



The Inns of
Court College
of Advocacy

Raising the Bar

Please Note: this document was commissioned and created in 2011 by the Advocacy Training Council, the forerunner of The Inns of Court College of Advocacy.

Foreword

The manner in which the vulnerable are treated in our Court system is a mark of how civilized a society we are.

The effective handling by advocates of vulnerable witnesses, victims and defendants is crucial for the good and fair administration of justice and requires skill, experience, education and understanding.

This Report is the first major research project in England & Wales specifically directed to considering the training barristers need to develop the right skills and understanding in how to interview, examine and cross-examine those in our Court system – whether witness, victim or defendant – who are most vulnerable by reason particularly of their young age, learning difficulties, or state of mental health.

The Advocacy Training Council¹ is the body responsible for overseeing standards of advocacy training for the Bar of England & Wales, reporting to the Council of the Inns of Court². The ATC set up a Working Group on vulnerable witness and defendant handling in June 2009 following a number of striking cases that emphasised the urgent need to ensure that all advocates, in whatever field, were equipped to handle and question vulnerable people in Court, in a manner which was appropriate, sensitive and effective. This area is, rightly, a matter of growing public and professional concern.

The Working Group has heard evidence over a period of 20 months from a large number of experts across a wide range of fields including child/adolescent psychiatrists, intermediaries, members of the judiciary, officials from the Ministry of Justice and the Crown Prosecution Service, police officers and social workers. This evidence-based, consultative approach has ensured that the Report and its recommendations have a sound factual and expert basis, having drawn on the collective wisdom and experience of a wide pool of those most qualified and knowledgeable in this important field. I would like to express the ATC's gratitude to all those who have given so freely of their invaluable time and expertise to meet and advise the Working Group.

This Report makes a series of practical and far-reaching recommendations for the training of barristers in how to handle vulnerable witnesses, victims and defendants. Such handling should have three virtues. First, it should at all times be sensitive and understanding with regard to the needs and vulnerabilities of the person concerned. Second, it should uphold the requirement rigorously to examine the evidence and fulfil the barrister's duty both to court and client. Third, it should seek to elicit 'Best Evidence'.

In addition, the Report includes a useful 'toolkit' to assist barristers as they prepare their lines of questioning, in particular identifying common problems encountered when examining particular vulnerabilities, and recommending possible solutions.

I would especially highlight Part Four: Recommendations and urge all those with responsibility for the training of barristers to consider how they might rapidly carry into effect the Report's recommendations on training.

The Report also makes suggestions which might merit consideration by bodies outside the immediate remit of the ATC, including the Judicial Studies Board and the Police Force, as they develop their own training programmes in this area.

¹ Now the Inns of Court College of Advocacy.

² The joint body for the four Inns of Court.

I pay a warm tribute to Bobbie Cheema (Chair) for her inspiring leadership of this Working Group, to Rachel O'Driscoll and the other members of the Working Group for their unwavering commitment to this project, and to Sarah Perry (Secretary) for her sterling contribution, particularly in the production of this Report.

I strongly commend this Report to all those who have an interest in a fair society and the proper administration of justice.

Charles Haddon-Cave QC

Chairman, Advocacy Training Council of the Bar of England & Wales

March 2011

Part 1: Introduction

Chapter 1: Executive Summary

The Evidence

The Working Group (WG) heard a large volume of evidence in a period of 20 months³ from a wide range of experts and individuals with first-hand experience of vulnerable witnesses, victims and defendants: HM Court Service (Chapter 3), Child/ Adolescent Psychiatrist (Chapter 4), Judges (Chapter 5), Adult Learning Advisors (Chapter 6), Practitioners at the Bar (Chapter 7), CPS Trainer (Chapter 8), Police (Chapter 9), Respond UK⁴ (Chapter 10), Social Workers (Chapter 11), Intermediaries (Chapter 12), Witness Support (Chapter 13) and the Nuffield Foundation/ NSPCC (Chapter 14).

Their evidence was revealing. It provided a host of invaluable insights into the fears, problems and difficulties experienced by vulnerable people when in the Court system, whether as witnesses, victims or defendants. In addition, it demonstrated the challenges that understanding and handling such vulnerable people present, if they are to be dealt with fairly and sensitively, and in a manner that will achieve 'best evidence' (Chapters 3-14).

Three strong themes emerged:

- First, the urgent need to address the significant problems associated with vulnerable people in the Court system, in particular as regards (i) the perception and experience of vulnerable people in the Court system (i.e. feeling deeply worried and intimidated)⁵, (ii) the paucity of understanding by some advocates as regards the particular condition and needs of vulnerable people, and (iii) the inconsistency and weaknesses of some advocates in handling and questioning vulnerable people.
- Second, the considerable benefits that proper education and training would bring to the way in which advocates approach the task of handling, advising, examining and cross-examining vulnerable people.
- Third, that the handling and questioning of vulnerable witnesses, victims and defendants is a specialist skill, and should be recognised as such by practitioners, judges, training providers and regulators. The desirability of a system of accrediting or 'ticketing' advocates suitably trained, qualified and experienced in the handling of vulnerable witnesses should now be recognised.

Pre-Trial: A culture change is needed. Advocates must have sufficient knowledge and training to identify where a commonly experienced vulnerability exists, and do more preparation with regard to vulnerable witnesses pre-trial (Chapter 15).

ABE Interviews: Weaknesses and variations in the standard and effectiveness of ABE interviews by police must be addressed: there should be better preparation by police prior to interview, and better training of police officers on interview techniques (Chapter 16).

³ July 2009-February 2011

⁴ Respond is a leading UK voluntary sector organisation working with victims and perpetrators of crime.

⁵ See the 2008 WAVES Survey (Chapter 3).

Role of Judges: The role of judges is pivotal if vulnerable witnesses, victims and defendants are to have fair and proper access to justice. A pre-trial meeting is particularly important (Chapter 17).

Intermediaries: Intermediaries have an increasingly high reputation: their use is to be encouraged where appropriate (Chapter 18).

Intermediary/Psychiatric Reports & Witness Profiles: It is crucial that everyone involved in the trial process is aware of the potential need to obtain the assistance of intermediaries, psychiatrists and psychologists (Chapter 19).

Communication & Questioning Methods: Appropriate communication and questioning methods are key to dealing effectively with vulnerable witnesses, whether their vulnerability lies in youth, learning disability or a mental health diagnosis. Advocates must make it their own responsibility to craft their questions in a manner that will enable effective communication (Chapter 20).

Coping Strategies: There are a variety of simple strategies that can be employed to help the vulnerable cope with trials, such as shorter sitting times (Chapter 21).

Training: There is a clear and pressing need for training for advocates in how best to handle vulnerable people in Court. The number of cases involving vulnerable witnesses is increasing. The need for training is not confined simply to cases such as those involving sexual abuse of young children, but includes the whole gamut of cases involving vulnerable people, including those with learning disabilities. Advocates should be certificated to handle cases involving vulnerable witnesses, victims or defendants. Detailed recommendations are made as regards training, such as that developed by Kingston University (Chapter 22).

Recommendations

This Report makes 48 recommendations under six headings:

Training: A comprehensive modular programme of training in handling vulnerable witnesses, victims and defendants should be put in place for all criminal and family practitioners, both new and experienced. It is suggested that it should be led by the Bar Council in partnership with the Inns of Court and Criminal Bar Association, with training programmes approved and moderated by the Advocacy Training Council (Recommendations 1-12).

Practitioners: A range of recommendations for practitioners, including the provision of “Toolkits” for advocates setting out common problems and solutions, and recommendations on areas such as pre-trial visits, the use of leading questions, disclosure, agreed notes for the jury, PCMH⁶, etc. (Recommendations 13-25).

The Judiciary: Suggestions for the consideration of the Judiciary include the possibility of the JSB developing generic directions regarding vulnerable witnesses, victims and defendants (Recommendations 26-32).

Trial Management: Recommendations on trial management, such as taking breaks every 45 minutes for child witnesses and giving more consideration to the needs of young offenders travelling long distances to court (Recommendations 33- 35).

Police: Recommendations include better and continuous training for the Police in handling ABE⁷ interviews, practical exercises and the early involvement of the CPS in ABE interviews (Recommendations 36-41).

⁶ Plea and Case Management Hearing.

⁷ Achieving Best Evidence.

Other Recommendations: Other recommendations include a possible requirement for similar compulsory training for solicitor advocates, wider dissemination of the HMCS ‘Going to Court’ DVD, and training for Witness Service volunteers. Further consideration should also be given to the provision of special advocates for vulnerable witnesses⁸ (Recommendations 42-48).

Toolkits

The Report provides a practical “Toolkit” to assist advocates as they prepare to handle vulnerable witnesses or defendants in court. This includes guidelines to inform the preparation of lines of questioning, and reference sheets setting out common problems together with suggested solutions.

Further Resources

The Report concludes with a section providing direction to important sources of further information, many of which are cited in this Report.

⁸ See the Report by Baroness Stern 2010.

Chapter 2: The Working Group and an Overview of the Task

Introduction

Legislative changes touching the criminal justice system in recent years reflect a shift in society's attitude towards its most vulnerable members. There is a growing concern that those most at risk of marginalisation by virtue of age, learning disabilities or a mental health diagnosis should have, and be able to exercise, equal access to justice. That such matters attract anxious thought is a reflection of a civilised and democratic society, and should be welcomed by all who are engaged in the legal profession.

Evidence suggests that vulnerable witnesses and defendants frequently face almost insurmountable barriers to justice, from the first stages of making their complaint or giving an account, to their experience in the courtroom. Where measures are taken to accommodate their needs – such as the use of social workers and, increasingly, intermediaries – advocates are better able to test the evidence.

Ensuring equal access to justice for vulnerable people demands a twofold approach: advocates must be equipped to handle vulnerable defendants and witnesses in a manner that is sensitive to their needs; whilst the primary purpose of the trial remains to receive and then to rigorously test those parts of the evidence which are controversial.

