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ESTABLISHING MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND PROTECTION FOR CRIME VICTIMS WITH SPECIFIC PROTECTION NEEDS.

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INTRODUCTION

The EU *Directive establishing minimum standards on the rights, support and protection of victims of crime* (the ‘Directive’)¹ was adopted on the 25th of October 2012. With an aim of ensuring that ‘victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings’,² the Directive replaces the 2001 *Framework Decision on the standing of victims in criminal proceedings* (the ‘Framework Decision’),³ the implementation of which the Commission had previously condemned as being largely ineffective.⁴

In many respects the Directive goes beyond the scope of the Framework Decision with its preamble stating that it is intended to ‘amend and expand’⁵ the terms of that document. With a view to achieving effective minimum EU harmonisation on provision for crime victims the Directive has been drafted as a much more detailed instrument than its predecessor, removing a great deal of the discretion that had been afforded to the Member States under the Framework Decision. Adding to this the increased legal clout afforded to directives as a result of their being subject to the full jurisdiction of the Court of Justice of the EU (CJEU)⁶ and the potential for their provisions to be directly effective within the national systems of the Member States,⁷ and it is anticipated that Directive 2012/29/EU will be a much more effective instrument in securing rights, support and protection for victims than has ever previously been the case within the EU.

This paper focuses on Articles 22–24 of the Directive, which outline the minimum standards of provision expected in respect of victims with specific protection needs. Here we explain the extent of these obligations and assess the suitability of our English domestic law in meeting these aspects of the Directive.⁸

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¹ Directive 2012/29/EU of the 25 October 2012 [2012] OJ L 315/57.

² The Directive, Art 1. All references to ‘Art; Articles’ are to the Articles of the Directive.

³ Framework Decision 2001/220/JHA of 15 March 2001 [2001] OJ L 82/1.

⁴ European Commission Impact Assessment SEC/2011/580 of 18 May 2011, 6.

⁵ Preamble to the Directive, para 65.

⁶ A major change introduced by the Treaty of Lisbon (amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/01) was to extend the competence of the CJEU in the area of Freedom, Security and Justice with the effect that the competence of the court is now unrestricted in respect of all new EU criminal law instruments (including Directive 2012/29/EU).

⁷ For some time the possibility that provisions of directives could achieve direct effect has been recognised. See case 41/74 *Van Duyn v Home Office* [1974] ECR 1338.

⁸ Art 27(1) of the Directive requires that Member States implement the laws, regulations and administrative measures necessary to transpose the Directive into their domestic law by the 19th of November 2015.

ARTICLE 22 – INDIVIDUAL ASSESSMENT OF VICTIMS TO IDENTIFY SPECIFIC PROTECTION NEEDS.

Article 22(1) requires that Member States ‘shall ensure that victims receive a timely and individual assessment. . .to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings. . .due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation’.

While Member States are permitted significant flexibility in the way that they conduct this individual assessment⁹ it is clearly intended that the assessment takes place at as early an opportunity as possible,¹⁰ and that it should be updated throughout criminal proceedings if the elements that form its basis have changed significantly.¹¹

In conducting the individual assessment the Member States are required by Article 22(2) to pay particular attention to the personal characteristics of the victim and to the type, nature and circumstances of the crime. The only group specifically identified as having presumed protection needs are child victims,¹² but even here the Member States remain obliged to conduct an individual assessment to assess the nature and extent of any special measures required.¹³ Beyond child victims the preamble to the Directive also identifies other vulnerable groups such as victims of human trafficking, terrorism, and domestic violence as being at high risk of secondary and repeat victimisation, intimidation and retaliation, with a presumption that these victims will also benefit from special protection measures.¹⁴ To a lesser extent this presumption is reflected within the wording of Article 22(3) itself.¹⁵

In the English jurisdiction, the Youth Justice and Criminal Evidence Act 1999 (as amended by s.98 of the Coroners and Justice Act 2009) (the ‘YJCEA 1999’) sets out the eligibility criteria for witnesses with specific protection needs, known under the legislation as vulnerable and intimidated witnesses. Section 16 YJCEA 1999 concerns the eligibility of witnesses for assistance by special measure on the grounds of age or capacity. Under this section witnesses aged 18 or under¹⁶ at the time of the hearing are deemed to be automatically eligible for assistance.¹⁷ Additionally, if the court concludes that the quality of evidence given by a witness is likely to be diminished due a mental or physical disorder, or other significant impairment, then that witness will also be deemed eligible for assistance by virtue of this section.¹⁸ Section 17 then provides that a witness identified by the court as being intimidated, in that the quality of their evidence is likely to be diminished due to fear or distress, is eligible to access special measures to aid them in giving evidence.¹⁹ Victims of sexual offences, victims of human trafficking for exploitation, and any witness in a case involving a ‘relevant offence’,

