

A comparative analysis of protective measures for vulnerable and intimidated victim-witnesses in South African and English law

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Abstract

This article evaluates protective measures for vulnerable witnesses in light of both the Victims' Charter and measures in English law, giving effect to the right to protection in the Framework Decision on the Standing of Victims in Criminal Proceedings. It further highlights the fact that special measures for vulnerable witnesses are inadequate, being restricted to intermediaries and CCTV testimony. The pre-recorded evidence-in-chief and cross-examination, along the lines of the Youth Justice and Criminal Evidence Act 1999 (YJCEA), ought to be introduced. It was found that the hearsay exception does not adequately protect vulnerable witnesses who are too afraid to testify. An exception to this, such as that in the Criminal Justice Act 2003, which permits a court to admit hearsay evidence if a vulnerable witness does not give evidence through fear. Drawing on European Court of Human Rights and English case law, it could be argued that pre-recorded video evidence-in-chief and cross-examination, as well as a hearsay exception based on fear of testifying, would not infringe the accused's constitutional right to challenge evidence. The article also assesses the restrictions on sexual history evidence as contained in the YJCEA. These have been interpreted by the House of Lords to permit sexual history evidence that is relevant to an act of consent, i.e. to disallow it would violate the accused's right to a fair trial. In this article it is also argued that the Legislature is unlikely to succeed in preventing the admission of sexual history evidence based on gendered constructions of consent. The article goes on to postulate that sexual offence victims should be granted leave for their lawyers to object to the admission of such evidence. The article concludes by arguing that, in order to create the impetus to introduce the measures that it advocates, the Victims' Charter should be revised to adopt the expansive right to protection enshrined in the Framework Decision.

Introduction

'Only the court can help to wash away the suffering.' (Chum Mey, witness, Cambodia 'Killing Fields' trial) (Fawthrop, 2009).

Victim-witnesses, particularly those who are vulnerable or intimidated, have found themselves falling through the chasm between rhetoric and reality in the South African courts. While the government has expressed its commitment to victims' rights, stating that 'an equitable criminal justice system can only be achieved if the rights of both victims

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and accused persons are recognised, protected and balanced' (Preamble, Service Charter for Victims of Crime in South Africa (2004, the Victims' Charter)), for many victim-witnesses the reality of the court process is fraught with secondary victimisation. Within the framework of the right to protection in the Victims' Charter, this article points to the procedural and evidential shortcomings in the South African criminal process that inure to the detriment of vulnerable and intimidated victim witnesses (VIVW). It surveys the protective measures that currently exist, namely, the use of intermediaries for child witnesses; testimony by closed circuit television (CCTV) and restrictions on sexual history evidence. Against the backdrop of the substantial protection that is afforded to VIVW in the United Kingdom (UK), the introduction of new measures, such as pre-recorded video testimony, and the admission of hearsay evidence by frightened witnesses are advocated. In addition, aims to change authority, i.e. permitting anonymous evidence in rare cases, contending that this authority ought to be extended in line with current provisions of English law. Drawing on the jurisprudence of the European Court of Human Rights (ECtHR), as well as South African case law, the article maintains that the measures that it advocates are consonant with the accused's right to a fair trial.

Vulnerable and intimidated victim-witnesses

For the purposes of this article, VIVW are those victims who experience secondary victimisation in the court process when called upon to testify against 'their' offenders. Such victims include victims of gender-based violence, child abuse, racially motivated crime, homophobic crime and elder abuse, as well as the family members of homicide victims. The extent to which such victims experience secondary victimisation in the court process has been documented amply,¹ and will not be considered in this article. However, in order to focus on the analysis, it is necessary to adopt a working definition of VIVW.

The English Youth Justice and Criminal Evidence Act 1999 (YJCEA) introduced definitions of vulnerable and intimidated witnesses. Such witnesses are eligible for special measures to assist them to testify, including pre-recorded video evidence and evidence by live link (see below). In terms of s.16, vulnerable witnesses are those who are younger than 17 at the time of the hearing (s.16(1)(a)), or whose evidence is likely to be diminished in quality due to a mental disorder, 'a significant impairment of intelligence and social functioning', or a physical disability or disorder (s.16(1)(b)). In terms of s.17 (1), an intimidated witness is one whose evidence is likely to be diminished in quality due to fear or distress concerning the adducing of testimony. The categories of victims mentioned above would fall within these provisions, although the YJCEA also applies to witnesses who are not victims of a crime.

In the South African law, on the other hand, there is currently no definition of VIVW. Although the South African Law Reform Commission (SALRC) has recommended the recognition of a category of vulnerable witnesses who are complainants or children testifying in sexual offence cases, the legislature, in enacting the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (CLAA), chose not to adopt this recommendation (Gallinetti & Kassan, 2008: 147-8). Victim-witnesses who fall within the above categories are thus not recognised, as a matter of law, as eligible for protection due to vulnerability or fear. The absence of a category of VIVW creates the space for secondary victimisation to continue. In order that VIVW may qualify for the

range of special measures and forms of evidential and procedural assistance considered below, categories of VIVW, analogous to those in the YJCEA, ought to be entrenched in legislation.

Victims' right to protection

This section evaluates the extent to which VIVW have enforceable rights to protection from criminal justice agencies. It surveys the provisions of the Victims' Charter, maintaining that the absence of victims' legal standing to sue for a breach of its provisions renders the rights it contains less than effective in practice. Furthermore, it argues that the substantive content of the right to protection is insufficient to protect VIVW effectively from secondary victimisation in the court process.

In a bid to explore more effective ways of protecting such victim-witnesses, this section considers the analogous provisions of the Framework Decision on the Standing of Victims in Criminal Proceedings (2001, the Framework Decision), which regulates the rights of victims in Member States of the Council of Europe, including the UK. It maintains that, although the Framework Decision does not generate enforceable victims' rights in the UK, the scope of its right to protection is much wider than that of its South African counterpart. Supplemented by Recommendation No. R (97) 13 concerning Intimidation of Witnesses and the Rights of the Defence (1997) (Rec. No. R (97) 13), the Framework Decision provides substantial protection to VIVW. Such victim-witnesses in South Africa would benefit from the inclusion of analogous provisions in the Victims' Charter.

The victims' charter

The Victims' Charter was adopted in terms of s.234² of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution). Accordingly, its provisions are subject to the Bill of Rights. It grants victims several rights, including the right to protection (article 4) and the right to assistance (article 5). However, unlike victims of human rights violations, who may approach a court for relief, victims of crime whose Victims' Charter 'rights' have been breached only have recourse to the complaints mechanisms³ contained therein. Despite its purported consonance with the Bill of Rights, therefore, the fact that the redress in the Victims' Charter is restricted to a mechanism for complaints, rather than legal standing to approach a court to enforce its provisions, renders the rights it contains unenforceable. In light of this lack of enforceability, the Victims' Charter rights are able to provide victims with substantive redress only insofar as they have found expression in 'hard law', such as, the Constitution, legislation and case law (see below).

In terms of article 4, victims have 'the right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse'. In certain cases, such victims may be placed in a witness protection programme. Furthermore, the court may, in certain circumstances, prohibit such victims' details (including their identity) from being published, or order that the proceedings be conducted *in camera*. Within the context of the right to assistance in article 5, the prosecution has the duty to make sure that special measures are used in sexual offence and domestic violence cases, and that, if possible, such cases should be decided by specialised courts.