If judges and practitioners are fully to play their parts in the pursuit of justice in such cases, it is essential that they adopt an open mind-set, willing to embrace a new and challenging set of skills. Advocates should not be prevented from cross-examining effectively, but be supported in the adoption of different techniques and approaches, whilst maintaining their duty both to court and client. There is no reason why the evidence of young and otherwise vulnerable witnesses and defendants cannot be effectively and rigorously tested.

Advocates will encounter vulnerable witnesses and defendants in many cases, not merely those with child witnesses or involving grave sexual allegations, and whether prosecuting or defending. Appropriate training must therefore be provided to all criminal and family practitioners, whether they prosecute or defend. At least an element of continuous professional development for those advocates should be compulsory, and a vigorous and informed debate must take place about some form of ticketing for advocates engaged in these cases, so that a high quality threshold is maintained.

Specialist training must begin in pupillage, and extend throughout the advocate's career. It must include a range of approaches, teaching a comprehensive set of skills including the identification of vulnerabilities; awareness of conceptual understanding at various thresholds of development; and how best to prepare and modify lines of questioning. Advocates should have access to resources including 'toolkits' outlining common problems encountered with vulnerable witnesses, together with suggested solutions, and quick-reference 'checklists' of communication techniques.

The Judiciary, the CPS and agencies such as the police force would benefit from revisiting their own training practices in the light of this Report, and working alongside the Bar to ensure equal access to justice for vulnerable people.

Genesis

The first-hand account of what a witness⁹ saw, heard and experienced is vital in all fact-finding hearings – be it in court, tribunal or panel. Direct oral evidence gives a legitimacy to legal proceedings that can be delivered in no other way. The effective testing of that evidence is an essential part of the proper administration of justice, and crucial to a fair trial.

Any witness or defendant may have difficulty in retaining and recounting the events which are the subject of their testimony. Difficulties arise through the passage of time, the emotional impact and legacy of events, and the pressures anticipating at least some form of challenge to the evidence. These difficulties may be vastly exacerbated for a witness who is vulnerable by reason of age, learning disabilities, or mental health diagnosis, or other problems relating to level of understanding or concentration.

Whilst different statutes define vulnerability in a variety of ways, this report includes and is concerned with anyone who, because of their inherent personal characteristics, finds the trial process particularly difficult to cope with. Over the past 20 years or so, an increasing number of cases have reached the courts which in the past would have failed either to generate an actionable complaint to the police, or to satisfy the prosecuting authorities that there was a realistic prospect of a conviction. This welcome advance is in part the result of a change in legislative and procedural provisions enabling vulnerable witnesses to give evidence by the use of special measures.

The barrister¹⁰, however experienced, is likely to encounter particular problems when dealing with vulnerable people in court. It is the advocate's professional duty to ensure witnesses can give their evidence fairly and effectively, and that defendants can give instructions, follow the proceedings and give their evidence. Where evidence is challenged cross-examination is required to test the credibility of the witness and/or reliability of the evidence. Advocacy exercises and training focus on the effective use of leading questions in cross-examination. Psychiatrists and intermediaries suggest that questions such as these may pose a particular difficulty for the vulnerable witness to understand and handle.

In recent times, there has been criticism of the way barristers handle vulnerable witnesses and defendants – particularly children. Nor is the Bar alone in having perceived inadequacies: the sad case of Fiona Pilkington – who killed herself and her daughter after prolonged bullying and abuse not properly recognised by police and social services – demonstrates that barristers are not the only professionals struggling to recognise and meet the needs of vulnerable members of society. Well-targeted training is crucial to ensuring that advocates at all levels are seen to deliver work of the highest professionalism.

A growing body of work is being undertaken to assess and improve the lot of vulnerable witnesses and defendants, particularly in enabling them to give evidence to the best of their ability. Whilst this work deserves wider dissemination, some research may not be easily accessible, or readily absorbed into an advocate's practice – particularly without an understanding of both its underlying rationale and its practical impact. Misconceptions both within and about the Bar by those engaged in these issues must be challenged.

The underpinning framework for conduct applicable to all practising barristers includes:

302 A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.

⁹ Whether witness for the prosecution or the defence; those making allegations of crime; or defendants.

¹⁰ The terms 'Advocate' and 'Barrister' are used throughout this report, effectively interchangeably. The Advocacy Training Council (now the Inns of Court College of Advocacy) is principally a body overseeing the training of barristers, but no exclusion of other advocates is intended.

303 A barrister:- (a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any professional client or other intermediary or another barrister);

307 A barrister must not: (c) compromise his professional standards in order to please his client, the Court or a third party, including any mediator¹¹.

These extracts, set in the context of the Code of Conduct as a whole, make it plain that the barrister's proper duty does not include seeking to take advantage of difficulties faced by vulnerable witnesses and defendants in negotiating the court process. Rather, methods must be found to test evidence appropriately, whilst remaining faithful to the overriding duty to assist the Court in the administration of justice.

There is another perspective to these concerns: there must be a desire amongst all who wish to uphold the legitimacy and integrity of the criminal justice system to ensure the process of giving evidence is not so traumatic for witnesses that it reaches the threshold of conduct prohibited by Article 3 of the European Convention on Human Rights¹². Article 3 imposes positive obligations affecting the rights of vulnerable victims of crime, with authorities under an obligation to protect them, by way of deterrence, from ill treatment. It is not inconceivable that what takes place during a trial might arguably amount to preventable ill treatment.

It may be that the extensive changes noted here may in due course serve to highlight how poorly the preparation and conduct of criminal proceedings have served young and other vulnerable citizens in this jurisdiction in the past. Equally, the suggestions for training offered in this report may in time be seen as the first step in the growing recognition that targeted and well-crafted training for advocates is central to a mature and effective justice system.

Aim

In 2009, the Advocacy Training Council established the Vulnerable Witnesses and Defendants Handling Working Group (the WG). The group's membership and terms of reference are provided below. The WG's chief aim has been to gather sound evidence from a wide range of sources upon which to base a set of recommendations - both for barristers and for other key groups - with a view to improving the experience of vulnerable people in the court system, using the training of barristers as the principle tool for change.

In carrying out this work the WG has appreciated afresh the friction between the philosophy of those seeking to protect vulnerable people from questioning which undermines and challenges their evidence, and the need in an adversarial system for controversial parts of that evidence to be effectively tested in the interests of a fair trial. This need is crucial to satisfying the overriding objective of the Criminal Courts 'that criminal cases be dealt with justly', including acquitting the innocent, convicting the guilty, and respecting the interests of witnesses.¹³ Whilst there are sometimes suggestions of deliberate 'communicative mischief' which is plainly unacceptable, there is a strong public interest in equipping all advocates to carry out their duties as professionally as possible.

This Report and its recommendations cannot hope to smooth these frictions entirely, but it both responds to them and offers constructive solutions. Training provision built on the recommendations of this Report must directly address the perception that defence advocates may knowingly compromise the need to

¹¹ Code of Conduct of the Bar of England Wales Part III: Fundamental Principle (emphasis added).

¹² <http://tiny.cc/txOfk>

¹³ Criminal Procedure Rules 2010, Rule 1.1 (2) (a) and (d) respectively.

obtain best evidence in the interests of their client, or that effective defence cases must necessarily stray into questioning techniques that disadvantage the witness.

Approach

At its first scoping meeting, the WG agreed to seek input from experts across a range of specialisations pertinent to the experience of vulnerable people in court. These included members of the judiciary; child/adolescent psychiatrists; representatives from the police force and the Ministry of Justice; intermediaries; training experts; and those from a social work/support background together with a body of practitioners. Individuals were identified by members of the WG following consultation with their representative bodies, or suggested by other consultants.

Fully briefed as to the scope and remit of the WG, experts were invited to attend meetings at which they contributed views on the most pressing problems faced by vulnerable people in court; crucial issues likely to be faced by advocates when handling vulnerable witnesses and defendants; and potential training solutions to these problems. Where appropriate, the consultants were asked to contribute more formally to the report, for example by working with the WG on drawing up documents/training modules to assist advocates and judges in identifying and addressing common problems faced by vulnerable witnesses in court.

Where evidence elicited by the WG touched upon the role of other professionals involved in the criminal justice system, such as the judiciary and the police, the WG formulated suggestions and recommendations, as appropriate, so that no potentially helpful area is missed. However, the WG remained mindful of its own principle arena of interest and understanding: that of the advocate in court.

Terms of Reference

Purpose

1. To examine the issue of handling vulnerable witnesses from a range of perspectives, consulting a range of experts in order to develop a sound understanding of the particular needs of vulnerable witnesses and defendants and drawing on all relevant research/reports on this issue.
2. To make evidence based recommendations to the Advocacy Training Council for the training of advocates in handling vulnerable witnesses and defendants in the court system, including recommendations as to:
 - ◆ the content of such training;
 - ◆ the most appropriate form of training delivery;
 - ◆ the stage(s) at which training should be provided;
 - ◆ the status of training (i.e. voluntary or compulsory); and
 - ◆ a mechanism to monitor the effectiveness and quality of training, once rolled out.
3. To identify issues beyond the remit at (b) above which, if addressed by other bodies, could contribute to the better handling of vulnerable witnesses and defendants by advocates.

Membership

- Bobbie Cheema (Chair)
- Johannah Cutts QC
- Charles Haddon-Cave QC
- HHJ Wendy Joseph QC
- Joanna Korner QC
- Philip Mott QC
- Sally O'Neill QC
- Rachel O'Driscoll
- Sarah Perry (Secretary)

Part 2: The Evidence

Contributing Consultants

Amrita Dhaliwal (Head of Victim, Witness & Juror Branch, HM Court Service)

Responsibilities include ensuring the best possible experience for witnesses attending court.

