



Monitoring Access to Justice for Disabled Witnesses of Disability Hate Crime

Angela Laycock and Louise Hewitt

DISABLED WITNESS PROJECT

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ABBREVIATIONS

ABE	Achieving Best Evidence
ACPO	Association of Chief Police Officers
ASB	Anti-social Behaviour
BPTC	Bar Professional Training Course
CDA	Crime and Disorder Act 1988
CEDRM-UK	Comparative Evaluation of Disability Rights Mechanisms - United Kingdom
CJA	Criminal Justice Act 2003
CPS	Crown Prosecution Service
DDA 1995	Disability Discrimination Act 1995
DDA 2005	Disability Discrimination Act 2005
DPP	Director of Public Prosecutions
DRPI	Disability Rights Promotion International
ECHR	European Convention on Human Rights 1950
EHRC	Equality and Human Rights Commission
ECtHR	European Court of Human Rights
GAD	Greenwich Association of Disabled People's Centre for Independent Living
HMICFRS	Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services
HMCPSP	Her Majesty's Crown Prosecution Service Inspectorate
ICCA	Inns of Court College of Advocacy
LSET	Legal services education and training
MOJ	Ministry of Justice
MPS	Metropolitan Police Service
NPCC	National Police Chiefs' Council
PEEL	Police Effectiveness, Efficiency and Legitimacy (inspection framework)
POA	Public Order Act 1986
TAG	The Advocate's Gateway
TPR	Third-Party Reporting
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UPIAS	Union of Physically Impaired Against Segregation
UoGSL	University of Greenwich School of Law
VRR	Victims' Right to Review
YJCEA	Youth Justice and Criminal Evidence Act 1999

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All content and any errors remain the responsibility of the editors.

EDITORS

Angela Laycock, Senior Lecturer in Law, University of Greenwich
Louise Hewitt, Lecturer in Law, University of Greenwich

RESEARCH TEAMS

2012-2013

Jessica Gray, Benjamin Howland, Deanne Phillips, Helmer Ramirez,
Lizzie Taylor-Wilson

2013-2014

Stuart Barnes, Jessica Gray, Vivian Kintu, Fariha Malik, Ilona Smyth

2014-2015

Nubia Laurendeau, Rebecca Leong, Hannah Walker

For further information please contact:

Angela Laycock: angelalaycock027@gmail.com

¹ Currently Equalities Officer METRO GAD

² Currently 1-2-1 Advocacy Co-ordinator, Crime and Hate Crime Advocate, Lewisham Speaking Up

ABOUT THIS REPORT: 'MONITORING ACCESS TO JUSTICE FOR DISABLED WITNESSES OF DISABILITY HATE CRIME'

This report, Monitoring Access to Justice for Disabled Witnesses of Disability Hate Crime describes the work of the first phase of the Disabled Witness Project 2012-18 in examining the operation of the law relating to Disability Hate Crime, with a view to ensuring that disabled victims of Disability Hate Crime could gain protection through the law. It outlines the Disabled Witness Project's findings relating to the challenges that in practice often prevent the disabled witness from gaining legal protection and recommendations as to what could be done further to ensure "equal justice"³ for disabled witnesses of Disability Hate Crime.

The Report is divided into four parts.

Part 1 - Disabled Witness Project: Monitoring Access to Justice for Disabled Witnesses of Disability Hate Crime in the Royal Borough of Greenwich introduces the Disabled Witness Project. This section describes the background to the setting up of the Disabled Witness Project, a community research project reviewing the operation of the law relating to Disability Hate Crime: development of the social model of disability; the pioneering work of Greenwich's disabled community supported by the Metropolitan Police Service (MPS); the University of Greenwich School of Law's (UoGSL) research into Disability Rights as Human Rights; the Greenwich Association of Disabled People's Centre for Independent Living⁴ (GAD)/UoGSL) Partnership; developments in international, domestic law and Government policy promoting action against hate crime, which provided an opportunity for the setting up of the Disabled Witness Project. Part 1 also provides a description of the organisation and approach of the Disabled Witness Project.

Part II - Access to Justice for Disabled Witnesses of Disability Hate Crime: Criminal Law details the findings of the Disabled Witness Project as a result of an examination of the degree of protection for Disability Hate Crime provided through legislation. The Disabled Witness Project argues that the current legislation is not "fit for purpose"⁵ since the Criminal Law fails to provide equality of protection for victims of Disability Hate Crime. Part II also outlines the many practical barriers to achieving a remedy for Disability Hate Crime through the current law: lack of recognition of Disability Hate Crime when it occurs and failure to report it; the failure of the police to record a crime as a Disability Hate Crime with the result that enhanced sentencing, the legal remedy for Disability Hate Crime, is not available to the disabled witness, even when an incident gives rise to prosecution for another offence; and lack of resources for the Criminal Justice System.

³ Anne Novis MBE, Chair of the Board of Trustees, Inclusion London, House of Commons Petitions Committee Online abuse and the experience of disabled people. House of Commons Petitions Committee, Online abuse and the experience of disabled people hearing <https://www.parliamentlive.tv/Event/Index/e2cf146d-4840-4558-aca3-bed718478182> accessed 8 May 2019

⁴ Registered charity: "Greenwich Association of Disabled People's Centre for Independent Living promotes the welfare of disabled people who live, work or study primarily within the Royal Borough of Greenwich, including assisting such persons to obtain their full rights and privileges as citizens." available at <https://beta.charitycommission.gov.uk/charity-details/?regid=1052814&subid=0>

⁵Andie Gbedemah, Public Affairs Officer, Dimensions, House of Commons Petitions Committee, Online abuse and the experience of disabled people hearing n3 at 15.57.12-18 <https://www.parliamentlive.tv/Event/Index/e2cf146d-4840-4558-aca3-bed718478182> accessed 8 May 2019

Part III - Access to Justice for Disabled Witnesses of Disability Hate Crime: Common Law examines the role of the Common Law in achieving access to justice for disabled witnesses through precedent. The judgment in *R v Killick* [2011] EWCA Crim1608, through its recognition of the right of a victim of a crime to seek a review of the Criminal Prosecution Service's (CPS) decision not to prosecute, led to a change in prosecution policy establishing the Victims' Right to Review (VRR) scheme and official recognition of victims' rights as part of the adversarial Criminal Justice System. The report discusses the consideration given by the Court of Appeal in *R v Killick* of the European Union Directive (which was due to come into force establishing minimum standards for the rights, support and protection of victims of crime) and the role of Human Rights Law and International Law in achieving access to justice for disabled witnesses at common law. *R v Killick* was the result of a series of attempts to achieve justice for three disabled witnesses to sexual assault, the integrity of whose evidence had initially been rejected because of speech disabilities due to cerebral palsy. Their evidence not only achieved a criminal conviction for the offence but also compensation in the civil law courts for the witnesses' initial treatment by the police and CPS, which contributed to recognition that prosecutors should "avoid incorrect judgments being made about disabled people's credibility as a witness giving evidence in court"⁶ and the integration of victim's rights into the common law adversarial system.

Part IV – Recommendations

Recommendation One

The Disabled Witness Project recommends that there should be a full review of the use of the term 'vulnerable' in the Criminal Justice System in consultation with disabled people with a view to changing such references in the context of Disability Hate Crime.

Recommendation Two: There is a need for a detailed review of the efficacy of the Criminal Law to protect disabled witnesses of Disability Hate Crime with a view to reform.

Recommendation Three: In view of the lack of consistency in recording Disability Hate Crime, the Disabled Witness Project recommends that there should be a review of innovative strategies for effective policing of Disability Hate Crime at force level, which could provide the foundations for changes in national police policy and procedure.

Recommendation Four: The Disabled Witness Project recommends developing strategies to raise recognition, reporting and recording of Disability Hate Crime, including publicity campaigns and training of police, members of the Criminal Justice System and disabled witnesses. All reviews and training relating to Disability Hate Crime and access to justice should be conducted in consultation with, and where possible, led by disabled people.

⁶ Crown Prosecution Service, Special Measures, Legal Guidance, updated August 2019 accessed 19 August 2019, available at <https://www.cps.gov.uk/legal-guidance/special-measures>

Recommendation Five: In addition to a review of the legislation in relation to Disability Hate Crime, there is also a need for a review of access to reporting of Disability Hate Crime and the impact of cuts in government spending on the pre-trial and trial process.

Recommendation Six: The Social Model of Disability and the Human Rights Model of Disability have proved invaluable tools in facilitating access to justice for disabled persons. The Disabled Witness Project recommends their continued use when reforming the law relating to Disability Hate Crime.

Recommendation Seven: A review of how far, in practice, reforms in the pre-trial and trial process achieve access to justice for disabled witnesses of Disability Hate Crime (including the role of advocacy and support services, legal aid, court procedure and special measures) would be an important contribution to ensuring access to justice for disabled witnesses of Disability Hate Crime.

Part I

DISABLED WITNESS PROJECT: MONITORING ACCESS TO JUSTICE FOR DISABLED WITNESSES OF DISABILITY HATE CRIME IN THE ROYAL BOROUGH OF GREENWICH

1. What is the Disabled Witness Project?

The Disabled Witness Project was commissioned as an independent *pro bono* research project based in the University of Greenwich School of Law (UoGSL) by the Greenwich Association of Disabled People's Centre for Independent Living (GAD)⁷, supported by the Metropolitan Police Service (MPS) to examine the operation of the law through a study of how far the current legislation, common law, codes of practice, pre-trial procedures do, in fact, provide the necessary support to facilitate the giving of evidence in court by disabled witnesses to Disability Hate Crime. Central to the first phase of investigation 2012-18 was the analysis of how closed cases were handled through the examination of police reports and the first-hand experience of those involved in the pre-trial process.

The Project's aim throughout has been to facilitate access to justice for disabled witnesses of Disability Hate Crime. Building on the findings of the first phase of the Disabled Witness Project 2012-18, the second phase 2018-19, funded by the Peter Harris Trust, was able to further two of the recommendations outlined in this report: (i) to make a detailed review of the efficacy of the Criminal Law to protect disabled witnesses of Disability Hate Crime and (ii) to improve the identification, reporting and recording of Disability Hate Crime through an investigation of strategies for effective policing of Disability Hate Crime and an initiative to achieve consistency in the identification and recording of incidents of Disability Hate Crime at national level through the PEEL (Police Effectiveness, Efficiency and Legitimacy) inspection framework.⁸

The Disabled Witness Project 2012-16 was also a legal education project piloting the use of research-based learning – which, until that time, had been almost exclusively confined to the post-graduate Law curriculum - in the LLB curriculum through undergraduate student participation as researchers in a community project. In 2005 in an article in Legal Education Review, Dr Anne Macduff, Senior Lecturer, Australia National University College of Law, argued that research-based learning was

“more effective because it emphasises the importance of teaching practices that provide critical and personally engaging activities and deep learning.

⁷ A registered charity GAD joined 'METRO' "an equality and diversity charity providing health, community and youth services in England" on 1 April 2019 to become 'METRO GAD': a "user-led organisation of disabled people in London" that "provide(s) advice and information, advocacy and volunteering opportunities for disabled people who live, work or study in the Royal Borough of Greenwich." available at <https://metrocharity.org.uk/community/metro-gad> accessed 25 August 2019; see also for further details <https://advicefinder.turn2us.org.uk/Home/Details/1882>

⁸ Hewitt Louise and Laycock Angela, Promoting Access to Justice for Disabled Witnesses, University of Greenwich August 2019, reports on the second phase of the Disabled Witness Project 2018-19

Moreover, deep social learning leads to a more sophisticated understanding of social issues and reaffirms the student's agency to act in the real world.”⁹

In 2013, The Legal Education and Training Review 2013 recommended:

“The learning outcomes at initial stages of LSET should include reference (as appropriate to the individual practitioner's role) to an understanding of the relationship between morality and law, the values underpinning the legal system, and the role of lawyers in relation to those values.”¹⁰

Though reporting on the Disabled Witness Project as a legal education pilot is beyond the terms of reference of this report,¹¹ it is worth noting that the pilot was successful not only in integrating research-based learning into the undergraduate curriculum as a final year LLB option, as well as in providing opportunities for research-based learning through non-curricular placements, but its outcomes also confirmed the benefits of research-based learning as a method of legal training. Involvement as researchers in this community project enabled future solicitors and barristers to gain an understanding of the operation of the law in practice, and a deep understanding of the law relating to Disability Hate Crime. To quote one Disabled Witness Project research team member and future practitioner:

“The Vulnerable Witness Project¹² enables you to widen the breadth of your understanding of law. The Vulnerable Witness Project opens your eyes to how the law can actually affect people, both in a negative and positive way, which I feel is a vital skill needed for every future lawyer.”¹³

⁹ Macduff, A., (2005) 'Deep learning, critical thinking and teaching for law reform' Legal Education Review. Vol.15, no.1 & 2, 2005. pp. 125-35.

¹⁰ Ching, Jane, Maharg, Paul, Webb Julian, Sherr Avrom, Setting Standards: The Future of Legal Services, Training and Education in England and Wales, June 2013, 'Executive Summary', Recommendation 7, p xiv available at <http://www.letr.org.uk/wp-content/uploads/LETR-Report.pdf>; the LSET abbreviation stands for 'legal services education and training'

¹¹ See 3 and 4 below. The Disabled Witness Project's pilot legal education/training project and community research-based learning in Disability Law has been reported on elsewhere: Laycock, Angela, From UN Resolution to Local Pro Bono: A Grounded Theory Approach to Inspire Undergraduate Research in the Field of Human Rights, British Conference of Undergraduate Research (BCUR) 2013; Laycock, Angela, The Vulnerable Witness Project - Local Pro Bono: A Grounded Theory Approach to Inspire Undergraduate Legal Research in the Field of Human Rights, Higher Education Academy, Workshop Embedding Legal Research, 7 April 2014 available at <https://www.slideshare.net/HEASocSci/hea-workshop-presentation-slides>; accessed 19 March 2019; Undergraduate Research Projects in the Local Community: Curricular or Extra-curricular? SHIFT Annual Conference of Learning and Teaching, July 2013; See also Laycock, Angela, Grounding research projects in the undergraduate curriculum: assessment strategies. Compass: Journal of Learning and Teaching, [S.l.], v. 4, n. 8, dec. 2013. ISSN 2044-0081 available at: <https://journals.gre.ac.uk/index.php/compass/article/view/123>. accessed 18 March 2019

¹² Due to the importance of Youth Justice and Criminal Evidence Act s.16 in providing special measures for disabled witnesses, the Disabled Witness Project was originally named the Vulnerable Witness Project taking its name from the terminology of the Criminal Justice System at the time. Once research revealed the problematic nature of the term 'vulnerable' the project was renamed the Disabled Witness Project. See [2.3.2] below.

¹³ Stuart Barnes, Vulnerable Witness Project Interim Report 2013

2. How are Key Terms used by the Disabled Witness Project?

2.1 Monitoring Access to Justice

Article 6 of the European Convention on Human Rights 1950 (ECHR), incorporated into UK law by the Human Rights Act 1998, establishes a legal right to a fair trial:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

In order for that right to be available to everyone in the United Kingdom, every person, whoever they are, whatever their characteristics, must have an equal opportunity to bring a case to court or to give evidence either in their own defence or against someone who has committed an offence or acted unlawfully.

On 8th June 2009, the Government of the United Kingdom ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD), which established in detail how the United Kingdom must honour its commitment to ensure disabled people have equal opportunities for protection under the law:

“Article 13 Access to justice

- 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.***
- 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”***¹⁴

The role of the first phase of the Disabled Witness Project 2012-18 was to examine the operation of the law to find if there were any challenges that would prevent disabled witnesses of Disability Hate Crime from giving evidence in court or gaining legal protection.

