
Special Measures' Applications for Victims and Vulnerable and Intimidated Witnesses: The Way Forward

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ABSTRACT:

Special treatment for victims and vulnerable and intimidated witnesses (VIWs) in a criminal process has developed over time in the United Kingdom, United States and Australia. This development has initiated the use of special measures' application in courts proceedings. In those countries, some measures to lessen stress and trauma of such witnesses undergoing a criminal process were introduced into the legislations. Yet, as many other Asian countries, Malaysia developed her victims' policy only in 1990s and issues relating to the protection of VIWs were raised within the criminal justice system a few years back. The tendency to put the standpoint into practice in the Malaysian legal system is demonstrated in the establishment of the Evidence of Child Witness Act 2007 (ECWA 2007) and the amendment of Section 272B of the Criminal Procedure Code. This paper aims at evaluating the current position of victims' and VIWs' rights and legal protection in the Malaysian criminal justice process. It elaborates on the rights of victims and other VIWs to special measures' applications in the court proceedings such as live TV-link, screens, removal of formal attire, intermediaries and visual aids communication. It advocates for the potential of special measures' application to accommodate victims' and VIWs to give testimony in court. The feasibility of video-recorded evidence as one of the means to facilitate traumatized victims and VIWs to give evidence and testimony in courts is also advocated in this paper.

(235 words)

KEYWORDS: (*special measures, vulnerable witness, intimidated witness, victim*)

INTRODUCTION (Uppercase, Century Gothic, font 11, bold)

Victims and witnesses are the key persons in a criminal case but their rights and interests do not gain sufficient attention from the criminal justice players. During the past 30 years, the development of victims' rights has occupied a significant place in Western countries, such as in the English criminal justice system. Legislative and administrative measures, including special measures in the courtroom, have been introduced into the system to accommodate vulnerable victims and witnesses. A number of surveys and studies have researched the extent to which the legislation and procedures for vulnerable and intimidated witnesses (VIWs) have influenced the practices of the English criminal justice system since the establishment of the 1988 and 1991 Criminal Justice Acts.¹ There have been comprehensive cross-disciplinary analyses of the treatment of child witnesses within the English system.² Most of the research aimed to evaluate

¹ Graham Davies and Elizabeth Noon, *An Evaluation of the Live Link for Child Witnesses* (London: Home Office 1991); Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (London: Home Office 1998) ('Speaking Up for Justice (1998)')

² John R Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (London: Blackstone Press 1990)

the application of special measures for VIWs either from the perspective of the victims and witnesses³ or from that of the practitioners.⁴ Most studies seem to agree on the importance of special measures applications (SM applications) to reduce the fear and distress experienced by VIWs in court.

This paper aims to set out the background of Malaysian law and procedures of the need for VIWs' protection throughout the criminal justice process. It examines the nature of the criminal justice process that relates to VIWs in Malaysia, particularly the development of protection measures at various stages of the Malaysian criminal justice process: the investigation, pre-trial and trial stages. The advance of legislation relating to protection of child witnesses and other vulnerable witnesses, and the progress of SM applications are emphasized in this paper. The challenges to which the legislative and administrative measures are being put into practice in the Malaysian system is established in the concluding part of the paper.

DEVELOPMENT OF SPECIAL MEASURES' APPLICATION IN MALAYSIA

Issues of victims' rights arose quite late in the Asian region compared to their development in Western countries. Considering that the enhancement of victims' rights and protection has evolved over the last 30 years, Asian countries have experienced reforms at a comparatively later stage. The issue of victims' support was initiated in Japan in 1982⁵ and was followed by the establishment of the Victims' Charter in Hong Kong in 1996⁶, before spreading to other Asian countries including Malaysia.⁷ Although Malaysian legal scholars began to highlight issues of child abuse, neglect and other related matters concerning the rights, best interests and protection of children in the 1980s, child victims' issues only became an important consideration of the Malaysian Government's reforms in the late 1990s.⁸ This resulted in the passing of the Child Protection Act 1991, which was later merged with two other Acts, the Women and Girls Protection Act 1973 and the Juvenile Courts Act 1947, to become the Child Act 2001.

Despite the emergence of the rights and interests of victims and VIWs in the 1990s, as manifested in legislative provisions, protection measures for vulnerable groups of witnesses, including children, are still generally underdeveloped in the Malaysian criminal justice system. SM applications for VIWs during the trial were in their early stages when the Kuala Lumpur Sessions Court 3 started operating at the new court building⁹ on 3rd May 2007.¹⁰ This was the first new

³ Becky Hamlyn, Andrew Phelps, Jenny Turtle and Ghazala Sattar, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (HORS 283, London: Home Office 2004); Joyce Plotnikoff and Richard Woolfson, 'In Their Own Words: The Experiences of 50 Young Witnesses in Criminal Proceedings' (London: NSPCC/ Victim Support 2004)

⁴ Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (London: Home Office 2006a)

⁵ At the 4th International Symposium on Victimology; Tatsuya Ota, 'Introduction: The Development of Victimology and Victim Support in Asia', *Victims and Criminal Justice: Asian Perspective*, (Tokyo: Hogaku-Kenkyu-Kai, Keio University 2003) 3

⁶ Tatsuya Ota (2003) 22

⁷ *Ibid*, 3

⁸ Norbani Mohamed Nazeri, 'Protecting Child Victims in Malaysia' in Wing-Cheong Chan (ed), *Support for Victims of Crime in Asia*, (London: Routledge 2008) 291

⁹ the Jalan Duta Court Complex, Kuala Lumpur

¹⁰ Office of the Registrar, 5 Apr 2007. Press Release, Putrajaya: Palace of Justice, 5 Aug 2010, http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=1086, accessed on 30 Apr 2011

Court Complex where criminal courts are equipped with live link application. Even though live link was previously applied in the case of 'Ayah Su'¹¹ at the Shah Alam Sessions Court, and screens have been used in some rape cases in other courts¹² at the request of the prosecution, proper implementation only began with the opening of the new Kuala Lumpur Court Complex.

Although the application of special measures in the Malaysian criminal justice system is still in its infancy, the law and procedures that generally afford protection for child victims have actually evolved over time. The law on criminal process and procedure has been improved to become more 'victim-friendly' through several amendments during the last decade. SM applications have been mandatorily applicable for child victims in Malaysia since the Evidence of Child Witness Act (ECWA) 2007 came into force on 31st December 2007.

