefit a vulnerable defendant, one respondent [J-1] interviewed considered that they could give a judicial direction to explain that there's a difference between giving evidence in court and 'sitting in the court in the dock doing nothing, saying nothing.' J-2 also said that he might ask the jurors to consider 'how you feel watching the case as compared to the time you had to stand up in front of everyone and give your oath – how much more nervous you felt at that point.' This demonstrates that raising the awareness of criminal practitioners about the potential benefits of live link for defendants could change their attitudes towards its use.

<sup>80</sup> Cashmore J. The use of video-technology for child witnesses. *Monash University Law Review* 1990;16:228-250, p.241.

The respondents seemed similarly concerned with the jury's perception of prosecution witnesses who had given their evidence remotely by live link and then sat in the public gallery to watch the remainder of the case. This was described as a something of a 'head in hands moment' for the prosecution as it risked the jury deeming the witness' use of the measure as insincere, and subsequently undermining their credibility:

'I think there would be a perception that it's an odd thing to do. If one of the grounds for using live link is that you don't want to be in court and then you go and sit in court and watch, it creates a question of how appropriate the use of the special measure was in the first place.' **[R-1]**

'The [prosecution witnesses] want this special measure, they want that special measure. And then they turn up in the bloody public gallery to watch [the defendant] give evidence. Some public galleries are upstairs and out the way so OK fine, but where the jury can see - urgh. And I swear to god [the jury] thinks "well what was all that about then? She can't be that scared."' **[R-3]**

The purpose of the live link among the profession is to keep a witness out of court entirely. The profession also perceives this to be the view held by the jury. This renders the use of the live link problematic to criminal practitioners when the beneficiary of the measure will be physically present in court for much of the trial. The solution for non-defendant witnesses may be to advise them against entering the courtroom, but this is not an option for defendants.<sup>81</sup>

Another tactical objection that the respondents in this research voiced in terms of the live link provision related to their desire to achieve the defendant's 'best evidence.' A tension exists between the way that best evidence is conceptualised in the 1999 Act and the belief as to what this is in practice. In the Act, references to the quality of the evidence are to its 'completeness, coherence and accuracy.'<sup>82</sup> It is well documented in the literature, however, that the prevalent belief among the legal profession is that 'best evidence' constitutes that which is extracted live, in court, in front of the jury.<sup>83</sup> It is this latter position that was well supported by the respondents in this research, for instance:

'I think that trial lawyers tend to think that the best evidence is live evidence in court...' **[J-4]**

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<sup>81</sup> As per Criminal Practice Direction 14.E.3 (2015) trials on indictment will only be continued in the absence of the defendant if it is a step which is unavoidable. In circumstances where the defendant is absent, the court should consider Lord Bingham's judgment in *R v Jones* [2003] UKHL 5.

<sup>82</sup> YJCEA, s16(5).

<sup>83</sup> See: Davies G. The impact of television on the presentation and reception of children's testimony. *IJ Law & Psychiatry* 1999;22(3-4):241-56, p.251; Hoyano L Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses. *CLR* 2000:250-273, p.268.

Correspondingly, evidence given via the live link was thought by them to lose its impact on the jury. This is viewed as problematic since it is often the impact of the evidence that is seen by the profession as fundamental to winning a case:<sup>84</sup>

‘If [the defendant is] giving evidence, he will want to do so in the way...most persuasive – face to face with the jury.’ **[R-1]**

‘I think there may be a reluctance, however, to make an application because the defendant, however vulnerable he may be, or his lawyers, would perceive there would be a [loss of] impact on the jury because they haven’t given their evidence in court.’ **[J-1]**

R-3 illustrated her view, that giving evidence by live link diminishes its impact, by comparing how engaged the audience is at the cinema versus at the theatre. At the cinema, the viewers watch a big television screening (similar to the live link), and at the theatre the actors are physically present and performing live (like witnesses in court):

‘[P]eople go to the cinema and look at their mobile phones and eat popcorn, [while] people don’t tend to do that so much at the theatre.’ **[R-3]**

These quotes show a clear preference for live evidence in court. Despite this, all the respondents had been involved in multiple Crown Court trials involving prosecution witnesses giving their evidence by live link. This shows that concerns surrounding the evidence’s impact do not seem to impede the use of this measure by non-defendant witnesses in the same way that they seem to for defendant witnesses. This is so notwithstanding the existence of alternative measures (such as screens)<sup>85</sup> which could be used by non-defendant witnesses instead, which are not available to the defendant.