2.2 Disability Hate Crime

Launching its review of Hate Crime laws in England and Wales in March 2019, the Law Commission stated:

*“Hate crimes are **acts** of violence or hostility directed at people because of who they are.”*¹⁵

¹⁴ Disabled Witness Project authors' emphasis

¹⁵ Law Commission, 'Current Project Status' *Hate Crime* <http://www.lawcom.gov.uk/project/hate-crime/> accessed 19 March 2019; Disabled Witness Project authors' emphasis

Currently, five specific characteristics are protected under Hate Crime laws: Race, Religion, Sexual Orientation, Transgender Identity and Disability. However, unlike Race and Religious Hate Crime, Disability Hate Crime is not a criminal offence. There is no definition of Disability Hate Crime in English Law. A person “*demonstrating or being motivated by hostility towards*”¹⁶ a disabled person cannot be prosecuted and convicted of Disability Hate Crime. Victims of Disability Hate Crime are protected only by enhanced sentencing powers provided that a crime has been committed and “hostility” towards that person because of his/her disability is identified, reported and recorded.

The Law Commission definition of Hate Crime can be applied to all Hate Crime since the use of the word “acts” overcomes the existing distinction between the aggravated crimes of Race and Religion and Disability Hate Crime. The term “hostility”, however, could prove problematical if this definition were to be used when legislating to establish Disability Hate Crime as a criminal offence: though a person might have been “targeted” for his/her disability, “hostility” is not always present in Disability Hate Crime. Giving evidence to the House of Commons Petitions Committee, Professor Mark Walters, Criminal Law and Criminology, University of Sussex, submitted that the “motivation by hostility” test should be replaced with a “by reason of” test. If a victim has been selected “*by reason of*” *his/her disability, that should be enough to demonstrate a hate crime.*”¹⁷

The definition agreed by the Association of Chief Police Officers (ACPO)¹⁸ and the Crown Prosecution Service (CPS) in 2013 was confirmed in the HMFICRS and HMICPS 2018 report as:

“Any incident/crime which is perceived, by the victim or any other person, to be motivated by hostility or prejudice based on a person’s disability or perceived disability.”¹⁹

The phrase “*prejudice based on a person’s disability or perceived disability*” provides an alternative to the requirement of “hostility” similar to Professor Walters’ “by reason of” test, while the definition itself recognises Disability Hate Crime as an incident as well as a crime. For these reasons this report will use the ACPO/CPS definition.²⁰

¹⁶ Law Commission, *Hate Crime: Background to our Review* https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2019/03/6.5286-LC_Hate-Crime_Information-Paper_A4_FINAL_260219_WEB.pdf accessed 19 March 2019

¹⁷ House of Commons Petitions Committee, *Online abuse and the experience of disabled people* [110] p38 available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmpetitions/759/759.pdf>; see discussion in Hewitt Louise and Laycock Angela, *Promoting Access to Justice for Disabled Witnesses*, University of Greenwich August 2019 n8 [4.2]

¹⁸ Now the National Police Chiefs’ Council (NPCC)

¹⁹ HMFICRS & HMICPS, *Joint Inspection of the Handling of Cases Involving Disability Hate Crime* [4.1] p9 (October 2018); available at https://www.justiceinspectors.gov.uk/cji/wp-content/uploads/sites/2/2018/10/CJJI_DHC_thm_Oct18_rpt.pdf accessed 5 April 2019; Disabled Witness Project authors’ emphasis

²⁰ See [5] below; for further consideration of analysis see Hewitt Louise and Laycock Angela, *Promoting Access to Justice for Disabled Witnesses*, University of Greenwich August 2019 n8 [4.2]

2.3 Disabled Witness

According to the Equality Act 2010 s.6(1)

*“A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”*

Section 2 states:

“A reference to a disabled person is a reference to a person who has a disability.”

However, under section 146 of the Criminal Justice Act 2003 (CJA), an increase in sentence for aggravation related to disability is imposed, providing that *“disability means any physical or mental impairment”*.²¹ Since s.146 CJA is currently the key provision facilitating access to justice for disabled witnesses of Disability Hate Crime, for the purposes of this report, *a disabled witness is a person who has a “physical or mental impairment” and who has witnessed a Disability Hate Crime.*

2.3.1 ‘Disabled Witness’ = Victim and Defendant

No distinction is made between defendant and victim in this report, since the disabled witness of Disability Hate Crime, whether defendant or victim, has guaranteed in UK law a right to a fair trial and the UK Government is bound by UNCRPD Article 13 to *“ensure effective access to justice for persons with disabilities on an equal basis with others.”*²² Joyce Plotnikoff DBE, co-founder of The Advocate’s Gateway (TAG), interviewed in 2010 by the University of Greenwich Comparative Evaluation of Disability Rights Mechanisms-UK (CEDRM-UK) project team, said that she would like to see an end to the distinction between “vulnerable witnesses” and defendants. It does not matter if they are victim or defendant, she argued, if there is a communication need, *“they both need an intermediary”*.²³ Nearly a decade later, the distinction in English Law regarding assistance for the giving of evidence remains, as demonstrated by this observation from the authors of a recent article in the International Journal of Evidence and Proof:

“What is available for vulnerable defendants is more restrictive (Cooper and Wurtzel, 2013) and unequal (Fairclough, 2018)”.²⁴

²¹ Section 146(5) CJA

²² See 2.1 above

²³ Interview 12 April 2010 with Joyce Plotnikoff and Richard Woolfson, co-authors of The ‘Go-Between’: Evaluation of Intermediary Pathfinder Projects available at http://lexiconlimited.co.uk/wp-content/uploads/2018/03/Intermediaries_study_report.pdf; Joyce Plotnikoff, Intermediaries in the Criminal Justice System 2015 Policy Press; see [3.1] for project details; TAG founded in 2012, *“provides free access to practical, evidence-based guidance on vulnerable witnesses and defendants.”* available at <https://www.theadvocatesgateway.org/20-welcome/18-welcome>

²⁴ Cooper Penny, Coral Dando, Thomas Ormerod, Michelle Mattison, Ruth Marchant, Rebecca Milne, Ray Bull International Journal of Evidence and Proof 2018, Volume 22/Issue 4, October/Articles/One step forward and two steps back? The ‘20 Principles’ for questioning vulnerable witnesses and the lack of an evidence-based approach – IJEP 22 4 (392) available at <https://journals.sagepub.com/doi/10.1177/1365712718793435#> accessed 24 August 2019

The 2019 Justice Report Understanding Courts criticises “the narrow eligibility criteria under the YJCEA 1999”:

“It is unclear why statutory provision for defendants is not equal to that for witnesses, and unacceptable that courts, at their discretion, determine what provision will be made. In particular, access to registered intermediaries for defendants is limited. Intermediaries for Justice is a body for intermediaries trained to work in the courts and drawn from a number of professions having specialist knowledge of vulnerability and communication. It is concerned that vulnerable defendants are not receiving intermediary assistance in the same way as witnesses and complainants. This is exacerbated by lack of funding, and the absence of recruitment and training requirements for defence intermediaries, but also by the different role of defendant and witness in trial.”²⁵

2.3.2 ‘Disabled Witness’ not ‘Vulnerable Witness’

More importantly, the term “disabled” rather than “vulnerable” witness is used in this report. While it is recognised that the term “vulnerable” had its origins in an attempt to provide access to justice for disabled persons through the provision of special measures to aid witnesses in giving evidence,²⁶ the term “vulnerable witness” is frequently inaccurate or misleading and often inappropriate in the context of Disability Hate Crime. It has the effect of setting the disabled witness apart from other witnesses. Interviewed by the Disabled Witness Project in 2016, Anne Novis MBE, Chair of the Board of Trustees of Inclusion London - “the only London wide organisation run by and for Deaf and Disabled people”²⁷ - argued that there was a “need to change the way we are perceived and the way we access justice.” Being treated by the Criminal Justice System as ‘vulnerable witnesses:

“disempowers us as disabled people...It’s not about vulnerability. We’re in vulnerable situations like anyone else... and people can take advantage of that. It’s about seeing you as someone that they can take advantage of that is a vulnerable situation and it’s not about your vulnerability per se.”²⁸

Three years before her interview with the Disabled Witness Project, in her chapter in Disability, Hate Crime and Violence, Anne Novis had expressed the hope that the UNCRPD would lead to equality of law and justice for disabled people, but she was pessimistic:

²⁵ Sir Nicholas Blake (Chair) Understanding Courts: A Report by JUSTICE, [4.12] p95-6, available at <https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf>

²⁶ Youth Justice and Criminal Evidence Act s.16; “In England and Wales, ‘the concept of the “vulnerable witness” took root in the report *Speaking up for Justice* [Home Office, 1998], which in turn led to the Youth Justice and Criminal Evidence Act 1999’ (Cooper and Wurtzel, 2014: 42) (YJCEA 1999).” n24 above. Due to the importance of YJCEA s.16 in providing special measures for disabled witnesses, the Disabled Witness Project was originally named the Vulnerable Witness Project taking its name from the terminology of the Criminal Justice System at the time. Once research revealed the problematic nature of the term ‘vulnerable’ the project was renamed the Disabled Witness Project.

²⁷ Inclusion London Strategic Business Plan 2018-21 available at <https://www.inclusionlondon.org.uk/about-us/about/our-mission/>

²⁸ Interview September 2016

“Yet I doubt I will see this in my lifetime due to the inherent flaws in the structures of justice services that segregate, exclude, and tend to focus on vulnerability, a distraction, rather than equality of legislation and service provision.”²⁹

It is true that there continues to be some categorizing of disabled people as “vulnerable” in the Criminal Justice System: the Vulnerable Assessment Framework, for example, is a risk assessment tool for police officers to ensure they provide the best possible response to a witness.³⁰ A second example is the use of the term ‘vulnerable’ when requesting special measures for a court hearing. The CPS’ guidelines on Special Measures updated in August 2019 observes:

“The term ‘vulnerable’... is sometimes unavoidable in the context of criminal proceedings, due to the wording of the law and relevant Sentencing Guidelines. For example, if prosecutors do not use the term in court, they may be unable to properly explain that an offence is aggravated because of a victim’s vulnerability, and should attract an increased sentence. This would in turn disadvantage the disabled victim, as the perpetrator may receive a more lenient sentence than is appropriate.”³¹

This argument for using the term ‘vulnerable’ in court to gain enhanced sentencing is not a strong one. Under section 146 of the Criminal Justice Act 2003, to achieve enhanced sentencing, the prosecution must prove that the person has committed a crime and, at the time of committing the crime, that the defendant either demonstrated hostility or was motivated by hostility to that person because of his/her disability. As recently as October 2018, this problem was reported by HMICFRS and HMCPSI in their Joint Inspection of Handling of Cases involving Disability Hate Crime report:

“The difficulties prosecutors have in applying the definition is demonstrated by some of the review notes on the files examined. For example:

Offence 3 – Can we prove S was a trespasser and stole: It is a difficult offence. V has learning difficulties and it is his mother that has provided a statement. Although V is vulnerable (I have flagged it as a disability hate crime – there is no suggestion that the burglary was committed as a hostile act based on that disability.

And

I am not satisfied that we can prove that the offence was either motivated by hostility or that the suspect has demonstrated hostility based on disability because although the victims are disabled and very vulnerable and he is alleged to have abused them both verbally and physically it is

²⁹ Anne Novis MBE, ‘Disability Hate Crime’ in Alan Roulstone and Hannah Mason-Bish, Disability, Hate Crime and Violence, 2013 Routledge, UK, USA & Canada p124; note the inaccurate reference to GAD in the Law Reports (*R v Killick* [2011] EWCA Crim1608 [1]) as “Greenwich Association for Disabled People” rather than “...of Disabled People”

³⁰ “But the MET police have ...this vulnerability framework. It’s a risk assessment tool and they have to call it that because of the equality stuff. I tried to get the name changed as well but it is about assessing risk.” Anne Novis Disabled Witness Project Interview September 2016; see also Hewitt Louise and Laycock Angela, Promoting Access to Justice for Disabled Witnesses, University of Greenwich August 2019, n8, [5.3]

³¹Above n6.

not clear that he has demonstrated hostility to them based on their disabilities or that his actions are motivated by hostility to disabled people. I have though flagged it for monitoring as a disability hate crime and also crime against older person.”³²

The problematic nature of the term “vulnerable” for disabled witnesses was officially recognised by the House of Commons Petitions Committee in its report, Online abuse and the experience of disabled people, 8th January 2019:

“The criminal justice system is too quick to categorise disabled people as “vulnerable”. Hostility towards disabled people is often based on a perception that they are an easy target who can’t contribute to society.”³³

Accepting Professor Walters’ evidence that

“the vulnerability designation perpetuates damaging stereotypes about disabled people, which in turn may reinforce the beliefs and attitudes that lead to disabled people being marginalised and abused,”

the Committee recommended that, since the CPS and the police could only work within the existing legal framework, the Government should review the law, consulting disabled stakeholders with *“the aim of ensuring hate crimes are properly reported and sentenced as such and that “vulnerability” is only used when appropriate.”³⁴*

Furthermore, there is evidence that the discourse on Disability Hate Crime in the Criminal Justice System is shifting from focusing on vulnerability to achieving equality of legislation and service provision, particularly for the police³⁵ and for the CPS. The special section of the CPS’ Special Measures Guidelines, updated in August 2019, entitled The use of the term ‘Vulnerable’, demonstrates this:

“The CPS is aware that disabled people are regularly labelled as “vulnerable”. This labelling has been repeatedly criticised by disabled people and others and is not in line with the social model of disability. Prosecutors should understand that use of this label can give the message that disabled people are inherently “weak” or “dependent” as individuals and as a group, when in fact it is physical barriers and social attitudes that create inaccessible, unsafe and therefore vulnerable situations for disabled people.

Moreover, the belief that disabled people are vulnerable may be disabling in itself and can lead to decisions and actions that adversely affect disabled

³² HMICFRS and HMCPSI Joint Inspection of Handling of Cases involving Disability Hate Crime, October 2018, n19 [4.14] available at https://www.justiceinspectors.gov.uk/cjji/wp-content/uploads/sites/2/2018/10/CJJI_DHC_thm_Oct18_rpt.pdf; see [4] & [5] below and report on Disabled Witness Project Phase 2 n8 for further discussion of “motivated by hostility” proof.

³³ Above n17 [117] p41

³⁴ Above n17 [118]

³⁵ See Hewitt Louise and Laycock Angela, Disabled Witness Project: Promoting Access to Justice for Disabled Witnesses of Hate Crime, University of Greenwich August 2019 for a review of the efficacy of current legislation and strategies to develop effective policing in Disability Hate Crime n8.

people's independence, safety and security. Crucially in the context of the criminal justice system, this attitude can undermine their perceived competence, credibility and reliability as a witness and therefore their access to justice.

Prosecutors will avoid the use of the term "vulnerable" where possible and avoid any use of the term which may suggest disabled people are inherently weak or dependent."³⁶

Further evidence of a shift in focus from 'vulnerability' to facilitating the giving of evidence is recognition in the 2019 JUSTICE report, Understanding Courts, that

"court and legal professionals (need) to appreciate that people giving evidence may not be officially "vulnerable" according to legal definitions, but nevertheless may be having to recount an incident that was violent or traumatic. Moreover, the anxiety of giving evidence makes all witnesses inherently vulnerable – and by varying degrees – to the process of questioning, to which advocates must not become desensitised."³⁷

Recommendation One

The Disabled Witness Project recommends that there should be a full review of the use of the term 'vulnerable' in the Criminal Justice System in consultation with disabled people with a view to changing such references in the context of Disability Hate Crime.

3. How was the project carried out?

3. 1 How did the Disabled Witness Project come about?

The Disabled Witness Project³⁸ was commissioned by Greenwich Association of Disabled People's Centre for Independent Living (GAD) in June 2012. The Disabled Witness Project is very much a Greenwich community project. It came about as a result of decades of campaigning for disability rights by disabled people living and working in Greenwich to remove the barriers that prevented disabled people from taking part in society, according to the 'social model of disability' devised by Mike Oliver, Professor of Disability Studies, University of Greenwich; recognition by campaigners, advocates and police in the Borough that Disability Hate Crime, though rising, was under-reported; and nearly a decade of research into the effectiveness of UK Disability Law in protecting disability rights based in the UoGSL.