Malaysian jurisdiction, which is an adversarial system in common with the English system from which it is derived,¹³ has set out laws and procedures that are ostensibly friendly to victims and VIWs, especially children. However, have the legal provisions really benefited the victims and VIWs? What, if any, improvements have there been in the management of certain groups of adult victims and witnesses? Previous studies have been conducted from a legal perspective on child abuse and sexual offences; these have clarified the relevant statutes and recounted their historical development.¹⁴ Most of the empirical studies on child victims and victims of sexual offences have principally discussed issues in terms of the medical and health¹⁵, social¹⁶ or psychological aspects¹⁷.

POSITION OF VICTIMS AND VIWS IN MALAYSIA

As in many other Asian countries, Malaysia developed her victims' policy in the 1990s, when the reform of criminal justice systems spread through the Asian region.¹⁸ The emergence of a victims policy and victim support was influenced by the 4th International Symposium on Victimology in Japan in 1982 and the United Nations (UN) Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985,¹⁹ which was later adopted by the law ministers of the Commonwealth countries. Consequently, the Malaysian criminal justice system embarked

¹¹ Mohd Yusof B. Rahmat v Public Prosecutor [2009] MLJU 0033

¹² For example in Ampang Session Court, Selangor (Judge-J1)

¹³ Due to historical colonial past, English law has heavily influenced the Malaysian array of legislation prior to her independence in 1957. See Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System* (Kuala Lumpur: DBP 1995); Wu Min Aun, *The Malaysian Legal System* (Petaling Jaya: Longman 1999)

¹⁴ Salim Ali Farrar, 'The 'New' Malaysian Criminal Procedure: Criminal Procedure (Amendment) Act 200', 4 (2009) *Asian Criminology*, 129; Baljit Singh Sidhu, 'Amendments to the Criminal Procedure Code: Radical or Piecemeal Legislation?' (2008) *Praxis*, 28; Siti Hajar Mohd Yasin and Abu Bakar Munir, 'Child Abuse: Facing the Inadequacies of Protection Afforded by the Law' [1993] 1 MLJ xv; [1993] 1 MLJA 15; Abu Bakar Munir, 'Video-taped Evidence of Children in Malaysia' [1991] 3 CLJ xciv

¹⁵ World Health Organization (WHO) Malaysia, National Report on Violence and Health Malaysia, (WHO Kobe Centre 2006); K Nadesan, 'Victims of Violence: An Asian Scenario' 7 (2000) *Journal of Clinical Forensic Medicine*, 192

¹⁶ Malaysia Ministry of Women, Family and Community Development, "Child Protection and Child Welfare Services in Malaysia", (Beijing High Level Officials Meeting 2010) 6-4 November

¹⁷ Noorliza Mohamad Nordin, *Battered and Betrayed: Combating Child Abuse in Malaysia* (Kuala Lumpur: Collaboration Centre for Health Policy Appraisal and Enhancement (CHPAE) 2010)

¹⁸ Tatsuya Ota, 'Introduction: The Development of Victimology and Victim Support in Asia', *Victims and Criminal Justice: Asian Perspective* (Tokyo: Keio University 2003) 3

¹⁹ Ibid

on the development of the protection of VIWs, with emphasis on children. The law and procedure relating to VIWs has developed continuously ever since.

As a State party to the UNCRC, the Committee on the Rights of the Child advised the Malaysian Government to take certain measures in promoting protection for child victims and witnesses in the criminal justice process.²⁰ The Committee suggested legislative and administrative measures to abolish delays in disposal of cases involving children.²¹ This suggestion shows that legislative measures for child victims are still underdeveloped despite the existence of the Child Act 2001, which was codified on the merging of three comprehensive Acts, the Juvenile Courts Act 1947, Women and Young Girls Protection Act 1973 and Child Protection Act 1991. This Act provides procedures for handling child offenders but is not concerned with children as victims.

Dissatisfaction with the rules of criminal justice procedures and evidence concerning child witnesses in Malaysia arose as early as 1991, owing to the increasing number of reported child abuse cases.²² The increased rate of reported child abuse is argued to demonstrate "a growing social problem in the country",²³ although it may explain an emergence of awareness on the matter, because we cannot disregard the fact that the crime is possibly underreported.²⁴ The circumstances surrounding child testimony are alleged to be quite often unsatisfactory.²⁵ In 2007, there were 1,494 reported child abuse cases as recorded by Malaysia's Ministry of Women, Family and Community Development, but it has been estimated that this number is likely to represent only 10% of actual incidents,²⁶ as many of them actually remained unreported. Violence and abuse against children in Malaysia, as in other jurisdictions, happens mainly in secret, in locked rooms or behind people's backs; therefore, it is hard to establish a genuine rate of occurrence.²⁷ The most severe child abuse or neglect cases normally come to light after a tragedy involving death or injuries.²⁸

Child victims of sexual abuse²⁹ and sexual offences are potentially vulnerable and entitled to special treatment and protection. Sexual offences involving children and minors would come

²⁰ Committee on the Rights of the Child, "Consideration of Reports Submitted by States Parties under article 44 of the Convention – Concluding Observation: Malaysia", CRC/C/MYS/CO/1, 2 February 2007, para 104, ('CRC Concluding Observation (2007)') 25

²¹ The specific reform pertaining to this group of VIWs, according to the Committee, could be based upon the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Resolution 2005/20 of the Economic and Social Council); see the CRC Concluding Observation (2007) 25

²² Abu Bakar Munir [1991] 3 CLJ xciv

²³ *The New Straits Times* (Kuala Lumpur 2 April 1991)

²⁴ Crime surveys usually demonstrate a discrepancy between reported crime figures and the actual occurrence of crimes. See this trend in *Crime in England and Wales 2001/2002* (London: Home Office) up until *Crime in England and Wales 2010/2011* (London: Home Office)

²⁵ Syed Hamid Albar. 'Child Abuse and the Law – Important Aspects' (Second National Conference on Child Abuse and Neglect, Kuala Lumpur, 13-14 July 1991)

²⁶ The United Nations International Children's Emergency Fund (UNICEF) Malaysia, "Violence Against Children", *Child Protection*, http://www.unicef.org/malaysia/protection_4202.html, accessed 15 May 2008

²⁷ *Ibid*

²⁸ *Ibid*

²⁹ In 1981, Kempe and Kempe classified four types of child abuse – "physical violence, physical and emotional neglect, emotional abuse (such as being continually terrorized, berated or neglected) and sexual abuse". C.H. Kempe, and R.E. Kempe, *The Battered Child* (Univ of Chicago Press 1981) 2nd Edn in Ian Marsh, John Cochrane and Gaynor Melville, *Criminal Justice: An Introduction to Philosophies, Theories and Practice* (London: Routledge 2004) 97

under the category of rape offences or statutory rape, if the victims were aged below 16³⁰ at the time of the offence, and even if it happens with the consent of the victim, if she is below 12 years of age.³¹ Incest, which was criminalized under section 376A of the Malaysian Penal Code in August 2002,³² if the offence is committed between close family members, can also involve child victims. It does not amount to incest if it is committed without the victim's consent, and instead will be charged as rape,³³ punishable by a heavier sentence.³⁴ Prior to the introduction of the incest provision, the perpetrators were charged under section 376 of the Penal Code for the offence of rape or statutory rape, if committed against girls below 16 years,³⁵ who form part of the VIWs.