HHJ Susan Tapping (Kingston Crown Court)

Widely experienced in a number of trials involving child/vulnerable witnesses, particularly in sex crimes, and a contributing trainer for the Judicial Studies Board Serious Sexual Offences Seminar

Dr Tony Baker (Child/Adolescent Psychiatrist)

Wide range of experience in providing psychiatric reports on child witnesses.

HHJ Rook QC and HHJ Philips QC (Course Directors, Judicial Studies Board)

Offering a judicial perspective on how best to support both judges and advocates when handling vulnerable people in court and how the JSB addresses these issues in its own training.

Mark Lake (Crown Prosecution Service)

Head of Legal and Management Training.

Lynne McGeachie (Adult Training Expert, Judicial Studies Board)

Works with the JSB on the development and delivery of their training programmes.

Louise Wallis (Respond UK, via the Ann Craft Trust)

Respond UK supports vulnerable people, usually with learning difficulties, who may be either witness or defendant, or whose complaint may not have reached trial.

Geraldine Monaghan and Mark Pathak (Liverpool Joint Investigations Unit)

Social workers working with the Liverpool Crown Court to support vulnerable people in the lead-up to a trial and during a trial, including through the provision of witness profiles to both counsel and judge.

DC Jon Shirley (Metropolitan Police Force)

Works chiefly in cases of crimes against children, supporting children and carers in the lead-up to a trial.

Amanda McLellan (Intermediary)

Communication specialist, mediating between witness/defendant and other participants during trial.

David Wurztel (Consultant on CPD, City University)

Involved in the design and delivery of Intermediary training programmes and in providing support to intermediaries.

Shaun Bruwer (Witness Service Co-ordinator, Central Criminal Court)

Responsible for a team of witness service personnel at the Old Bailey.

Practising Barristers

Over a dozen criminal advocates at varying levels of seniority were asked to address the issues raised in the Terms of Reference.

Chapter 3: HM Court Service

Amrita Dhaliwal, Head of Victim, Witness and Juror Branch in Her Majesty's Court Service (HMCS), provided a helpful background on the range of recent government initiatives aimed at vulnerable witnesses. These included a CPS Inspectorate report on the quality of advocacy for victims and other witnesses¹⁴ and the Witness and Victim Experience Survey (WAVES), an annual survey undertaken by MORI of 37,000 vulnerable witnesses over 17 years of age. In addition, NSPCC/Nuffield Foundation Report (*Measuring Up: Evaluating implementation of government commitments to young witnesses in criminal proceedings*) details the experiences of child witnesses, and sets out helpful guidelines for advocates (see Part Six: Further Resources).

The 2008 WAVES survey, which questioned 37,000 vulnerable witnesses over 17 years of age on their experiences in court, found:

- 33% of witnesses were deeply worried about being cross-examined.
- 25% of those asked "Were you intimidated by anyone" said yes, of whom 6% said they were intimidated by the lawyer.
- 27% of those questioned had to wait 2-4 hours before giving evidence, and 17% waited more than 4 hours.
- Only 60% met the prosecution lawyer before entering the courtroom.
- 82% were completely, very or fairly satisfied by the prosecution lawyer.
- 86% were cross-examined, of whom 36% said that the defence lawyer was discourteous.

Research undertaken in 2002 (*Child Witnesses in Canada: Where We've Been, Where We're Going*¹⁵) had been similarly revealing, asking 150 child witnesses what they could remember 3 years, 5 years and 12 years after a trial. Those who had been personally thanked by a judge remembered it clearly – and this was likely to be of particular importance to vulnerable witnesses and defendants. The key lesson to be learned from this research was the importance of maintaining a human touch, whilst treating all involved in the court process the same.

In 2007 HMCS produced the "Going to Court" DVD, a step-by-step guide to being a witness. The WG viewed the DVD and found it to be an accessible introduction to the court process, and a means by which defence advocates and solicitors – as well as police officers – could begin to help a vulnerable witness/defendant to familiarise themselves with court procedures. Helpfully, copies are available in many languages including Cantonese, Punjabi and Arabic, and the DVD is available free online¹⁶. Its use, however, is patchy: whilst 92% of witnesses who had seen it thought the DVD was useful, only 9% of all witnesses had been offered the opportunity to view it.

Amrita Dhaliwal felt the DVD should be standard preparation for every witness who has neither a family liaison officer, nor the support provided to witnesses in the gravest cases. Copies should be kept in

¹⁴ Thematic Review of the quality of prosecution advocacy and case preparation: report by HM Crown Prosecution Service Inspectorate 2009: www.hmcp.si.gov.uk/documents/services/reports/THM/ADV_thm_Jul09_rpt.pdf

¹⁵ www.lfcc.on.ca/Cwp_2002.pdf

¹⁶ <http://moj.coionline.tv/videos/goingtocourtvideo/>

chambers, and distributed by defence advocates to both defendants and defence witnesses, and it should be included on the schools' Citizenship foundation syllabus. From the 26th May 2010, and subsequent to the WG's recommendation that it should be made more widely available, the DVD has been published via links on the Criminal Bar Association website. All advocates who know of witnesses going to court to give evidence should use this valuable resource as a first step in proper preparation.

In addition to seeing the 'Going to Court' DVD, it would be helpful if child witnesses and older vulnerable witnesses for whom it would be appropriate could have access to the NSPCC's child witness material, including the NSPCC/ChildLine Young Witness Pack (1998), model courtrooms and the NSPCC/ChildLine video, *Giving Evidence - what's it really like?* (2000). Again, use and provision is erratic: these resources are readily available from the NSPCC, but rarely requested.

Another resource for defence and prosecution witnesses is a leaflet setting out basic information regarding services at both Crown Courts and Magistrates' Courts. It is made available in each Crown Court and Magistrates' Court, and can be downloaded from the HMCS website.¹⁷

Witness support services are available in all Crown Courts, and in 90% of Magistrates' and Youth Courts. Although these facilities are available for both defence witnesses and prosecution witnesses, the former rarely make use of them. Pre-trial visits to the court for witnesses are essential – but there is no payment for defence solicitors to attend with the witness, and as a result these visits are rare in the case of defence witnesses. Witnesses should therefore be made aware that Witness Support can help with arranging a pre-trial visit and accompanying the witness or defendant on the visit.

Following the WG's recommendation, and based on Amrita Dhaliwal's evidence, section 17 of the PCMH form has been significantly expanded to allow for more thorough consideration of the needs of vulnerable witnesses/defendants, including any special arrangements such as pre-trial visits or the use of an intermediary¹⁸.

Since the vast majority of young people who appear before the courts are dealt with in the Youth Court, where they are usually represented by solicitor advocates or young members of the Bar, it follows that training for dealing with vulnerable defendants should embrace new practitioners. It should also be open to those non-Bar advocates who need to learn the same skills.

The expectations of witnesses and their families in relation to the public nature of a trial must be carefully managed: parents of child witnesses are often appalled to discover that their child's face will appear on a screen viewed by the defendant and the public gallery. The occasions when a court sits in the absence of the public are very rare indeed, though where an application is made in an appropriate case, steps can be taken to remove the screen from public view. It is important, however, that parents or other family members are not given unrealistic expectations by police officers or others.

Child witnesses frequently suffer difficulties concentrating during the trial. Parents and carers are best placed to assist in advising about issues such as concentration span, but are rarely asked to do so. A meeting between advocates, the judge, the child witness and parents/guardians to address such issues should be the usual expectation. School lessons, which are rarely longer than 45 minutes, may offer a useful example of an appropriate length of time for which a child should be expected to concentrate in court; best practice should be that, where there is a child witness or defendant, the court should not sit for longer than this period without having a break.

¹⁷ <http://www.hmcourts-service.gov.uk/HMCSCourtFinder/CourtList.do>

¹⁸ http://www.justice.gov.uk/criminal/procrules_fin/formspage.htm

Chapter 4: Child/Adolescent Psychiatrist

Dr Tony Baker was one of the Child Psychiatrists involved in examining competency issues in a sex abuse case involving a 4 year-old witness. He has previously contributed to police formulations for the conduct of ABE interviews of very young children, and in identifying appropriate questions and the manner in which they are asked. He has also helped to identify the possible ambiguities of a child's answer, particularly if a question was insufficiently precise or couched in inappropriate language.

A key issue raised with him was the need to obtain consensus between his professional colleagues as to the general level of comprehension of children at various stages of development, so that there was a commonly accepted 'threshold' under which children of a particular age would not be expected to understand certain concepts. These could include concepts relating to time, recalling what they had been asked about on another occasion, or the distinction between truth and lies. Whilst it could only be a general guide, it is not currently available to advocates and would prove a useful tool in preparation.

Dr Baker was especially concerned about the need for improving techniques of questioning at the ABE stage, since the audibility and admissibility of the ABE video are often key to the success of the trial. He emphasised the need for the interviewing police officer or the advocate to familiarise themselves with essential details such as the layout of any house or building cited in evidence, the names and ages of any siblings, and day-to-day information such as which school they attend, and where and when they may have been on holiday. He advised preparing in advance a set of short simple questions, and deciding how long a cross-examination should be to take into account the age and capacity of a child witness.

He felt that a "rapport stage" prior to addressing the controversial evidence was essential: the advocate should make efforts to build a good relationship with their witness, asking non-threatening questions about birthdays or recent events unrelated to the trial.

Dividing questions into clear topics, and explaining to the witness what kinds of questions would be asked in each topic, would be a useful approach to simplifying questioning for the witness. It would also be useful to identify in advance areas which may be too complex to be put to the witness, and which could instead be put to a more competent witness such as a police officer or a social worker. Where the advocate adopts this approach, it would be useful to advise the judge beforehand.

During the trial, he felt it essential that the advocate listen carefully to the answer a child witness gives, where necessary using a different approach rather than simply repeating the question. Concluding questions with interrogatories such as 'Didn't you?' is likely to confuse and should be avoided. Children are susceptible to leading questions.