⁹ This is evident in Art 22(1) where Member States are permitted to conduct the assessment ‘in accordance with national procedures’ and in Art 22(5) where the extent of the individual assessment can be varied ‘according to the severity of the crime and the degree of apparent harm suffered by the victim’.

¹⁰ Preamble to the Directive, para 55.

¹¹ Art 22(7).

¹² Art 22(4).

¹³ *Ibid.*

¹⁴ Preamble to the Directive, para 57.

¹⁵ Art 22(3) only requires that: ‘victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be *duly* considered’ (emphasis added).

¹⁶ Prior to the amendments made by the Coroners and Justice Act 2009 Act this limit had been set at age 17.

¹⁷ S 16(1)(a).

¹⁸ S 16(1)(b).

¹⁹ S 17(1).

currently defined to include homicide offences and other offences involving a firearm or knife, are automatically categorised as eligible witnesses under s. 17.²⁰

On initial consideration this categorisation appears to be somewhat limited in its classification of those people who may be eligible for special protection and assistance when interacting with the criminal justice system. This is so, as inherent within the design of the domestic legislation was a focus on the needs of witnesses, rather than specifically on the needs of victims. This overlooks the fact that many victims will never appear as witnesses in court but may still require special measures of support and protection during their other interactions with the Criminal Justice System. In this respect the legislation is geared towards the crime control objectives of the Criminal Justice System rather than the support and protection needs of victims, and this seems somewhat at odds with the underlying thread of the Directive.

Of course to offer a fair assessment of the English position, the provisions of the YJCEA 1999 must be considered in light of other initiatives in this field, most notably, the recently revised *Code of Practice for Victims of Crime* (the 'revised Code').²¹ The original version of the Code was issued in 2006 (the '2006 Code')²² which, for the first time, placed on a statutory footing the minimum levels of service that a victim could expect to receive from criminal justice agencies.²³ In subsequent years however, the Code had attracted growing criticism, much of it levied at the fact that it was process orientated,²⁴ which often resulted in ineffective targeting of resources towards victims who were not in need of protection and support whilst overlooking those that were.

Following two consultations on proposals for reform²⁵ the Government published the revised *Code of Practice for Victims of Crime* in October 2013 (the 'revised Code'). The intention behind this revised edition is clearly to bring the domestic approach in line with that of the Directive, and this is particularly evident in relation to victims with specific protection needs. Within the revised Code the police are now obligated to conduct an initial needs assessment with victims and the expectation is that this will take place as soon as a crime reference number is issued and prior to any witness statement being taken.²⁶ This is a significant change to the previous approach under the 2006 Code,²⁷ and one which addresses the requirement under Article 22(1) that Member States conduct both an individual and timely assessment of victims to identify specific protection needs.

Furthermore, the categories of victims now eligible under the revised Code to access enhanced services to support and protect them throughout the criminal justice process has increased to include victims of the most serious crimes; persistently targeted victims; and vulnerable or intimidated victims, with this last category of entitled victims being based upon the eligibility criteria provided in ss. 16 and 17 of the YJCEA 1999.

²⁰ S 17(4).

²¹ Ministry of Justice (The Stationery Office 2013).

²² Office for Criminal Justice Reform, *The Code of Practice for Victims of Crime* (VictCode/1, 2005).

²³ A Code of Practice for Victims of Crime was provided for under s 32 of the Domestic Violence, Crime and Victims Act 2004 but note that s 34 of that Act makes it clear that any breaches of the Code by criminal justice agencies do not give rise to legally enforceable rights for victims.

²⁴ Ministry of Justice, *Improving the Code of Practice for Victims of Crime* (2013) para 5.

²⁵ Ministry of Justice, *Getting it Right for Victims and Witnesses* (Jan 2012) and Ministry of Justice, *Improving the Code of Practice for Victims of Crime* (March 2013). See also the Government's responses: Ministry of Justice, *Getting it Right for Victims and Witnesses: The Government Response* (July 2012) and Ministry of Justice, *Improving the Code of Practice for Victims of Crime* (Oct 2013).