The stress, trauma and emotional breakdown of child victims, especially of sexual crimes, can even obstruct clarity and frustrate evidence, and further damage the case.³⁶ Vohrah J (as he then was) observed in this regard that emotional burdens of child witness include crying, turning pale, refusing to speak, refusing to identify the defendant and resistant.³⁷ It is therefore understandable that the child in the case of *Sidek bin Ludan v Public Prosecutor*³⁸ was under great pressure, intimidated and nervous when she was asked to describe the incident that happened between herself and her neighbour as "it is quite embarrassing for her to expose the sordid rape episode in court".³⁹

The vulnerability of incestuous rape victims relates to the ordeal that they possibly suffered, as the perpetrators are closely related to them. KN Segara J (as he then was) acknowledged in *Ismail Rasid v Public Prosecutor*⁴⁰ that this offence is more serious and was of the view that: "when a father rapes his daughter and is convicted in court, any sentence passed must reflect the abhorrence of society to such a heinous and despicable act".⁴¹ Committing sexual relations with a child in a familial relationship is undoubtedly abusive, manipulative and exploitative because of 'the balance of power in the family unit and the close and trusting relationships' within it.⁴² This concurs with Rook and Ward's view that incest victims 'suffered physically and psychologically', and were placed in a vulnerable position as the existing relationship creates fear and risk of being exploited.⁴³

³⁰ Malaysia, Penal Code, s. 376(2)(d)

³¹ *Ibid*, s. 376(2)(e)

³² Penal Code (Amendment) Act 2001 (Act A1131), s. 6

³³ *Ibid*, s. 376B(2)(b); hereinafter will be referred as 'incestuous rape' for the purpose of this study, to indicate that the offence is committed by close family members

³⁴ That is imprisonment of not less than eight years and not more than thirty years, and which shall also include whipping of not less than ten strokes. See Penal Code, s. 376(3)

³⁵ Norbani Mohamed Nazeri, "The Importance of Live Link in Child Abuse Cases (Incest)", (2007) 6(2/3/4) *International Journal of Technology Transfer and Commercialisation* 113-120, 114

³⁶ Departmental Committee on Sexual Offences, Cmnd 2561 (1925) para 66, in Norbani (2007) 117

³⁷ *Yusaini Mat Adam v Public Prosecutor* [1999] MLJU 336; (1999) 3 MLJ 582, 586; [2000] 1 CLJ 206

³⁸ (1995) 3 MLJ 178

³⁹ *Ibid*, 184

⁴⁰ (1999) 1 MLJ 307; [1999] 4 CLJ 402

⁴¹ *Ibid*

⁴² Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (London: Home Office 2002) para 58

⁴³ Rook and Ward, *Sexual Offence* (Sweet & Maxwell 1997) 108

The risk of fear, distress and intimidation is arguably high due to the victim-perpetrator familial relationship and the age of the victims. The judge in *Safae Ing v Public Prosecutor*⁴⁴ regarded the appellant in a case of raping his daughter as the "predator to his own child"⁴⁵, who has breached the trust invested in him to care, raise and protect his child with love and affection. The breach of trust is emphasized by Zawawi Salleh JC as rendering a child victim "more vulnerable to such an offence".⁴⁶ The respondent's abuse of his position as stepfather to the victim by raping her has exploited the close relationship that accompanies the role of a parent. The judge observed that any standard shall regard such act as "an abhorrent, despicable and dastardly crime".⁴⁷ Therefore, it is really important to imbue these victims with the confidence to come forward and give evidence as witnesses in court, however tender their age.

Judicial responses in decided cases signify recognition of the existence of vulnerability among child victims of sexual offences. The victim's acquiescence in *Mohd Romzan*'s case to the respondent's warning not to say anything about the perpetrated crime demonstrates vulnerability. Other reasons apart,⁴⁸ the victim, who was aged 11 at the time of the offence, was considered vulnerable due to "a difficulty in testifying against the perpetrator"⁴⁹ because of her natural physical and mental limitations.

The judiciary identified the possibility of adversarial proceedings aggravating the vulnerability. Zawawi JC observed that, as the respondent had pleaded guilty, the victim had been spared "the unfortunate experience of having to give evidence in court, as well as the mental torture and anguish the victim would suffer"⁵⁰ had she been asked to testify against the stepfather in open court. The judge has incidentally recognized the existence of pain and distress among victims when confronting and testifying in court against defendants who are known to them. It is arguably worth examining whether these judicial responses exert any influence on criminal justice practitioners' consideration in identifying VIWs and implementing SM.

Adult victims and witnesses can be vulnerable in court as evident in many studies.⁵¹ Some witnesses may experience intimidation from the defendants or other individuals such as the defendants' family members. Thus far, there has been no specific definition of 'vulnerable witness' or explanation of 'vulnerability' in any legislation in Malaysia although the fear and distress of witnesses has attracted considerable attention among the practitioners. Intimidated witnesses seem to be easier to identify since intimidating a witness is an offence,⁵² but

⁴⁴ [2006] 5 MLJ 698

⁴⁵ *Ibid*, 706 (para 20)

⁴⁶ *Public Prosecutor v Mohd Romzan bin Ramli* [2008] 2 MLJ 741, 751 (para 17)

⁴⁷ *Ibid*, 751 (para 17)

⁴⁸ i.e. 'an inability to resist' and 'a difficulty in calling for help'; See *Public Prosecutor v Mohd Romzan bin Ramli* [2008] 2 MLJ 741 (para 14)

⁴⁹ *Ibid*, 750 (para 14)

⁵⁰ *Ibid*, 752 (para 22)

⁵¹ Ray Bull, 'The investigative interviewing of children and other vulnerable witnesses: Psychological research and working/professional practice', (2010) 15 *Legal and Criminological Psychology* 5-23; Gill Green, 'Vulnerability of witnesses with learning disabilities: preparing to give evidence against a perpetrator of sexual abuse' (2001) 29(3) *British Journal Of Learning Disabilities* 103-109; Gudjonsson G.H., Murphy G.H. & Clare I.C.H. 'Assessing the capacity of people with intellectual disabilities to be witnesses in court' (2000) 30 *Psychol Med*, 307-314.