He advised that where a child is showing signs of distress, the advocate should not be too hasty in offering a break: changing a line of questioning to something less challenging can be just as effective in settling or reassuring the witness. If a child is slow to respond, it is helpful to wait and establish whether they have failed to understand the question, or are giving their response some consideration. Child witnesses – particularly those who are very young – should not be permitted to respond only by nodding or shaking their heads: this may signal that they have lost concentration. It is useful to prompt a vocal response by asking their age, or how they travelled to court that day.

Dr Baker undertook a piece of research – in conjunction with the WG and colleagues at Kingston University – to develop a Model Training Programme template, drawing upon some of the themes emerging for this report. Key themes include using professionals from relevant fields of expertise, rather than relying solely on

practitioners or judges for training (and see Chapter 22: Training). Dr Baker's advice and expertise also informed the 'toolkit' for practitioners included with this Report (Part Five).

Chapter 5: Judges

The WG met HHJ Philips QC and HHJ Rook QC, Director of Studies at the Judicial Studies Board and former Course Leader of the Serious Sexual Offences Seminars (SSOS) respectively. The SSOS courses train new and existing judges and senior recorders who have been authorised to try cases of a sexual nature; attendance on the course is compulsory before the judge can try such cases. The JSB has a wide remit to provide appropriate training for the judiciary and has recently instigated a 'Judicial College'¹⁹.

HHJ Rook urged a particular focus on training in the handling of child witnesses. Both he and HHJ Philips felt that the core advocacy problems for training to address was the need to phrase questions at a level appropriate to a child's understanding, and the need to avoid addressing a child in an unnecessarily aggressive way. The primary aim of training should be to ensure that advocates could properly identify appropriate strategies and examine the evidence of vulnerable witnesses in a manner consistent with their professional duty.

It was agreed that specialist training should begin in pupillage and be available to established practitioners throughout their career. A possible recommendation, which would reflect in part the 'ticketing' of judges, would be a recommendation to the Bar Standards Board that 2 CPD points should be ring fenced each year for continuing professional development training in this field.

The Judges stressed the importance of using intermediaries where appropriate – a view supported by the JSB, which recommends that judges seek a referral report when in doubt as to the need for an intermediary. Ideally psychiatric nurses should be made available in each large court centre, both to assist judges and to direct defence teams towards sources of reports and examinations. A triage system identifying the most urgent cases for assessment before trial would ensure a more efficient approach to seeking psychiatric reports. A key benefit of this approach is that it would assist the Legal Services Commission in making informed decisions as to which applications to allow for expenditure on reports.

Court-based psychiatric nurses could also assist with "complex" diagnoses, for example where vulnerable witnesses such as children have additional vulnerabilities such as a learning disability, and identifying defendants with learning disabilities and/or a mental health diagnosis. The judges noted that it would be useful for defence counsel to be obliged to tell the judge when they had a report indicating that their client had a psychiatric condition on something akin to a "without prejudice" basis. They welcomed the proposal that there should be a document setting out "thresholds of comprehension" for children at various stages of development, and suggested a paper setting out "common mistakes when questioning vulnerable witnesses."

Good communication with the witness and their family to ensure their understanding of the purpose and extent of special measures was encouraged. Applications for their use should be properly supported by evidence and made well in advance of the trial. Whilst prosecutors are making improvements in this area, there is no excuse for such applications being made late where from the outset it is apparent that the legislation is engaged. The judges also emphasised the importance of making arrangements for judge and counsel to meet the witness before the trial. Proper consideration needed to be given to any potential problems in individual cases, such as a vulnerable witness in an abuse case meeting a potentially

¹⁹ <http://www.judiciary.gov.uk/supporting-our-judiciary/training>

intimidating-looking male counsel. This clearly indicates a need for sensitivity of approach in individual cases, and does not detract from the primary principle.

The judges went on to outline a number of helpful training methods in use by the JSB. These included a DVD showing the benefits of using intermediaries and relevant advocacy techniques. Another useful example was a recent DVD prepared by the JSB relating to the cross-examination of complainants in sex cases about their previous sexual conduct. The format of the DVD encourages the trainees to assume the role of the judge and this interactive training has been seen to be effective in challenging preconceptions.

The judges acknowledged potential resource difficulties in providing effective practical training exercises across the Bar, such as the use of actors able to mimic the characteristics of children. Experiments with training involving psychiatrists as speakers had not always been successful in their experience, and often providers reverted to using experienced judges to lead training courses. Smaller discussion groups helped focus the minds of the participants and encourage debate, and using 3 or 4 separate exercises to raise a number of issues was also useful. Filming training sessions so that judges could see themselves and each other in action had proved helpful. They also recommended that the WG consider the use of cascade training.

The WG consulted HHJ Sue Tapping on the recommendation of HHJ Rook and HHJ Philips. Her main concerns included the perception that bad habits are ingrained very early in an advocate's practice. She favoured good habits being fostered from the start, and considered there to be forceful arguments for imposing relevant core requirements for any advocate practising in this field (such as accreditation or 'ticketing'). This possibility was supported by most judicial responses to the WG and by some practitioners. She cited the CPS's 'rape list' as a helpful model, in which advocates wishing to prosecute rape cases must undergo approved training by the Criminal Bar Association (defence solicitors and the barristers they instruct are not bound by such a list, and therefore need no compulsory training). A similar list for both prosecution and defence advocates who will have to handle vulnerable people, with a minimum threshold of training, would allow a recognised set of standards to be put in place.

Judge Tapping had devised an exercise for SSOS in which a cross-examination involving a child witness is recorded, and played to a small group training in syndicate. The recording is started and stopped, and the trainees are asked how appropriate the questioning was, whether there was any bad practice to identify, and how the judge could intervene. Whilst it offered a useful model for future training courses, it did not include having judges re-formulate questions for the advocate, which would assist advocates in learning how to quickly re-formulate questions under the pressure of jury, witness and defendant scrutiny.

HHJ Tapping emphasised the differing needs and foibles of different children. Advocates must be equipped to adapt their questioning to the sulky teenager, the 10 year-old with learning disabilities, and the very young. She felt that all 'tag' questions were unacceptable, as were questions with long pre-ambls. Furthermore, police training must challenge the tendency to go over an account many times in ABE recorded interviews, eliciting a great deal of often contradictory detail when the essence of the allegation had already been given. Police officers should also be encouraged to consider whether an intermediary should be used in the first ABE interview. In recent years, she had noticed a significant diminishment in the quality of key witness interviews and ABE interviews, with too much repetition being a major failing.

Chapter 6: Adult Learning Advisers

Lynne McGeachie, advisor to the JSB's Training Advice Division, had been involved in setting up and monitoring the JSB's courses for new and existing judges and recorders, and in particular the specialist Serious Sexual Offences Seminars. Analysis of judges' training needs suggested they were more keen to receive training in skills than in black letter law. The WG echoed that wish from the point of view of advocates: practical training requiring practice in the skill to be obtained has the greatest, most lasting impact on the participant.

She set out the crucial requirements of any training for adults:

- **Identifying the overall aim:** what do we want advocates to be able to do better after training?
- **Identifying the most pressing training need:** how to identify a vulnerable witness; how to modify advocacy techniques.
- **Focus on the 'middle sector':** these (rather than very new or very established practitioners) may be the most receptive to training and open to new ideas, and are therefore the most likely to benefit.
- **Evaluating the success of training** after the event to inform and calibrate the training provided.

A principal feature of JSB training is that relative newcomers train alongside the more experienced attending refresher courses. The majority of the time is spent in small tutor groups of about 6 participants, together with a trained tutor judge. This ensures that there are experienced judges present for the newcomers, but also that fresh ideas and questions are introduced. The team of regular tutor judges can ensure that new ideas are picked up and fed back, and also that a consistent message is given on key areas.

Live training has particular benefits but has the disadvantage of being costly in terms of trainers and other resources. A more cost-effective model could involve a talk from a respected and experienced advocate about problems he or she had experienced in practice, with hints as to what could have been done to improve the performance. She recommended mentoring as a good structure for long term improvements.

A collaborative approach, setting up joint training with the JSB, would ensure a consistent message being taught. For example, if both advocates and judges had the same training on the length and format of acceptable questions for a young witness, it would facilitate judges' controlling the proceedings without having to have long and disruptive breaks for argument and rulings. Joint training was unlikely to be workable response to all training needs, but some cross-fertilisation from judges' training to that provided to the Bar would be helpful.

Chapter 7: Practitioners

The WG interviewed a number of practitioners at a variety of levels of seniority, including those with considerable experience of defending in cases involving vulnerable witnesses or defendants. These included Treasury Counsel at the Central Criminal Court and Senior Silks, together with practitioners at many other levels, including junior advocates working in the Youth Courts. A balance was sought between prosecutors and defenders, and contributors had been involved in most of the noteworthy recent cases in this field.

The practitioners concurred with the view that there is a need for better training of police officers conducting ABE interviews: too often the interviewing officer adopts a broad brush approach, treating more mature or confident children in the same way as a truly immature child of the same age.

The practitioners noted the often overwhelming prejudice against defence advocates in the eyes of the jury, and felt it essential that the judge should not confirm this approach by appearing to ‘correct’ or ‘discipline’ the advocate in front of the jury. Guidelines on dealing with very young children tend to assume the child is telling the truth, and whilst using appropriate language and approach is indisputably important, there is currently no consolidated and consistent approach to the overriding need for defence counsel to challenge the case.

To effectively test the evidence is a more complex task than the advocate merely asking a few open questions or baldly putting their case in short segments. One practitioner cited a recent case involving the rape of a very young child, in which a judge in the Court of Appeal suggested that since the defendant’s case was ‘I didn’t do it’, defence counsel only needed to put that issue to the child. This is hard to reconcile with the need to effectively and fairly test the witness’ evidence in a serious – or indeed any – criminal case: without more than a bald confrontation, how is the jury to assess where the truth lies?