Contrary to the Council of Europe instruments considered below, the provision of special

measures is subsumed within the right to assistance rather than the right to protection. As the aim of special measures is to protect VIVW from the trauma of testifying in court, particularly in the accused's presence, they are more accurately included in the right to protection, and the Victims' Charter would benefit from an amendment to this effect. Consequently, this article addresses special measures within the context of the right to protection.

The provisions of article 4 and article 5 relating to victim protection, lack substantive content in several respects. Firstly, they restrict the right to special measures to victims of sexual assault and domestic violence, excluding many VIVW, such as, victims of racially motivated and homophobic crime, and the family members of homicide victims. Secondly, they do not specify the special measures to which victims are entitled, leaving their determination to the vagaries of the legislative process. Thirdly, they do not refer expressly to protection that takes the form of keeping witnesses' identities from the accused. By contrast, the Council of Europe instruments discussed below provide comprehensive protections to VIVW, which ought, it is submitted, to be included in the Victims' Charter.

Council of Europe instruments

The Framework Decision, which was adopted by the Council of Europe in accordance with article 34(2) of the Treaty on European Union (TEU), enshrines several rights for victims, including the right to protection (article 8). It binds Member States as regards 'the result to be achieved' but not as to the 'form and methods' of achieving such results (see Wolhuter et al, 2009: 121-2). It has 'indirect effect' (Fletcher, 2005: 872), and consequently obliges national authorities, particularly national courts, to interpret domestic law 'in conformity with Community law'. However, the interpretation must accord with the rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ECHR), particularly the right to a fair trial.⁴ Furthermore, Member States, who have made a declaration accepting the jurisdiction of the European Court of Justice (ECJ) 'to give preliminary rulings on the validity and interpretation of framework decisions ... and on the validity and interpretation of the measures implementing them', may refer matters to the ECJ (article 35 TEU). The existence of this jurisdiction means that individuals may invoke the Framework Decision in national courts to obtain 'a conforming interpretation of national law'.⁵ Accordingly, victims in such Member States have access to a mechanism to enforce their rights (Fletcher, 2005: 875).

However, the UK has not made the requisite declaration (Löf, 2006: 429), depriving victims of the opportunity to request a referral to the ECJ. The scope for victims' reliance on the Framework Decision in English law is thus dependent upon the extent to which domestic courts are willing to uphold their duty to give it indirect effect. Nevertheless, although victims' access to the Framework Decision is limited in this respect, the legislature has introduced far-reaching measures to protect VIVW in the court process (see below). In addition, the courts have adopted an expansive approach to the interpretation of the ECHR that accords such victim-witnesses significant protection (see below).

In terms of article 8 of the Framework Decision, Member States are obliged to provide victims with protection (see Wolhuter et al, 2009: 156-7). Victims, as well as their families and other persons in a similar position, where appropriate, must be given ‘a suitable level of protection’ where there is ‘a serious risk of reprisals’ or evidence of a ‘serious intent to intrude upon their privacy’ (article 8.1). Suitable measures must be adopted in court proceedings in such cases to protect their ‘privacy and photographic image’ (article 8.2). In addition, contact between victims and offenders on court premises must be prevented, and separate waiting areas for victims must be provided progressively (article 8.3). In terms of article 8.4, Member States must ensure that, where victims, especially vulnerable victims, need protection ‘from the effects of giving evidence in open court’, they may be permitted to testify in a way that will facilitate such protection, using any suitable means that accord with the principles of the relevant legal system. Article 8 expressly grants victims a right to these protective measures.

Rec. No. R (97) 13 – which is non-binding but persuasive – supplements the provisions of article 8. Article 17 of Rec. No. R (97) 13 requires Member States to take ‘legislative and practical measures’ to protect vulnerable witnesses from intimidation, and to ease pressure when they give evidence against family members in criminal cases. Children (article 19), as well as victims of domestic violence and elder abuse (article 21), must be afforded special protection. Article 27 recommends that pre-recorded video statements be used to prevent ‘face to face confrontation and unnecessary repetitive examination’. It also provides for audio-visual techniques, which may be used at trial to enable the court to hear the witnesses away from each other’s presence. In terms of article 28, the judge must supervise the examination of the witness closely, and in cases, especially sexual offence cases, where cross-examination may traumatise a witness excessively, s/he must ‘consider taking appropriate measures to control the manner of questioning’. Furthermore, criminal justice agencies must attempt to avoid subjecting vulnerable witnesses to secondary victimisation (article 23).

In terms of article 10, Member States may grant witnesses anonymity as ‘an exceptional measure’. There must be ‘a fair balance between the needs of criminal proceedings and the rights of the defence’, which must include giving the defence an opportunity to contest the need for anonymity, the credibility of the witness, and the source of his/her knowledge (article 10). Anonymity should only be permitted where the witness’s life or freedom, or the ability of an undercover agent to engage in future work, ‘is seriously threatened’ (article 11). Additional measures to protect witnesses, such as, screens, facial disguise or voice distortion, should be available, if appropriate (article 12). Significantly, article 13 provides that a conviction must ‘not be based solely or to a decisive extent’ on anonymous evidence.

The above analysis demonstrates that the Council of Europe measures are providing the right to protection, albeit unenforceable in the UK, they nevertheless grant VIVW much greater protection than the Victims’ Charter. Such victim-witnesses are in an unenviable position in South Africa. The amendment of the Victims’ Charter to include similar comprehensive protections would be to their benefit.

Balancing the constitutional rights of victims and accused persons

As was stated above, the rights in the Victims' Charter are able to afford victims substantive redress only insofar as they have found expression in 'hard law', particularly in the Constitution itself. Accordingly, drawing on the analysis of victims' and accused persons' rights in the jurisprudence of the ECtHR, this section assesses the extent to which the right to protection for VIVW in the court process finds expression in the rights in the Bill of Rights. The ECHR does not enshrine victims' rights expressly. Nonetheless, in order to protect VIVW from secondary victimisation in the court process, the ECtHR and the English judiciary have incorporated the victim's rights/interests into the proportionality requirement of the accused's right to a fair trial in article 6 of the ECHR (see Wolhuter et al, 2009: 123). The instances in which they have done so, have concerned the limitation of the accused's right in article 6(3) (d) 'to examine or have examined witnesses against him'. In *Doorson v. The Netherlands*⁶ the ECtHR emphasised that the interests of victims and witnesses, while not expressly protected by article 6, are protected by other rights in the ECHR, such as the rights to life, liberty and security of the person, and respect for private and family life; and that the principles of a fair trial thus require that defence interests must be balanced against victims'/witnesses' interests in appropriate cases (para 70; see Wolhuter et al, 2009: 124; see, also, below).

Within the context of such an inclusive concept of a fair trial, the courts have taken the view that, where witnesses are too afraid to testify, their rights/interests may legitimate the use of anonymous evidence, hearsay evidence, or special measures, such as, the relaying of prerecorded interviews. In appropriate circumstances the limitation on the accused's right in article 6(3) (d) that such measures entail may be justified (see below).

The South African judiciary has not developed an inclusive concept of the right to a fair trial in s.35 (3) of the Constitution that applies to VIVW generally. However, recent dicta indicate that the courts are beginning to realise that the constitutional rights of certain victims, such as children and victims of sexual offences, require alterations to the traditional adversarial concept of a fair trial. In *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others (DPP, Transvaal)*,⁷ for instance, the Constitutional Court emphasised that, although child victims are not 'parties to the criminal proceedings,' they 'have constitutional rights which must be protected by the court' (para 114). Significantly, it stated that, in the light of the particular vulnerability of child witnesses, trial fairness is enhanced by the use of special measures, such as intermediaries and CCTV. Accordingly, these measures 'should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all' (para 116; see below).