⁵² It is an offence punishable by imprisonment for up to ten years and shall also be liable to a fine, but no maximum amount is mentioned. See *Abduction and Criminal Intimidation of Witnesses Act 1947 (Revised 1977) (Act 191)*, s. 5

acknowledging them as VIWs depends on whether the intimidation is reported to the criminal justice practitioners. Potential VIWs are generally, but not exclusively, victims of sexual offences and domestic violence.

Research shows that victims of rape,⁵³ incest⁵⁴ and sexual abuse⁵⁵ suffer psychological distress and trauma that will affect them for a long time or permanently, particularly if the perpetrators are family members or individuals close to the victims.⁵⁶ Victims' emotional reactions have three categories: firstly, sadness and crying; secondly, a stable condition; and thirdly, absence of grief accompanied by shame and frustration over the incident.⁵⁷ Sometimes victims tend to hide their emotional distress in court⁵⁸ but their subsequent behaviour reflects the trauma. The trauma of the victims is translated from their emotions, physiology and behaviours; for example, the victims were 'sad, ashamed, fearful, angry and hateful' towards the abusers,⁵⁹ and some were suicidal.⁶⁰ Although the reaction and trauma differ between one victim and another, any of the emotional reaction categories could result in the victims' lack of cooperation, refusal and reluctance to share their stories with outsiders.⁶¹

Rape victims will be eligible for special measures if the court thinks that 'it is expedient in the interest of justice to do so' under Section 272B of the Criminal Procedure Code (CPC). The legislation is, however, silent in describing the circumstances that would render it 'expedient' to do so. Shaikh Daud J (as he then was), however, recognized the existence of trauma and re-victimization of rape victims in the trial where "rape victims, especially young victims, go through traumatic experience at the time of the offence and later, and also at the trial more often than not they become the accused rather than the accuser",⁶² which reflects the secondary victimization of rape victims in court proceedings.⁶³

⁵³ Nicola Gavey and Johanna Schmidt, "'Trauma of rape" discourse: A double-edged template for everyday understandings of the impact of rape' (2011) 17(4) *Violence Against Women* 433-456; Rebecca Campbell, 'The psychological impact of rape victims' (2008) 63(8) *American Psychologist* 702-717; Campbell *et al.* 'Social reactions to rape victims: Healing and hurtful effects on psychological and physical health outcomes' (2001) 16(3) *Violence and Victims* 287-302

⁵⁴ N. Shafrin Ahmad and Rohany Nasir, 'Emotional Reactions and Behaviour of Incest Victims', (2010) 5 *Procedia Social and Behavioral Sciences* 1023-1027

⁵⁵ C. Feiring and L.S Taska, 'The persistence of shame following sexual abuse: A longitudinal look at risk and recovery', (2005) 10 *Child Maltreatment* 337-349; P. Coffey *et al.* 'Mediators of the long-term impact of child sexual abuse: perceived stigma, betrayal, powerlessness and self-blame' (1996) 20(5) *Child Abuse & Neglect* 447-455; D. Finklehor and A. Browne, 'The traumatic impact of child sexual abuse: A conceptualization' (1985) 55(4) *American Journal of Orthopsychiatry* 530-541

⁵⁶ Ahmad and Nasir (2010) 1026

⁵⁷ *Ibid*, 1025

⁵⁸ *Public Prosecutor v Tanwir bin Masri and Anor* [2009] MLJU 0933, Criminal Appeal No (MT-5) 42-40-2008

⁵⁹ Ahmad and Nasir (2010) 1025

⁶⁰ *Ibid*, 1026

⁶¹ *Ibid*, 1025

⁶² *Public Prosecutor v Yap Huat Heng* [1985] 2 MLJ 414, 416; see also *Amran bin Ahmad v Public Prosecutor* [2005] MLJU 589

⁶³ Lees (1993) and (1997); Steven J Collings, 'Professional services or child rape survivors: A child-centred perspective on helpful and harmful experiences' (2011) 23(1) *Journal of Child and Adolescent Mental Health* 5-15; R Campbell *et al.* 'Preventing the second rape: Rape survivors' experiences with community service providers' (2001) 16 *Journal of Interpersonal Violence* 1239-1259; R Campbell and S Raja, 'Secondary victimization of rape victims: Insights from mental health professionals who treat survivors of

Victims of domestic violence could suffer from several types of abuse including "physical violence, psychological, emotional and verbal abuse, social abuse (enforced isolation), economic abuse (total control of finances) and sexual abuse (rape and coercion into sexual acts)".⁶⁴ Domestic violence began to receive public attention in Malaysia as early as the 1980s.⁶⁵ A national survey conducted by the Women's Aid Organisation (WAO) estimated that, in 1989, 1.8 million or 39 per cent of women aged above 15 had been physically abused by their partners, but only 909 cases were reported in that year.⁶⁶

In some circumstances, family members who should become the key witnesses to the incident do not even support or cooperate with the victims,⁶⁷ which may lead to the victims' reluctance to proceed with the case. Victims' hesitance and unwillingness to lodge reports or even seek help are due to the feeling of "shame, sense of self-guilt, fear of retaliation from their spouses and lack of awareness that domestic violence is a crime,"⁶⁸ which was also proven in earlier research.⁶⁹ Just like the situations in other jurisdictions, it is universally recognized that the sensitivity of the lawyers and practitioners to domestic violence survivors is essential;⁷⁰ hence training and skill-reinforcement in dealing with domestic violence victims should be continuously undertaken.⁷¹

Giving evidence against one's own family member or someone trusted or known to oneself in rape or incest cases is stressful, painful and distressing. Relating the incident of being raped to others would furthermore be embarrassing, upsetting and confusing for victims and could lead to 'a repetition of victims' trauma'⁷² or 'secondary victimization' or a 'second rape'.⁷³ They are

violence' (1999) 14 *Violence & Victims* 261-275; JE Williams, 'Secondary victimization: confronting public attitudes about rape' (1984) 9 *Victimology* 66-81