One practitioner suggested that there may be circumstances in which the judge should order ‘special counsel’ independent of the parties to deal with particularly sensitive parts of the cross-examination. This follows the approach recommended in difficult disclosure cases²⁰. Other practitioners did not support this approach: objections included the concern that it would diminish the trial advocate in the eyes of the jury, and affect the client’s confidence in his representative.

All agreed it was essential to equip the advocate to identify particular weaknesses in comprehension, expression or analysis. The absence of any time to establish ‘rapport’ before cross-examination makes this particularly difficult – not least since there can be huge variations in the abilities and limitations of children of the same age. Relying on a psychiatric report alone, where one is available, is not sufficient: these are not always even-handed. Similarly, advocates should not rely solely on the ABE interview to assess a child’s maturity or mental capacity, since they can develop substantially in a relatively short period.

In the absence of the ‘full Pigot’²¹ (cross-examination recorded on video immediately after a charge is made), which most interviewees were clear should be introduced, one barrister suggested that a useful innovation would be to have an ABE style cross-examination recorded in the presence of the judge but not of the jury, near the time of the trial, or indeed during the trial but out of court. This approach would allow for unhelpful answers or other inadmissible material to be edited out. Resource implications are not substantial, and it may be sufficiently close to the ‘full Pigot’ as to be indistinguishable from it in practice.

²⁰ http://www.hmcourts-service.gov.uk/cms/files/disclosure_protocol.pdf

²¹ Report of the Advisory Group on Video Evidence (1998)

The traditional objection to the full Pigot recommendations has been that defence practitioners would need to obtain disclosure of unused material before cross-examining a complainant, and that such disclosure could not be provided immediately post-charge. Practitioners noted that very often if one examines, in retrospect, the cross-examination of a child or vulnerable witness, very little of the questioning concerns or arises from latterly disclosed material. This objection may therefore constitute poor justification for the continued failure to implement Section 28 of the Youth Justice and Criminal Evidence Act 1999²².

The practitioners stressed that it is essential to preserve the fairness of the trial: if cross-examination must be limited to accommodate a vulnerable witness, there must be a reciprocal effort to maintain balance in fairness to the defendant. The judge may need to receive from defence counsel a list of crucial matters which they consider cannot appropriately be put. It would then be for the judge to put these matters to the jury, and explain why they cannot be put to the witness²³.

The party calling a vulnerable witness should discharge a duty of disclosure going beyond the legal minimum²⁴. There should be a presumption that any third party material - such as Social Services files - must be inspected by someone present at the trial, keeping the disclosure of such material under active review. The current trend towards junior police officers or CPS lawyers taking this role does not allow for active ongoing review and should be discontinued in cases of this kind.

There was concern that the received wisdom that all questions can be put very simply is seriously flawed: this approach is not always possible for the defence advocate. It was strongly felt that it is for suitably experienced counsel to formulate appropriate questions; they would not generally welcome a third party rephrasing their questions. Intermediaries can be valuable in some cases to help phrase questions: ideally, the cross-examining advocate should have access in advance to an intermediary, separate from any intermediary who might be assisting the witness. The practitioners considered some questions frequently recommended as acceptable for use when cross examining a child witness too open-ended from the defendant's point of view. This is a tension that is frequently glossed over, rather than being the subject of discussion and preparation prior to the calling of the witness.

The proposal that advocates should be ticketed to deal with vulnerable witnesses was generally welcomed, providing the required ticketing was widely available and not exorbitantly expensive. A scheme could be devised in which the judge should identify cases involving a vulnerable witness at an early stage of case management. Only certified counsel should then be instructed to conduct the trial. Before advocates could be 'ticketed', they would be expected to have undergone training to enable them to recognise vulnerability and use appropriate language, sentence structure and concepts. Training would need to provide counsel with the ability to adjust their approach and deal effectively with the tensions between the duty to court and client.

Emphasis was laid on the pre-trial process when considering young defendants. The ability of the defendant to fully absorb matters such as the charges, evidence and various legal issues is often underestimated. Advocates representing young defendants, and those preparing their training, should have access to universally agreed resource material on mental, physical and emotional development for different ages²⁵.

Prior to the trial, a conference away from the court setting is crucial to fostering trust and understanding, with ideally at least one 'acclimatisation' conference before instructions are taken and the case discussed in detail. Young defendants may not fully appreciate the importance of providing details which could be

²² www.opsi.gov.uk/acts/acts1999/ukpga_19990023_en_1

²³ See guidance when permission is given for a statement to be read in a trial because the witness is unavailable, ill or deceased (S.116 Criminal Justice Act 2003,) <http://www.legislation.gov.uk/ukpga/2003/44/section/116>

²⁴ Criminal Procedure and Investigations Act 1996

²⁵ See the Practice Direction handed down following R v. Thompson & Venables 1993 (Archbold 4-96b).

essential to their defence. The advocate should take great care in eliciting proofs of evidence, where possible expanding on the proof in conference. Defence advocates should also be sensitive to deficiencies in vocabulary, and be prepared to ask other lawyers and the judge to simplify their language if necessary: overall a change of culture is required.

The practitioners felt that in grave cases involving young defendants, I.Q. tests would prove useful, facilitating a proper assessment of the client's aptitude to absorb the proceedings. The vast difference between a defendant of high intelligence and one of significantly low mental aptitude is frequently transparently manifest in court but not until the defendant enters the witness box, which is likely to be too late in the proceedings.

Consideration should be given to the concentration span of young or vulnerable defendants, who should be excused attendance in court during lengthy legal arguments. Judges should order breaks where appropriate. Research into teenage development suggests that it is difficult for a young adult to function effectively before around 10am, and this should be taken into consideration. Serious concerns may arise in grave cases involving young defendants housed in secure training centres, which are located across the country. One practitioner cited a recent case in which a 15 year-old defendant was woken at 5am to be transported to where his trial was taking place. This would be potentially damaging to the defendant's capacity to handle court proceedings and questioning. Under these circumstances the advocate should ensure that the situation is brought to the court's attention and adequate time is requested.

It was suggested that the Judicial Studies Board should develop suggested generic directions, drawing on similar work regarding complainants in sex cases. These would assist the jury in understanding matters such as language development, and clarify that physical development does not necessarily accord with mental or emotional development.

Defence advocates consider that their role is often misunderstood as being to 'destroy' the witness. Those who have brought to the fore the issue of the treatment of vulnerable people in court - including academics and some practitioners - can be reluctant to recognise the crucial importance of the defence advocate's role in the adversarial trial system.

Chapter 8: CPS Trainer

Mark Lake, Head of Legal and Management Training for the CPS, outlined current training provision, and offered some suggestions as to how high-quality ‘exemplar’ courses might be constructed for Higher Court Advocates regularly dealing with cases involving vulnerable witnesses and defendants. He particularly emphasised that the CPS considers the appropriate questioning of child witnesses to be of primary importance not merely in relation to the victims of sexual offences, but in relation to any child witness of any offence, whether or not a victim, and whether giving evidence in the youth courts, the magistrates’ courts or Crown Court.

When considering advocacy training needs in respect of CPS advocates, it should be borne in mind that the CPS currently employs around 4,000 practitioners, not all of whom are in need of, or will have access to, the same level of training. Much CPS in-house training focuses on awareness-raising, early identification of vulnerabilities, and practical measures to assist.

The CPS employs several formats as part of its training programme:

- Group or ‘face to face’ learning;
- ‘E-learning’ through the Prosecution College; and
- Policy and Legal Guidance documents.

In 2010/2011, ‘face to face’ learning opportunities have included 13 courses for practitioners specialising in child abuse cases (CA); 8 courses on rape and serious sexual offences (RASSO); 22 on rape and serious sexual assault (RASSA); and some pre-trial witness interviewing courses for specialists. All of these take into account the need for appropriate handling of vulnerable witnesses and defendants. The CA course in particular addresses advocacy techniques and questioning styles, and cites NSPCC/Nuffield Foundation Good Practice Guidance²⁶. Training builds on the Introduction to Prosecuting for new recruits, which deals with issues including special measures directions and the obligation on the part of police for early identification of vulnerable or intimidated witnesses, together with the Code of Practice for Victims of Crime²⁷ and the Witness Charter²⁸.

Theoretical aspects of handling vulnerable witnesses are taught through a number of online-based learning packages, including witnesses with mental health diagnoses; young people; those with learning disabilities; and the elderly. There is a clear focus on identifying vulnerable witnesses, and on the availability of special measures, with less emphasis on providing advocates with opportunities to practise their advocacy skills.

E-learning opportunities include a three-part package on special measures, available to all staff and including sections on the protection of witnesses, the trial process, and cross-examination techniques. In addition, there is an e-learning module on Hate Crime, available since May 2010, which has a focus on victim and witness vulnerability. The CPS is shortly to produce a Mental Health e-learning package, following work with the mental health charity MIND²⁹. It will cover aspects of trial advocacy, but will not allow for the practical application of skills development.

²⁶ http://www.nspcc.org.uk/Inform/research/findings/measuring_up_guidance_wdf66581.pdf

²⁷ http://www.cps.gov.uk/victims_witnesses/victims_code.pdf

²⁸ http://www.cps.gov.uk/legal/v_to_z/witness_charter_cps_guidance/#Toc194480781

²⁹ http://www.mind.org.uk/campaigns_and_issues/current_campaigns/another_assault/improving_peoples_court_experiences

Good practice guidance forms an important part of the training and support offered to CPS advocates. The NSPCC/Nuffield Good Practice Guide has been made available to all prosecutors, and to all external advocates through Instructions for Prosecuting Advocates (a regularly updated document drawn up in consultation with the Bar). Other policy and legal guidance documents include the CPS guidance on Safeguarding Children as Victims and Witnesses, and on Prosecuting Cases of Child Abuse. Both specifically reference the NSPCC/Nuffield guidance, which was endorsed by the Director of Public Prosecutions. Existing legal guidance was amended to take into account the findings of the NSPCC/Nuffield report, for example the timing of opportunities provided to child witnesses to refresh their memory of their initial ABE interview. Further guidance was also issued to prosecutors following the Court of Appeal's judgement in *Barker [2010] EWCA Crim. 4*. In addition, CPS Instructions to prosecuting advocates – which accompany all briefs – explicitly refer to the need to ensure questioning techniques are appropriate for any child witness.