Since it was established in 1975, GAD, an organization run by disabled people and most of whose employees are disabled or have disabled relatives, has delivered services for deaf and disabled people in the Royal Borough of Greenwich, including advocacy services. In 2001, the Diversity Directorate of the MPS supported GAD as

³⁶ Above n6

³⁷ Above n25 [3.62] p87; see also 5.3.1 below for recommendations for training in Understanding Courts report

³⁸ Then the 'Vulnerable Witness Project'; see n12 above

the first disabled people's organisation in the United Kingdom to launch a Third-Party Reporting (TPR) Centre for witnesses of Disability Hate Crime.³⁹ This means that, as a designated centre for TPR, reports made to GAD can be passed on to the police and the investigation process can begin. This was an important development in providing access to justice for disabled witnesses of Disability Hate Crime. As Anne Novis, who campaigned to establish it, explained:

*"I noted early on that barriers to reporting were one of the key issues facing disabled victims. I saw the potential for 'third party reporting' to be implemented for disabled people and it became a priority to have this provision available in my local area of Greenwich.... Meaningful reporting would mean ensuring a venue that is accessible to all disabled people, which most police stations are not; having disabled people as staff and volunteers who understand the issues and enable accessible communication and hate crime information...a place where other disabled people would share their experience and be encouraged to make formal reports of alleged hate crime."*⁴⁰

Even though Parliament introduced enhanced sentencing for Disability Hate Crime in 2003⁴¹, and imposed a duty to promote disability equality on all public authorities in 2005⁴², there was little development in practice nationally. It was only in 2005 that ACPO⁴³ included Disability Hate Crime in its manual and, even then, evidence was not collected compulsorily till 2008. The CPS was also slow to respond - for example, it was 2007 before it issued its first Disability Hate Crime guidance. Meanwhile, in Greenwich, John Bowater, in his role as Senior Advocate for GAD became aware of alleged sexual assaults on three men with cerebral palsy and began to assist them in starting proceedings, encouraging them to make a report to the police with a view to bringing their perpetrator to justice. Thus began the long and tortuous battle to achieve access to justice for these three disabled witnesses, which culminated in the landmark case of *R v Killick* [2011] EWCA Crim 1608, the introduction of the Victims' Right to Review and "*the readjustment of our criminal justice arrangements to accommodate victims' rights*".⁴⁴

GAD's work was informed by the 'social model of disability', the work of Professor Mike Oliver, for whom the first UK Chair in Disability Studies was created by the University of Greenwich in the 1990s. A decade earlier, in 1981, Mike Oliver, then lecturing at the University of Kent, coined the phrase 'social model of disability'⁴⁵ for the argument (originally put forward in 1976 by the Union of the Physically Impaired Against Segregation (UPIAS) in Fundamental Principles on Disability) that it was the disabling

³⁹ Originally, TPR had been set up for Race and Religious Hate Crime following the recommendation of the MacPherson report on the inquiry into the racist murder of Stephen Lawrence.

⁴⁰ Above n29 p121

⁴¹ CJA s.146

⁴² Disability Discrimination Act 2005

⁴³ Now the National Police Chiefs' Council

⁴⁴ Sir Keir Starmer QC, Human Rights, Victims and the Prosecution of Crime in the 21st Century [2014] Crim. L.R., Issue 11; see Part III below for full report on *R v Killick*

⁴⁵ Professor Colin Barnes, The Social Model of Disability video made for the Disabled People Against Cuts (DPAC) seminar 2013 published on YouTube Jan 2, 2015 available at <https://www.youtube.com/watch?v=mXuiP-n1h8s>

barriers faced by society, and not disabled people's impairments, which prevented disabled people from playing a full part in society. His intention was to help his MA students,⁴⁶ qualified social workers and other professionals, to *“develop a means of translating that simple idea into everyday work with their disabled clients and their families.”*⁴⁷ In 1983, he published Social Work with Disabled People which brought the social model of disability to a wider, and ultimately, a global audience. Mike Oliver suggested that *“those working with disabled people...in order to make their practice more relevant to the needs of disabled people...needed to re-orient their work to a framework based upon a social model.”*⁴⁸

Interviewed in 2018, Professor Mike Oliver explained his motivation in introducing the 'social model of disability':

*“I did want to provide an alternative, more optimistic, picture, which wasn't simply about seeing disability as personal tragedy, disabled people as unemployable, and so on, and it was about having an optimistic view of what disabled people could achieve if many of the barriers that they faced were removed.”*⁴⁹

Within five years, Mike Oliver was well on the way to achieving his goal: the social model of disability *“had become the mantra for many disabled people's organisations and was beginning to make its way into official government documents.”*⁵⁰ Though Professor Oliver retired in 2003, he continued his work as Emeritus Professor of Disability Studies at the University of Greenwich until his death in March 2019. The Centre for Disability Studies, University of Leeds, described his work on the social model as *“essential for challenging social injustice”*; his collaboration with disabled activists and disabled people's organisations as transforming disability *“from a personal and private trouble to a public issue, one that remains a matter of social justice”* and *“his extensive publications”* as having *“challenged all of us to consider how disabled people's historical and contemporary experiences are captured, articulated and used as a way to bring about emancipation.”*⁵¹

The UoGSL began monitoring UK Disability Law in 2003 with a project to investigate the effectiveness of UK legislation protecting the rights of disabled people as part of the Disability Rights Promotion International (DRPI)⁵² project, *Building a human rights monitoring system in the field of disability*. The project was set up as a direct result of Resolution 2000/51 passed by the UN Commission for Human Rights which invited

⁴⁶ This MA at the University of Kent was the UK's first Disability Studies course.

⁴⁷ Mike Oliver (2013) The social model of disability: thirty years on, *Disability & Society*, 28:7, 1024-1026, DOI: 10.1080/09687599.2013.818773 [1] available at <https://doi.org/10.1080/09687599.2013.818773>

⁴⁸ Above n47 [2]

⁴⁹ Quoted from an interview with J. Brady by John Pring in Professor Mike Oliver: outpouring of admiration for social model pioneer, *Disability News Service* 7 March 2019 available at <https://www.disabilitynewsservice.com/professor-mike-oliver-outpouring-of-admiration-for-social-model-pioneer/> from recording of Jonjo Brady's Interview with Mike Oliver 17 December 2018, available at <https://www.youtube.com/watch?v=NMfvoh-j9qw&feature=youtu.be&fbclid=IwAR3k-YmNpPhbb7EjhVygo4CKuYAYOPConqK172GXo8Pmf96yA-r3KbGM7xM>

⁵⁰ Above n49

⁵¹ Available at <https://disability-studies.leeds.ac.uk/olivertribute1/>

⁵² DRPI is a collaborative project to establish a comprehensive, sustainable international system to monitor human rights of people with disabilities." available at <https://drpi.research.yorku.ca/> accessed August 2019

“the United Nations High Commission for Human Rights, in co-operation with the Special Rapporteur on Disability, to examine measures to strengthen the protection and monitoring of human rights of persons with disability and solicit input and proposals from interested parties.”

At the international seminar on human rights and disability⁵³ organised by the then UN Special Rapporteur on Disability, Mr. Bengt Lindqvist, Mary Robinson, the UN High Commissioner for Human Rights, posed the following questions:

“How can persons with disabilities themselves speak up for their rights and make human rights a tool in their continuous struggle for dignity, equality and justice?”

“How can we ensure that the rights proclaimed in international norms and legislation are translated into real improvements in the lives of persons with disabilities?”

One of the suggestions made in Stockholm was that the monitoring of legislation could be carried out by Law Schools. Angela Laycock at the Law Department of the University of Greenwich, United Kingdom, and David Yarrow at Osgoode Hall Law School, Canada, formed a three year project, the DRPI ‘Legal Education and Research Project’, with two aims: firstly, to facilitate the collection of data on the effectiveness of legislation in promoting the rights of persons with disabilities and, secondly, as a legal education project, to provide an opportunity to pilot new methods in teaching and training in Human Rights and Disability Law through research-based learning. Between 2003 and 2007, successive CEDRM-UK project teams at the University of Greenwich researched and reported on the operation of UK Disability Law in key areas: employment, education, transport, hospitality and prison life.⁵⁴

In 2007 the GAD Advocacy Service/UoGSL partnership began with the dual purpose of providing an opportunity for research-based learning and training in UK Disability Law while at the same time providing GAD with reliable evidence on *“the effectiveness of UK Disability Law and the work of the GAD Advocacy Service in the following areas:*

- *Access to employment for people with learning disabilities*
- *Harassment and discrimination in employment*
- *Provision of funding for disabled persons*
- *Provision of financial assistance to disabled persons requiring a personal assistant*
- *Consent, confidentiality and the role of the Independent Mental Capacity Advocate Scheme*
- *The rights of disabled children in school and youth activities.*⁵⁵

⁵³Almasa Conference Centre, Stockholm, Sweden, 5th-9th November 2000

⁵⁴During this period, UoGSL was the only institution researching disabled prisoners’ rights, hence the request for submission of a chapter in Rioux, M., Basser, A. & Jones, M. (2011) Critical Perspectives on Human Rights and Disability Law. Leiden: Brill (Laycock, Angela, ‘Price V UK: The Importance Of Human Rights Principles In Promoting The Rights Of Disabled Prisoners In The United Kingdom’)

⁵⁵ Linda Leone, CEO of GAD, Letter of invitation to an Open Meeting at Charlton House, 8th April 2008

Three key national initiatives in 2010, 2011 and 2012 led to the commissioning of the Disabled Witness Project. In 2010, in line with the UNCRPD, section 149 of the Equality Act 2010 established the public sector duty in English and Welsh Law:

“(1)A public authority must, in the exercise of its functions, have due regard to the need to—

*(a) **eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;***

*(b) **advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;***

*(c) **foster good relations between persons who share a relevant protected characteristic and persons who do not share it.**”⁵⁶*

There was now a legal imperative on local authorities, the police and legal professionals to protect disabled witnesses of Disability Hate Crime. The Act was then followed in 2011 by the Equality and Human Rights Commission (EHRC) report, Hidden in Plain Sight: Inquiry into Disability-Related Harassment, which observed

“that the extent of harassment remains largely hidden, its seriousness rarely acknowledged, its link to the victim’s disability not investigated.... This data and our own evidence leads us to believe that the 1,567 cases of disability hate crime recorded in the ACPO data for 2009/10 significantly under-represent the scale of the problem. Filling this data gap and getting comprehensive information on the scale, severity and nature of disability-related harassment therefore features highly in our recommendations.”⁵⁷

Work on filling the “data gap” had already begun in Greenwich. At the request of the GAD Advocacy Service, the 2009-10 CEDRM-UK research team concentrated their research on access to justice for vulnerable witnesses with communication disabilities examining the legislation, codes of practice and evidence from case studies of disabled witnesses’ experiences, including the experiences of the three *Killick* witnesses.

The third development was the Government’s publication in March 2012 of Challenge it, Report it, Stop it: The Government’s Plan to Tackle Hate Crime, in which it reaffirmed and justified its “*policy approach to hate crime*” as being “*based on a human rights approach*”.⁵⁸ The Government’s intention was to work “*across Government departments, with local agencies and voluntary sector organisations, and also with the Government’s Independent Advisory Group on Hate Crime*” focusing on three core principles:

⁵⁶ Disabled Witness Project authors’ emphasis

⁵⁷ Equality and Human Rights Commission, Hidden in Plain Sight: Inquiry into Disability-Related Harassment, 2011 p6 available at <https://www.equalityhumanrights.com/en/publication-download/hidden-plain-sight-inquiry-disability-related-harassment>

⁵⁸ Home Office (2012), Challenge it, Report it, Stop it: The Government’s Plan to Tackle Hate Crime, [1.19] p9, available at <https://www.gov.uk/government/publications/challenge-it-report-it-stop-it>

- “• *Preventing hate crime – by challenging the attitudes that underpin it, and early intervention to prevent it escalating;*
- *Increasing reporting and access to support – by building victim confidence and supporting local partnerships; and*
- *Improving the operational response to hate crimes – by better identifying and managing cases, and dealing effectively with offenders.*”⁵⁹

The Disabled Witness Project⁶⁰ was launched in June 2012 after a meeting between Colin Finch, Senior Advocate, and Alan Kerr, Equalities Manager, of the Greenwich Association of Disabled People’s Centre for Independent Living and Angela Laycock and Louise Hewitt from the University of Greenwich School of Law. Disability Hate Crime had risen in the Borough of Greenwich, but it remained under-reported. GAD and MPS officers working in the Borough wished to take forward a “*review of closed (disability) hate crime cases to identify good practice and how procedures could be built on.*”⁶¹ Angela Laycock and Louise Hewitt agreed to set up an independent *pro bono* research project to examine the operation of the law in practice through a study of how far the current legislation, common law, codes of practice, procedures and pre-trial processes do provide the necessary support to facilitate the giving of evidence by disabled witnesses to Disability Hate Crime.

3.2 How was the Project Organised?

Disabled Witness Project research teams were appointed annually and consisted of a maximum of eight second and third year undergraduate LLB students and two permanent members, Angela Laycock, Project Leader, and Louise Hewitt, Project Administrator. The project and individual team members were approved by the University of Greenwich Research and Ethics Committee and, before they were able to analyse the problem profiles, each researcher signed a confidentiality agreement provided by the MPS. Before starting the project, each member of the Disabled Witness Project team received disability awareness training from a GAD trainer.

Team members each took responsibility for one part of the investigation, recorded their findings on an intranet page to which team members had exclusive access. Taking the grounded theory approach, the work of the Disabled Witness Project team included:

- (i) assessment of current legislation, policy documents and publicly available statistics;
- (ii) a comparative analysis of two sets of problem profiles from the MPS;
- iii) in-depth qualitative semi-structured interviews with: Disability Hate Crime witnesses; staff of non-governmental organisations and charities that support

⁵⁹ Above n58, [1.6] p6

⁶⁰ Then the ‘Vulnerable Witness Project’; see n12 above

⁶¹ Minutes of GAD/UoG Meeting 27.6.2012

victims of Disability Hate Crime; trainers in Disability Hate Crime and the UK Cross-Government Hate Crime Programme Manager.

Weekly project meetings were held to monitor progress, discuss findings and plan future activities. The minutes of these meetings were circulated to the Head of UoGSL and GAD. Monthly meetings were held with stakeholders to report progress and gather evidence. Team members on placements with GAD acted as liaison.

3.3 What is the Disabled Witness Project's Approach?

3.3.1 Grounded Theory

Fundamental to the Disabled Witness Project is the team's grounded theory approach. In their book, Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law, the authors define grounded theory as:

*"an iterative process in which data and theory, lived reality and perceptions about norms are constantly engaged with each other to help the researcher decide what data to collect and how to interpret it."*⁶²

It follows that a researcher adopting this approach

*"is likely to be engaged in efforts to investigate empirically and from this to generate critiques and arguments as to how judges, lawmakers and administrators could and, perhaps, should interpret or amend the law. Not only the so-called formal or state legal system has to be scrutinized but also other fora and mechanisms for dispute resolution and regulation need to be closely examined."*⁶³

Sometimes practical difficulties can reduce the effectiveness of the legislation or the legislation itself fails to provide the most effective mechanism for the promotion of rights so that equality in law does not match equality in fact. Therefore, when analysing the effectiveness of the law with a view to reform, it is the job of the researcher *"to bridge the gap between law and reality"* and this can only be done when the gap is understood.⁶⁴

*"The law can be properly evaluated or appraised only if, in addition to understanding the intentions and the rationale behind the law, one also has an insight into the consequences of the law on individuals."*⁶⁵

⁶² Helleu Anne & Stewart Julie, (eds.) Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law, 1998 Harare Mond Books, p18

⁶³ Above n62 p25-6

⁶⁴ Interview with Julie Stewart, author of Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law, 23 March 1996

⁶⁵ Maboreke, Mary 'Introducing Women's Law', Stewart, Julie and Armstrong, Alice (eds.) women and Law in Southern Africa Vol 2: The Legal Situation of Women in Southern Africa, 1990 University of Zimbabwe Publications

The Disabled Witness Project's approach, therefore, is that the most effective way of examining the operation of the law relating to Disability Hate Crime is not to trust the legislation alone but to examine what is happening in practice.