In *S. v. Staggie and Another*,⁸ a case involving an application for CCTV evidence to be given by an adult rape victim, who feared intimidation by the accused (known gangsters), the court highlighted the need to balance the interests of such victims in receiving protection while testifying, against the fair trial right of the accused (251B-E). It stated that the use of CCTV does not limit the accused's right to be present in court while the witness testifies, but merely constitutes a form of presence other than physical presence. However, even if it does, 'it is a mild intrusion that is outweighed by the right of witnesses to be protected' (249A-C; see below).

Dicta such as these, being restricted to the protection of the constitutional rights of children and sexual offence victims, do not go far enough. In order to develop an inclusive concept of a fair trial, as the ECtHR has done, the constitutional rights of all VIVW must inform the courts' approach to the accused's right to a fair trial. By analogy to the approach of the ECtHR, these rights would include the rights to life (s.11), privacy (s.14), and freedom and security of the person (s.12), amongst others. The accused's right to a fair trial must thus be balanced against these rights of VIVW who are called upon to testify.

Protective measures in court

In the light of the foregoing analyses, particularly the inclusive concept of a fair trial outlined above, this section considers the measures for the protection of VIVW in South African and English courts. Note is taken that the measures that exist in South African law focus on child victims and victims of sexual offences to the exclusion of other categories of VIVW. It highlights the comprehensive protective measures available for VIVW in English courts, maintaining that, despite the lack of enforceability of the Framework Decision, the English legislature and courts have forged significant protections for victims. In view of the relative success of these measures, this article advocates the adoption of analogous provisions in South African law.

Special measures

South African law

In South African law, special measures to assist VIVW to testify are restricted to the use of intermediaries to assist vulnerable child witnesses, the admission of testimony by CCTV in certain circumstances, and the hearing of evidence *in camera*.⁹ As proceedings *in camera* do not protect victim-witnesses from testifying in the presence of the accused, the following discussion is restricted to the use of intermediaries and evidence by CCTV.

Intermediaries

Section 170A (1) of the Criminal Procedure Act 51 of 1977 (CPA) provides that an intermediary may be appointed to assist a witness who is 'under the biological or mental age of eighteen years', if, in the court's opinion, such a witness would be exposed to 'undue mental stress or suffering if he or she testifies at such proceedings'. In *DPP, Transvaal*, the Constitutional Court held that 'undue mental stress or suffering' frequently arises in sexual abuse cases, where the child must testify in open court in the accused's presence, and is intensified by aggressive cross examination. In many cases the cumulative effect of this experience will traumatise the child as extensively as the abuse (para 108). Consequently, the adversarial process itself engenders undue stress or suffering. In order to give effect to the injunction in s.28(2) of the Constitution that '[a] child's best interests are of paramount importance in every matter concerning the child', courts must consider the appointment of intermediaries in all cases involving child witnesses (paras 113, 114).

Section 170A (3) of the CPA provides that, when appointing an intermediary, the court may order the child to give evidence in a place 'which is informally arranged', to ensure that the child is at ease, and out of sight and hearing of anyone 'whose presence may upset' the child. However, 'the court and any person whose presence is necessary at the

relevant proceedings' must be able to see the intermediary and the child, either directly or by means of 'electronic or other devices'. In practice, courts tend to order the use of CCTV to give effect to s.170A (3) (Reynecke & Kruger, 2006: 89).

In *DPP, Transvaal*, the court dismissed a contention that the existence of judicial discretion to appoint an intermediary is unconstitutional, holding that such discretion enables courts to determine "the individual needs, wishes and feelings" of child witnesses 'on a case-by-case basis' (paras 117, 123, 124). However, it emphasised that this discretion is restricted by the court's constitutional duty to uphold the child's best interests (para 126).

The question whether s.170A is consistent with the accused's right to a fair trial has arisen in several cases. In terms of s.35 (3) (i) of the Constitution, the accused has the 'right to a fair trial, which includes the right ... to adduce and challenge evidence'. One of the core components of this right is the right to cross-examine. The right to a fair trial also includes the right 'to a public trial before an ordinary court' (s.35 (3) (c)). In *K. v. The Regional Court Magistrate NO and Others*,¹⁰ the court emphasised that s.170A(2)(a) expressly allows the accused to cross-examine the child through the intermediary, and hence that the right to cross-examine is not excluded (442A-B). Although 'the forcefulness and effect of cross-examination' may be dulled by the interposition of an intermediary between the cross-examiner and the witness, the accused's right to a fair trial is not violated, as the child witness's interests in receiving protection from secondary victimisation must also be considered (443H, 444E-F).¹¹

The court held further that the right to a public trial is not violated by s.170A (3), as 'it does not guarantee the right of the accused and the witness to be physically present in the same room' (447C). By contrast, the witness's interest in protection and the accused's right to a fair trial are balanced by allowing 'the witness to testify in congenial surroundings and out of sight of the accused' (448D). The court in *DPP, Transvaal* lent its support to this approach, holding that, in view of child witnesses' particular vulnerability, trial fairness is increased rather than hindered by s.170A (para 116; see above).

Despite the courts' approval of s.170A, its practical application has caused concern. In *DPP, Transvaal*, the court found that a mere 14 per cent of Regional Courts have facilities for intermediaries, and that the equipment in many courts that do have such facilities frequently malfunctions or breaks down (para 195). Furthermore, intermediaries are often ill equipped to perform their functions (para 196). The court accordingly found that, by failing to ensure that adequate resources were available, the state had breached the Constitution (para 202).

Closed circuit television

Testimony by CCTV is available to all witnesses, not only those under the mental or biological age of 18. Section 158(2) of the CPA provides that a court may order a witness or an accused to testify 'by means of closed circuit television or similar electronic media'. However, it may only do so if the requisite facilities are available or obtainable readily, and if, in its view, testimony by this means would –

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be convenient;
- (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
- (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings (s.158(3)).

The court in *S. v. F.*¹² held that testimony by CCTV is only admissible if factors (a) to (c), as well as either factor (d) or factor (e), are present (578D-579B). On the other hand, the court in *S. v. Staggie and Another*¹³ took the view that the existence of any one of the factors is sufficient (248G-H). The uncertainty was resolved in *S. v. Domingo*,¹⁴ where the court, in a special review (Schwikkard & van der Merwe, 2009: 390), approved the approach in *Staggie* (198F-G).

Section 158(4) expressly requires the court ‘to ensure a fair and just trial’, and preserves the right of the prosecution and the defence to question the witness and to observe his/her reaction. In light of this provision, the courts in *Staggie* (para 252H) and *Domingo* (199F-H) held that testifying by CCTV does not violate the accused’s right to a fair trial.

Testimony by CCTV has ‘become common practice in cases involving children’ (Reynecke & Kruger, 2006: 88). However, it remains an exceptional measure for adult witnesses. This has a particularly deleterious impact on adult sexual offence victims, whose traumatic experiences of testifying in an accused’s presence have been overlooked by the courts (Gallinetti & Kassan, 2008: 151).