Training courses for Higher Court Advocates are undertaken on a pass/fail basis for Crown Court advocacy. The courses are cumulative, and consist (as of March 2011) of the following segments:

- Non-jury advocacy I (2 days). If passed, progression to
- Non-jury advocacy II (2 days). If passed, progression to
- Jury advocacy, including all stages of the trial (3 days)

The third section is currently being re-written and there may be scope for inclusion of training on vulnerable witness handling.

The CPS does not provide training on the handling of vulnerable defendants. However, existing training on handling child witnesses in court is likely to be of assistance, and there is some input on the effects of a mental health diagnosis on a defendant's capacity to deal with the rigours of a trial. Again, these aspects of training are restricted to limited courses aimed at a small proportion of Higher Court Advocates.

CPS advocates are assessed internally against a form based on the CPS National Standards of Advocacy. The assessors are Crown Advocates, who are themselves assessed for consistency by external assessors.

Though Mark Lake recognised that providing advocates with opportunities for skills practice is important, he felt there were practical difficulties to be overcome; in his view, it was not always appropriate or feasible to practise skills on people with vulnerabilities, whether children or those with learning difficulties; and role play may not be either realistic or desirable. He had been giving consideration to the possibility of designing a training module based on the practical application of advocacy skills, and asking a vulnerable person who had given evidence at trial to be interviewed about his or her experiences. It was felt this would help foster a sense of empathy and understanding amongst trainees.

Compulsory training in handling vulnerable witnesses and defendants would present significant practical problems: 'face to face' training for more than 4,000 CPS prosecutors would be highly resource intensive and impossible to achieve under present financial restraints. Restricting training of this kind to those with higher court rights would be a more manageable – though nonetheless significant – task.

With an estimated 98% of the CPS's cases being dealt with outside of the Crown Court, many will involve victims, witnesses and defendants experiencing a range of vulnerabilities, including mental health diagnoses or learning disabilities. It was therefore felt that skills training should not be restricted to Crown Court advocates. A possible solution raised was 'ticketing' a defined number of advocates, internal and external, equipped to handle cases involving particular sensitivities, such as the use of intermediaries. This would suggest a training programme offering 'levels' of training to advocates dealing with different complexities within the trial.

Given the resource implications for a public body such as the CPS providing adequate training for all its advocates, it looks to 'new media' formats where possible. Mark Lake strongly felt that e-learning was an effective use of limited resources, and was keen to explore the possibility of joint e-learning programmes with the Bar. He saw considerable scope for training in areas such as podcasts, video casts, 'webinars' and other forms of remote learning. Good practice guidance could be developed using court transcripts and reconstructions, and the CPS had some expertise in developing materials of this nature in-house. He welcomed the 'toolkit' provided in this Report (Part Five: Toolkits) as an excellent resource for practitioners. He recommended that it should complement other resources such as the MIND toolkit, and perhaps go on to form the basis of further e-learning modules. In response to this report and the training developed as a result, the CPS would look to apply for accreditation as a recognised provider of such training in-house, regulated and assessed by the Bar Standards Board as appropriate.

Chapter 9: The Police

The WG heard evidence from DC Jon Shirley of the Metropolitan Police. DC Shirley has extensive experience in dealing with child victims of crime.

He explained that police training in the handling of young or vulnerable witnesses is largely theoretical, and suggested that, in its current form, training falls short of the needs of officers, witnesses and their families. He commented on the usefulness of a one-off opportunity for new police officers to attend a Learning Difficulties advocacy group, at which officers were able to interact with people with learning disabilities on a range of tasks/activities not related to crime.

DC Shirley highlighted the increasing reliance of the Police Force on the use of intermediaries, who could, as with all professionals, vary significantly in quality and/or helpfulness.

It was noted that difficulties experienced by child witnesses in particular could be significantly exacerbated by the long gap between first contact with police and the trial (a year having a significant impact on a child's development). He emphasised the particular importance of the police establishing a rapport with child witnesses and maintaining that rapport.

Chapter 10: Respond UK

Louise Wallis is a Policy and Campaigns Officer at Respond UK, a voluntary sector organisation working with victims and perpetrators of crime - particularly sexual abuse - who have a diagnosed or undiagnosed learning disability. They provide risk assessment, parenting and family assessments, counselling, psychotherapy and family therapy for adults, young people and children. They also train professionals, and provide education and preventative workshops for adults and young people on Positive Relationships, Bullying and Disability Hate Crime. Their work has expanded to include those with autistic spectrum disorders, mental health problems and other developmental disorders such as ADHD.

Her central concern was that advocates should be aware of the wide spectrum of learning disability so that they could aim to establish, as far as possible, the individual's particular condition. Most learning disabilities are not classifiable. There is a disproportionately high number of people with learning disabilities in prison: whilst just 2% of the UK population has a learning disability, this proportion increases to 10% amongst prisoners.

She threw out a general challenge to the WG and to the criminal justice system: can we ensure access to justice for defendants or witnesses who will never be able to understand or fully engage with the legal process as it stands?

Case Study: John

John was referred to Respond in 1999 for psychotherapy. He was 24 and lived in a group home in the Midlands. He had Cerebral Palsy which affected his ability to communicate and meant that he used a wheelchair most of the time. When he was 20 he was involved in a local theatre group, often spending Saturdays involved in rehearsals. He was befriended by a 50 year-old man, who one day took John back to his house, holding him against his will for 24 hours. He showed John pornographic videos, raped him repeatedly and kept him locked in the flat while he went out. John vividly told of his fear watching the man disappearing down the street, and his terror wondering about what he should do.

The man eventually released John, who returned to the home. He wasn't questioned about where he had been; he had not been missed, and it was not until his mother arrived later that she noticed John didn't seem himself. John explained what had happened and his mother brought it to the attention of the managers of the home. The mother left it in the hands of the home, who failed to contact the police until 14 weeks after the incident. John's learning disability had led the home's managers to delay reporting the incident, since they felt he would not be believed.

By this late stage there was no forensic evidence. John was interviewed, and the case made it to court - where the jury found the defendant not guilty due to a lack of evidence.

Our witness emphasised that those with learning disabilities may not have autonomy in their personal lives and are likely to be used to depending on others to make decisions. Their dependency can manifest itself in a need for approval, and the tendency to tell others what they think they want to hear. Expressing their own feelings may be very difficult because they may not have been encouraged to think about their own needs, or supported to develop those skills.

Many have a deep mistrust of the legal system: they may not have been believed or understood at the police station, and may be considered a nuisance or not credible as witnesses. At court they often struggle with the

legal process, and in the witness box they are frequently easily confused. Hostile cross-examination may cause great anxiety, and make them feel undermined, and they may suspect judges, juries and barristers of having a prejudiced view against them.

Social isolation may mean that people with learning difficulties have a limited vocabulary and suffer from loneliness: Respond calculates that a third of learning disabled people have no friends, leaving them vulnerable to being preyed upon. In addition, Respond estimates that 15% of all forced marriage across a range of social groups involves at least one party with a learning disability.

It is crucial to adjust the way legal concepts are communicated, eliminating jargon or complex phrasing in favour of clear, simple language. In court, questions must be asked slowly, and adequate time given for comprehension. Repeating a question may assist the witness in absorbing what is required; tone of voice is very important and must not be aggressive.

Many people with learning disabilities associate formal situations with fearful circumstances, and would benefit enormously from a greater degree of court familiarisation.

There should be generic directions about learning disabilities where diagnosed, so that the jury is not left in ignorance about how the disability may have affected the witness' presentation at court. Advocates and judges alike should be alert to the fact that adults with learning disabilities may have a strong desire to please, which can give rise to suggestibility.

Louise Wallis suggested that a series of checklists should be prepared jointly by the Bar Council and the General Medical Council, to provide help to advocates and judges in handling witnesses/defendants with particular learning disabilities and other function inhibiting conditions. These could be placed online.

Case Study: Mark

This case study shows how effective multi-agency working can assist the pursuit of justice.

Mark is thirty and lives in a small residential home. His learning disabilities have not been formally assessed. He is able to care for himself and can travel familiar short routes on foot. He is physically mobile, but has severe verbal dyspraxia, a developmental disorder affecting the coordination of movements for speech. As a result of his dyspraxia, he has no intelligible speech. He has however, a very good understanding of language, spending much of his time listening to the conversation of others and successfully using Makaton signs and Picture Communications Symbols for expressive communication.

In December 1997, Michael was subjected to a serious sexual assault. He sustained a fractured skull, eye injuries, anal injuries and cuts and bruises. The assailant was known to Michael. The Police were called, and a Sexual Offences trained officer was part of the team that responded.

Five days after the assault, Mark's speech and language therapist contacted the police to ask if she could help in taking a statement. The police who planned to take a videotaped victim statement knew they needed an expert in both dyspraxia and Makaton signing to assist in the process. Three weeks later, the police contacted the therapist informing her that, in their assessment, Mark had a mental age of six. There was therefore a clear need to establish his ability to understand and answer questions as part of a victim statement, as well as his capacity to be cross-examined. A report was completed, which found Mark to be able.

In preparation for making a victim statement, police submitted a list of questions they planned to put to Mark. A one-hour pre-interview meeting was planned for the day of the victim statement, during which Mark met with his speech and language therapist, the specially-trained police interviewer and the rest of the police team. Mark was encouraged to draw pictures and use a set of six picture communication symbols for various

words/concepts (yes, no, I don't know, I like it, I hate it, I don't understand). A set of about fifty other symbols was also prepared, to cover possible topics that might arise.