⁶⁴ Ian Marsh, John Cochrane and Gaynor Melville, *Criminal Justice: An Introduction to Philosophies, Theories and Practice* (London: Routledge 2004) 98

⁶⁵ Kamala MG Pillai, 'Physical protection' in *Family Law in Malaysia* (Selangor: LexisNexis 2009) 135-163, 135; Kumaralingam Amirthalingam, 'A Feminist Critique of Domestic Violence in Singapore and Malaysia', *Asia Research Institute Working Paper Series No. 6* (Singapore: NUS 2003) 15

⁶⁶ Rashidah Abdullah, Rita Raj-Hashim and Gabrielle Schmitt, *Battered Women in Malaysia: Prevalence, Problems and Public Attitudes* (A summary report of Women's Aid Organization Malaysia's National Research on Domestic Violence) (Kuala Lumpur: WAO 1995) 5

⁶⁷ Nor Azilah Jonit (2006) 120

⁶⁸ Ibid

⁶⁹ Kenneth E Fletcher, 'Post-traumatic stress disorder' in Eric J Mash and Russell A Barkley, *Assessment of Childhood Disorder* (4th edn, New York: Guilford Press 2007) 398-486; Murray B Stein and Colleen Kennedy, 'Major depressive and post-traumatic stress disorder co-morbidity in female victims of intimate partner violence' (2001) 66(2-3) *Journal of Affective Disorders* 133-138; Judith L Herman, 'Complex PTSD: A syndrome in survivors of prolonged and repeated trauma' (1992) 5(3) *Journal of Traumatic Stress* 377-391

⁷⁰ Collings (2011) 5-15; Wong Yut-Lin and Sajaratulnisa Othman, 'Early detection and prevention of domestic violence using the women abuse screening tool (WAST) in primary health care clinics in Malaysia' (2008) 20 *Asia Pacific Journal of Public Health* 102-116; Louise Ellison, 'Responding to victim withdrawal in domestic violence prosecutions' (2003) *Crim LR* 760-772; Edwards (1989)

⁷¹ Nor Azilah Jonit (2006) 121; see also Sajaratulnisa Othman and Noor Azmi Mat Adenan, 'Domestic Violence Management in Malaysia: A Survey on the Primary Health Care Providers' (2008) 7(2) *Asia Pacific Family Medicine*, <http://www.apfmj.com/content/7/1/2> accessed 15 May 2011 on the need to have adequate knowledge and appropriate personal values regarding domestic violence in order to have positive attitude and positive practices towards domestic violence identification and management

⁷² Walby and Allen (2004); C. Wells (1997); RP Dobash and RE Dobash (2004); Dobash *et al.* (1992)

vulnerable, moreover, to the adversarial nature of criminal proceedings⁷⁴ and the lack of appropriate response from criminal justice practitioners.⁷⁵ Thus, we have to examine the nature of the criminal justice system in Malaysia in terms of how criminal justice processes involving the VIWs are handled.

CHALLENGES IN THE CRIMINAL JUSTICE PROCESS FOR VIWS

This paper presented evidence-based and empirical findings pertaining to VIWs in the Malaysian criminal justice system to the following effects:

The Under-identification of VIWs

The identification of VIWs is a challenging process for criminal justice practitioners. This study demonstrates that VIWs are likely to be under-identified in the Malaysian criminal justice system, except for certain categories of witnesses. Legislations in England and Wales as well as in Malaysia have provided adequate frameworks to guide practitioners in evaluating whether witnesses are potentially vulnerable but the lack of definition of VIWs in the statutes seems to have contributed to this problem, which has been an underlying problem in other jurisdictions such as in England and Wales.⁷⁶ Many of the witnesses in the Malaysian courts are not identified early but are only recognized by the judges during court proceedings; this is also the case in England and Wales, where they are spotted by the Witness Service.⁷⁷

The practitioners in Malaysia, like those in England and Wales,⁷⁸ seem to apply an exclusionary approach, regarding witnesses as not vulnerable unless they subscribe to certain factors. The practitioners seem to outline internal and external factors that can typify a witness as vulnerable in order to categorize them as qualifying for SM applications. All factors raised by the practitioners are common to those outlined in the provision and recognised in English jurisdiction except the socio-economic identifying factor which appears to be more unique to Malaysia. This seems to limit the possibility of including a wider group of witnesses who are potentially vulnerable; thus applying inclusionary approach by which every victim and witness is perceived as potentially vulnerable should be thought of.

The practitioners tend to identify witnesses as vulnerable in accordance with the prescribed categories in the legislation. This makes the identification categorical to what has been provided in the legislation. Therefore, the trend has been for practitioners to identify children and victims of sexual offences as VIWs; previous research has revealed similar findings.⁷⁹ This leads to the issue of hierarchy in the identification, in that some witnesses such as those with learning or communication disabilities are not likely to be identified when the indication of disabilities goes unnoticed without proper screening,⁸⁰ and practitioners such as the police are inexperienced

⁷³ Collings (2011) 5-15; Campbell *et al.* (2001) 1239-1259; Campbell and Raja (1999) 261-275; Williams (1984) 66-81

⁷⁴ K. Muller, 'The effect of the accusatorial system on the child witness' (2000) 1 *Child Abuse Research* 13-23

⁷⁵ Collings (2011); ME Van Zyl and I Sinclair, 'Silent victims of rape: Police effectiveness in dealing with child rape cases' (2006) 7 *Child Abuse Research* 4-13; LT Gries *et al.*, 'Positive reactions to disclosure and recovery from child sexual abuse' (2000) 9 *Journal of Child Sexual Abuse* 29-51

⁷⁶ Burton *et al.* (2006a); [2006b] 229; Debbie Cooper and Paul Roberts, *Special Measures for VIWs: An Analysis of Crown Prosecution Service Monitoring Data* (London: CPS 2006)

⁷⁷ Hamlyn *et al.* (2004); Burton *et al.* (2006a); (2006b)

⁷⁸ Burton *et al.* [2006b] 240

⁷⁹ *Ibid.*, 231-235

⁸⁰ Burton *et al.* [2006b] 231-235

and unskilled in this regard.⁸¹ The lack of training and experience among police officers handling initial reports from victims and complainants is another issue that leads to under-identification of VIWs, as appropriate investigative interviewing is a necessary tool in handling VIWs.⁸² The lack of training and procedure for identification in practice, particularly in the initial stage with the police, has passed the 'buck' to the prosecution, raising the need for pre-trial meetings.