²⁶ This ordering of this process is outlined in the revised Code (n21) in the Victim's journey through the Criminal Justice System flowchart, p 5.

²⁷ Under para 4.11 of the 2006 Code (n 22) the police were charged, alongside the other criminal justice agencies, with identifying victims who were vulnerable or intimidated but there was no specific requirement for the police to conduct any early stage needs assessment with victims.

Additionally the revised Code also recognises that victims of particular crimes, such as terrorism, domestic violence, hate crimes, human trafficking and attempted murder may warrant access to enhanced services despite the fact that they may not fall within the specific parameters set down by the current legislative provisions.²⁸ This wider inclusion appears to align the English domestic position with the requirements under Article 22 of the Directive, with the Code replicating many of the example offences set out in Article 22(3) itself.

That said, the English authorities still face significant practical challenges if they hope to meet the identification requirements under Article 22 due to the documented existence of a notable identification deficit in respect of victims with specific protection needs. While it is appreciated that identification practices may have moved on significantly²⁹ since the leading research by Burton et al³⁰ was conducted in 2006, the extent to which the rights under Article 22 will be guaranteed in this jurisdiction cannot be determined in the absence of updated research into the effectiveness of current identification practices.

ARTICLE 23 – THE RIGHT TO PROTECTION OF VICTIMS WITH SPECIFIC PROTECTION NEEDS DURING CRIMINAL PROCEEDINGS.

Article 23 divides measures available to victims who have been identified as being in need of specific protection during criminal proceedings into two categories: those measures which should be available during criminal investigations,³¹ and those measures which should be available to victims participating in court proceedings.³²

Measures relating to criminal investigations.

Article 23(2) of the Directive sets out three general measures that Member States should make available during criminal investigations to victims identified as having specific protection needs. The first requirement, that interviews should be carried out in specially designed or adapted premises, is well met by current police practice in England. Indeed, the Ministry of Justice in their *Achieving Best Evidence in Criminal Proceedings*,³³ place a great deal of focus on pre-interview planning and specifically require that active consideration should be given to the location of the interview and the layout of the room in which it is to take place. This requirement is similarly reflected in the revised Code.³⁴

The second requirement under Article 23(2), that interviews should be carried out by or through trained professionals, is also well met by current English standards with the Association of Chief Police Officers issuing a *National Investigative Interviewing Strategy*³⁵ in 2009, which sets down national occupational standards for investigative interviewers and explains the service-wide structures that are required to support the

²⁸ The revised Code (n 21) ch 1, para 1.8.

²⁹ For guidance on current identification practice see: Ministry of Justice, *Vulnerable and Intimidated Witnesses: A Police Service Guide* (2011) and Office for Criminal Justice Reform, *Working with Intimidated Witnesses: A Manual for Police and Practitioners Responsible for Identifying and Supporting Intimidated Witnesses* (2006).

³⁰ Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (Home office 2006).

³¹ Art 23(2).

³² Art 23(3).

³³ Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (2011).

³⁴ n 21 Ch 2, part B, para 1.6.

³⁵ National Policing Improvement Agency, *National Investigative Interviewing Strategy* (ACPO 2009).

training of those conducting investigative interviewing. This approach is echoed in *Achieving Best Evidence in Criminal Proceedings* with paragraph 1.30 of that document additionally requiring the development of specialist training for interviewers conducting interviews with witnesses with particular needs.

The third requirement in Article 23(2) is that all interviews with a victim should be conducted by the same person. This approach is well reflected in current English practice with *Achieving Best Evidence in Criminal Proceedings* placing a great deal of emphasis upon the importance of rapport building with witnesses,³⁶ which is likely to be best achieved where the number of interviewers is kept to a minimum. The requirement that the same person conducts all interviews with the victim, where possible and if appropriate, is also highlighted in the revised Code as one of the duties incumbent upon police.³⁷

Additionally, where a victim has suffered a crime of sexual violence, gender-based violence or violence in a close relationship, Article 23(2)(d) requires that Member States make specific provision for interviews to be conducted by someone of the same sex as the victim. While there are acceptable operational and practical constraints which mean that this requirement may not always be met in practice,³⁸ it is clearly the intention of the English authorities that this will be accommodated where possible. This is evidenced by the indication in *Achieving Best Evidence in Criminal Proceedings*³⁹ and in the requirements under the revised Code⁴⁰ that due regard should be had to the gender of the witness and to any preference on the witness's part as to the gender of the interviewer, when decisions about the choice of interviewer are being made.