Lacunae

In light of the above analysis, this section contends that special measures for VIVW are restricted unduly in two respects. Firstly, they are used for a limited category of victim-witnesses. Intermediaries are only available for child witnesses, and, although any witness may adduce evidence by CCTV if s/he complies with one of the requirements of s.158 (3) of the CPA, the courts are reluctant to admit such evidence in the case of adults. The only cases in which adults have been permitted to testify in this way have concerned sexual offences. There are no decisions admitting CCTV testimony in the case of other VIVW, such as, victims of racially motivated or homophobic offences, or the family members of homicide victims. Secondly, the range of available special measures is limited. There is no provision for the use of screens or pre-recorded video testimony. The absence of the latter special measure, which is arguably the most comfortable method of testifying, as it enables the victim-witness to testify prior to the trial as well as out of the accused’s presence, is a particular cause for concern.

English law

In order to point to ways in which South African law may improve its responses to VIVW, this section evaluates the array of special measures in English law (see Wolhuter et al, 2009: 161-3). A witness is eligible for special measures if s/he is younger than 17¹⁵ at the

time of the hearing (s.16 (1)(a) YJCEA), or if, in the court's opinion, his/her evidence is likely to be reduced in quality due to a mental disorder, 'a significant impairment of intelligence and social functioning', or a physical disability or disorder (s.16(1)(b) YJCEA).

A witness will also qualify for special measures if, in the court's opinion, his/her evidence is likely to be reduced in quality because of fear or distress about testifying (s.17 (1)). To determine whether this is the case, the court must consider several factors, such as, the witness's age, social and cultural background, ethnic origins, domestic circumstances, and religious beliefs (s.17(2)). Victim-witnesses in sexual offence cases are automatically eligible for special measures, unless they do not wish to take advantage of them (s.17 (4)).

Section 89 of the Coroners and Justice Bill 2009 (CJB) inserts a new s.17 (5) of the YJCEA. It provides that witnesses in proceedings concerning certain offences involving weapons, including non-fatal offences against the person, automatically qualify for special measures, unless they inform the court that they do not desire them. If passed into law, this provision will enable particularly vulnerable or fearful victims, such as victims of domestic violence, and racially motivated and homophobic hate crime, who are often victims of offences involving weapons, to qualify automatically for special measures.

Section 21 of the YJCEA provides special assistance to child witnesses, especially child witnesses in need of special protection, namely, those testifying in sexual offence, kidnapping and assault cases. The court must admit pre-recorded video evidence (see below) by child witnesses in need of special protection, and permit them to give evidence by live television link (see below) as regards any matter that has not been pre-recorded, if the requisite measures are available (s.21(3), s.21(4)(a)). These provisions have been criticised for disempowering child witnesses by depriving them of the opportunity to choose other methods of testifying (Hoyano, 2007: 856-7). Consequently, the CJB makes substantial changes to s.21. Firstly, it abolishes the category of 'child witnesses in need of special protection', making s.21 applicable to child witnesses generally (s.90 (2)). Secondly, it provides that, if the child witness does not wish to give evidence by pre-recorded video recording and/or by live link, the court may permit evidence to be given by other means if, in its opinion, the witness's evidence would not be diminished in quality (s.90(4)(b)). If the child has to testify in court, special measures must be taken, requiring a screen to be used. However, if the child does not wish to use a screen and his/her evidence would not be diminished in quality, or if a screen 'would not be likely to maximise the quality of the witness's evidence' (s.90 (5)) it need not be used. When deciding whether to grant the child's wish not to testify by pre-recorded video, live link or a screen, the court must consider several factors, including the child's age and maturity; ability to understand the consequences of his/her wish, and 'social and cultural background and ethnic origins' (s.90(6)).

The YJCEA contains a range of special measures to assist s.16 and s.17 witnesses to testify. These measures include, firstly, a provision that the witness may testify from behind a screen so that s/he cannot see the accused (s.23). However, s/he must be able to see and be seen by the judge, the jury, if any, the legal representatives, and an interpreter or other support person, if any (s.23 (2)). Secondly, the witness may testify by live link (s.24; see, also, s.51 of the Criminal Justice Act 2003 (CJA 2003)). A live link is 'a live television link

or other arrangement' where a witness is absent from the courtroom but 'able to see and hear a person there,' and able to be seen and heard by the judge, the jury, if any, the legal representatives, and an interpreter or other support person, if any (s.24(8), read with s.23(2)). The CJB proposes that a support person may accompany a witness testifying by live link (s.92 (1)).

Thirdly, a video recording of an interview with the witness may be admitted as his/her evidence in- chief (s.27). However, if the court is of the view that the interests of justice require that the video-recorded evidence must not be admitted, it will not grant a special measures direction to this effect (s.27(2)). Furthermore, if 'the witness is not available for cross-examination' and the parties have not agreed that the witness need not be cross-examined, the court may order that the video-recorded evidence may not be admitted (s.27(4)(a)). Fourthly, in cases where video recorded evidence has been admitted as evidence-in-chief, the court may also admit video recorded cross-examination and re-examination (s.28). This provision is controversial and has consequently never been brought into force. A governmental review group has recommended that s.28 ought to be revised to apply to witnesses who are the most vulnerable, and then only if there is no other 'way in which they would be able to give evidence' (Hoyano, 2007: 855). Examples of eligible witnesses would include those who are very young, terminally ill or suffering from a mental incapacity (Hoyano, 2007: 855).

The YJCEA introduced two further special measures that only apply to s.16 witnesses, namely, the use of intermediaries (s.29), and devices to enable the witness to communicate or receive questions and answers despite having a disability, disorder or other impairment (s.30). Although s.29 has existed for a decade, the government only implemented the intermediary special measure nationally in June 2007 (Hoyano, 2007: 850), and it is too soon to know whether it will be effective.

In *R. (D) v. Camberwell Green Youth Court; R. (Director of Public Prosecutions) v. Camberwell Green Youth Court*,¹⁶ the House of Lords held that the special measures in s.21 of the YJCEA do not infringe the accused's right to examine witnesses in terms of article 6(3)(d) of the ECHR. This finding derives firm support from the jurisprudence of the ECtHR (see Wolhuter *et al*, 2009, p. 125). The ECtHR has recognised that victims' interests must be taken into account in the proportionality element of the right to a fair trial in article 6 of the ECHR in instances where special measures, such as, pre-recorded testimony, are used, in order to free the witness from having to testify in court. In *SN v. Sweden*,¹⁷ a case concerning a child sexual abuse victim whose testimony was admitted via video and audio recordings (para 35), the testimony was 'virtually the sole evidence' on which the applicant's conviction was based (para 46). The ECtHR held that, because sexual offence victims experience trials as an ordeal, their right to respect for private life must be considered in determining whether the accused has received a fair trial.

However, the special measures must not prevent the accused from exercising his/her rights adequately and effectively (para 47). They had not done so *in casu* as the applicant's counsel had consented to the victim being interviewed by the police without the applicant (or his counsel) being present (paras 49-51), and thus article 6(3)(d) had not been violated.

Although special measures comply with the ECHR and the government is committed to them, the courts' predilection for oral testimony has hampered their use in rape cases (Ellison, 2000: 53). However, if it is passed, the CJB will go a long way to ensuring that pre-recorded video evidence is used more routinely in such cases. It inserts a new s.22A into the YJCEA making special provision for vulnerable (s.16) and intimidated (s.17) victims of sexual offences who are not under 18 at the time of the hearing, in cases where the trial does not take place in the magistrates' court. If, on application for pre-recorded video evidence to be used, the court determines that the victim qualifies for assistance in terms of s.16(1)(b) or s.17, the court must grant the application, unless, in its opinion, testifying in such a way 'would not be likely to maximise the quality' of the victim's evidence.