“Demanding that there should be greater emphasis in teaching and research on the reconceptualization of law to take proper account of the needs of ...marginalized groups, is nothing but rhetoric if those who make the demands do not have the tools to establish their case. Means are needed to create these new concepts and deliver an effective way to address the needs of the groups on behalf of whom they argue. If change is to be stimulated there is a need to critically re-examine the way in which legal rights are mediated and investigated.”⁶⁶

Two “tools” for “addressing the needs” of disabled witnesses of Disability Hate Crime have informed the Disabled Witness Project research: the “social model of disability”⁶⁷, and “a human rights approach to disability”⁶⁸.

3.3.2 Social Model of Disability

The social model of disability's basic premise is that it is not a disabled person's impairment which prevents that person gaining full access to society⁶⁹ but the range of barriers that confront people with impairments. Reviewing its impact in 2013, thirty years after its introduction, Professor Oliver described the social model of disability as

“the vehicle for developing a collective disability consciousness ...Armed with the idea that we needed to identify and eradicate the disabling barriers we had in common, the disabled peoples' movement forced...the legal system to become more accessible and the legal system changed to make it illegal to discriminate against us.”⁷⁰

More recently, the social model of disability has influenced the treatment of disabled witnesses of Disability Hate Crime to the extent that it forms part of the policy of the CPS. In January 2017, after a thirteen-week consultation period, the CPS published a summary of responses to its policy statements. The CPS reported that the reaction from the thirty disabled stakeholders to the question, “Does this section on the social model of disability explain how the CPS applies the model to its own work?” was “largely positive”. The three examples the CPS recorded in the Summary of Responses provide evidence that the social model of disability continues to act as “a tool with which to identify barriers with a view to... finding solutions to eradicate those problems”:⁷¹

⁶⁶ Above n62, p24

⁶⁷ See above [3.1] and below [3.3.2] for further discussion of the 'social model of disability'

⁶⁸ See above [3.1] and below [3.3.3] for further discussion of the 'human rights model of disability'

⁶⁹ The premise of the individual/medical model of disability.

⁷⁰ Above n47 [3]

⁷¹ Professor Colin Barnes, University of Leeds, n45

“• *“The introduction of the social model of disability is a very positive and progressive step”.*

• *“We are delighted to see [the social model] being used as the foundation for [the CPS] approach to crimes against disabled people”.*

• *“We are particularly impressed at the effort made in the disability statement to promote the social model of disability and to avoid reference to vulnerability.”⁷²*

One suggested change that the CPS did not include was “using a different term, such as the “disability rights model”” on the grounds that:

“the social model of disability is an accepted term in the disability and academic community. It is not for the CPS to re-name it.”⁷³

The Disabled Witness Project agrees that the human rights model of disability does not replace the social model of disability but argues that the human rights model of disability is an invaluable tool in the social model of disability armoury to “eradicate the disabling barriers” that disabled witnesses of Disability Hate Crime “had in common.”⁷⁴ This approach has underpinned the Disabled Witness Project’s researches and informed its analysis. To quote Anne Novis when asked by the Disabled Witness Project about the social model of disability and the role of human rights:

“The social model is not fixed; like any model it has to grow and evolve with the people. And it’s disabled people who evolved the social model and it’s disabled people it needs to influence as it grows. It may still be called the social model but it has grown and the rights agenda is very much a part of the social model. We don’t see it as separate, it’s part of it.”⁷⁵

3.3.3 A Human Rights Approach to Disability

“A human rights approach to disability is empowering.”⁷⁶ Firstly, international recognition of human rights since the Universal Declaration of Human Rights 1948 provides a moral framework:

“an internationally accepted moral code by which the intrinsic humanity of every individual is recognised and protected. Human rights are the fundamental, universal

⁷² CPS, Consultation on Hate Crime Public Statements, Summary of Responses, ‘Summary of Responses to Specific Questions, Question 3’ available at <https://www.cps.gov.uk/sites/default/files/documents/consultations/Consultation-on-Hate-Crime-Public-Statements-Summary-of-Responses.pdf>; see [2.3.2] above for discussion of use of term ‘vulnerable’ in relation to Disability Hate Crime and Disabled Witness Project Recommendation One.

⁷³ Above n72

⁷⁴ Above n47 [3]

⁷⁵ Disabled Witness Project Interview September 2016

⁷⁶ Referenced to Marcia Rioux and Anne Carbert, Human Rights and Disability: The International Context (2003) 10:2 Journal on Developmental Disabilities 1 at 11 in Joffe Keri, Arch Disability Law Centre, Enforcing the Rights of People with Disabilities in Ontario’s Developmental Services System, 30 June 2010 Law Commission of Ontario p39 available at https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities_joffe.pdf accessed 25 August 2019

and indivisible principles by which every human being can claim justice and equality. As disability describes the barriers faced by people with impairments to achieving equality and justice, and because disabled people are human beings too, it is axiomatic that disability is a human rights issue. And as with all groups who face discrimination and disadvantage it is the recognition of that intrinsic humanity that is essential to reaching outcomes that result in the full implementation and protection of human rights.”⁷⁷

However, as Ontario staff lawyer, Kerri Joffe, pointed out in her briefing to the Law Commission of Ontario on enforcing disability rights, *“Rights alone are not enough. People with disabilities must have appropriate tools to enable them to enforce those rights.”* A human-rights-based (HRB) approach, she argued, provides such a tool:

“An HRB approach is predicated on the existence of rights, but goes beyond merely enshrining rights in legislation or policy.... An HRB approach enables people with disabilities to conceive of themselves as rights-bearers, and positions them as active claimants of rights in relation to government and service providers.”⁷⁸

Being able to demand the UK government protect their human rights has already played a significant part in removing many of the social, philosophical and legal barriers that perpetuated discrimination and denied disabled people access to justice.

One key example is the change in the treatment of disabled prisoners. Use of the social model of disability supported by research for the British Council of Disabled People in Britain and campaigning by the Disabled People’s Direct Action Network persuaded the UK government to introduce the Disability Discrimination Act 1995 (DDA 1995). Unfortunately, many of its provisions seemed to be informed by the medical, rather than the social model of disability: the terminology, “impediment”⁷⁹, seemed to suggest that it was the impairment that was the barrier; protection under the Act depended on the type of impairment; discrimination could only be claimed after the event; adjustments for an impairment had only to be made if reasonable; certain public authorities were exempt from having to make adjustments. The prison authorities were believed not to be subject to the DDA 1995. Indeed, under the original Prison Service Order 2855, the Prison Service undertook to *“ensure that prisoners with physical, sensory and mental disabilities are able ... to participate equally in prison life”* only *“as far as practicable,”* while the obligation on the Governor was limited to a requirement *“to consider what reasonable adjustments, if any, are necessary to meet the needs of the disabled prisoner”*.⁸⁰ It would be the human rights model of disability which would remove the barrier of exemption of prisons under the DDA 1995

⁷⁷ Albert Bill and Hurst Rachel, Disability and Human Rights Approach to Development, Disability Knowledge and Research briefing paper available at

<https://pdfs.semanticscholar.org/bd51/f5ecf571cf152b45c8cf6195eaa66242eb89.pdf> accessed 12 August 2019

⁷⁸ Joffe Kerri, Arch Disability Law Centre, Enforcing the Rights of People with Disabilities in Ontario’s Developmental Services System, 30 June 2010 Law Commission of Ontario pp38-39 available at

https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities_joffe.pdf accessed 25 August 2019

⁷⁹ DDA 1995 s.1 and Schedule 1; DDA 1995 & DDA 2005 were replaced by the Equality Act 2010.

⁸⁰ Prison Service Order Number 2855 issued 20/12/99: *Management of Prisoners with Physical, Sensory or Mental Disabilities*

and oblige prison authorities to ensure that disabled prisoners could “*participate equally in prison life.*”⁸¹

In July 1996, Ms Price, a quadriplegic as a result of thalidomide, having failed to achieve a remedy under common law⁸² launched an application against the United Kingdom government alleging that “*her committal to prison and her treatment in detention violated Article 3*”⁸³ of the ECHR, which guaranteed “*freedom from torture, inhuman and degrading treatment*”. In 2001 the European Court of Human Rights (ECtHR) found that her treatment “*constitutes degrading treatment contrary to Article 3. It therefore finds a violation of this provision in the present case.*”⁸⁴ Under Article 46 ECHR, the UK government, as a High Contracting Party of the ECHR, had undertaken “*to abide by the final judgment of the Court*”. This was clearly demonstrated in August 2001 when the Home Office agreed to an out of court settlement of £3,500 plus legal costs for a subsequent action brought by a disabled prisoner who claimed mistreatment under the DDA 1995. In addition, The Human Rights Act 1998 had incorporated the substantive rights of the ECHR into UK law and so, unlike Ms Price, who had had to go to the ECtHR, the prisoner could have brought his action for violation of his human rights in the UK courts. The prison authorities could no longer claim exemption under the DDA 1995. The new Prison Service Order (PSO) 2855 issued on 27th July 2005 was unequivocal:

“This PSO updates and replaces the previous PSO on the management of prisoners with physical sensory or mental disabilities. It sets out required actions and good practice relating to all aspects of prison life relating to prisoners with disabilities.

This PSO applies to all prisoners, and it will usually be best to assume that a prisoner has a disability rather than not.”⁸⁵

Thus, failure to accommodate a disabled prisoner satisfactorily had ceased to be a ‘problem’ which did not necessarily have a solution and had become a ‘violation’ of that prisoner’s rights. This example demonstrates clearly the importance of the human rights model of disability and the reason for the Disabled Witness Project’s use of it when monitoring access to justice for disabled witnesses of Disability Hate Crime. Article 6 ECHR guaranteeing the right to a fair trial underpinned the decision in *R v Killick*, ensuring that disabled witnesses with communications disabilities could give evidence,⁸⁶ while Article 13 UNCRPD requires the UK government to ensure access to justice for disabled people. The human rights model of disability is an important tool for monitoring and achieving access to justice. To quote one commentator:

⁸¹ See Laycock, A. “Price v UK: The Importance Human Rights Principles in Promoting the Rights of Disabled Prisoners in the United Kingdom’ in Sioux, Basser and Jones, (editors), Critical Perspectives on Human Rights and Disability Law, Brill Publishers, (July 2011), n52

⁸² The DDA 1995 did not come into force until December 1996.

⁸³ *Price v UK* (33394/96) (2002) 34 E.H.R.R. 53 11 B.H.R.C. 401 (2002) 5 C.C.L. Rep. 306 Times, August 13, 2001, 2001 WL 825435 [3]

⁸⁴ Above n83 [30]

⁸⁵ H M Prison Service Order 2855 *Prisoners with Disabilities* p 1

⁸⁶ See below Part III [7] *R v Killick* [2011] EWCA Crim 1608: Achieving Access to Justice through Precedent

“The real potential of human rights lies in its ability to change the way people perceive themselves vis-à-vis the government and other actors. A rights framework provides a mechanism for reanalysing and renaming ‘problems’ as ‘violations’, and, as such, something that need not and should not be tolerated.”⁸⁷

Disabled People’s Organisations (DPOs) have recognised the importance of this model for many years. For example, in 2008, Disability LIB Alliance⁸⁸, drew up a Statement of Common Understanding, which opened:

“The landscape in which DPOs are operating is changing rapidly. The DDA 2005 put a duty on public authorities to proactively promote disabled people’s equality; the government has made a public commitment to achieve equality for disabled people by 2025 which includes establishing a user-led organisation in every locality by 2010; and the UN Convention on the Rights of Persons with Disabilities, signed by the UK in March 2007, provides a new framework for understanding and protecting disabled people’s human rights.”⁸⁹

The statement concluded confirming *“our unwavering commitment to human rights, in particular, the principles laid down in the UN Convention on the Rights of Persons with Disabilities.”⁹⁰*

⁸⁷ Christopher Jochnick, “Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights” (1999) 21:1 Human Rights Quarterly 56 at 59

⁸⁸ “Disability LIB is the first capacity building alliance led by disabled people and has been set up to tackle the crisis facing disabled people’s organisations (DPOs).” available at http://www.mulrooney.co.uk/engage/disability_lib/about-disability-lib.html accessed September 2019

⁸⁹ ‘A Statement of Common Understanding’ in Thriving or Surviving: Challenges and Opportunities for Disabled People’s Organisations in the 21st Century C28897 Disability LIB Report 2/4/08 13:03 Page 47 Published by Scope in February 2008 on behalf of Disability LIB alliance (Listen Include Build)

⁹⁰ Thriving or Surviving: Challenges and Opportunities for Disabled People’s Organisations in the 21st Century C28897 Disability LIB Report 2/4/08 13:03 Page 48 Published by Scope in February 2008 on behalf of Disability LIB alliance (Listen Include Build)

Part II

ACCESS TO JUSTICE FOR DISABLED WITNESSES OF DISABILITY HATE CRIME: CRIMINAL LAW

In July 2016, the UK Government published its four year plan for tackling Hate Crime, confirming that “(a)ny crime that is motivated by hostility on the grounds of race, religion, sexual orientation, disability or transgender identity can be classed as a hate crime.”⁹¹ The publication’s introductory chapter begins with two powerful statements: the first describes the “pernicious”⁹² nature of Hate Crime while the second considers the action that must be taken to deal with it:

“The UK has one of the strongest legislative frameworks to tackle hate crime in the world. However, legislation can only ever be part of the answer. Unless people have the confidence to come forward, unless the police are equipped to effectively deal with these crimes, unless victims are properly supported and perpetrators brought to justice, and crucially unless we take action to tackle the attitudes and beliefs that drive these crimes, too many people will continue to suffer.”⁹³

In June 2019, the EHRC published Is Britain Fairer? The State of Equality and Human Rights 2018. Unfortunately, two of its findings suggest that UK legislation may not be sufficiently strong to tackle Hate Crime and that insufficient progress has been made in overcoming the practical barriers that impede justice for victims of Hate Crime. In the ‘Executive Summary’ to the report, the EHRC outlines the situation relating to Hate Crime as follows:

“The level of hate crime, sexual violence and domestic abuse is concerning. While increases in reported crime may be the result of better reporting and recording, the level of identity-based violence is worrying, particularly in light of Britain’s impending exit from the EU and the spikes in hate crime we saw around the time of the referendum. The higher rates of domestic abuse and sexual assault experienced by disabled people, LGBT people and women are also of concern.”⁹⁴

Secondly, despite the 2016 UK government action plan to tackle Hate Crime, it would seem from the EHRC’s report that international opinion is that insufficient progress has been made:

“The need to strengthen measures to prevent hate crime and ensure appropriate prosecutions and convictions has been a key focus of UN human rights treaty bodies in recent years (UNCERD, 2016; UNCRPD, 2017). They have urged the UK and devolved governments to ensure the effective

⁹¹ Home Office (2016) Action Against Hate: The UK Government’s plan for tackling Hate Crime, Chapter 3, [11] available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf

⁹² Above, n91 [9]

⁹³ Above, n91 [10]

⁹⁴ Equality and Human Rights Commission Is Britain Fairer? The State of Equality and Human Rights 2018, June 2019 available at <https://www.equalityhumanrights.com/sites/default/files/is-britain-fairer-accessible.pdf> p10

implementation of relevant legal and policy frameworks, introduce new awareness raising campaigns, improve reporting and provide victims with adequate support.”⁹⁵

Arguably, the progress in tackling Disability Hate Crime has been even slower than for other Hate Crimes. This, it would seem, is the perception of disabled stakeholders:

“Just 43% of disabled adults in England and Wales reported that the criminal justice system is effective, compared with an average of 53%.”⁹⁶

An explanation for this lack of confidence in the Criminal Justice System can be found in two statements made in February 2018 by representatives of the disabled community to the House of Commons Petitions Committee, Online abuse and the experience of disabled people. The first is that the legislation does not provide equal protection for disabled witnesses of Disability Hate Crime:

“It’s about strengthening the law so that disabled people are treated as the same as other groups...there is no specific offence for Disability Hate Crime at the moment, so, if there was to be parity in that respect, then there would be that same level of protection whether it is online or offline, and hopefully that would lead to more prosecutions and more people having that on their record, so, for us, it is very much about getting equality in law. That’s very much the focus for us.”⁹⁷

The second is that the legislation does not achieve its purpose:

“The legislation just isn’t fit for purpose when it comes to the type of offending that we see against people with disabilities for various reasons....It’s not clear enough in helping police and prosecutors to be able to get a criminal justice outcome for disabled people that reflects that this was a hate crime rather than a crime against a vulnerable person or something different.”⁹⁸

4. Disability Hate Crime and Legislation

4.1 “Getting Equality in the Law”

There is a growing consensus that there is a need for legislative reform to ensure that Hate Crime law works equally for disabled people as it does for victims of Race and Religious Hate Crime. As one Disabled Witness Project interviewee observed:

⁹⁵Above n94 [6.2.2] p124

⁹⁶Above n94 ‘Key findings Civil and Criminal Justice’ p121

⁹⁷ Rob Holland, Parliamentary Manager Mencap, House of Commons Petitions Committee Online abuse and the experience of disabled people 15.31.33-15.32.20 n3 accessed 8 May 2019; see also Mark Walters, Susann Wiedlitska, Abenaa Owusu-Bemba with Kay Goodall, Hate Crime and the Legal Process, University of Sussex 2017 Part C: The Case for Law Reform, available at <https://www.sussex.ac.uk/webteam/gateway/file.php?name=final-report---hate-crime-and-the-legal-process.pdf&site=539>

⁹⁸Andie Gbedemah n3,15.57.12-18 <https://www.parliamentlive.tv/Event/Index/e2cf146d-4840-4558-aca3-bed718478182> n3 accessed 8 May 2019

*“Hate crime for all. It’s not just about disability because there is also other people not getting equality in law as well. But why should it be different if it’s about the same type of crime?”*⁹⁹

As for Disability Hate Crime, the House of Commons Petitions Committee, Online abuse and the experience of disabled people, made one key recommendation:

“Disability hate crime is not fully recognised and perpetrators are not appropriately punished. The law on hate crime must give disabled people the same protections as those who suffer hate crime due to race or religion.”¹⁰⁰

Unlike victims of Race and Religious Hate Crime, Disability Hate Crime is not a criminal offence. Section 146 of the Criminal Justice Act 2003 (See Annex 1) establishes that, in circumstances where a person commits a crime, and it is proved that, at the time of the offence, or immediately before or after (s.2(a)), the offender demonstrated towards the victim of the offence hostility based on that person’s disability or presumed disability, or the offence is motivated by hostility towards the person who has a disability (s.2(b)), the court must treat those circumstances as an aggravating factor. In summary, a crime must be committed, reported and the perpetrator recorded as having demonstrated or being motivated by hostility towards the disabled person when committing the crime and, only then, will this lead to enhanced sentencing power and ‘sentence uplift’. In contrast, sections 28-32 of the Crime and Disorder Act 1998 (CDA) provide an immediate remedy for an offence which is motivated by hostility on the grounds of race or religion. Once recognised as such, the initial offence¹⁰¹ becomes a separate offence with a higher maximum sentence immediately available. In addition, s.145 CJA (see Annex 2) provides for enhanced sentencing for any crime “religiously or racially aggravated” not recognised as an aggravated crime by the CDA. As one participant at an event organised by the House of Commons Petitions Committee, Online abuse and the experience of disabled people, observed: *“It’s only a disability hate crime if someone remembers at sentencing. No one is investigating people for disability hate crime.”*¹⁰²

Moreover, there is no offence of stirring up hatred on grounds of disability, whereas victims of Race¹⁰³ and Religious Hate Crime¹⁰⁴ are further protected by offences under the Public Order Act 1986 (POA). It is also a crime to stir up hatred on grounds of sexual orientation.¹⁰⁵ Incitement to hatred offences require threatening, abusive or insulting behaviour. In 2014 the Law Commission recommended *“not extending the stirring up offences on grounds of disability or transgender identity”* since such offences *“would rarely, if ever, be prosecuted, and their communicative or deterrent*

⁹⁹ Disabled Witness Project Interview September 2016

¹⁰⁰ Above n17 p7; the only recommendation written in bold.

¹⁰¹ Crime and Disorder Act 1998 ss.28-32 records the offences that can become aggravated offences. For analysis of how the legislation could be reformed see report on Disabled Witness Project second phase, above n8 [4.2]

¹⁰² Above n17 [105] p37; see also discussion above at [2.2] & [2.3]

¹⁰³ Public Order Act 1986 Part 111 ss.17-29.

¹⁰⁴ Above n103 Part 3A s.29.

¹⁰⁵ Above n103 Part 3A s.29

*effect would therefore be negligible.*¹⁰⁶ Even if there had not been reports of a significant increase in such behaviour against disabled people,¹⁰⁷ there is still an issue of equality of access to justice when victims of three of the five recognised ‘strands’ of Hate Crime are protected from such crimes by law while disabled and transgender victims are not. As Anne Novis argued when giving evidence to the House of Commons Petitions Committee, Online abuse and the experience of disabled people, there is a need for “*equal justice...it is a human right to have the same access to justice as everybody else.*”¹⁰⁸ The Law Commission has begun to address this issue by including in the terms of reference for its current review of Hate Crime the question, “*Should crimes of stirring up hatred in the POA be extended or reformed?*”¹⁰⁹

4.2 Not “fit for purpose” to achieve a satisfactory outcome for Disability Hate Crime

*“0.02% of an estimated 34,840 disability hate crime cases reported to police in 2015-16 resulted in a conviction and an uplift in sentencing. The gap between reported hate crime and convictions that result in a sentencing uplift is particularly big for disability hate crime, when compared to other hate crimes.”*¹¹⁰

This gap has two main causes: the first is the requirement of proof for Disability Hate Crime in s.146 CJA that, at the time of committing the offence, the offender must have demonstrated hostility¹¹¹ or be motivated by hostility¹¹² to the person because of his/her disability; the second are the practical challenges afforded by the process, as set down in s.146, of gaining a remedy for Disability Hate Crime.¹¹³

Not only, as mentioned earlier in this report,¹¹⁴ has the requirement for evidence of hostility under s.146 proved problematic in identification of Disability Hate Crime by the CPS, but even when the crime has gone to trial, judges have sometimes not accepted that there was evidence of hostility towards the victim because of his/her disability, and consequently, have not imposed an aggravated sentence for Disability Hate Crime. Not all Disability Hate Crime is motivated by hostility nor is hostility to the disabled person necessarily demonstrated by the perpetrator when committing the crime. This is because Disability Hate Crime can be targeting somebody because of his/her perceived vulnerability, for example, stealing a blind person’s wallet or – as was the case in one of the MPS problem profiles scrutinised by the Disabled Witness

¹⁰⁶ Law Commission Summary, available at <https://www.lawcom.gov.uk/project/hate-crime-completed-report-2014/> accessed 24 June 2019

¹⁰⁷ “Multiple participants in our events spoke about a culture of “demonising” disabled people. The hostile language associated with benefits and using blue badges came up at all the events we ran.” n17 [41]

¹⁰⁸ Above n3

¹⁰⁹ Above n16

¹¹⁰ Written evidence provided by Professor Mark Walters, University of Sussex, to the House of Commons Petitions Committee, Online abuse and the experience of disabled people n17 [109] p117

¹¹¹ Section 146(a) CJA

¹¹² Section 146(b) CJA

¹¹³ Discussed below [5]

¹¹⁴ See above at [2.3.2]

Project¹¹⁵ - persuading a person with learning disabilities to invite her into his house and then stealing from him.

A further requirement under s.146 is that enhanced sentencing for Disability Hate Crime is dependent upon the perpetrator being found guilty of the original crime. If the verdict is 'not guilty', then any hostility towards the disabled person becomes an irrelevance as no sentence is required.

An additional difficulty in gaining a remedy for Disability Hate Crime under the current legislation is that Disability Hate Crime does not appear on the offender's record because the hate crime element is part of the sentencing and not part of the aggravated offence. As Paul Giannasi, UK Cross-Government Hate Crime Programme Manager¹¹⁶, explained in his evidence to the House of Commons Petitions Committee:

*"With any crime the court is obligated to increase the sentence and say why it has done so, if it is satisfied that the offender demonstrated, or was motivated partly by, hostility. That is currently not recorded on people's criminal conviction record; the core offence of assault may be, but not the hostility element, so we can look at people's records and not see that."*¹¹⁷

Legislating to make Disability Hate Crime a criminal offence would send a message that such behaviour is a crime and unacceptable.

*"There still remain the negative attitudes inherent in society that demean disabled people in all sorts of ways and allow us to become a target when it is costly or 'inconvenient' to address the inequality of disabled people, let alone give us the same equal human rights as all people should have in the UK."*¹¹⁸

It would also go a long way to providing solutions to many of the challenges that disabled witnesses to Disability Hate Crime face when seeking the protection of the law.¹¹⁹

Recommendation Two: There is a need for a detailed review of the efficacy of the Criminal Law to protect disabled witnesses of Disability Hate Crime with a view to reform.

¹¹⁵ See [5.1.2] below

¹¹⁶ 2007-2018; since 1 January 2019 Police Hate Crime Policy Lead.

¹¹⁷ Paul Giannasi, House of Commons Petitions Committee, Online abuse and the experience of disabled people above n17 [120] p127-8; The UK Cross-Government Programme was set up in 2007 to bring all parts of the justice system into a single programme focusing predominantly on race. The programme was responsible for identifying the five strands of hate crime to measure and monitor and for setting up an independent advisory group which includes experts on disability and hate crime.

¹¹⁸ Anne Novis n29, p124

¹¹⁹ See Hewitt Louise and Laycock Angela, Disabled Witness Project: Promoting Access to Justice for Disabled Witnesses, University of Greenwich August 2019, n8, for review of the efficacy of Disability Hate Crime legislation and recommendations for reform.

5. Practical barriers to effective operation of Disability Hate Crime Law

The requirement in the current legislation for Disability Hate Crime to be recognised, reported and recorded as a Disability Hate Crime before it can proceed to trial creates a process which, at each stage, can lead to the denial of access to justice for disabled witnesses of Disability Hate Crime. The Disabled Witness Project has identified the following potential barriers to achieving an effective remedy for Disability Hate Crime: lack of recognition and reporting of Disability Hate Crime by the police, disabled witnesses and members of the public; lack of recording of Disability Hate Crime by the police; lack of resources for the Criminal Justice System and lack of consistency in facilitating the giving of evidence at the pre-trial and trial stages.

5.1 Lack of Recognition of Disability Hate Crime

5.1.1 Civil Society including Disabled Witnesses

Failure to recognise Disability Hate Crime is common across society. A key aim of the Cross-Government Hate Crime Programme was to “*raise awareness amongst professionals and the public as well as people who have influence.*”¹²⁰ Colin Finch, 1-2-1 Advocacy Coordinator, Crime and Hate Crime Advocate, for Lewisham Speaking Up, a charity for people with learning disabilities, also cited lack of recognition of Disability Hate Crime as one of the key challenges to combatting it:

*“I think where...the problem still lies is with the public, and I would say that that applies both generally and also to the disabled community... I think if you were to stop people in a shopping centre and ask them to name a type of discrimination or type of hate crime, I would expect that certainly anybody that wasn't themselves disabled or didn't personally know someone with a disability or impairment that had been a victim, would probably name disability last, if they named it at all. Now I think part of that is almost the disbelief among people that it actually happens.”*¹²¹

In his forward to the EHRC report, Hidden in Plain Sight, Inquiry into disability-related harassment, Mike Smith, Lead Commissioner for the Inquiry, suggested that the term ‘hate crime’ “*probably contributes to the culture of disbelief*” and “*acts as a barrier to effective reporting and recognition*”, especially by disabled victims of Disability Hate Crime:

*“Many people think they have just been taken advantage of, rather than hated. Who wants to think of themselves as hated?”*¹²²

Despite the work of many organisations such as Mencap¹²³, METRO GAD and Lewisham Speaking Up, there is plenty of evidence to support Mike Smith’s view. Paul Giannasi, for example, told the Disabled Witness Project, of a friend with Downs

¹²⁰ Paul Giannasi OBE Disabled Witness Project Interview August 2018

¹²¹ Colin Finch Disabled Witness Project Interview August 2018

¹²² Above n57 p8

¹²³ The Royal Mencap Society is a charity based in the UK that works with people with a learning disability.

syndrome who dismissed being spat at in public as normal, and therefore, not a matter for the police. Mr Giannasi also pointed out that

“the nature of disability and crime...is significantly different (from other hate crime) in that victims are more likely to be repeats; victims are more likely to know the perpetrators and they are less likely to understand their rights to be protected and less likely to recognise if what’s happening to them is a crime.”¹²⁴

Education and awareness are very important in tackling Disability Hate Crime. One Disability Hate Crime advocate pointed out that too many disabled people take the view that the pushing and shoving and the comments made about them “go with the territory”. They need to know that the anti-social behaviour they experience is not acceptable. There is a need for initiatives such as Lewisham Speaking Up’s Hate Crime Training, run by people with learning disabilities, which aims not only to raise awareness of “Learning Disability Hate Crime” and how to report it among people with learning disabilities but also to raise awareness among the general public by running workshops for sixth formers and for front-line staff.

Further demonstration of the need for such initiatives to raise awareness of Disability Hate Crime is the Cross-Government Hate Crime Programme’s discovery, as a result of analysis of data from a 2015 survey, that in over 50% of the cases identified as Disability Hate Crime, it was a police officer who triggered the identification rather than carers, personal assistants or victims. The Programme had, therefore, undertaken to produce a document aimed at carers and family members and disabled persons themselves to raise awareness of the rights of disabled witnesses to Disability Hate Crime and advice as to how to report it.¹²⁵ Cross-community local initiatives involving DPOs, the police and local authority officers also play an important part in achieving greater recognition of Disability Hate Crime. In the Borough of Greenwich, for example, Hate Crime Case Panel Meetings and High Risk Victim Panel Meetings are held monthly, which enable representatives from the police, METRO and METRO GAD, the Greenwich Inclusion Project (GrIP), and the Greenwich Council Tenancy and Anti-social Behaviour teams to discuss individual cases of Hate Crime.

5.1.2 The Police

Analysis of two sets of MPS problem profiles (2009-12 and 2016-18 respectively) has enabled the Disabled Witness Project to examine how the police approached disabled witnesses of Disability Hate Crime over an extended period. The profiles show a range of responses from the investigating police officers. All the profiles, however, indicate that positive action in this context is dependent on the individual responding police officer.

In the 2009-12 set of problem profiles, there were situations where the police did not identify the witness’s disability and the subsequent multi-agency assistance provided

¹²⁴ Disabled Witness Project Interview August 2018

¹²⁵ Above n120

was limited. There were at least two problem profiles which provided evidence of this, notably concerning disputes between disabled witnesses and their neighbours. There was no mention in these profiles of partner agencies being engaged to support either the witness, or the other individuals who had been affected. In one of these, the witness called the police, by dialing 999, for random subjects more than fifty times: she believed that her neighbours were conspiring against her. It took from the 14th June 2010 until the 6th October 2010 for this witness to be assessed by a mental health unit. Ideally, this mental impairment should have been identified significantly earlier than it was. In the 2016-18 set of problem profiles, the incident in each profile was recognised as a Disability Hate Crime. However, two of the profiles highlighted how more could have been done either to support or to help the victim during the investigation. In one of these, the officer investigating an incident concerning an elderly man living in semi-independent housing who suffered from vascular dementia did not complete an Achieving Best Evidence (ABE) interview with an intermediary present as should have been the case. It is unclear from the profile whether this option was offered to the victim in place of a written statement. In another profile, a disabled witness with dwarfism, who reported an assault occasioning actual bodily harm, was not visited by the officer investigating the offence. Instead the police tried to contact her by letter or by a telephone call. In 2019, the Disabled Witness Project has been made aware of further instances of reports not having been followed up by the police in the Borough of Greenwich to discuss individual cases of Hate Crime.