One way in which the differences in the use of the live link might be explained is through a consideration of the process through which special measures are obtained by vulnerable parties to criminal proceedings. For non-defendant witnesses, it is the police who first assess the potential needs of victims and witnesses with regards to special measures.<sup>86</sup> If they decide that there is a potential case for the application of special measures, an MG2 form<sup>87</sup> must be completed, with section three requiring the officer to consider which special measures are likely to be of assistance. This initial assessment by the police, involving a discussion with the witness to obtain and record their views, sets the process in motion for the non-defendant witnesses obtaining special measures.<sup>88</sup> Non-defendant witnesses are

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<sup>84</sup> Burton M, Evans R and Sanders A. (n 18) p.404 practitioners view is that ‘special measures [used by prosecution witnesses]...reduce the impact of children’s evidence making a conviction *less likely*.’

<sup>85</sup> YJCEA, s23.

<sup>86</sup> The MG11 (witness statement form) requires the completing officer to consider whether the witness ‘requires Special Measures Assessment as a vulnerable or intimidated witness.’ See:

[http://www.met.police.uk/foi/pdfs/disclosure\\_2012/feb\\_2012/2012020000618.pdf](http://www.met.police.uk/foi/pdfs/disclosure_2012/feb_2012/2012020000618.pdf)

<sup>87</sup> See: <http://library.college.police.uk/docs/appref/MoG-final-2011-july.pdf> p.49-51.

<sup>88</sup> Ericson R and Haggerty K. *Policing the Risk Society*. Oxford: Clarendon Press, 1997, p.31-38 discuss how ‘communication formats’ limit police discretion in decision making. The paper trail of MG11 and MG2 forms

also likely to come into contact with Victim Support or Witness Services who will provide them with further advice regarding the available special measures provisions. Some of the respondents interviewed made reference to this, stating that this process can tie prosecutors' hands in terms of which special measure they must ultimately apply for:

'As far as the police and CPS go there is an assumption that a particular special measure, usually giving evidence by way of live link, will be applied for...' [J-1]

'Well it's very easy isn't it? If you're sitting at the end of the phone and you're employed in a witness care capacity, and you've got a domestic violence victim saying I don't want to come to court and give evidence – what is the biggest thing in their armour? The best thing for them to do is to turn round and go "well actually we can offer you special measures."' [PS-2]

Where the defendant is concerned, an initial assessment by the police about a suspect's vulnerability may be recorded in their custody record. The responsibility for considering special measures then rests solely on the defence solicitor or barrister. The defendant does not receive support from an organisation equivalent to Witness Services, who may suggest live link as a way to proceed. This means that the defendant does not expect anything other than what is offered by his legal representative, who can ensure that the possibility of live link is never raised. Thus, even defendants who have made multiple appearances in the Crown Court on previous indictments can remain ignorant to the provision's potential availability. It remains plausible, therefore, that the profession's concerns about the impact of a defendant's evidence can still trump use of the live link for a defendant where they cannot for a non-defendant witness.

The avoidance of the live link provision by defence advocates who are aware of its existence and their client's eligibility for its use might, then, be best described as tactical. If their aim is to ensure that the defendant's evidence has maximum impact on the jury, and they are of the view that this is done best live in court, then they will not invoke its use. Much more emphasis will be placed on the defendant making a good impression on the jury when testifying. This is evident from the following quotes:

'I don't think defence barristers would ever consider giving evidence via live link because you lose that personal connection. What you want your client to do is to have that connection with the jury and have them feel some form of empathy.' [R-2]

'I used to say to clients when I was defending that if the jury liked them that would be half the battle, and that is true, sentiment plays a huge part in your prospect of being acquitted...But if [the idea of live link] does arise [the defence] probably think well I want this person to present themselves sympathetically and it's going to be much harder for them to do that if they do it on a live link.' [J-2]

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ensure that the police set the case up along a track that means special measures will be applied for where they are needed.