The interview statement was carried out at the child protection interview suite at the local general hospital. The police officers wore ordinary clothing, and Mark was accompanied by his key worker from the day centre who watched the interview from behind a two-way mirror. Mark was able to establish a good rapport with the interviewing officer and the interview itself took about 70-minutes. Mark was able to identify the assailant from a photograph, and use symbols to answer questions put to him. He drew a set of pictures relating to the crime scene showing where the attack took place. At the conclusion of the interview Mark was read the statement, and asked to use his symbols to confirm or disagree with what had been recorded.

The statement was read to the court during the week-long trial. The defendant was convicted and sentenced to a term of imprisonment.

Chapter 11: Social Workers

Geraldine Monaghan and Mark Pathak of the Liverpool Investigations Support Unit (LISU) spoke to the WG about their experiences in supporting vulnerable witnesses through trials. They have particular expertise in building profiles to assist adults with learning disabilities in giving their evidence. Profile reports produced by the LISU are considerably fuller and more detailed than those produced by Intermediaries, since the social worker has access to the witness for a far longer period.

Their main concern was the need for both judge and counsel to understand that witnesses with learning disabilities may do all they can to conceal lack of understanding of the questions they are being asked. Their concealment may be so effective that advocates fail to realise that their witness has lost comprehension. Additionally, advocates should be aware of the extreme complexity and variability of learning disabilities. Each witness vulnerable in this respect will have needs that differ significantly from needs the advocate may have encountered elsewhere: no assumptions can be made. The tendency to refer to adults with learning disabilities as having a 'mental age' is misleading and unhelpful: an adult with the 'mental age of ten' will have considerably more life experience than a child of ten years old.

Both recommended that witness profiling reports should be made available to both defence and prosecution counsel, and also to the judge: this ensures that all involved in the trial are fully aware of the relevant issues. Ensuring the trial date is set and the judge identified early is essential to ensuring full witness profiles can be prepared, and all the necessary information shared.

They also felt it essential that vulnerable witnesses are made aware that they can give evidence in court if they wish, rather than via the live TV link, which is often the default choice. Giving evidence via a TV link can be positively unhelpful to adults with learning disabilities, hampering their effective communication and damaging their sense of being fully included in the trial process. They expressed the view that it is helpful for witnesses to be positioned near the judge, whose presence and assistance can be very reassuring for learning disabled adults who might be intimidated by the formality and strangeness of the trial process.

The crucial importance of using appropriate language was again emphasised. The social workers offered the useful example of a witness fully grasping the concept of having been standing 'in front' of the defendant when an alleged incident of abuse took place – and yet not understanding the concept of the defendant having been standing 'behind' them.

Chapter 12: Intermediaries

Evidence was provided by Amanda McLellan, an intermediary experienced in a number of trials, particularly those involving people with learning disabilities; and David Wurztel, a barrister who has designed and delivered a number of training programmes for intermediaries.

Amanda McLellan emphasised the importance of a pre-trial meeting to establish ground rules, including clarifying the role of the intermediary. She encouraged the WG to consider when witnesses should view the ABE video (i.e. before the trial or only at court), and other matters including the positioning of the video screen in court, and timing within the trial for the showing of the ABE video. Intermediaries are professionals from a variety of backgrounds, including education, speech therapy, medicine and psychology.

It was felt the judge has a role to play in explaining the role of defence counsel, noting the content of the intermediary's report, and intervening where appropriate to assist the vulnerable witness/defendant. The role of the intermediary in the trial may not be fully understood by some advocates, and the judge should assist here.

The positioning of the intermediary in court is important: Amanda McLellan favoured sitting next to the witness, and only being visible on screen when intervention is required.

To be of most assistance, intermediaries' reports should contain a high level of detail specific to the needs and vulnerabilities of a particular witness, and should be available well in advance of a trial. Developmental assessment should permit a report to state the level of understanding of a vulnerable witness or defendant. To be of most assistance, the report should articulate the complexities and differences between various kinds of learning difficulties.

It was felt that these helpful strategies might assist advocates when handling child witnesses or defendants, or those with learning disabilities:

- Using 'signposting' questions – i.e.: "We are going to talk about your home now..."
- Being led by the child's choice of vocabulary for objects/body parts, particularly for the genitals.
- Being led by the child's choice of vocabulary for those perceived to be in authority (i.e.: some children may be used to calling teachers 'Mr' and 'Mrs', and would be reassured by the same language. Others may find it less intimidating to use first names)
- Repeatedly use the child/vulnerable witness' name.
- Recognising the importance of correctly interpreting body language, including being alert to counter-intuitive body language (a child may nod not in affirmation, but because they no longer understand a line of questioning).
- Reconsidering received wisdom on questioning: for example, 'piggy backing' may either confuse or assist a witness, depending on their level of understanding.
- Seeking to achieve clarity in questioning, thus helping a child understand process of evaluating evidence:
 - ◆ You told the PC X it happened in your bedroom

- ◆ You told X it happened in the bathroom
 - ◆ They cannot both be true.
- Ensuring that prepared questions contain no commas or semi-colons.

It was essential that advocates establish in advance a system by which the intermediary can signpost problems arising for the vulnerable witness during questioning (such as obviously losing concentration). The advocate should be willing to seek a break where a child appears to be getting distressed, and consider the use of strategies for calming a witness, such as breathing techniques, providing a stress ball or identifying a familiar 'token' that a child might like to have with them. 'Play therapy' can offer a useful model of strategies that allow children to become more responsive and better able to concentrate.

Advocates must have regard to the fact that some adults with learning disabilities may have developed 'coping strategies' that disguise their level of understanding such as nodding to show they understand, when in fact they do not.

In Amanda McLellan's experience, the promise or affirmation that children and vulnerable witnesses are expected to say is far too complex, and can be very intimidating to repeat, particularly in a full court. Vulnerable witnesses who struggle with its archaic language risk their confidence being severely undermined before their role in the trial has begun.

Chapter 13: Witness Support

Shaun Bruwer is the Witness Service Manager at the Central Criminal Court. He is on secondment from Thames Magistrates' Court, and has worked on Witness service issues for eight years. He describes the *raison d'être* of the Witness Service as 'reducing barriers.'

He observed that there often appeared to have been ineffective communication with witnesses about the special measures available. Although most young witnesses will have had ABE interviews and therefore given evidence via TV link, he believes that many would prefer screens and/or anonymity. This is particularly so when the case involves gang-on-gang violence: he believes that a number of cases have failed because of that concern. He considered, however, that if Witness Services had access to the witnesses sufficiently early, they would be able to clarify what options might be available, helping witnesses make an informed decision. At present, Witness Services only become involved after the trial date has been set.

Our witness also expressed concern regarding some inconsistency of practice across the country. For example, in West London there is a policy of screening the TV monitor, presumably to prevent the defendant seeing the witness. These inconsistencies may lead to police officers having different experiences of common practice in particular courts, contributing to mixed messages being conveyed to witnesses. It is also clear that some police officers are primarily concerned with getting a witness to court under any circumstance - perhaps promising more than can be delivered. He noted inconsistencies across the country regarding who will be present in the TV room with the witness, and suspected that decisions on this matter are made on an ad hoc, case-by-case basis.

The equipment necessary to deliver a TV link frequently causes problems, often because of insufficient training of court staff, and differences in the type of equipment used. This can be the cause of considerable delay, which is very disturbing both for witnesses and for their parents or carers – who are often in need of more support than the witnesses themselves.

Our witness also noted that whilst Witness Services is intended to be available for the defence, he knows of only two cases where this facility has been used to assist defence witnesses in his eight years working on witness support issues.

He finally commented that Witness Services, when advising witnesses as to what to expect during the trial, state that prosecution counsel will attempt to get the defendant convicted, and that defence counsel will set out to confuse the witness. He agreed that it would be helpful for Witness Services to reconsider whether this constitutes the most appropriate way of describing the various roles.

Chapter 14: Nuffield Foundation/NSPCC

Members of the WG have undertaken detailed discussions with Joyce Plotnikoff who, together with Richard Woolfson, has been responsible for *Measuring Up? Evaluating implementation of Government commitments to young witnesses in legal proceedings* (2009), the Nuffield Foundation/NSPCC sponsored research on questioning young witnesses. Their evidence stressed the need for early identification of communication problems, which will often be not immediately apparent.

With some research³⁰ suggesting that as many as 60% of young defendants experience some form of communication difficulty, swift identification of the problem and the appropriate adaptation of questioning methods are essential.

At a talk in Middle Temple in February 2011, Joyce Plotnikoff emphasised the usefulness of intermediaries in ensuring witnesses are able to put their evidence, and advocates are equipped effectively to test it, providing useful examples of intermediary interventions permitted by judges:

- **Prosecution barrister:** It was about 1pm. What was the weather condition? Was it sunny, rainy, foggy, what was the situation, what was it like?
- **Intermediary:** What was the weather like?
- **Defence barrister:** One time, the once, a different time from the second incident?
- **Intermediary:** How many times have you been to Bob's house?

Aspects of communication to be considered by practitioners handling vulnerable people included avoiding 'tag' questions such as He didn't touch you, did he?, which combine a positive assertion with a negative, and are likely to prove difficult to unravel. Figurative patterns of speech should also be avoided: witnesses with Autistic Spectrum Disorders in particular are likely to be perplexed by such phrases as *Can you put us in the picture?* They also urged consideration of body language, citing anecdotal evidence of young witnesses feeling intimidated by aggressive patterns of speech.

On the 10th June 2010 a seminar took place in London, at which crucial issues relating to the experience of children in court were examined. The background papers to the seminar raised some key questions to be addressed:

- Are existing measures sufficient to ensure questioning is developmentally appropriate?
- Are advocates hindered from putting the defendant's case if they cannot lead the witness?
- How should developmentally appropriate questioning be addressed in advocacy training?
- Are there alternatives to the current system?