The Need for Prosecution Witness Pre-Trial Assessment Meetings

The lack of early identification at the outset of the criminal process, particularly by the police, leads to poor evaluation of potential vulnerability of victims and witnesses. This affects information given to the prosecution, who usually rely on the IOs' initial reports, while the police were recognized as a mere 'channel of communication' in the bureaucratic decision-making settings for prosecution.⁸³ The lack of pre-trial meetings between the prosecutors and prosecution witnesses, including victims and other VIWs discussed in this research, inhibits appropriate assessment of particular witnesses.

The importance of pre-trial meetings is demonstrated in a recent experimental study,⁸⁴ and since 2001, an amendment to the Crown Prosecution Service (CPS) official policy in England and Wales has allowed for direct contact between prosecutors and victims,⁸⁵ to the extent of assessing the witnesses in terms of their needs and interests for protection and SM applications. VIWs should be assessed according to their need of SM applications in court, as some measures may be suitable for certain witnesses but not for others. There is a need to assess the VIWs according to the spectrum of vulnerability and personal needs,⁸⁶ but this has not happened in the Malaysian CJ system due to the lack of evaluation and assessment of VIWs' needs and information on available measures for them.

The Underdeveloped Pre-Trial Support and Out-of-court Protection for VIWs

The lack of ability among practitioners, particularly the police, to establish the needs of witnesses at an early stage results in a lack of pre-trial support and out-of-court protection for VIWs, and later of SM applications, which rely profoundly on the 'accuracy and fullness of information' provided to the prosecution and, further, to the court.⁸⁷ This study indicated that the out-of-court protection and pre-trial support for VIWs in Malaysia are not well-developed. The under-identification of VIWs in the criminal justice system reduces the potential for pre-trial support and SM applications during the proceedings. Early identification affords a better opportunity for VIWs to enjoy pre-trial support and preparation which can compensate for the risk of secondary

⁸¹ Gregory and Lees (1999); Susan Edwards (1989); Faragher (1985) Van Zyl *et al.* (2006) 4-13

⁸² Ray Bull (2010) 5-23; Powell *et al.* (2009) 1-16

⁸³ John Spencer, 'The Victim and the Prosecutor', in Anthony Bottoms and Julian V. Roberts (eds), (2010) 143-144

⁸⁴ Paul Roberts and Candida Saunders, *Interviewing Prosecution Witnesses: A Socio-Legal Evaluation of the Pre-Trial Witness Interview Pilot* (CPS 2008) at http://www.cps.gov.uk/publications/research/interviews_report.html accessed October 10, 2011; Paul Roberts and Candida Saunders, 'Piloting PTWI – A Socio-Legal Window on Prosecutors' Assessments of Evidence and Witness Credibility' (2010) 30(1) *Oxford Journal of Legal Studies*, 101-141

⁸⁵ J Spencer, in Bottoms and Roberts (eds) (2010) 144

⁸⁶ Mandy Burton *et al.* 'VIWs and the adversarial process in England and Wales' (2007) 11(1) *International Journal of Evidence and Proof* 34-37

⁸⁷ Ellison (2001a) 39; Hoyano [2000] 253

victimization throughout the criminal justice process.⁸⁸ This study has implied that this is not yet the case in Malaysia.

The issue of inter-agency responsibility arises as early as the initiation of pre-trial support and protection for VIWs. The police's denial of responsibility for providing out-of-court protection is shown in this research, whilst they stand at the initial point at which the criminal justice process commences as they meet the victims and complainants and are likely to take charge. This is a similar problem elsewhere, such as in England and Wales,⁸⁹ and has been much criticised;⁹⁰ it warrants appropriate evaluation, particularly for VIWs.⁹¹ Victims' limited rights to effective out-of-court protection from the police should not be abandoned and are consistent with the requisites of the UNCRC, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁹², International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the Malaysian Federal Constitution on the right to equality including to equal protection of the law. Such rights are also supported by other authors.⁹³ Issues on criminal justice practitioners' awareness of their legal duty and the extent of their professional culture to secure protection for VIWs remain unsettled, precisely on two limitations; the conflict of responsibility and legal duty, and the knowledge and awareness of practitioners in handling various groups of VIWs and interpreting the real issues and circumstances. The enhancement of existing avenues such as the OSCC and SCAN Team is a relevant step in order to strengthen inter-agency collaboration for the protection of VIWs' needs and interests.

The State of SM Applications in Malaysia

The open-ended debates on the status of victims' rights and position in the criminal justice system do not undercut the development of SM applications for VIWs. Victims' and VIWs' rights have developed to incorporate protection and participation in the criminal justice process to certain extents. The degree of assimilating the measures for the treatment of VIWs in the criminal justice system varies between jurisdictions. The evolving initiatives on victims' and VIWs' rights have led to the legislating of SM applications.

Practitioners' perspectives on SM applications since they were first introduced in the Malaysian courts demonstrate a mixed picture. Most of them, including the defence counsels, are

⁸⁸ Ellison (2007b) 171-187

⁸⁹ The challenge in implementing appropriate protection for VIWs does not only surface in Malaysia, but is highlighted in the decisions of *Van Colle and Smith*, which are not likely to be accepted or have influence in England and Wales; See *Chief Constable of the Hertfordshire Police v Van Colle* (administrator of the estate of GC (deceased)) and another *Smith (FC) v Chief Constable of Sussex Police* SESSION 2007-08 [2008] UKHL 50, on appeal from: [2007] EWCA Civ 325 and [2008] EWCA Civ 39; 2008 WL 2872476

⁹⁰ Burton (2008) Ch 6

⁹¹ Mandy Burton, 'Failing to protect: Victims' rights and police liability' (2009) 72(2) *The Modern Law Review*, 272-295; Maria Schwarz-Schloglmann, 'The role of the police from the point of view of victims' protection organization' in Michaela Krenn *et al.* (eds) *10 Years of Austrian Anti-Violence Legislation: Documentation of International Conference: Stop Domestic Violence Against Women* (Vienna: Federal Chancellery 2008) 88-90; Madelaine Adelman *et al.* 'Policing violence against minority women in multicultural societies: "community" and the politic of exclusion' (2003) 7 *Police & Society* 105-133

⁹² Article 12.3 (a) and (c) of the CEDAW

⁹³ Burton (2009); Schwarz-Schloglmann (2008) 88-90; Adelman *et al.* (2003) 105-133; Patricia A Seith, 'Escaping Domestic Violence: Asylum as a Means of protection for Battered Women (1997) 97(6) *Columbia Law Review* 1804-1843; Deborah Anker *et al.* 'Women whose governments are unable or unwilling to provide reasonable protection from domestic violence may qualify as refugees under United States asylum law' (1997) 11 *Georgetown Immigration Law Journal* 709-750

supportive of this motion but provide different reflections on initiating arrangements for SM applications. SM applications are not likely to become priorities for some prosecutors, despite the establishment of the new legislation and special provisions, which is also an issue highlighted in other research.⁹⁴ There is a lack of a monitoring mechanism to evaluate SM applications in practice, in terms of success and failure of the existing arrangements in the Malaysian system. Such a mechanism would be significant for providing a better understanding of the extent of SM applications in accommodating VIWs, the need for better arrangements and the scope of implementation,⁹⁵ which is necessary to inform policy and practice relating to the rights of victims and VIWs.