‘Trials are often won or lost on whether they like the defendant and whether they seem truthful or not. I think that comes across much better in open court.’ **[DS-1]**

A small number of respondents also revealed that defence counsel may even seek to showcase a defendant’s vulnerability to the jury by putting them on the stand:

‘You want to create an impression that excites sympathy...I’ve seen defendants do really badly, be in tears, virtually admit the offence, and the jury feel sorry for them and acquit them.’ **[J-2]**

‘If you’ve got a defendant there who is vulnerable and has one difficulty or another – emphasising that to the jury by having them there in front of them for them to see, in open court, may give you another chance at the jury saying “well he may be technically guilty but we won’t convict him because we feel bad for him.”’ **[DS-2]**

‘I’m forever saying to clients “look, you can’t pretend to be something you’re not, the jury just want to hear from you.” ...and you say to the jury “he’s just dim! Don’t convict him because he’s stupid.”’ **[B-1]**

The idea here appears to be that even in cases where the prosecution are likely to discharge the burden of proof to the standard required for a finding of guilt, the defendant presenting as vulnerable may tempt the jury into acquitting them anyway. The use of the live link, and subsequent (perception of a) loss of impact, would likely be deemed as subverting this goal. Such a focus on impact and tactics by some defence advocates thus provides a potential barrier to the use of the live link by vulnerable defendants.

## **Discussion**

One of the key findings shown above is the lack of awareness among some interviewees of the existence of the live-link provision for vulnerable defendant witnesses. Further indication that there is an awareness deficit within the profession comes from an article written by Felicity Gerry (QC), a high profile, practising barrister. The piece, titled ‘Vulnerable Defendants and the Courts,’<sup>89</sup> contains a section devoted to considering the measures that are available to assist vulnerable defendants. Within this section, the availability of the live link to vulnerable defendants is entirely omitted from discussion. As a result, a lack of awareness of the provision is at risk of being further embedded and proliferated among those of the profession who peruse this article.

In a similar vein, the recent Youth Proceedings Advocacy Review<sup>90</sup> brings together a series of interviews and surveys undertaken with barristers, solicitor advocates and other professionals working within the criminal courts. Section 4.2.3 discusses the ‘limited

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<sup>89</sup> See: Gerry F (QC). Vulnerable defendants and the courts. (The Justice Gap, 20 April 2012)

<<http://thejusticegap.com/2012/04/vulnerable-defendants-and-the-courts/>> accessed 17 June 2015.

<sup>90</sup> Wigzell A, Kirby A and Jacobson J. (n 4).

courtroom provision for young witnesses and defendants.<sup>91</sup> Yet there is no mention anywhere in the report of the defendant live link provision. Moreover, a barrister quoted earlier in the report asserts that 'it's only very recently that a lot of advocates even appreciated that you could get special measures for defendants, so I think people don't ask for them.'<sup>92</sup> While this statement refers to special measures generally, it is by implication inclusive of the defendant live link provision under the YJCEA. All of this may further suggest that there is a lack of awareness of the provision among criminal practitioners. Alternatively (and perhaps additionally), the absence of references to the availability of the live link in both the Youth Proceedings Advocacy Review and Felicity Gerry's article may signify its perceived unsuitability for defendant witnesses. If the usefulness of the measure is viewed by many as redundant in the context of defendant witnesses, it becomes an unlikely candidate for discussion by advocates considering how best to protect vulnerable defendants within the system.

Another finding warranting further discussion relates to the identification of the potential or actual vulnerability of defendant witnesses by the legal profession. R-4 suggested that, generally, victims are inherently more vulnerable than defendants. This portrays a very simplistic set of stereotypes about offenders and victims with echoes of Nils Christie's work on ideal victims and suitable offenders. He describes how, at a social level, an important attribute for the construction of the 'ideal victim' is weakness.<sup>93</sup> This weakness could stem from the victim being sick, old or very young; attributes which today are often associated with vulnerability. Christie also describes an ideal offender as someone who 'differs from the victim...[and] is, morally speaking, black against the white victim.'<sup>94</sup> Such a depiction of ideal victims as being vulnerable, and ideal offenders as the opposite of victims (and thus not vulnerable), may result in some defendants struggling to have their vulnerability recognised within the criminal justice system. To dichotomise victims and defendants in this way is false, since victims are not always vulnerable, and defendants often are; as vast amounts of practitioner and academic research has highlighted.<sup>95</sup> Furthermore, the reality is that victim and offender populations often interchange,<sup>96</sup> and thus any vulnerability should be recognised and responded to notwithstanding the position of the individual in the criminal case.