Where the police did identify a witness as requiring support and help, they also engaged the relevant departments from the local council and other agencies. For example, in the 2009-12 set of problem profiles, one witness disclosed his mental health issues to the police when they attended an incident involving allegations of anti-social behaviour between neighbours. The police worked closely with the housing officer at the local council to try to resolve the issues. It was evident from the profile that the police recognised how the witness's condition affected his behaviour, making it clear that he *"must feel victimised and unhappy enough to make these allegations"*. In the 2016-18 set of problem profiles, recognition of the witness' disability was more frequent even when the disability might have been less obvious. For example, an elderly man living in semi-independent housing who had vascular dementia, as well as heart disease and Type 2 diabetes, while sitting outside his block of flats, was approached by a 47-year old woman who convinced the victim that they knew each other. She persuaded him to invite her up to his flat for a cup of tea and, whilst inside, she searched the flat and stole money. The investigating officer recognised that the man was targeted because of his disability and immediately engaged the help of the victim's carers to support the victim during the investigation. The officer also applied for special measures for the trial and made contact with the victim's general practitioner, who wrote a letter to the court explaining why the victim would find giving evidence extremely distressing. As a result, the suspect was identified after an extensive trawl through CCTV footage and found guilty at court.

The first set of problem profiles showed that where the police were told about a disabled witness's condition through a housing officer, carer or mental health support team, they were able to utilise the existing support that was already in place for the

witness. In one example the police worked with a mental health recovery team for a planned arrest of a disabled witness anticipating that he would probably need to be sectioned. The second set of problem profiles demonstrated how identification of Disability Hate Crime early in the investigation could lead to an effective resolution for both the victim and the offender. A 45-year old wheelchair user reported being approached by an older man who took hold of his ankles and then used an object to touch his chest whilst mumbling. The victim shouted at the man to let go and the police were called. Using CCTV the police located the suspect in a local shop. He was arrested and taken into police custody. The police officer identified the incident as a Disability Hate Crime. However, when the officer spoke to the suspect, he recognised that the suspect might himself have a mental impairment and on further investigation he discovered that the suspect had schizophrenia. The suspect was extremely apologetic, and the officer completed a community resolution, giving the victim and the suspect an opportunity to meet. During this meeting, the victim had a chance to have his voice heard and the suspect was able to apologise.

These examples demonstrate the importance in practice of the wording of the NPCC/CPS approved definition of Disability Hate Crime. In the case in which the offender targeted the man with vascular dementia for the purposes of theft, the officer identified the offence as a Disability Hate Crime. The offender could not be said to be “*motivated by hostility*” but could arguably be “*motivated by... prejudice based on a person’s disability or perceived disability*” and thus fall within the NPCC/CPS definition of Disability Hate Crime. A lack of consistency in applying the definition may also explain the comparatively low number of cases flagged as Disability Hate Crime which receive sentence uplift. HMICFRS and HMCPSI reported:

“In the 12 months to December 2017, the uplift was applied in 68.6% of cases where an application was made.... This continues a positive performance trend, with year-on-year improvements since 2015-16 when the application rate was only 33.8%.”¹²⁶

A change in the wording to Professor Walters’ “*motivated by reason of disability*” would reduce still further the potential for confusion as to whether a crime could be flagged as a Disability Hate Crime.¹²⁷

5.1.3 The Crown Prosecution Service and Judiciary¹²⁸

While commending “*a much greater awareness now amongst prosecutors of s.146*” in 2018 than there had been in 2015, HMICFRS and HMCPSI reported:

“There is still some confusion, as demonstrated by an endorsement on a file examined:

¹²⁶ Above n19 [4.6] p16

¹²⁷ See discussion above on the definition of Disability Hate Crime at [2.2]

¹²⁸ See also [5.3.1] and [6.1] below for additional comment on disabled witnesses’ court experiences.

*Objectively this could be perceived as a hate crime, however I am not certain the motivation is due to a hostility towards the disabilities of the patients. The Court should they deem this to be a disability hate crime can reflect this in the sentencing uplift.*¹²⁹

Even if a case comes to court, judges may not impose enhanced sentencing for Disability Hate Crime. As discussed above at [2.3.2] and [4], even when the CPS has flagged that the case is one of Disability Hate Crime, judges, despite the fact that they have accepted that a witness requires special measures for giving evidence in the trial, will not necessarily recognise Disability Hate Crime, often because, in their eyes, the perpetrator did not “*demonstrate hostility*” nor was he “*motivated by hostility*” when committing the crime.

5.2 Lack of Recording of Disability Hate Crime

Mike Smith suggested that “*this lack of recognition leads to a lack of recording of bullying, antisocial behaviour and crime as linked to disability.*”¹³⁰ Recording of Disability Hate Crime by the police is essential for the legal protection of Disabled Witnesses. It is the job of the police to record an offence/incident as Disability Hate Crime by “flagging” it as such on the computer records. It is only when “flagged” that the court “*must treat the fact that the offence was committed in any of those circumstances as an aggravating factor*”.¹³¹ One of the problems that has been raised is that Disability Hate Crimes are often recorded as criminal damage or anti-social behaviour (ASB). It is evident from the police profiles that incidents concerning disabled witnesses are quite complex, with allegations not only made against the witness but sometimes by the witnesses themselves. All the offences in the 2009-12 MPS problem profiles were recorded as anti-social behaviour or harassment, and, as has been mentioned in [5.1], there were occasions when the police tried to resolve the issues without any form of criminal sanction. None of these profiles recorded the crime as Disability Hate Crime, even though these reports were made almost ten years after the CJA had come into force. In the HMICFRS report in 2015, errors were found in the recording of data relating to Disability Hate Crime by the police and the CPS. A number of reports lacked information to show they complied with the agreed definition of Disability Hate Crime because it was not made explicit who had perceived the crime to be motivated by hostility or prejudice against the victim’s disability or perceived disability.

The Disabled Witness Project has been made aware of situations where the responding officer has not recognised a crime as a Disability Hate Crime, and consequently, has failed to record it as such, thus depriving the victims of a remedy, sometimes even when advised by a Disability Hate Crime professional that the crime should be flagged as such. One recent example was the painting of the words “child molesters” in white paint on the blue front door of the home of several adults with

¹²⁹ Above n19 [4.5] p16

¹³⁰ Above n57 p123

¹³¹ Section 146(3)(a) CJA

learning disabilities. Not only was the crime recorded as criminal damage without a flag for Disability Hate Crime but, in addition, only one victim (the registered owner) was recorded. In fact, all the residents of the multi-occupancy property were victims. Eventually, the assistance of the local Crime and Hate Crime Advocacy Service led to the incident being flagged as a Disability Hate Crime. Flagging in this way meant that the investigating officer was able to speak to the local hate crime advocate who was then able to represent the victims and demonstrate how the crime had affected them. This could lead to an aggravated sentence under s.146 CJA, which, in turn, would mean that the disabled witnesses will be represented in the crime figures as victims of Disability Hate Crime.¹³²

Despite the fact that the 2016-17 figures showed a 53% increase in the recording of Disability Hate Crime from 2015-16 (5,558¹³³ compared with 3,629 in 2015/16¹³⁴) which in turn was the largest increase in the recording of hate crime for all five characteristics,¹³⁵ there still seems to be a disparity between the figures for Race Hate Crime and those for Disability Hate Crime. The Joint Inspection of the Handling of Cases involving Disability Hate Crime by the HMICFRS and HMCPSI in October 2018 found that the Disability Hate Crime flag had only been used in 63 of the 90 cases that were examined.¹³⁶ The HMICFRS inspection in July 2018 into how police forces deal with hate incidents and crimes also identified the same findings.¹³⁷ This indicates that the recording of Disability Hate Crime has not been accurate and potentially the figures are higher than those recorded due to the fact that a number of Disability Hate Crimes are going unrecorded. The Home Office publication, Hate Crime, England and Wales 2017/18, shows that, whereas there were 71,251 Race Hate Crimes recorded in 2017-18, there were only 7,226 recorded Disability Hate Crimes. When broken down into different subgroups, the disparity seems even more marked. For example, out of the 33,332 violence against the person hate crimes recorded in 2017-18, 22,135 were flagged as Race Hate Crime but only 3,124 as Disability Hate Crime. Further evidence that recording is too low is the Crime Survey for England and Wales' estimate that there are 52,000 disability motivated hate crimes per year.¹³⁸

Similarly, a comparative study of the figures for specific areas for 2017-18 show that there "*can be significant fluctuations in performance from quarter to quarter*".¹³⁹ For example, the 2017-18 figures for recorded incidents of Disability Hate Crime in London, the area with the most recorded incidents of Hate Crime, 20,806 in total, was 462, while the figure for the North West¹⁴⁰, the area with the second most recorded incidents at 16,168, was 1,023. As Colin Finch observed,

¹³² Disabled Witness Project Interview August 2018.

¹³³ Police recorded crime, Home Office 2016/17.

¹³⁴ Police recorded crime, Home Office 2015/16

¹³⁵ Above n19 [2.6] p6

¹³⁶ above n19 [2.6] p6

¹³⁷ HMICFRS Understanding the difference. The initial police response to hate crime, July 2018 [4.5] p9.

¹³⁸ Quoted in House of Commons Petitions Committee, Online abuse and the experience of disabled people above n17 [31] p31

¹³⁹ Above n19 [2.8] p6

¹⁴⁰ Cheshire, Cumbria, Greater Manchester, Lancashire and Merseyside

*“The inconsistencies still exist.... asking the right questions and flagging things is still one of the biggest issues.”*¹⁴¹

There is also evidence that identification of Disability Hate Crime, which in turn will lead to increased flagging of Disability Hate Crime, could be improved through training. Initiatives such as ‘Disability Hate Crime MATTERS’ could be one such remedy. Launched in March 2016 by the MPS and Inclusion London, the ‘Disability Hate Crime MATTERS’ initiative used the mnemonic “MATTERS” to spell out exactly how reports of Disability Hate Crime should be recorded and flagged by police officers. Following the launch of Disability Hate Crime MATTERS, the MPS saw an increase in the number of recorded Disability Hate Crimes from 357 in 2015/16¹⁴² to 666 in 2016/17.¹⁴³ In 2017/18, however, only 462 Disability Hate Crimes were recorded because the initiative stalled.¹⁴⁴ Two reasons have been suggested for this, the first could be “initiative fatigue”¹⁴⁵ as a result of the police being consistently asked to change their priorities without having nearly enough time to put into practice what they have been asked to learn. The second reason reported to the Disabled Witness Project was that the officers responsible for delivering the briefings left or changed roles with the result that the training was either not delivered or not delivered properly. It is clear that such an initiative has merit and can have an impact in raising awareness of Disability Hate Crime amongst police officers but it needs to be maintained in order for that impact to be consistent. The Disabled Witness Project welcomes the news that the MPS plans to relaunch this initiative.¹⁴⁶

In October 2018, the Joint Inspection of Handling Cases of Disability Hate Crime identified four issues that Chief Constables needed to address. All four related to the identification and transference of information to the CPS. Chief Constables should ensure, firstly, that the system for requesting charging should clearly identify a case as one which the police considered to be a Disability Hate Crime; secondly, that cases involving Disability Hate Crime should be accurately flagged in accordance with the Home Office counting rules; thirdly that there was effective supervision of all Disability Hate Crime cases and fourthly, that victims are given the opportunity to make a personal statement and that that statement is forwarded to the CPS.¹⁴⁷ The CPS in turn should work with the NPCC to revise the police section of the MG3 record of charging decision so it can be flagged clearly how, according to the definition, the police consider that it is a Disability Hate Crime. The CPS should also *“modify the prosecutor app to allow the prosecutor at court to check the relevant box on the case management system which shows that the s.146 uplift has been applied by the court”*. In addition, individual prosecutors at the charging stage or initial review stages in police-charged cases must set out clearly on the CPS management system why the

¹⁴¹ Disabled Witness Project Interview August 2018.

¹⁴² Police recorded crime, Home Office 2015/16.

¹⁴³ Police recorded crime, Home Office 2016/17.

¹⁴⁴ Police recorded crime, Home Office 2017/18.

¹⁴⁵ Colin Finch, Disabled Witness Project Interview August 2018.

¹⁴⁶ For a more detailed discussion of Disability Hate Crime MATTERS and police training see Hewitt Louise and Laycock Angela, Promoting Access to Justice for Disabled Witnesses, University of Greenwich August 2019 n8

¹⁴⁷ Above n19 p4

case should be flagged and comply with the requirement to send a section 146 letter to the court and the defence and compliance should be monitored by Area Hate Crime Co-ordinators.¹⁴⁸

In April 2019, the Home Office made it mandatory for all police services to flag Hate Crime in accordance with the counting rules for recorded crime.¹⁴⁹ The Disabled Witness Project hopes that this initiative will lead to further training for police officers in recognition and recording Disability Hate Crime, which in turn will lead to an increase in the recording of Disability Hate Crime locally and nationally.

Recommendation Three: In view of the lack of consistency in recording Disability Hate Crime, the Disabled Witness Project recommends that there should be a review of innovative strategies for effective policing of Disability Hate Crime at force level, which could provide the foundations for changes in national police policy and procedure.

5.3 Lack of Reporting of Disability Hate Crime

5.3.1 Low Confidence and Trust in System of Reporting and in Criminal Justice System

The EHRC opens its observations about civil and criminal justice in its Key policy and legal developments section to the 2019 report, Is Britain Fairer? with the following observation:

“Public confidence and trust in the civil and criminal justice systems across Britain are crucial.

Lack of trust in the justice system can affect how people engage with it, which in turn can lead to different outcomes.”¹⁵⁰

There is general agreement among stakeholders that inconsistency in response to reporting of Disability Hate Crime is one of the main reasons for lack of reporting and consequently the relative paucity of convictions for Disability Hate Crime. A poor response can deter a witness to Disability Hate Crime from reporting. One interviewee told the Disabled Witness Project about her negative experience of reporting a Disability Hate Crime to the police. When she telephoned the police to report being knocked out of her wheelchair, she was told that they were too busy to attend the scene. On her way home, she called in to Brixton police station to give them a statement about what had happened, at which point the police became embarrassed and apologised. She told the Disabled Witness Project that she believed this to be part of a bigger issue: the criminal justice system perceived her not to have credibility as a

¹⁴⁸ Above n19 p3

¹⁴⁹ The Home Office counting rules for recorded crime help to ensure that crimes are recorded consistently and accurately by all police forces in England and Wales. All five strands of Hate Crime are included under the counting rules. available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/791106/count-flags-apr-2019.pdf accessed 24 May 2019.

¹⁵⁰ Above n94

witness because of her disability.¹⁵¹ This latter observation that disabled people are not perceived to have credibility as witnesses is supported by the evidence given to the House of Commons Petitions Committee inquiry into online abuse and the experience of disabled people as key reasons for lack of reporting:

“Believing people is really important and not seeing the disability but seeing the person”¹⁵²; “The biggest barrier we face is disbelief by professionals and the belittling of what we experience and the impact of it.”¹⁵³

A second key factor for under-reporting by witnesses is the lack of remedy once Disability Hate Crime is reported due to the inadequacy of the existing legislation. Andie Gbedemah summarised both these factors:

“I think there is very low confidence and trust around the system of reporting because people feel they won’t be believed. They perhaps think what’s happened to them is not serious enough to bother the police with and that’s exacerbated when someone comes forward, they report and there isn’t anything that the perpetrator can be charged with; so a lot of it comes back to the law and issues around the law and the fact that, with the best will in the world, police and the prosecutors aren’t then going to be able to give people the outcome they are looking for when they report if they don’t have the mechanism to do that in legislation.”¹⁵⁴

The length of the process of giving evidence can also be very off-putting, even for a seasoned disability campaigner, particularly when a satisfactory outcome is unlikely. Anne Novis explained that she did not always report abuse:

“So why would you want to do it? Now, I got abused in Greenwich Market a couple of weeks ago and I’ve not reported it because I don’t want to go through all the hassle and know it won’t go to court and nothing will happen. The person won’t be caught, so what is the point. And that’s even me who is very aware and knowing that actually stats. are quite important.... So, when you get those things like the verbal abuse in the street, you just think, this is going to be several hours of giving a statement. That’s actually not going to get anywhere. What will be is one flagged report of disability hate crime, that’s all it will be. And there is a lot of effort I need to put in for that...so that’s what a lot of us are feeling that you just haven’t got the energy.”¹⁵⁵

The evidence above indicates the importance of the police being proactive and quick in their response to reports of Disability Hate Crime.