The adversarial nature of criminal proceedings and aggressiveness of cross-examinations may counter the effect of SM applications, for which video-recorded evidence and remote link should be appreciated. The lack of appreciation of remote link, which is useful for certain groups of witnesses, or in certain circumstances, is also canvassed in this study. The video-recorded evidence has not been applied as it is supposed to be, albeit recordings are made in the CPU, when the recorded video is not presented in place of an examination-in-chief of a child witness. The most is it being treated as documentary evidence under which the maker is to be called for examination. The potential protection that these two measures could offer is great, particularly in combating the inadequacy and shortcoming of other measures in the background of an adversarial trial system. Furthermore, the value of fresh, candid and first-hand testimony of victims from video-recorded evidence should not be discarded.

Despite the existing dearth of administrative undertakings, such as a monitoring mechanism, resources and standard protocols, the opportunity to develop and apply victims' model/approach that provides for the treatment and protection of VIWs as has been highlighted under the normative approach frameworks, in the Malaysian criminal justice system, as has been highlighted under the normative approach framework, is considerable. The initial stage of the endeavour has received a positive response from the judiciary and should work better with improvements in respect of training and resources. This victims' model/approach that enhance the rights of victims and other VIWs, just like those advanced by other scholars,⁹⁶ would be appropriate for adoption in Malaysia and appear not to be prejudicial to the rights of defendants associating the adversarial proceedings.

The Effectiveness of SM Applications in Adversarial Proceedings

Against the backdrop of the adversarial system, SM applications must negotiate a challenging course. The adversarial nature of the Malaysian criminal justice system focuses on cross-examinations as an element to check the accuracy and reliability of witnesses' evidence,⁹⁷ which are argued to be a mere fact-finding procedure rather than a truth-finding tool.⁹⁸ This fact-finding mechanism administers heavy demands and is argued to be compromising to the purpose of SM applications for VIWs.⁹⁹ The ordeal of cross-examination which causes undesirable distress and a sense of being re-victimized has been proved in studies and acknowledged in

⁹⁴ Cooper and Roberts (2006); Burton *et al.* (2006a)

⁹⁵ Roberts *et al.* (2005) 269-290, 288-289

⁹⁶ Hall (2010) and (2009); Shapland and Hall (2010); Doak (2008) and (2003); Sanders and Young (2007); Sanders and Young (2001) 44; Sanders *et al.* (2001) 437-458

⁹⁷ Murphy (1994); Stone (1994)

⁹⁸ Jules Epstein, 'Cross-examination: seemingly ubiquitous, purportedly omnipotent and "at risk"', (2008-2009) 14 *Widener Law Review*, 427-448; Doak (2008); Findlay and Henham (2005) 327-328; Ellison (2001a)

⁹⁹ Ellison and Wheatcroft (2010) 823-839; Ellison (2001a)

case law over the past three decades.¹⁰⁰ Many studies contended that VIWs are exposed to aggressive, confrontational, confusing and intimidating cross-examination¹⁰¹ that has negative effects on confidence levels and the accuracy of adult¹⁰² and child witnesses' testimony¹⁰³ alike. Thus, special measures were developed to ameliorate the impact of cross-examination, and the whole proceeding in general, on VIWs.

Although the existing adversarial nature may impinge on the accommodating character of special measures, this study does not support this proposition insofar as what the respondents have shared. The vulnerability of the victims and/or witnesses emerged and exhibited at various stage of the proceeding even as early as during examination-in-chief by the prosecutors or in identification procedure, which may be depending on various factors such as age of the VIWs, gravity and nature of the offence and the relationship with the offenders. Therefore, in some circumstances, special measures such as live link and screen are able to assist the VIWs to relate their testimony effectively during trial; but not in some others, depending on the ability of the witness to adapt to the situation and to control their emotions.

The causing of distress and trauma to VIWs during the cross-examination is nonetheless anticipated and the lack of monitoring and control mechanisms on counsels' practice of cross-examining VIWs, including rape victims, is acknowledged in this study. This is consistent with previous findings that, without further assessment of the practice of advocacy and further training to compensate for the existing attitudes of defence counsels, substantial improvement of VIWs' experience in court are unlikely to be achieved.¹⁰⁴ Confrontational cross-examination does not always occur; indeed, this study has highlighted that some defence counsels prefer a 'gentlemanly' approach in taking the VIWs through the evidence, particularly when the witnesses are not familiar with the conduct of trials. Witness familiarisation is suggested¹⁰⁵ and judicially endorsed¹⁰⁶ to improve witnesses' comprehension of the questioning in cross-examination, and understanding of the course of proceeding in general, but this research has enlightened that this measure is not sufficiently applied.

Although the judiciary in Malaysia, as in England and Wales, welcomes and extends good cooperation in SM applications, the judges' intervention in the prosecutors' undertaking is limited as they tend to subscribe to the neutral position and reactive role as they should be in the adversarial criminal justice system.¹⁰⁷ The cooperation of judges in SM applications has been shown in this study but some judges demonstrate a reactive response and a neutral stance in recommending SM applications to the prosecution, even though judges' intervention is acknowledged in case law¹⁰⁸ as being accommodating to VIWs' rights. In certain situations,

¹⁰⁰ Adler (1987); Lees (1993) and (1997); Temkin (1987) and (2002); *R v Momodou (Henry)* [2005] EWCA Crim 177; [2005] 1 W.L.R. 3442; *R v Salisbury* [2005] EWCA Crim 3107

¹⁰¹ Wheatcroft *et al.* (2004) 83-101; Kebbell and Giles (2000) 129-139; See Lees (1997) 249

¹⁰² Valentine and Maras (2011) 554-561; Kebbell *et al.* (2004) 23-35; O'Kelly *et al.* (2003) 229-240

¹⁰³ Zajac and Hayne (2006) 3-16 and (2003) 187-195

¹⁰⁴ Jennifer Temkin, 'Prosecuting and defending rape: Perspective from the Bar' (2000) 27(2) *Journal of Law and Society*; see also Louise Ellison, 'Cross-examination in rape trials' (1998) *Crim. L.R.* 605-615 arguing for tighter regulation of cross-examination in criminal trials to address the ordeal of rape victims in court.