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<sup>91</sup> Wigzell A, Kirby A and Jacobson J. (n 4) p.50-51.

<sup>92</sup> Wigzell A, Kirby A and Jacobson J. (n 4) p.31.

<sup>93</sup> Christie N. On Society and the Victims of Crime. In: Fattah E. (ed) *From Crime Policy to Victim Policy*. London: Macmillan Press Ltd; 1986, p.19.

<sup>94</sup> *ibid.* p.26.

<sup>95</sup> For example Green S. Crime, Victimization and Vulnerability. In: Walklate S. (ed) *Handbook of Victims and Victimology*. Devon: Willan Publishing, 2007, p.91-113 discusses how the group most at risk of victimisation are 'the heavily offending, young male, economically disadvantaged.'

<sup>96</sup> This is referred to in the criminological literature as the 'victim-offender overlap', see: Berg M, et al. The victim-offender overlap in context: examining the role of neighbourhood street culture. *American Society of Criminology* 2012;50(2):359-390; Tillyer MS and Wright EM. Intimate partner violence and the victim-offender overlap. *Journal of Research in Crime and Delinquency* 2014;51(1):29-55.

The initial part of PS-2's reflection on her experience of vulnerable defendants also seems consistent with this set of false stereotypes which depict (all) defendants as not vulnerable and thus not in need of special measures. The idea of a vulnerable defendant in practice seems to be somewhat of a peculiarity to her prior to the interview, but her response is demonstrably reflective. She considers how this perception of defendants might not actually reflect the reality, and thus acknowledges the possibility of a vulnerable defendant in practice. The fact that this CPS solicitor seems to reflect for the first time on this issue in interview suggests that she had not been required to do so in the course of her work previously by, for example, a defence advocate arguing for special measures for their client or a trial judge permitting them. This observation comes with the caveat that this respondent had been in practice for only six years. However, given that the treatment of the vulnerable in criminal trials has become ever more topical in recent years,<sup>97</sup> and yet she had still not been forced to reconsider her view, it is argued that this finding remains one of significance.

The final areas in need of discussion relate to the respondents' perceptions of a lack of practical advantage to be gained from employing the live link for vulnerable defendants, and instead the apparent tactical disadvantages. The absence of leadership offered by the appellate courts with regards to the utility of the live link provision is perhaps relevant to the attitudes of the criminal practitioners interviewed in this research.<sup>98</sup> Where intermediaries are concerned, the appellate courts have, as previously discussed, clearly advocated and paved the way for their use by vulnerable defendants. Furthermore, effort has been made to bridge the shortfall in their supply when a suitably matched intermediary cannot be found for a vulnerable defendant.<sup>99</sup> The distinct lack of judicial support for the defendant live link provision, and the consequent lack of guidance regarding its use,<sup>100</sup> seems to be reflected in the legal profession's uncertainty as to its benefits.

R-3 suggests that the jury would pay more attention to a witness giving evidence in court as opposed to by live link. This applies, she suggests, in much the same way that a theatre audience pays more attention to a play than a cinema audience does to a film, where they are distracted by popcorn and mobile phones. It is perhaps true that greater attention may be paid by theatre-goers to a play than by viewers at a cinematic screening, as a direct result of the presence of the actors themselves. However, applying this analogy to the jury's receipt of evidence is problematic. Whether the evidence is delivered live in person or via the live link, the jury remain in the courtroom. The barristers still conduct their examination

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<sup>97</sup> In addition to the work of the Advocate's Gateway and others such as the Prison Reform Trust, the Court of Appeal is reformulating the way vulnerable witnesses can be cross-examined. See, for example: Henderson E. Bigger fish to fry: should the reform of cross-examination be expanded beyond vulnerable witnesses? *IJEP* 2015;19(2):83-99

<sup>98</sup> I am grateful to the anonymous referee for highlighting the importance of this point.