¹⁵¹ Disabled Witness Project Interview September 2016; see also [7.1] below

¹⁵² Amy Clarke, Digital Assistant, Mencap, House of Commons Petitions Committee, [Online abuse and the experience of disabled people](#) n3 above at 15.11.00 accessed 7 May 2019

¹⁵³ Anne Novis MBE, disability campaigner, Inclusion London, above n3

¹⁵⁴ Andie Gbedemah, Public Affairs Officer, Dimensions, above n3, accessed 7 May 2019

¹⁵⁵ Disabled Witness Project Interview September 2016

When the police service has engaged in good practice they have done so well. The Disabled Witness Project has watched, with permission from the MPS, video-taped interviews provided by the disabled witness. The MPS police officers who conducted the interviews did so with care and attention. They clearly explained what was happening in the interview room. The police officer was patient in waiting for a response to the questions he asked. He also checked that the witness understood the questions, which were open questions. The questioning, however, did go on for a long time without a break, although, when the witness became upset from the questioning, the interviewer did stop the process and comfort him. There was clearly a development in technology between the two interviews. The first interview depended on a limited number of pictures and words in a book with a personal assistant looking for signs from the witness as to when to stop at a particular word or picture. In the second interview the witness was able to express himself through an electronic device.

A second example of interviewing technique illustrates the need for disability awareness training for police officers. A disabled witness was targeted by street beggars who followed him home and pushed past him to get access to his house and subsequently stole some money from a cash tin. The witness is functionally illiterate. The police took the witness's statement on video and allowed an advocate to support him at the police station. The advocate reported to the Disabled Witness Project that the interview was conducted with thought and care and attention, however, some of the words and expressions used by the investigating officer made it difficult for the witness to understand fully. For example, when the police officers had used the word "diagram", the advocate could see that the witness did not know what a diagram was but that he did not have the confidence to tell the police officers that he did not understand what they were asking him to do. It would have been more appropriate for the police officers to ask the witness to draw a "picture". The advocate commented that it was the small details that matter when responding to a report of Disability Hate Crime. For example, if an officer says, "We'll catch up later", most people would not expect that to be today but a disabled witness with learning disabilities may take that literally.

The advocate reported that he was in a position to give feedback to the police officers so that they would be able to gain a more accurate report from a witness with learning disabilities in future.¹⁵⁶ This example highlights the importance of face to face training initiatives such as Disability Hate Crime MATTERS, which involve disabled witnesses, to enable police officers and civilian receptionists to understand how best to respond to disabled witnesses reporting Disability Hate Crime.

Previous negative experiences of the trial process can also deter disabled witnesses from reporting Disability Hate Crime. There remains a need for disability awareness training for lawyers and court officials as illustrated by the experience of one Disabled Witness Project interviewee:

¹⁵⁶ Disabled Witness Project Interview August 2018

“I got run over . . . I’m in a wheelchair.... I went to court and the guy who was supposed to be representing me . . . he more or less insulted me. He thought I didn’t know what way was up. He walked into the room, he didn’t seem interested in me . . . and he said, “What day is it?.... Luckily for me I’m not a doormat...I’ve got it all there.... He told me because I’m disabled, I’m not a credible witness. I showed him.... He tried to say I ran into the car. I said if I had run into the car, it’s a miracle I am here. He sat down after that.”¹⁵⁷

Recently, some progress has been made in the training of advocates. In 2016, the same year as the above interview, the Inns of Court College of Advocacy (ICCA) was established and the Advocacy and the Vulnerable National Training Programme: The 20 Principles of Questioning introduced. Professor Penny Cooper¹⁵⁸ and colleagues, writing in the International Journal of Evidence and Proof, praised what was “*to the authors’ knowledge...the first, widespread, post-qualification advocacy training initiative in England and Wales...to improve the questioning of vulnerable witnesses and defendants*” but expressed concern that very few of the principles were underpinned by evidence-based research:

“This review (of the 20 Principles) highlights a need for further research into advocacy as it is practised in courtrooms and the research evidence base for principles of effective witnessing in court....The authors invite the Law Commission of England and Wales to instigate a review of the handling of witness evidence because there appears to be a yawning gap in law where a research evidence-based approach to witness evidence should exist.”¹⁵⁹

The 2019 Understanding Courts report argues that legal professionals should be trained to assess the needs of all lay users¹⁶⁰ before trial, not just those designated by law as “vulnerable” under s.16 YJCEA - all lay users find themselves in an alien culture:

From the moment a member of the public enters a court or tribunal building, they find themselves in an unfamiliar, intimidating environment. They must negotiate security, find the relevant courtroom, and try to make sense of the process and outcome of the hearing. Increasingly, they must also represent themselves. These features are exacerbated by the fact that legal professionals and judges are often not representative of the people using our courts – in particular in terms of gender, racial, ethnic and socio-economic background. The look, manner and language of court professionals can alienate many members of the public who do not identify with their culture, lifestyle and

¹⁵⁷ Interview September 2016; see below Part III Access to Justice for Disabled Witnesses of Disability Hate Crime: Common Law

¹⁵⁸Co-Founder and Chair of The Advocate’s Gateway

¹⁵⁹ Above n24

¹⁶⁰ “In this report, we have intended the term “lay user” to include all non-professional individual participants spanning the full range of civil, family, administrative and criminal proceedings.³⁰ This includes those playing a part in the proceedings, whether in person or through a representative, and/or being directly impacted by the outcome of proceedings, such as jurors, victims, defendants, claimants, respondents and other witnesses, as well as their family and members of the community attending the hearing.” Above n25 [1.17] p12

*heritage. This can create a perception of the courts as being not only remote but lacking legitimacy.*¹⁶¹

Consequently, the authors of Understanding Courts argue, there is a need for a “*cultural or professional shift... to increase awareness among professional court users of how they treat lay users and their experience of procedural justice.*”¹⁶² To achieve this:

*“All court professionals should be encouraged through training, continuing professional development and reflective processes to put themselves regularly in the lay user’s shoes, involving both active and observational methods such as sitting in the witness box and dock, using the video link, sitting in court to observe a trial that is not their own, and shadowing intermediaries and support volunteers.”*¹⁶³

This cultural shift:

*“requires court and legal professionals to appreciate that people giving evidence may not be officially “vulnerable” according to legal definitions but nevertheless may be having to recount an incident that was violent or traumatic. Moreover, the anxiety of giving evidence makes all witnesses inherently vulnerable – and by varying degrees – to the process of questioning, to which advocates must not become desensitised.”*¹⁶⁴

The report makes two key suggestions as to how to bring about the recommended “cultural shift”, which it argues has already begun.¹⁶⁵ Firstly:

*“that the questioning of witnesses should always be adapted to the needs and understanding of the witness to ensure that they can give their best evidence and to promote comprehension on the part of participants to the hearing. This principle should be applicable across all jurisdictions and in respect of all witnesses, not merely in cases where witnesses are formally identified as ‘vulnerable or intimidated’ or pre-recording under section 28 YJCEA is available. It should also have in mind all lay users in the courtroom when formulating questions.”*¹⁶⁶

Such an approach, though costly and time-consuming, would ensure greater equality in access to justice for all. Every witness could be the subject of a Ground Rules

¹⁶¹ Above n25 Introduction [1.1] p4

¹⁶² Above n 25 [3.62] p87

¹⁶³ Above n25, [2.60] p50; see also [6.1] below for further recommendations for improving access to justice for the “lay user”

¹⁶⁴ Above n25 [3.62] p87

¹⁶⁵ Above

¹⁶⁶ Above n25 [3.66] p88-9

Hearing in which the personnel involved in the trial¹⁶⁷ would consider if any adjustments needed to be made to facilitate the giving of evidence. This would overcome the problematic nature of s.16 YJCEA and the need to designate a witness as “vulnerable” in order to gain adjustments discussed above at [2.3.2]. Disabled witnesses of Disability Hate Crime would no longer be treated as “vulnerable” *per se* though like “any other witness, (they) might, or indeed might not, be found to be in a “vulnerable situation”¹⁶⁸ which requires adjustment.

Secondly:

“New and continuing practitioner training providers and regulators should train advocates to adapt the style of their questioning routinely to the needs and level of understanding of the lay user being questioned. In particular, BPTC and Higher Rights Advocacy training should embed these principles in the criteria for witness examination assessments.”¹⁶⁹

These suggestions are summarised in Recommendation 32 of the report:

“Training providers should make witness handling and communication with lay people key components of legal professional training. They must also do more to provide opportunities to speak with lay people about their experiences of courts, to instil in students from the outset of their training that they should not leave their ordinary ability to communicate with non-lawyers at the door of court, but take it in with them and apply it. Teaching – at all stages of professional training – should harbour a culture of respect for, and communication with, lay people.”¹⁷⁰

Recommendation Four: The Disabled Witness Project recommends developing strategies to raise recognition, reporting and recording of Disability Hate Crime, including publicity campaigns and training of police, members of the Criminal Justice System and disabled witnesses. All reviews and training relating to Disability Hate Crime and access to justice should be conducted in consultation with, and where possible, led by disabled people.

5.3.2 The need to improve access to reporting

A further reason for the lack of reporting of Disability Hate Crime is the use of technology for reporting. One Disabled Witness Project interviewee spoke about the difficulties she had had in making a complaint about safeguarding, saying that she felt the police were “*failing in their duty to protect people*”:

¹⁶⁷ The CPS prosecutor, the magistrates/judge and the trial advocates and an intermediary if the witness has communication disabilities

¹⁶⁸ Above n28

¹⁶⁹ Above n25 [3.68] p89

¹⁷⁰ Above n25, p111; See also [2.3.2] and Part III Access to Justice for Disabled Witnesses of Disability Hate Crime: Common Law [6.1] & [6.2]

“We get an automated response saying ring the police. What the hell is that? Have the police not time to respond to issues that should be ironed out by the safeguarding people?”¹⁷¹

The lack of response when reporting online was also a feature of the evidence Amy Clarke, Digital Assistant, Mencap, gave to the House of Commons Committee Online abuse and the experience of disabled people. True Vision is the current online reporting tool. Amy Clarke suggested that there should be a live chat facility or even a phone number that a witness could ring if they got into difficulties reporting.

The Disabled Witness Project heard evidence from more than one witness that reporting online as a method for reporting Disability Hate Crime *“automatically excludes some people”*. One younger interviewee suggested that *“the majority of older people were excluded partly because of a feeling they can’t do it”* though a lot of the time they probably could. She also mentioned that people with dyslexia, reading difficulties, visual impairments and learning disabilities also had difficulties with reporting online. Another interviewee commented that, in addition to an impairment causing difficulties in using the internet, disabled people are often on low incomes and so do not have access to the internet at home. *“Therefore, online reporting immediately becomes restrictive and inhibits the possibility of the crime being reported at all.”¹⁷²*

A further barrier to reporting has been the closure of many police stations and some TPR centres due to cuts in funding. In its 2019 report, the EHRC commented upon the number of closures to criminal and civil courts as part of a modernisation programme *“driven by the aim of using technology to enhance access to the justice system and to make the system more proportionate”*. The EHRC went on to express concern about these closures:

“Over 100 court and tribunal buildings have closed since 2014. The impact on predicted travel times as a result of proposed closures was deemed to be minimal by the MOJ (2016b), but the analysis would have been stronger if it had included further evidence on court users with a range of protected characteristics, especially disabled people.”¹⁷³

The closure of the courts, the EHRC observed, made it harder for disabled people and those with caring responsibilities to access courts where video hearings are not appropriate.¹⁷⁴

As recently as July 2019, the Solicitors’ Journal reported that the Law Society had made a public plea to Boris Johnson when he became Prime Minister to address the

¹⁷¹ Disabled Witness Project Interview September 2016

¹⁷² Disabled Witness Project Interview August 2018

¹⁷³ Above n94 [6.3.2] p131

¹⁷⁴ Above n94 [6.3.2] p123

underinvestment in the Criminal Justice System. Law Society President, Simon Davis, was quoted as saying:

“If you want justice you have to invest – decades of cuts to this fundamental part of our country’s infrastructure mean the whole system is crumbling.”

He admitted that every organisation has its *“list of asks of the new Tory leader – but few things damage the country’s health more than the undermining of our justice system.”*¹⁷⁵ The Law Society asked the new government to make urgent changes to criminal legal aid fees and to conduct an independent economic review of the long-term viability of the criminal legal aid system.

A few months earlier, the EHRC had noted the urgency of the situation in its report:

*“Remuneration for criminal legal aid cases had come under fire. In January 2018, the Law Society issued proceedings against the MOJ to challenge a decision to implement further cuts to legal aid, in a bid to reverse a cut to Litigators’ Graduated Fee Scheme. In addition, the Criminal Bar Association called on its members to refuse instructions on all legal aid cases, and to be prepared to go on strike, in reaction to changes in the Advocates’ Graduated Fee Scheme.”*¹⁷⁶

In February, Steve Hynes, then Director of the Legal Action Group, in an article in the New Law Journal had also warned against the serious consequences that would be caused by further cuts to legal aid, observing:

*“In an adversarial justice system, it is essential to uphold the principle of equality before the law. Reductions to legal aid though, are leading to a system which is open only to those who can afford it while excluding most other citizens.”*¹⁷⁷

Recommendation Five: In addition to a review of the legislation in relation to Disability Hate Crime, there is also a need for a review of access to reporting of Disability Hate Crime and the impact of cuts in government spending on the pre-trial and trial process.

¹⁷⁵ 26 July 2019 Solicitors’ journal news available at <http://www.solicitorsjournal.com/news/201907/prime-minister-johnson-urged-place-criminal-and-civil-justice-heart-priorities>

¹⁷⁶ Above n94 p124

¹⁷⁷ Steve Hynes, The New Law Journal/2019 Volume 169/Issue 7827, February/Articles/Birthday wishes – 169 NLJ 7827, p7

Part III

ACCESS TO JUSTICE FOR DISABLED WITNESSES OF DISABILITY HATE CRIME: COMMON LAW

6. *R v Christopher Killick*: Achieving Access to Justice through Precedent

The Common Law through the precedents set by *R v Christopher Killick* [2011] EWCA Crim1608 has proved an important vehicle not only for facilitating access to justice for disabled witnesses and the recognition of disability rights as human rights but also for the introduction of victims' rights into the adversarial Criminal Justice System.

R v Killick was the result of a series of attempts to achieve a hearing for three witnesses of sexual assault, the integrity of whose evidence had initially been rejected because of speech disabilities due to cerebral palsy. The witnesses' evidence, once presented in court, not only achieved a criminal conviction for the offence but also compensation in the civil law courts for the victims' initial treatment by the police and CPS. This set a precedent which led to significant changes in police and CPS policy and practice in order to facilitate disabled witnesses in giving evidence. The current CPS instructions in the Special Measures, Legal Guidelines, for example, are a direct consequence of the precedent set in *R v Killick*:

*“Prosecutors must avoid incorrect judgments being made about disabled people's reliability or credibility as a witness giving evidence in court. Such judgments may lead to an incorrect charging decision or could undermine the potential success of a prosecution.”*¹⁷⁸

A second precedent set by the judgment in *R v Killick* was the recognition of the right of a victim of a crime to seek a review of the CPS decision not to prosecute:

*“As a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance.”*¹⁷⁹

Reflecting on the importance of *R v Killick*, the Director of Public Prosecutions (DPP), who launched the Victims' Right to Review (VRR) scheme giving “effect to the principles set out in *Killick*,”¹⁸⁰ wrote:

*“Only when victims and their representatives and champions started to find a voice and only when international human rights law developed the notion of victims' rights, did the traditional model begin to break down, or even come under any pressure to change. In this regard, positive rights under human rights law promise and deliver a good deal more negative freedoms under the common law.”*¹⁸¹

¹⁷⁸ Above n6

¹⁷⁹ *R v Killick* [2011] EWCA Crim1608 [48]

¹⁸⁰ CPS Victims' Right to Review Scheme, available at <https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme> accessed 19 August 2019

¹⁸¹ Above n44 p786

Though *R v Killick* was not recognised as an authority for Disability Hate Crime, the case provides insight into the practical issues relating to access to justice for disabled witnesses of crime and how remedies might be achieved through the operation of the law.