The YJCEA, particularly if it is amended as envisaged in the CJB, provides substantial protection to all VIVW. Their South African counterparts would benefit from the express inclusion of analogous provisions. In addition, it contains a comprehensive array of special measures, including pre-recorded video evidence, which, as was stated above, is particularly conducive to the removal of secondary victimisation. Unfortunately, although the SALRC advocated the recognition of such evidence, it changed its mind, and the CLAA makes no provision for it (Gallinetti & Kassan, 2008: 148). In light of the above jurisprudence of the ECtHR, it is unlikely that a South African court would find such evidence unconstitutional, and no reason, apart from cost, appears to exist for the refusal to introduce it. Cost-related objections may be countered by the clear benefits of such evidence to victims, and the South African government is accordingly strongly urged to consider its recognition (see Simon, 2006).

Restrictions on sexual history evidence

South African law

Prior to its recent amendment by the CLAA, s.227 (2) of the CPA provided that, apart from evidence and questions regarding the offence with which the accused is charged, no evidence concerning sexual intercourse or sexual experience on the complainant's part may be adduced, and no question regarding such intercourse or experience may be asked, unless the court permits it. Such permission may not be granted 'unless the court is satisfied that such evidence or questioning is relevant'.

The effectiveness of these provisions was impeded by the wide discretion granted to the courts, which have been loath to restrict sexual history evidence in the past (Schwikkard, 2008: 95). In fact, they have almost routinely ignored the provisions of s.227 (2) since its amendment in 1989.¹⁸ In *S. v. M.*,¹⁹ the Supreme Court of Appeal commented that it was unaware of any case in which s.227(2) has been applied and that the section is probably 'more honoured in the breach than in the observance' (422H). In considering the proper approach to s.227 (2), the court endorsed a dictum in *R. v. Viola*²⁰(which reflected the law prior to the YJCEA (see below)), that, while sexual history evidence seeking to discredit the complainant will rarely be admitted, evidence that is relevant to an issue in the trial (including consent), is likely to be admitted (423F-424D). The unrestricted admissibility of evidence that is relevant to consent is open to criticism as it permits the courts to admit sexual history evidence based on gendered constructions of consent (see Temkin, 2002:

The court also approved the proposals of the SALRC concerning the reform of s.227(2), holding that, 'even in the present state of the law', these proposals are 'considerations of great importance in arriving at a properly considered judgment on admissibility in terms of s 227(2)' (425C-H). Schwikkard (2008: 95) has ascribed the recent legislative entrenchment of the thrust of these proposals in the CLAA to their endorsement by the Supreme Court of Appeal.

The CLAA substitutes the old provisions of s.227 of the CPA.²¹ Section 227(2) now provides that, apart from evidence or questioning concerning the offence being tried, evidence regarding 'any previous sexual experience or conduct' may not be adduced, and evidence or questioning in cross-examination pertaining to such experience or conduct may not be put, unless one of two circumstances exist. The first circumstance is that the court, on application, must permit it (s.227 (2) (a)). However, a court may not grant such an application unless it is satisfied that the evidence or questioning is 'relevant to the proceedings' (s.227 (4)). In order to determine whether it is relevant, the court must consider whether the evidence or questioning –

- (a) is in the interests of justice, with due regard to the accused's right to a fair trial;
- (b) is in the interests of society in encouraging the reporting of sexual offences;
- (c) relates to a specific instance of sexual activity relevant to a fact in issue;
- (d) is likely to rebut evidence previously adduced by the prosecution;
- (e) is fundamental to the accused's defence;
- (f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
- (g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue (s.227(5)).

While the enumeration of these factors may limit the circumstances in which sexual history evidence is admitted, the retention of the open-ended criterion of 'relevance' creates the space for the judiciary to continue to permit 'unnecessary, prejudicial and intrusive' questioning by the defence (Vetten, 2007: 24). However, s.227 (6) contains a significant 'safety net' for complainants (Schwikkard, 2008: 97). It provides that the court may not grant an application if, in its opinion, the purpose of the evidence or questioning is to substantiate an inference that, in view of the 'sexual nature of the complainant's experience or conduct,' s/he 'is more likely to have consented to the offence' or 'is less worthy of belief'.

The second circumstance in which sexual history evidence or questioning may be admitted is where the prosecution has introduced the evidence (s.227 (2) (b)). Schwikkard (2008: 96) pointed out that this provision reflects the position in *S. v. Zuma*,²² where the prosecution had opened the door by leading evidence of the victim's past sexual conduct (see 198C-E; 200B-C). In light of the fact that the prosecution may share the judiciary's gendered assumptions about women's sexuality, the inclusion of this provision is regrettable. Like the criterion of 'relevance', it engenders the space for the continued admission of sexual history evidence in circumstances that cause secondary

victimisation. However, the provisions of s.227 (2) are new and have yet to be the subject of a court decision. Whether they will protect or undermine victims' dignity and privacy remains to be seen.

English law

Although s.41 of the YJCEA introduced substantial restrictions on the admissibility of sexual history evidence (Wolhuter et al, 2009: 163-5), many of them have been undone by the courts. This section briefly assesses s.41 as interpreted by the courts, pointing to possible ways in which, like s.41, the new South African law s.227(2) may be undermined by judicial interpretation.

Section 41(1) provides that, in sexual offence cases, no evidence or question under cross examination concerning the victim's past sexual behaviour may be adduced or asked by or on behalf of the accused, unless the court allows it. However, the court may admit sexual history evidence in specifically delineated circumstances, provided that it is satisfied that to refuse leave may render the conclusion of the jury or court unsafe on a 'relevant issue in the case' (s.41(2)). The first such circumstance is where the evidence or question, although relating to a 'relevant issue', does not relate to 'an issue of consent' (s.41 (3) (a)). For instance, s.42 (1) (b) provides that the accused's belief in consent, as opposed to the existence or otherwise of consent itself, is not an issue of consent. Many accused persons rely on a belief that the victim consented, as an alternative to a contention of consent. Consequently, this provision generates a loophole that will enable many accused to succeed in having sexual history evidence admitted (Temkin, 2002: 210). The second exceptional circumstance applies where the evidence or question involves an 'issue of consent,' but concerns the victim's alleged sexual behaviour 'at or about the same time' as the incident giving rise to the charge (s.41 (3) (b)). The third exceptional circumstance applies if the evidence or question involves an 'issue of consent,' but concerns sexual behaviour of the victim, which was allegedly 'so similar' either to behaviour which occurred as part of the incident giving rise to the charge or to any of the victim's other sexual behaviour which occurred 'at or about the same time' as this incident, 'that the similarity cannot reasonably be explained as a coincidence' (s.41 (3) (c)).