Measures relating to court proceedings.

Paragraph 53 of the preamble to the Directive makes it clear that Member States should provide as wide a range of measures as possible to prevent distress to victims during court proceedings. Article 23(3) states that these should include:

1. measures to avoid visual contact between victims and offenders;
2. measures to ensure that the victim may be heard in the courtroom without being present;
3. measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence; and,
4. measures allowing a hearing to take place without the presence of the public.

Under English law, once a victim has been identified as either vulnerable or intimidated in terms of the YJCEA 1999, a range of measures, known collectively as 'special measures', may become available to assist them in giving their best evidence in court.⁴¹ These measures are contained within ss. 23 – 30 of the YJCEA 1999 and include: the provision of screens in court;⁴² evidence via live link;⁴³ evidence given in

³⁶ n33 para 3.8.

³⁷ n 21 Ch 2, part B, para 1.6.

³⁸ Article 23(1) indicates that certain operational or practical constraints may make provision of certain special measures impossible and that this does not constitute a breach of the obligation under the Article.

³⁹ n33 para 2.180–2.181.

⁴⁰ n 21 Ch 2, part B, para 1.5.

⁴¹ It should be noted that identification of potential eligibility does not mean automatic access to special measures, but rather that the utilisation of them by a victim may be granted at the court's discretion.

⁴² S 23.

⁴³ S 24.

private;⁴⁴ removal of wigs and gowns;⁴⁵ video-recorded interviews which can be admitted as evidence-in-chief;⁴⁶ video-recorded cross-examination;⁴⁷ the use of an intermediary;⁴⁸ and, the use of communication aids.⁴⁹

The revised Code includes, but does not expand upon, the list of special measures available under the YJCEA 1999 as, on its face, the legislation appears comprehensive in meeting the Directive's requirements. Currently absent from inclusion in the revised Code, however, is a reference to s 28 of the YJCEA 1999, a provision that allows for the pre-recording of cross-examination evidence,⁵⁰ but which has previously been unavailable in practice. A pilot study of the implementation of this provision is currently underway⁵¹ and it is anticipated that it will be included in the revised Code if the pilot is deemed to have been successful. However, any failure on the part of the Government to roll out the pilot nationally, or to roll out an amended version based on the data received from the pilot if it is not successful in its current form, by the date of the Directive's implementation in 2015 should be viewed as a missed opportunity to better support vulnerable victims subjected to cross examination and, in turn, to better meet the requirements under the Directive.⁵²

ARTICLE 24 – THE RIGHT TO PROTECTION OF CHILD VICTIMS DURING CRIMINAL PROCEEDINGS.

In addition to the general measures of protection that child victims may access under Article 23 they are also eligible to access three further measures by virtue of Article 24.

Article 24(1)(a) requires that all interviews conducted with child victims during the criminal investigation may be audio-visually recorded and that such recordings may then be available as evidence in criminal proceedings. As discussed above, the provisions of the YJCEA 1999 support this approach and current English practice is to audio-visually record investigative interviews conducted with child victims in order that these may be used as the child's evidence-in-chief at any subsequent trial.⁵³

Article 24(1)(b) then makes provision for the availability of special representatives for child victims where there is a conflict of interest between the child and the person with parental responsibilities, or where the child is estranged from their family, and Article 24(1)(c) similarly makes provision for the child to have access to legal

⁴⁴ S 25.

⁴⁵ S 26.

⁴⁶ S 27.

⁴⁷ S 28.

⁴⁸ S 29.

⁴⁹ S 30.

⁵⁰ The anticipated benefactors of this provision will be child witnesses although the wording of s 28 extends to intimidated and vulnerable witnesses generally.

⁵¹ This six month pilot study commenced in December 2013. See: Ministry of Justice, 'Press release: Victims to be Spared from Harrowing Court Cases' (*Gov.UK*, 11 June 2013) <<https://www.gov.uk/government/news/victims-to-be-spared-from-harrowing-court-cases>> accessed 15 January 2014.