6.1 Achieving Access to Justice for Disabled Witnesses through Precedent

In 2010, soon after the decision to try the case in the Central Criminal Court, John Bowater, GAD Senior Advocate and advisor to the *Killick* victims throughout their fight to give evidence, observed that “*all the hurdles*” they had had to overcome were because the Criminal Justice System was “*slanted towards non-disabled individuals. If you can communicate, you can make use of the system.*”¹⁸² The Court of Appeal judgment in 2011 reinterpreted the law and in so doing began to redress the balance in the Criminal Justice System by facilitating the use of the system by disabled witnesses through recognising the integrity and credibility of their evidence.

As discussed above in Part II, the initial hurdle to access to justice is that a crime must first be reported to the police before it can be investigated. If the abuser is the witness’s personal assistant or carer, then there may not be an opportunity to report the crime as there may not be a time when a witness is without that person. Though, in the case of the *Killick* witnesses it was an acquaintance, not the personal assistant, who was the abuser, the opportunity arose only when GAD’s Senior Advocate visited one of the witnesses to advise on his independent living arrangements. Once aware, the advocate assisted the three witnesses with reporting the assaults to the police who then conducted ABE interviews.¹⁸³

However, the main hurdle for the *Killick* witnesses was the failure of the CPS to prosecute “*on grounds there was no realistic prospect of conviction,*”¹⁸⁴ because, the CPS argued, the witnesses’ communication disabilities would prevent them from giving evidence that was credible in court and that evidence was crucial to the success of the case against the perpetrator. Lord Justice Thomas’ judgment documents the many attempts on behalf of the witnesses, in the five years before the Court of Appeal hearing, to gain a complete review of the CPS’ decision.¹⁸⁵ In August 2007, the witnesses’ solicitors, appointed by the EHRC, challenged the decision not to prosecute, firstly, by sending a letter to the CPS stating that there should be an application for judicial review giving “*grounds for contending that the decision was unreasonable, in breach of the Code of Practice for Victims of Crime and contrary to the provisions of the Disability Discrimination Acts 1995 and 2005*”, and secondly, by issuing proceedings against the CPS under the Disability Discrimination Acts. This caused the CPS to agree to conduct a review. However, the review only considered whether the conduct of the CPS in making the decision was reasonable rather than the merits of the witnesses’ case. Consequently, the outcome of the review was

¹⁸² CEDRM-UK Interview 15 April 2010

¹⁸³ See above [5.1.2] and [5.3] for further details on reporting and police interviews of Disability Hate Crime

¹⁸⁴ Above n179 [20]

¹⁸⁵ Above n179 [20]-[28]

confirmation that there was “no grounds for disturbing the decision not to prosecute.”¹⁸⁶

Finally, in September 2009, the CPS initiated “a third tier review” in response to a pre-action protocol letter sent by the witnesses’ solicitors

*“indicating their intention to commence judicial review proceedings on the basis that the decision not to prosecute was irrational and on other grounds, including that the decision was arrived at unlawfully by taking into account the complainants’ status as disabled persons.”*¹⁸⁷

This review was carried out by the Principal Legal Adviser to the DPP, who, unlike the other reviewers, did not “restrict(ed) herself to deciding whether the previous decisions were reasonable but considered the matter afresh.” She concluded that, while the previous decisions were not unreasonable, they were wrong since

*“there was a realistic prospect of conviction and that it was in the public interest that there should be a prosecution.”*¹⁸⁸

Once the decision to prosecute had been made, everything was done to accommodate the witnesses. The GAD Advocacy Service had special dispensation to accompany the witnesses. The judge met the three witnesses to assess their needs. As a result, to facilitate the witnesses in giving evidence: one of the three was provided with a court intermediary; when being cross-examined by the defence barrister, breaks were granted whenever the witnesses needed them, and the days finished early. The GAD Senior Advocate reported that he believed that, as far as the criminal case was concerned, “all three of the victims got justice” and that the decisions were “understandable and probably correct”.¹⁸⁹ However, he was less satisfied with the arrangements made for these witnesses when bringing an action for compensation in the civil courts. For example, the pre-trial meeting to discuss support for the witnesses in giving evidence was held in a long thin room impractical for wheelchairs so that the individuals had to be carried through the building. In addition, it took far too long for the action to come to court and the compensation awarded was far less than the barrister’s opinion had forecast. “Compensation is available but only when the system has taken so long so that people become apathetic, they haven’t got the energy.”¹⁹⁰

In 2010, the experience of providing an advocacy service for the three *Killick* witnesses in both trials led John Bowater to recommend that the police needed greater training in taking pre-trial statements and that judges should be mandated to carry out an assessment of the adjustments required to facilitate the giving of evidence beforehand which would include the presence of an “Enabler” to give advice.¹⁹¹ As reported above, there remains a need for further training of police, advocates, judges

¹⁸⁶ Above n170 [28]

¹⁸⁷ Above n179 [36]

¹⁸⁸ Above n179 [36]

¹⁸⁹ John Bowater, CEDRM-UK Interview, April 2010

¹⁹⁰ John Bowater, CEDRM-UK Interview, December 2010

¹⁹¹ Above n189

and court officials.¹⁹² However, considerable advances have been made in facilitating disabled witnesses to give evidence, particularly in the Criminal and Family courts. Ground Rules Hearings,¹⁹³ not unlike the type of hearing suggested by John Bowater, are held to assess the needs of those legally recognised under s.16 YJCEA as “vulnerable witnesses” (children and witnesses who “*suffer from mental disorder*”, have “*a significant impairment of intelligence and social functioning*” or “*a physical disability or is suffering from a physical disorder*”). Even so, some witnesses who need adjustments to facilitate the giving of evidence do not qualify under section 16.¹⁹⁴ More importantly, the assistance provided is not uniform across all courts, hence the following recommendation by JUSTICE in its 2019 report:

“We recommend that reasonable adjustments to enable lay users to provide their best evidence should be available in all courts and tribunals where the needs of a fair trial demand it. This includes an obligation to consider whether any party or witness has a particular vulnerability or other need for an adjustment. In order to achieve this, we consider that best practice should generally be consolidated and promoted across different courts and jurisdictions... the Civil Procedure Rules should be amended along the lines of the Family Procedure Rules and similarly require that courts have regard to the civil TAG Toolkit. In particular, expert assistance from the Ministry of Justice Registered Intermediary Scheme should be available for all lay users who need it, across all jurisdictions.”¹⁹⁵

6.2 Victims’ Right to Review: Balancing Rights in the Adversarial System

The judgment in *R v Killick* was the first step towards incorporating human rights into the Criminal Justice System. Underpinning the judgment was recognition of the right of every individual to a fair trial. This right was guaranteed in international law through the ECHR and had been incorporated into UK law by the Human Rights Act 1998. However, the mechanism for achieving the witnesses’ right to a review of the CPS’ decision not to prosecute was precedent and the acceptance of a guarantee in European Law, even though it had not, as yet, come into force. The Court of Appeal rejected the appellant’s claim that the “*complainants had no right to request a review of a decision not to prosecute in contradistinction to the ability to make “a complaint”*”¹⁹⁶ not only on procedural but also on human rights grounds.

The Court of Appeal’s first approach was to examine past procedure and precedent. Not only did the internal CPS Guidelines state that where a challenge was likely to give rise to a judicial review, the decision not to prosecute should be re-viewed and if “*it is decided that the original decision was wrong, immediate action should be taken (if possible) to rectify the decision*”¹⁹⁷ but in addition:

¹⁹² See above at [5.3.1]

¹⁹³ See above at [5.3.1]

¹⁹⁴ Above n25 [4.12]; see discussion above at [2.3.2]

¹⁹⁵ Above n25 [4.16]; Understanding Courts authors’ emphasis

¹⁹⁶ Above n179 [49]

¹⁹⁷ Guidelines quoted at [26] Above n179

*“It has been established that there is a right of an interested person to seek judicial review of a decision not to prosecute (See R v DPP ex p C[1995] 1 Cr App 136); it would therefore be disproportionate for a public authority not to have a system of review without recourse to court proceedings.”*¹⁹⁸

It was, however, the Court’s second approach, foreshadowed in the first by the Court’s reference to “a public authority”, that introduced human rights into the Criminal Justice System:

*“In determining whether in the circumstances there was an abuse of process, regard must be had to the rights of the complainants to have the decision reviewed.”*¹⁹⁹

The reason for this decision was that such a right was already guaranteed in principle in domestic law and would be guaranteed more precisely through the government’s commitment to existing provisions in EU law:

“We can discern no reason why what these complainants were doing was other than exercising their right to seek a review about the prosecutor’s decision. That right under the law and procedure of England and Wales is in essence the same as the right expressed in Article 10 of the Draft EU Directive on establishing minimum standards on the rights, support and protection of victims of crime dated 18 May 2011 which provides:

“Member States shall ensure that victims have the right to have any decision not to prosecute reviewed.”

*See also the Explanatory Memorandum of the Ministry of Justice dated 2 June 2011.”*²⁰⁰

The Court of Appeal made clear that the final decision rested with the “*independent prosecutor*”, who should “*reach a decision impartially, subject only to review by the courts under well established principles.*”²⁰¹ One key principle was that the prosecutor must take into account the interests of the State as well as those of the defendant and the victim. The Victims’ Right to Review (VRR) scheme was launched in June 2013, putting into effect the principles outlined in the *Killick* judgment. *R v Killick* demonstrates how, through the common law, greater equality before the law can be achieved. As Dr Kirchengast, University of Sydney, has observed:

“While R v Killick demonstrates that such rights may not become meaningful for the victim until they are given local context by consideration by the courts (or parliament), the case does show how international norms for the treatment

¹⁹⁸ Above n179 [48]

¹⁹⁹ Above n179 [50]

²⁰⁰ Above n179 [49]

²⁰¹ Above n179 [51]

*of victims may come to modify criminal law and procedure identified as excluding the victim under an adversarial model.*²⁰²

6.3 A way forward: Disability Hate Crime, Human Rights and the Common Law

The acceptance of rights as part of the Criminal Justice System in *R v Killick* began the change in the discourse relating to Disability Hate Crime. In March 2012, the Government published Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime in which it reaffirmed and justified its “policy approach to hate crime” as being “based on a human rights approach”:

*“It is not, as some would claim, a sign of misguided political correctness. Protection from targeted abuse, regardless of how it manifests, is a right we all share whether we are part of the minority or majority population. We believe that it is right to focus our efforts on those who are most at risk, and to aspire to a position where we all share the same right, to live free from abuse based on our personal characteristic.”*²⁰³

Human rights instruments and the common law provide opportunities for tackling Disability Hate Crime. Reflecting on VRR, the role of human rights and the common law, Sir Keir Starmer QC observed:

*“Victims’ rights present a fundamental challenge to the basic criminal justice model which has been in place in most common law countries for decades if not centuries; that key developments in victims’ rights would not have taken place without the positive approach of human rights law (comparing here to the negative freedoms approach of the common law); and that the readjustment of our criminal justice arrangements to accommodate victims’ rights, whilst well and truly under way, is far from complete.”*²⁰⁴

As reported in Part I, the UNCRPD has played an important part in achieving access to justice for disabled witnesses of Disability Hate Crime. ECHR Article 10, right to life; Article 15, freedom from torture or cruel, inhuman or degrading treatment or punishment and Article 16, freedom from exploitation, violence and abuse are all relevant to Disability Hate Crime, while Protocol 12, which removes the limitation of ECHR Article 14’s limitation of prohibition of discrimination to the rights in the ECHR only and guarantees that no one shall be discriminated against on any ground by any public authority, if ratified, would also assist in achieving justice for disabled witnesses of Disability Hate Crime.

²⁰² Kirchengast T (2016) Victims’ rights and the right to review. A corollary of the victim’s pre-trial rights to justice. *International Journal for Crime and Justice and Social Democracy* 5(4): 103-115, p105.

DOI:10.5204/ijcjsd.v5i4.295. available at <https://www.crimejusticejournal.com/article/view/832>

²⁰³ Home Office (2012), Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime [1.6] p6, available at <https://www.gov.uk/government/publications/challenge-it-report-it-stop-it>

²⁰⁴ Above n44 p777

Recommendation Six: The Social Model of Disability and the Human Rights Model of Disability have proved invaluable tools in facilitating access to justice for disabled persons. The Disabled Witness Project recommends their continued use when reforming the law relating to Disability Hate Crime.

Recommendation Seven: Examination of the pre-trial and trial process in this report has been centred around the case of *R v Killick* which, though not identified as a Disability Hate Crime case, demonstrates how the common law can provide access to justice for disabled witnesses and can even change the Criminal Justice System to incorporate a recognition of victims' rights. A more specific review of how far in practice reforms in the pre-trial and trial process achieve access to justice for disabled witnesses of Disability Hate Crime - including the role of advocacy and support services, legal aid, court procedure and special measures - would be an important contribution to ensuring access to justice for disabled witnesses of Disability Hate Crime.

Part IV

RECOMMENDATIONS

7. Facilitating Access to Justice for Disabled Witnesses of Disability Hate Crime

Recommendation One

The Disabled Witness Project recommends that there should be a full review of the use of the term 'vulnerable' in the Criminal Justice System in consultation with disabled people with a view to changing such references in the context of Disability Hate Crime.

Recommendation Two: There is a need for a detailed review of the efficacy of the Criminal Law to protect disabled witnesses of Disability Hate Crime with a view to reform.

Recommendation Three: In view of the lack of consistency in recording Disability Hate Crime, the Disabled Witness Project recommends that there should be a review of innovative strategies for effective policing of Disability Hate Crime at force level, which could provide the foundations for changes in national police policy and procedure.

Recommendation Four: The Disabled Witness Project recommends developing strategies to raise recognition, reporting and recording of Disability Hate Crime, including publicity campaigns and training of police, members of the Criminal Justice System and disabled witnesses. All reviews and training relating to Disability Hate Crime and access to justice should be conducted in consultation with, and where possible, led by disabled people.

Recommendation Five: In addition to a review of the legislation in relation to Disability Hate Crime, there is also a need for a review of access to reporting of Disability Hate Crime and the impact of cuts in government spending on the pre-trial and trial process.

Recommendation Six: The Social Model of Disability and the Human Rights Model of Disability have proved invaluable tools in facilitating access to justice for disabled persons. The Disabled Witness Project recommends their continued use when reforming the law relating to Disability Hate Crime.

Recommendation Seven: Examination of the pre-trial and trial process in this report has been centred around the case of *R v Killick* which though not identified as a Disability Hate Crime case, demonstrates how the common law can provide access to justice for disabled witnesses and can even change the Criminal Justice System to incorporate a recognition of victims' rights. A more specific review of how far in practice reforms in the pre-trial and trial process achieve access to justice for disabled witnesses of Disability Hate Crime - including the role of advocacy and support services, legal aid, court procedure and special measures - would be an important contribution to ensuring access to justice for disabled witnesses of Disability Hate Crime.

Annex 1

Section 146 CJA: Enhanced Sentence for aggravation related to disability

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—....

(ii) a disability (or presumed disability) of the victim, or....

(b) that the offence is motivated (wholly or partly)—

(ii) by hostility towards persons who have a disability or a particular disability

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section "disability" means any physical or mental impairment."

Annex 2

Section 145 CJA: Increase in sentences for racial or religious aggravation

(1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (c. 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).

(2) If the offence was racially or religiously aggravated, the court—

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.

(3) Section 28 of the Crime and Disorder Act 1998 (meaning of "racially or religiously aggravated") applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.