The objective of s.41 was that a victim's past sexual behaviour was irrelevant, unless it fell within the ambit of one of the above exceptions. Notwithstanding this objective, *R. v. A. (No. 2)*²³ re-introduced the judicial discretion to admit sexual history evidence that does not fall squarely within one of these exceptions. Lord Steyn held that the provisions of s.41, in particular s.41(3)(c), insofar as they relate to previous sexual activity between the victim and the accused, must be interpreted as being subject to the accused's right to a fair trial in terms of article 6 of the ECHR. Consequently, 'logically relevant sexual experiences' between a victim and an accused may sometimes be admissible in terms of s.41 (3) (c). However, there will be instances in which previous sexual activity between the victim and the accused will be irrelevant, for instance, 'an isolated episode distant in time and circumstances' (para 45). The test is whether the evidence or question was 'so relevant to the issue of consent that to exclude it would endanger the fairness of the trial'. If it was so relevant, it ought not to be excluded (para 46). The trial judge must use his/her discretion to determine whether this test is satisfied (para 45). Lord Steyn emphasised, however, that, in applying this test, 'due regard' must be given to the

'importance of seeking to protect the complainant from indignity and from humiliating questions' (para 46). Beyond positing the above example of an irrelevant relationship between the victim and the accused, the court did not clarify the distinction between relevant and irrelevant prior relationships. Accordingly, it is likely that evidence concerning a prior relationship 'will generally be admitted in the future for fear of a successful appeal' (Temkin, 2002: 224).

The court's willingness to advert to the right to a fair trial to interpret s.41 broadly, despite its express provisions, permitting sexual history evidence to be adduced regarding consent, bodes ill for the new South African s.227(2). The South African judiciary may well follow this persuasive authority and hold that, despite s.227(6), sexual history evidence that is sought to be adduced to substantiate an inference of consent, must be admitted to ensure that the accused has a fair trial. The exception to s.41(1) arises where the evidence or question concerns evidence adduced by the prosecution regarding the victim's sexual behaviour, and the court is of the view that such evidence or question would not go further than is necessary to rebut or explain the prosecution's evidence (s.41(5)). Section 41(5) is more restrictive than s.227 (2) (b), which contains no requirement that the defence may not go further than rebutting or explaining the prosecution's evidence. Nevertheless, the courts have been willing to adopt an expansive interpretation of s.41 (5) that favours the defence. In *R. v. Hamadi (Zeeyad)*,²⁴ the Court of Appeal stated, albeit obiter, that, in its natural meaning, the phrase 'evidence adduced by the prosecution' refers to evidence given by prosecution witnesses during evidence-in-chief, as well as evidence elicited by the prosecution during cross-examination. However, to ensure a fair trial, s.41(5) must be read broadly to permit the accused to lead evidence to explain or rebut 'something said by a prosecution witness in cross-examination about the complainant's sexual behaviour which was not deliberately elicited by defence counsel, and was potentially damaging to his case'. In terms of s.41 (4) no evidence or question may be regarded as relating to 'a relevant issue in the case' if, in the court's opinion, it may reasonably be assumed that the purpose (or primary purpose) of the evidence or question is to impugn the victim's credibility. Unfortunately, the Court of Appeal in *R. v. Martin*²⁵ has watered down the effectiveness of this limitation. It held that, even if one of the purposes of the evidence or question is to impugn the victim's credibility, such evidence or question is admissible, if its purpose or main purpose is not to impugn her credibility. It is to be hoped that, as s.227 (6) refers only to 'the purpose', and does not include 'or the primary purpose', for which the application to lead evidence or question is sought, it will not be interpreted in a similarly broad fashion by the South African courts.

The courts' interpretation of s.41 has arguably resulted in the failure of the legislature's attempt to protect sexual offence victims from secondary victimisation. *R. v. A. (No. 2)* has re-opened the door to the admission of the sexual history between victims and accused based on gendered conceptions of women's sexuality. While such loopholes will probably be held to comply with the ECHR due to the importance of balancing the accused's and victims' rights, they nonetheless place sexual offence victims in an unenviable position. In light of the South African judiciary's past tendency to use their discretion to admit rather than exclude sexual history evidence (Schwikkard, 2008: 95), s.227(2) may also be doomed to fail. Rather than attempting to tinker with legislative

provisions, the interests of sexual assault victims may be served more effectively by permitting them legal representation (see Temkin, 2003: 241; Wolhuter et al, 2009: 189-93).

Hearsay evidence

South African law

Unlike English law (see below), South African law does not recognise an express exception to the hearsay rule permitting the hearsay evidence of witnesses who are too frightened or intimidated to testify in court. Nonetheless, this section contends that the open-endedness of the interests of justice criterion in s.3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988 (LEAA) creates the space for the admission of such evidence.

Section 3(1) (c) provides that no hearsay evidence may be admitted, unless the court deems it in the interests of justice to do so. In determining whether its admission is in the interests of justice, the court must have regard to:

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail;
- (vii) any other factor which should in the opinion of the court be taken into account.

The court has a discretion to admit hearsay evidence within the parameters of the above factors. None of these factors refer expressly to a witness's fear, whether of the accused or of the process of giving evidence. Furthermore, there is no decision in which such fear has been raised and accepted as a reason for the admission of hearsay evidence in a criminal trial.²⁶ Despite the absence of authority, however, it is submitted that the court's discretion to admit hearsay evidence in terms of s.3 (1) (c) is broad enough to admit the hearsay evidence of frightened witnesses in criminal cases, and that this would pass constitutional muster.

In *S. v. Ndhlovu*,²⁷ the court emphasised that the LEAA creates flexible standards for courts to decide whether hearsay ought to be admitted in the interests of justice, in spite of 'the procedural and substantive disadvantages its reception might entail' (para 14). However, the courts should not admit hearsay evidence easily, where it "plays a decisive or even significant part in convicting the accused, unless there are compelling justifications for doing so" (para 16). They must be astute to ensure that the accused's right to a fair trial is respected (para 17). With these caveats, the court holds that, even though hearsay evidence cannot be the subject of cross examination, the accused's right to adduce and challenge evidence is not violated in circumstances where the court deems the admission of such evidence to be in the interests of justice (para 24).

Given the flexibility of the criterion of the interests of justice, witnesses' fear of the accused, or of the process of testifying, particularly in the case of VIVW, ought to qualify

as a justifiable reason for not testifying (s.3(1)(c)(v)), to be considered along with the other factors in s.3(1)(c). A victim of racially motivated or homophobic violence, for instance, may be too afraid of reprisals to testify, where the accused is a member of an extremist right wing organisation. Similarly, a victim of child sexual abuse may be too afraid, both of the accused and of the court process, to testify. As long as the untested evidence is not 'decisive' or 'significant' in convicting the accused, there is no constitutional objection to its admission. However, Naudé (2006: 323) contended that a person who has made an out-of-court testimonial statement is to all intents and purposes a witness and ought to testify in court to give the accused an opportunity to cross-examine. This argument fails to consider that, where the witness is a VIVW, his/her rights to life, privacy and freedom and security of the person ought to be balanced against the accused's right to a fair trial (see above). An appropriate balance may be achieved by permitting the testimonial hearsay evidence of frightened victim-witnesses.

English law

Wolhuter et al (2009: 167-8), s.116(1) points out that the CJA 2003, read with s.116(2)(e), states that a statement not made in oral evidence is admissible as evidence of any matter stated if it is made by a person whose oral evidence on that matter would have been admissible in court; the person has been identified to the court's satisfaction; through fear, the person does not testify (or continue to testify) orally, 'either at all or in connection with the subject matter of the statement'; and the court permits the statement to be adduced as evidence. 'Fear' must be given a broad construction, and includes, for instance, 'fear of the death or injury of another person or of financial loss' (s.116 (3)). The Law Commission Report (which preceded the CJA 2003) 'suggests that it would be enough to trigger this provision if the witness is "just scared of the process of giving evidence"' (O'Brian, 2005: 484).