¹⁰⁵ Ellison and Wheatcroft (2010) 823-839

¹⁰⁶ *Momodou* [2005]; *R v Salisbury* [2005] EWCA Crim 3107

¹⁰⁷ Ellison and Wheatcroft (2010) 838

¹⁰⁸ See *CG v United Kingdom*, Application No. 43373/98, European Court of Human Rights, 19 Dec. 2001, [2002] *Crim LR* 313; (2002) 34 E.H.R.R. 31, which suggests that judges have considerable flexibility to intervene.

judges need to be proactive, either to invoke appropriate treatment or handling of VIWs, or to secure that fair trial principles are observed.

The Effect of SM Applications on the Rights of the Defendants

SM applications in Malaysia are acknowledged by most of the practitioners in this study as capable of enhancing victims' and VIWs' rights without eroding the rights of the defendants. The lack of objections from the defence counsels demonstrates that SM applications do not affect the strength of their cases and, to a certain extent, possibly work in favour of the defence. Some of the evidence rules in the adversarial system might be against the defendants' interests but they do not necessarily encroach, erode or affect the defendants' rights; this applies similarly to the SM applications for VIWs. However, the existence of a 'balancing approach' is shown in this study through the notion of allowing SM applications as a 'trade-off' for certain procedures in favour of the interests of the defendants, such as disclosure procedure. In short, some defence counsels do see SM applications as a 'bargaining tool' to secure and to show that it is detrimental to their interests.

On the other hand, this study showed that practitioners, particularly the prosecutors, acknowledge the notion that SM applications should only be provided for witnesses, not defendants, despite the potential needs and interests of the latter.¹⁰⁹ Studies have suggested,¹¹⁰ and has already been introduced in England and Wales¹¹¹ that the enhancement of VIWs' rights in terms of SM applications is not limited just to prosecution witnesses, but may also be extended to defendants and defence witnesses, and this will not infringe victims' and VIWs' rights.¹¹² However, this is not yet the case in current Malaysian practice.

Implications of the Research

This paper advocates the significance of developing comprehensive victims' model that enhances the support and protection of victims and other VIWs in the Malaysian criminal justice system. This normative approach appears to provide a better framework for the advancement of victims' and witnesses' rights and does not erode the fair trial principles and the rights of the defendants in criminal proceedings, albeit being in contradiction to certain interests of the defendants. This approach promotes special treatment and provision of special measures as assistance for vulnerable victims and VIWs and works to enhance their rights without materially eroding the right of defendants. The development of an approach for victims has been demonstrated considerably in the existing legislation, providing for legal protection and SM applications; however, the gap in practice is indicated.

This paper highlighted several limitations and weaknesses that might depreciate support, protection and SM applications for VIWs. Firstly, the lack of specific training for practitioners on handling VIWs warrants the need for specialist training and special skills courses, which are necessary precisely to improve the response of those practitioners who are directly involved with VIWs rather than through consultation with senior officers. Secondly, the lack of resources, in

¹⁰⁹ The ECtHR suggested that it may be appropriate to appoint intermediaries for defendants with communication needs in *SC v United Kingdom* (2005) 40 E.H.R.R. 10; [2005] 1 F.C.R. 347 (European Court of Human Rights). See also *Burton et al.* (2006c) 402-404; *Powell R* (2006) 562; *Hoyano* [2001] 948; *Birch* [2000] 241-242

¹¹⁰ *Roberts et al.* (2005); *Hoyano* (2010)

¹¹¹ CJA 2009

¹¹² Michael Tonry, "Rebalancing the criminal justice system in favour of the victim": the costly consequences of populist rhetoric' in Anthony Bottoms and Julian V. Roberts (eds) (2010) 72-103, 76

terms of human personnel and skills as well as physical facilities, is identified as an impediment to optimizing SM applications for VIWs, but the improvement to existing forums or centres such as One Stop Crisis Centre (OSCC) and Witness Service provided by the Social Welfare is a feasible option. These forums can be enhanced to provide information to victims and witnesses, as an adequate and specific information service is still currently unavailable.

The dearth of standard protocols and guidance regulating the process involving VIWs is the third potential challenge; such protocols should be accessible to the public at every stage of the criminal justice process to promote confidence in the system. Fourth, the development of awareness of less popular SM applications, such as the removal of formal attire, communication aids, witnesses' pre-trial familiarisation and separate waiting areas for VIWs, will perhaps provide better protection of their rights. Many of the reforms and improvements suggested above do not involve procedural implications and concur to the argument that victims (and VIWs) should have better 'service rights'.¹¹³ This research works as the first step towards further, thorough evaluation of SM applications in Malaysian criminal justice system. It has highlighted Malaysian criminal justice practitioners' perspectives on issues relating to the development of VIWs' rights and SM applications. This research did not, however, investigate the use of video-recorded evidence as one of the special measures that has not been put into full practice; and the perspective of the victims and witnesses, which may be explored in future research.

CONCLUDING REMARKS

Legal protection for VIWs is no longer a 'leap of faith' in the reform of the criminal justice process and criminal justice system. The ability of witnesses to give the best evidence to their utmost capability, to provide coherent and accurate testimony and to assist the discovery of facts in criminal justice proceedings will serve a just and reliable criminal justice process. A well-designed legal provision for SM applications is nonetheless futile and the victims' and VIWs' rights movement rhetorical without practice and implementation.

It is hoped that this paper will contribute to knowledge and add to the literature on empirical analysis of enhancement of victims' and VIWs' rights and the management of victims and other VIWs in Malaysia and the criminal justice process framework in particular. The findings of the research fundamentally indicate the importance of SM applications during the proceedings and the significance of having accessible legislative and administrative measures as procedures to accommodate VIWs in criminal justice proceedings. The enhancement of VIWs' rights and development of protection measures do not in any way erode the defendants' right to a fair trial. This study has shed light on the Malaysian practice with regard to putting the victims' and VIWs' rights into practice and applying special measures without infringing the rights of defendants and, in fact, serving them better.

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¹¹³ Ashworth and Redmayne (2005) 48-53

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