⁵² This discussion predominately relates to the requirements under Article 23(3)(a) and (b) that Member States make provision to provide victims identified as having specific protection needs with the opportunity to give evidence whilst avoiding visual contact with the offender and without having to be present in the courtroom itself. However, Tomas Lonigs, Sohail Wahedi and Tjalling Waterbolk in 'The European Union's Approach toward Child Victim Testimonies in Criminal Proceedings Compared to the Right to Fair Trial: *summum ius, summa injuria?*' 2013 6(4) *Journal of Politics and Law* 14, 18, indicate that the requirement under Article 24(1)(a) may also be relevant here. As we discuss in our next section, Article 24(1)(a) requires that all interviews conducted with child victims should be audio-visually recorded in order to be used as evidence in criminal proceedings and Lonigs, Wahedi and Waterbolk contend that this may give rise to a general right, beyond that provided under Article 23, for child victims who are called to testify in court to provide audio-visually recorded evidence.

⁵³ n33 para 2.31.

representation in their own right where there may be a conflict of interest between the child victim and the holders of parental responsibility. While it is often the case within the English jurisdiction that child victims will be supported by advocates or specialist workers during their interactions with the English Criminal Justice System, in real terms the rights contained in Articles 24(1)(b) and (c) lie dormant in this jurisdiction where victims are not recognised as parties to criminal proceedings in need of legal or special representation.⁵⁴

LIMITING THE RIGHTS AFFORDED UNDER ARTICLES 22–24 – THE PROBLEM OF DISCRETIONARY WORDING.

What we have in the Directive is the removal of a great deal of the discretionary language that had afforded the Member States too many opportunities to avoid their obligations under the Framework Decision. Of course some discretionary language necessarily remains in order to facilitate the harmonisation of rights, support and protection of victims of crime across the separate Criminal Justice Systems operating within the EU, and this discretionary approach is particularly evident in Articles 22–24.

In respect of the individual assessment required under Article 22, the Directive leaves the mechanisms by which this is to be achieved to be determined according to the national procedures of the Member States⁵⁵ and affords the Member States significant discretion in varying the extent of such an assessment dependent on the perceived severity of the crime and the degree of harm suffered by the victim.⁵⁶

On the face of Articles 23 and 24 the measures that Member States are to make available to victims identified as having specific protection needs appear extensive. That said, the wording of the Directive seems overly generous to States in some respects with the effect that significant limitations may be placed on the availability of measures in certain circumstances. For example, Article 23 allows for the restriction of certain special measures of protection in circumstances where such provision may prejudice the rights of the defence,⁵⁷ where the rules of judicial discretion require it,⁵⁸ if operational or practical constraints make its provision impossible,⁵⁹ or where to do so would prejudice proceedings⁶⁰ or run contrary to the good administration of justice.⁶¹

The possibility that the Member States will limit their provision under this part of the Directive by reliance on these various caveats may result in a wide variation in the type and extent of the individual assessment conducted, and to the type and extent of any special measures of protection afforded to victims within the EU. By providing such discretion to the Member States there is a danger that, just as was the case with the Framework Decision, the overarching aim of the Directive will be undermined.

⁵⁴ That this will be the position within Member States such as our own is accommodated by the wording of the Directive. Indeed, Article 24(1)(b) relates to the appointment of special representatives 'in accordance with the role of victims in the relevant criminal justice system', and Article 24(1)(c) relates to the right to legal advice and representation 'where the child victim has the right to a lawyer'.

⁵⁵ Art 22(1).

⁵⁶ Art 22(5).

⁵⁷ Art 23(1).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Arts 23(1) and 23(2)(d).

⁶¹ Art 23(2)(c).

CONCLUSION.

Articles 22–24 of the Directive seek to achieve minimum EU harmonisation on the rights, support and protection afforded to crime victims with specific protection needs. As a result of the amendments made to the *Code of Practice for Victims of Crime* and due to the various recent improvements in the treatment of such victims in practice, the English jurisdiction seems well placed to meet these minimum requirements by the date of the Directive’s implementation in November 2015, providing, that is, that the English government does not seek to avoid its obligations by exploiting the discretionary language employed within Articles 22–24.

The task ahead in achieving all of this presents no mean feat, but any efforts involved in meeting (and hopefully exceeding) the minimum standards set down in the Directive will be repaid immeasurably if real improvements can be secured for the most vulnerable of crime victims within our society.