The court may permit the admission of such a statement only if, in its opinion, the admission is required in the interests of justice (s.116 (4)). The court must consider the following in making its decision: the contents of the statement; the risk that its admission or exclusion will be unfair to any party, with particular regard to the difficulty of challenging it if the person does not give oral evidence; the fact that a special measures direction may be made; and any other relevant circumstances (s.116 (4) (a)-(d)). Nevertheless, the court may exclude the statement if, in its opinion, 'the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence' (s.126(1)(b)).

The courts have adopted an expansive approach to the admission of hearsay evidence in the case of frightened witnesses (see Wolhuter et al, 2009: 135-6). *R. v. Sellick and Sellick*²⁸ concerned the hearsay provisions of the predecessor to s.116, namely s.23 of the Criminal Justice Act 1988. The Court of Appeal held that, where the witness was kept from testifying by fear evoked by the accused, article 6(3) (d) of the ECHR would not be infringed if the witness's statement was read without the accused having an opportunity to challenge him/her. This was so even if the evidence was the 'sole or decisive evidence' against the accused (paras 51-2). The court added, however, that courts must take care to ensure that the hearsay provisions are not abused. They must scrutinise all the

circumstances carefully prior to exercising their discretion to admit the evidence, particularly where it is decisive evidence (para 57). In *R. v. Xhabri*,²⁹ the Court of Appeal held that article 6(3)(d) does not encompass an absolute right to cross-examine every witness, and that it was not infringed by the hearsay provisions of the CJA 2003 (paras 42-4).

In *Al-Khawaja and Tahery v. UK*,³⁰ re-iterating its existing jurisprudence, the ECtHR stated that the admission of hearsay evidence, which is the sole or decisive evidence against an accused who has had no opportunity to challenge it, violates article 6(1)(d) of the ECHR.³¹ It expressed strong doubt whether ‘any counterbalancing factors’ could justify the admission of a hearsay statement in these cases (para 37). However, approving *Sellick*, it stated that such counterbalancing factors would be present in the ‘special circumstances’ where a witness is kept from testifying ‘through fear induced by the defendants’ (para 37). Consequently, it is only untested hearsay where the fear emanates from a source other than the accused, and which amounts to the sole or decisive evidence against the accused, that falls foul of article 6(3) (d).

The approach of the English courts is much more generous than that of their South African counterparts. However, they are reluctant to admit untested evidence in cases involving victims of racially motivated and homophobic crime, where the victim is the only witness. As these victim-witnesses experience high levels of intimidation (which frequently emanates from the accused or his/her associates), this judicial reluctance hampers the admission of hearsay evidence in cases involving victims who have the greatest need for protection. While the hearsay provisions comply with the government’s duty to uphold victims’ right to protection, they may thus be less than effective in practice. Consequently, the introduction of a similar exception to the hearsay rule in South African law ought to be accompanied by judicial training, to ensure that it is applied to all categories of VIVW.

Witness anonymity

South African law

In terms of s.153(2) of the CPA, if the court considers that harm is likely to result to any person (apart from the accused) if s/he testifies, it may order that s/he testifies *in camera*, and that no person whose presence is not necessary or authorised may be present while the evidence is given (s.153(2)(a)). The court may also order that the person’s identity not be revealed at all, or for a specified period (s.153 (2) (b)). In *S. v. Leepile and Others (5)*,³² the court held that s.153, and, in particular, s.153(2)(b), empowers the court to withhold a witness’s identity from the public, not from the court or the defence (191A-C). Keeping the witness’s identity from the accused would cause significant prejudice, and would depart from the fundamental principles of criminal justice (189E, 190I).

The court in *S. v. Pastoors*³³ adverted to the difficulty of cross-examining a witness without knowing his/her identity (225G, 225J), but emphasised that, in the case of frightened witnesses, there is a conflict of interest requiring the court to uphold those interests that ‘weigh in favour of proper administration of justice’ (226B). However, the presentation of the defence case must be hindered no more than ‘absolutely necessary’

(226D). Having weighed the competing interests, the court permitted the witness to use a pseudonym for the purpose of the trial (226F-G). In *S. v. Ntoae and Others*,³⁴ the court held that concerns about the difficulty of cross-examining an anonymous witness do not ‘necessarily dictate’ that a court cannot withhold a witness’s identity from the accused and defence counsel, in appropriate cases (29C-D). If it is in the interests of justice, the court may do so (29E), albeit only ‘in rare and exceptional cases’ (29J-30A). The court accordingly acceded to the witnesses’ request that their true surnames be kept from the accused (31G).

Consequently, there is authority for the use of anonymous testimony in exceptional cases. However, neither the Supreme Court of Appeal nor the Constitutional Court has determined the matter finally, and orders permitting anonymous testimony are rare.

English law

In order to contextualise recent developments in the U.K. regarding witness anonymity, ECtHR jurisprudence requires brief consideration. In *Doorson v. The Netherlands*,³⁵ which concerned witnesses granted anonymity because of fear of reprisals from the accused, the ECtHR held that there was no violation of article 6(3)(d) of the ECHR (see Wolhuter et al, 2009: 124). It stated that the interests of victims and witnesses, while not expressly protected by article 6, are protected by other rights in the ECHR, such as the rights to life, liberty and security of the person, and respect for private and family life (para 70). Anonymous testimony may be used to protect witnesses, if it is strictly necessary and the limitations on the accused’s right are ‘sufficiently counterbalanced by the procedures followed by the judicial authorities’ (para 72). However, convictions must not be founded ‘solely or to a decisive extent on anonymous statements’ (para 76).

In *R. v. Davis*,³⁶ Lord Mance stated that it is not certain whether the requirement that anonymous evidence must not be ‘the sole or decisive evidence’ is an absolute one, or merely ‘a very important factor to balance the scales’ (para 89). Nonetheless, he held that the ECtHR would not have permitted anonymous testimony in the present case. Not only was it the sole or decisive basis of the accused’s conviction, the defence cross-examination was restricted severely by the anonymity of the witness, as well as by the distortion of their voices and the use of screens to shield them from the view of the accused and his counsel. There were no counter-balancing measures in place, and article 6(3) (d) was accordingly violated (para 96).

In *Al-Khawaja and Tahery v. UK*,³⁷ the ECtHR expressed doubt whether any counterbalancing measures could justify the admission of a hearsay or anonymous statement that constitutes the ‘sole or decisive evidence’ against the accused (paras 36, 37). However, the court recognised that ‘special circumstances’ remain where the matter concerns *identified* witnesses who are prevented from testifying as a result of fear caused by the accused. In such cases *hearsay evidence* may be admissible even if it is the sole or decisive evidence against the accused (para 37; see above). In *Davis*, Lord Carswell, albeit obiter, expressed support for the view that such principle also ought to apply to anonymous witnesses (para 60). However, the ECtHR in *Al-Khawaja* made no mention of a similar exception pertaining to anonymous witnesses, and the issue accordingly remains unresolved.

Lord Mance in *Davis* held further that, as the jurisprudence of the ECtHR does not require Member States to recognise witness anonymity, the matter must be decided in terms of English law (para 97). In principle (barring exceptional circumstances that do not apply to frightened witnesses), English law does not permit anonymous testimony, and the decision to introduce it is one for Parliament to make, not the courts (paras 97, 98). Parliament responded by enacting the Criminal Evidence (Witness Anonymity) Act 2008 (CEWAA).³⁸ Section 2(1) empowers courts to grant a witness anonymity order, which requires appropriate measures to be taken to preclude the disclosure of a witness's identity. Such measures include, withholding the witness's name and other identifying details; using a pseudonym; prohibiting questions that may result in identification; screening the witness; and modulating the witness's voice (s.2(2)). However, screens and voice modulation may not prevent the judge, jury or interpreter, if any, from seeing the witness and hearing his/her natural voice (s.2 (4)).