<sup>99</sup> The Court of Appeal stated that a trial judge should 'play the part of the role which the intermediary, if available, would otherwise have played' see: *R v Cox* (n 42) at [22]; see also 'guidance for future applications' in *R v GP and 4 others* (2012) T2012 0409 at [66].

<sup>100</sup> Similarly, there is no Advocate's Gateway toolkit for the defendant live link provision as there is for intermediaries, see: <http://www.theadvocatesgateway.org/toolkits>.

and cross-examination from the courtroom; the judge still demands order; popcorn and mobile phones remain prohibited; and the jury is still required to evaluate the evidence as part of their deliberations on the defendant's guilt. Thus, the atmosphere and conditions in which the jury receives evidence remain constant, and it is merely the medium through which that evidence is delivered that is altered.

It appears, therefore, that the accuracy of the profession's perception of 'best evidence' and evidence's impact is perhaps of questionable validity.<sup>101</sup> The 'sanctity of the jury room'<sup>102</sup> acts as a very real barrier to assessing the effect, if any, of the impact of the medium through which evidence is delivered on the jury. In an attempt to gauge its significance Ellison and Munro conducted mock jury research,<sup>103</sup> setting up various conditions through which testimony was received, including via pre-recorded video evidence, live link, from behind screens, and without the use of any special measures. In the jurors' deliberations, it was found that references to the way in which the witnesses testified were rarely made.<sup>104</sup> This suggests that, for these participants, significance was not explicitly placed on the method by which evidence was given. However the potential for loss of impact arguably remains as it may operate subconsciously and therefore becomes essentially unmeasurable. This makes the legal profession's belief that testimony is more impactful when delivered in court difficult to counter in its entirety, since its accuracy can be neither proved nor disproved.

The ideals of 'best evidence' from within the profession are not held exclusively in relation to defendants giving evidence. Temkin, in her research with barristers involved in rape trials, found a 'unanimous and strong opposition' to making live link routinely available to witnesses in rape trials, saying it would make prosecution more difficult and 'diminish the effect of the evidence.'<sup>105</sup> Similarly, Roberts et al.'s research into the outcome of CPS applications for special measures found that the judge refused requests for live link for a group of vulnerable adults and instead substituted it with screens. A potential interpretation of this suggested by the authors is that the judge may have wished to keep the witnesses in court so as to increase the impact of their evidence.<sup>106</sup> Many respondents in my own research project also discussed the value of all witnesses giving evidence live in court so as to achieve maximum impact on the jury. For example, the barristers interviewed disclosed an almost unanimous preference, when prosecuting, for the cross-examination of their vulnerable witnesses to take place from behind a screen in court rather than remotely by

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<sup>101</sup> See also: Davies G. (n 83)

<sup>102</sup> Contempt of Court Act 1981, s8(a) '...it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations in any legal proceedings.'

<sup>103</sup> See: Ellison L and Munro V. A 'special' delivery? Exploring the impact of screens, live-Links, and video-recorded evidence on mock juror deliberation in rape trials. *Social and Legal Studies* 2014;23(1):3-29.

<sup>104</sup> *ibid.* p. 21.

<sup>105</sup> Temkin J. (n 55) p.237.

<sup>106</sup> Roberts P, Cooper D and Judge S. (n 53) p.285-6

live link. Their explanation for this was that evidence given from behind a screen carried with it more impact than live linked testimony.

Whether there remains a proper place for 'tactics' in criminal trials is debatable. The respondents in this study suggest that the approach adopted in criminal trials is often contingent on the views of the advocates regarding 'best evidence' and its perceived tactical advantages. Given the recent push towards the criminal trial being a well-managed forensic examination of the defendant's guilt;<sup>107</sup> perhaps defence advocates should avoid engaging with such tactics in an attempt to secure an acquittal where it ought not to be due.<sup>108</sup> It certainly seems that this approach, whether rightly or wrongly, runs counter to Lord Justice Auld's view that 'the criminal trial is not a game under which a guilty defendant should be provided with a sporting chance.'<sup>109</sup> A full review of this debate is outside of the scope of this paper,<sup>110</sup> but it is sufficient to note that, in some cases, much more emphasis seems to be placed on tactical advantage than on the well-being of individual vulnerable defendants.

## Conclusion

Despite the statutory inequality between vulnerable defendant and non-defendant witnesses wishing to invoke the live link, my initial expectation that most of the practitioners interviewed would have had some experience of defendants utilising the provision seems reasonable. This is particularly so given the substantial evidence which exists regarding the prevalence of defendant vulnerability, as well as the fact that almost all of the respondents had been in practice since before the insertion of the provision for defendants. The findings from the interviews conducted in this research reveal what appears to be a very low use of the live link by defence advocates for vulnerable defendants. Only two of the criminal practitioners interviewed had been involved in a trial where the defendant testified in this way, and only one other occurrence of such could be recalled. This paper has thus argued that there are substantial barriers which impede the use of the live link by vulnerable defendants giving evidence in Crown Court trials.

These barriers include, first, an apparent lack of awareness of the availability of the live link to vulnerable defendants. Some respondents, including those who successfully invoked the live link, were unaware of the statutory provision prior to the interview. Other respondents, who were themselves aware, speculated that there was a general lack of awareness within the profession which inhibited its use. This was further supported by its lack of consideration by participants in the Youth Proceedings Advocacy Review and by Felicity

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<sup>107</sup> See: McEwan J. From adversarialism to managerialism: criminal justice in transition. *Legal Studies* 2011;31(4):519-46; Garland F and McEwan J. (n 57); Darbyshire P. (n 58).

<sup>108</sup> In McConville M and Marsh L. *Adversarialism goes West: Case management in criminal courts*. *IJEP* 2015;19(3):172-89, p.176 they discuss how, as per the overriding objective, defence lawyers bear the task of convicting the guilty as well as acquitting the innocent.

<sup>109</sup> Auld R. *Review of the Criminal Courts of England and Wales: Report* London: TSO 2001 p.459.

<sup>110</sup> But see: McConville M and Marsh L. (n 108).

Gerry (QC) in her article on vulnerable defendants for The Justice Gap. The second barrier attributed to the low uptake of the live link provision is the poor identification of vulnerability by those working within the profession. The respondents indicated that despite the profession's increased awareness of the existence of vulnerable defendants in theory, even defendants with the most obvious vulnerabilities are still not always identified as such in practice.

The third and final barrier to the use of the live link by vulnerable defendants relates to the profession's perceptions of its usefulness. This concerns both its practical and tactical benefits. Practically speaking, most respondents were unable to identify scenarios in which the live link provision might improve a vulnerable defendant's evidence. The purpose of the provision was viewed by the profession as to keep a witness out of court, and this was not seen as applicable to defendants who were already present in the courtroom throughout the trial. Tactically, respondents worried that the use of the live link by a defendant would be viewed suspiciously by the jury. In addition, the findings from the interviews support existing research which denotes that there is a belief within the profession that the 'best evidence' is that which is obtained live in court before the jury. The use of the live link by vulnerable defendants was viewed as reducing the impact of their testimony on the jury, and thus their chances of acquittal.

In its recent report on unfitness to plead, the Law Commission has supported a move towards the mandatory screening of defendants under the age of 14 for participation difficulties.<sup>111</sup> It has also recommended that the defendant live link provision be amended so as to reflect the comparable provision available to non-defendant witnesses.<sup>112</sup> If implemented, this would mean that the live link becomes statutorily available in equal measure to all vulnerable witnesses and defendants. Increased screening of defendants and legislative reform would serve to raise awareness of the existence of the live link provision for those identified as vulnerable. While these would be laudable developments, I have demonstrated that in isolation they will not result in greater use of the live link by defendant witnesses. The legal profession are the gatekeepers to vulnerable court users accessing special measures in the Crown Court. In order for vulnerable defendants to have any real chance of giving their evidence remotely, the perception among the profession, that the ability to give evidence in this way is not beneficial to them, and may even be positively detrimental to their case, will also need to be addressed.

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<sup>111</sup> Law Commission, *Unfitness to Plead volume 1: Report*. Law Com No 364. London 2006. p.256.

<sup>112</sup> Law Commission, *Unfitness to Plead Volume 2: Draft Legislation*. Law Com No 364. London 2016. Criminal Procedure (Lack of Capacity) Bill, s62. p.45 & 46 (p. 58 & 59 of report).