Before a court may grant a witness an anonymity order regarding a frightened witness, three conditions must be satisfied. Firstly, measures must be necessary to protect the witness's safety, the safety of another, or 'serious damage to property' (s.4 (3) (a)). The court must take cognisance of 'any reasonable fear' on the witness's part that s/he, or another, 'would suffer death or injury', or that 'serious damage to property' would result, if s/he were identified (s.4 (6)). In *R. v. Mayers, Glasgow, Costelloe, Bahmanzadeh, R v. P, V, R*,³⁹ the Court of Appeal held that the risk to the witness's safety may emanate from any source, not only the accused (para 28). Secondly, the measures must be consonant with a fair trial (s.4 (4)). Thirdly, the order must be necessary 'in the interests of justice by reason of the fact that it appears to the court that (a) it is important that the witness should testify, and (b) the witness would not testify if the order were not made' (s.4.(5)). In *Mayers*, the court emphasised that mere reluctance to testify is insufficient. The witness must refuse to testify (para 26).

The court must take into account the various considerations in determining whether these conditions are fulfilled. These considerations include the accused's right to know the witness's identity; whether the witness's testimony may be 'the sole or decisive evidence' against the accused; whether it is possible to test the witness's evidence properly without disclosing his/her identity and whether there are other 'reasonably practicable' ways to protect the witness's identity (s.5). In *Mayers*, the court held that if the evidence is both the sole and the decisive evidence, it may be more difficult to comply with the second condition (para 23). However, the relegation of the 'sole or decisive evidence' criterion to a mere factor may conflict with the jurisprudence of the ECtHR (see above).

The CEWAA does not address the question whether anonymous hearsay evidence is ever admissible. The court in *Mayers* held that neither the CEWAA nor the hearsay provisions in the CJA 2003 permit such evidence, and that the matter must be dealt with by Parliament (para 113). It is unlikely that the ECtHR 'would ever condone a conviction based on anonymous hearsay' (Ormerod, 2009: 279).

It appears from the foregoing analysis that, amidst some controversy, the legislature has chosen to forge a new special measure, which is compliant with the ECHR if it does not

permit testimony that is the sole or decisive evidence against the accused. The extent to which the courts will be willing to use this special measure to protect all VIVW remains to be seen. South African VIVW who are too afraid to testify would benefit from a similar special measure, particularly in the context of trials involving gang-related intimidation and violence. However, in view of the conflicting case law concerning s.153 of the CPA, it is unlikely to be used frequently in such cases. Furthermore, it contains insufficient details regarding the forms that witness anonymity may take. Consequently, this article advocates the legislative entrenchment of an approach analogous to that of the English CEWAA.

Conclusion

Highlighting the constitutional underpinnings of the right to protection in the Victims' Charter, as well as the importance of balancing victims' rights with the accused's right to a fair trial, this article has contended that a comprehensive array of protective measures will enable VIVW to move inwards from the margins of the trial process. The provision of a broader range of special measures, including pre-recorded video evidence and witness anonymity, to all VIVW, will alleviate the trauma of testifying in the accused's presence. Furthermore, the admission of hearsay evidence on the ground of fear or intimidation will free VIVW from the ordeal of cross examination by defence counsel. However, legislative restrictions on the admission of sexual history evidence are unlikely to succeed, and lawyers for sexual offence victims are more likely to reduce their experiences of secondary victimisation in this respect. In order to comply with its duties to uphold the constitutional rights of victims, and to give teeth to the Victims' Charter, the South African government must take steps to effect the introduction of these measures. In the absence of such reforms, VIVW will continue to be 'evidentiary cannon fodder' (Dignan, 2005: 64) in the adversarial process.

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Endnotes

¹ For English studies regarding secondary victimisation in court, see, inter alia, Ellison, 1998; Bacik, Maunsell, & Gogan, 1998; Ellison, 2000; Ellison, 2001; Lees, 2002; Temkin, 2002; Wolhuter, Olley, & Denham, 2009. For South African studies regarding secondary victimisation in court, see, inter alia, Simon, 2006; Reynecke & Kruger, 2006, Gallinetti & Kassan, 2008.

² Section 234 provides that '[i]n order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution'.

³ The Victims' Charter provides that complaints by aggrieved victims may be made to the following agencies: the Office of the Public Protector; the South African Human Rights Commission; the Commission on Gender Equality; the Independent Complaints Directorate; Metropolitan Police Offices; and the Health Professions Council of South Africa.

⁴ *Criminal Proceedings Against Pupino* [2005] 3 WLR 1102 at paras 34, 59.

⁵ *Criminal Proceedings Against Pupino* [2005] 3 WLR 1102 at para 38.

⁶ (1996) 22 EHRR 330.

⁷ [2009] ZACC 8; 2009 (4) SA 222 (CC).

⁸ 2003 (1) SACR 232 (C).

⁹ See s.153 of the Criminal Procedure Act 51 of 1977.

¹⁰ 1996 (1) SACR 434 (E).

¹¹ See, also, *Klink v. Regional Magistrate NO 1996 (3) BCLR 402 (SE)*.

¹² 1999 (1) SACR 571 (C).

¹³ 2003 (1) SACR 232 (C).

¹⁴ 2005 (1) SACR 193 (C).

¹⁵ In terms of s.88 (2) of the Coroners and Justice Bill 2009 (CJB), the age of a vulnerable witness is increased to 18 years.

¹⁶ [2005] 2 Cr. App. R. 1.

¹⁷ (2004) 39 EHRR 13.

¹⁸ This amendment was effected by the Criminal Law and Criminal Procedure Amendment Act 39 of 1989.

¹⁹ 2002 (2) SACR 411 (SCA).

²⁰ [1982] 3 All ER 73 (CA) at 77, quoted in *S. v. M. 2002 (2) SACR 411 (SCA)* at 423F-424B.

²¹ The substitution is effected in terms of s.11 of the schedule to s.68.

²² 2006 (2) SACR 191 (W).

²³ [2001] 2 Cr. App. R. 21.

²⁴ [2007] Crim L.R. 635 at 637.

²⁵ [2004] 2 Cr. App. R. 22. at para 37.

²⁶ However, see *Hlongwane and Others v. Rector, St Francis College and Others* 1989 (3) SA 318 (D), where fear of reprisals was held to justify the admission of hearsay evidence in an application for the re-instatement of school pupils.

²⁷ 2002 (6) SA 305 (SCA).

²⁸ [2005] 2 Cr. App. R. 15.

²⁹ [2006] 1 Cr. App. R. 26.

³⁰ (2009) 49 EHRR 1.

³¹ See *Lucà v. Italy* (2003) 36 EHRR 46 at para 33; *PS v. Germany* (2003) 36 EHRR 61 at paras 30-2.

³² 1986 (4) SA 187 (W).

³³ 1986 (4) SA 222 (W).

³⁴ 2000 (1) SACR 17 (W).

³⁵ (1996) 22 EHRR 330.

³⁶ [2008] 2 Cr. App. R. 33.

³⁷ (2009) 49 EHRR 1.

³⁸ Section 14 of the CEWAA provides that the courts may grant witness anonymity orders until 31 December 2009 only. However, the CJB provides the courts with the permanent power to grant such orders.

³⁹ [2009] 1 Cr. App. R. 30.