The papers have been useful to the WG, and whilst there are inevitably differences in approach from the practitioner's point of view to some of the topics raised, they deserve wider dissemination. A short report of

³⁰ For summary see 'Locked Up and Locked Out: Communication is the Key', Youth Justice Agency/Royal College of Speech and Language Therapists (June 2009)

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progress against the *Measuring Up* report, together with an account of the June 2010 seminars, is shortly to be published. For more information contact jplotnikoff@lexiconlimited.co.uk.

Part 3: The Analysis

Chapter 15: Pre-trial

The WG urges care in the analysis of statistical surveys carried out in the past, which have formed the basis for criticism of the legal profession and judges in terms of the experience of vulnerable witnesses attending criminal trials. For example, it is clear from the terms of reference that such surveys as *Measuring Up* (NSPCC/Nuffield Foundation) focus exclusively on the experience of prosecution witnesses, rather than a combination of those participants and child defendants. Where commentaries based on research of this nature criticise the questioning of witnesses as seeking to cast doubt on the credibility of a witness' evidence, the WG asserts that there is no difference between the approach of defence counsel, and that of the prosecution advocate challenging the account given by a child defendant. This is not a partisan problem.

Identifying vulnerability in a witness or defendant before the commencement of the trial is crucial, and HMCS resources should be fully exploited on a regular basis. Parents and carers are best placed to establish levels of concentration and understanding in a child or person with learning disabilities, but are rarely asked to do so. Experts such as psychiatrists should be consulted where appropriate. There needs to be a culture change: advocates should ensure they have sufficient knowledge and training to be able to identify where a commonly encountered vulnerability exists. The onus should be on the advocate to make the identification and adapt his approach accordingly, rather than on the witness to cope with the advocate's usual method.

Advocates and judges alike should be aware of 'complex vulnerabilities'. One contributing factor such as youth may mask another, such as a learning disability or mental health diagnosis. Unless information on the capacity of a vulnerable person to partake in the trial is established early on, it is impossible for appropriate decisions to be made at the PCMH stage.

Preparation by way of conferences in advance with vulnerable defendants is crucial, since they may need considerable time to absorb charges and their implications. The challenge of explaining common legal concepts such as joint enterprise to young defendants should not be underestimated: without a proper understanding of the ways in which the prosecution might prove guilt, and what might defeat the charge, full instructions may not be taken.

There are a variety of ways in which witnesses can be better prepared for court. These include having access to material such as leaflets and DVDs provided by government departments and awareness raising bodies such as the NSPCC. Pre-trial familiarisation visits have been shown to be enormously beneficial. These should be conducted in a manner that will reassure the witness: advocates should be sensitive to possible sources of anxiety, such as a vulnerable witness in a sex abuse case meeting a male advocate in a small, enclosed room.

A 'rapport' session in which the advocate can build a better understanding of the witness' capacity/communication needs appears to be essential in some cases. During case preparation, the advocate should consider finding out the names of the witness' siblings, or other day-to-day information such as where they attend school, and where they may have been holiday. This assists with effective communication during the trial. Where the complaint relates to a domestic setting, knowing the layout of the witness' house is useful, since a young or vulnerable witness may use unusual terms for placement (for example, 'the top of the stairs' may actually refer to the bottom steps).

It is important that the expectations of parents, guardians or other family members are carefully managed as to the use and relevance of special measures. Applications for special measures must be submitted in good time, with supporting statements where necessary. Witness Support volunteers should be trained to have a

better understanding of the role of defence counsel and cross-examination, ensuring witnesses are not misinformed about roles and potential approaches just before they enter court.

Cases involving vulnerable people require particular attention to pre-trial preparation regarding matters such as disclosure by the prosecution. Late disclosure, with neither party having adequate time to consider the impact of the material, may lead to witnesses being unsettled and confused, where earlier disclosure may have allowed more time for investigation and contextualisation of apparently prejudicial material. This is particularly the case when considering third party material in the hands of doctors, Social Services Departments and schools.

Chapter 16: ABE Interviews

Evidence suggests a failure on the part of the police to prepare properly for ABE interviews at all times. Too often police fail to consult appropriate experts such as psychologists or psychiatrists to assist in identifying vulnerabilities in a witness, or intermediaries who might assist with the questioning. The CPS is keen to assist from the earliest stages, but find the police frequently delay notifying them until the point of the charging process.

The following key areas are likely to render ABE interviews of vulnerable witnesses ineffective:

- Failure by the police to seek the services of an intermediary;
- Failure to ensure effective sound quality on the ABE video;
- Overlong rapport stages during which young witnesses in particular are likely to lose concentration;
- Repetitive interviews going over the same ground, eliciting unnecessary and often contradictory material;
- The ABE interview DVD not being watched by both advocates before trial, with any inadmissible parts being identified in good time to either edit by agreement, or have argued as a preliminary issue; and
- Failure to reduce agreed facts to writing, thus reducing the portions of the ABE which must be played to the jury.

Careful consideration should be given to when the witness sees the interview to provide an opportunity for memory refreshing: it should not be invariably assumed that the witness should view the interview at the same time as the jury during evidence in chief. If the witness views the video beforehand, consideration should be given to recording – either in writing or by video – anything significant that occurs during the procedure.

It is crucial that the advocate does not rely on the ABE interview to base their understanding of a child's capacities: much can change and develop in the period between the ABE and the commencement of the trial.

It is important for the police to engage with children to allow the development of a good relationship with the child, and an effective understanding of the best ways to communicate. Skills acquired through real-life interaction with child witnesses can alter/improve the confidence and skills of the child witness between first contact with police and the start of the trial, helping to ensure they are equipped to give best evidence.

Theoretical training will not provide police officers with the skills needed to best support young/vulnerable witnesses – even opportunities for police officers to interact with young/vulnerable people can provide useful insights that may provide a fairer deal for such individuals in the criminal justice system. The CPS is actively keen to involve the police in training on ABE interview techniques, including appropriate language use, structure and the use of potentially difficult concepts such as the timing of events. This would be highly beneficial.

Chapter 17: Role of Judges

The role of judges is pivotal if vulnerable witnesses and defendants are to have fair and proper access to justice. As in all other respects of the trial, the judge holds the reins of fairness, and must play an active part in ensuring that witnesses can give their evidence fairly and that advocates are able to examine the evidence in pursuit of the overriding objective.

They must also be vigilant, equipped with the skills to identify vulnerabilities even when not yet identified by counsel. A pre-trial meeting with judge, counsel and witness is of particular importance in this respect. Judges would benefit from the provision of generic directions, as suggested by the JSB, to assist juries with understanding the effects of learning disabilities, or the limitations of children's understanding. In modern British society – which socio-economic studies have shown to be increasingly disparate and including many more single person households than ever before – a juror's familiarity with children or any vulnerable person cannot be assumed.

It will frequently be necessary for a judge to play a more interventionist role in trials in which there is a vulnerable witness or defendant. Judicial interventions may occur at any time during the trial, and must avoid compounding the jury's prejudice against defence advocates by appearing to correct or 'discipline' them in the presence of the jury.

When appropriate, the court should exercise its statutory power to exclude the general public and/or press (apart from one press member, if nominated) from the giving of evidence about sexual offences³¹. Such special measures are likely to immeasurably enhance a vulnerable witness' confidence, particularly where they are concerned about speaking in public because of their particular vulnerability. Whilst such occasions are likely to be very rare, it is surprising that the WG came across no case in which a s.25 Youth Justice and Criminal Evidence Act 1999 order had been made.

Judges may have a role to play in conveying to the jury matters which defence counsel would have wished to put to the witness, but which they feel they cannot owing to particular vulnerabilities. They may also assist with matters which do not need to be explored in great detail with the vulnerable witness, such as independent evidence contradicting some of the witness' account (such as school reports or medical records etc.).

Unless there is a good reason not to, the judge should always see the child witness with counsel before the trial, and consideration should always be given to the same procedure being carried out with any vulnerable witness with particular disabilities. The WG urges all judges to consider the compelling evidence of the impact of children of coming to court to give evidence in a criminal trial. Anything that can be done to minimise the negative impact of court proceedings through familiarisation should be done. This should of course be tempered by the circumstances: an appropriate room should be made available, and consideration should be given to the potential for misconceptions or feelings of intimidation, particularly in cases involving very young children, or witnesses likely to feel physically vulnerable.

Evidence suggests that where judges maintain a proactive 'human touch' – for example by personally thanking a witness, with no preference indicated to either defence or prosecution – it can be highly beneficial to the witness, and reduce anxiety and the stress of the trial experience.

³¹ Section 25, Youth Justice and Criminal Evidence Act 1999 (<http://www.legislation.gov.uk/ukpga/1999/23/notes/division/4/2/1/9>)

The current Judicial Studies Board Serious Sexual Offences Seminar, in which judges are trained to try offences such as rape, provides exercises using intermediaries. These effectively demonstrate the way an objective intermediary will intervene where necessary, assisting both the judge and the witness in making sure that the questioning is appropriate and fair. Use of an intermediary can be a useful facility, not only for the witness but also for the judge, by allowing him/her to retain a distance from the arena, and thus ensuring that interventions are as limited as possible.

Chapter 18: Role of Intermediaries

Judges and practitioners with experience of working with intermediaries tend to think highly of them. Experience suggests they should be used wherever appropriate – a message reinforced by the JSB, who strongly encourage judges to use intermediaries where necessary, and who recommend seeking a referral report when in doubt.

All advocates should be made aware of the circumstances in which the use of an intermediary would be advisable, as well as the mechanisms by which they may be identified and engaged in the case. Courts should keep a copy of both the Intermediary Training Handbook and the Procedural Manual³² to be consulted where appropriate.

It is essential that applications for the use of intermediaries be made in the context of special measures, within a timescale sufficient to permit the provision of adequate funding, and the matching of the appropriate intermediary to the case.

There should be a 'Ground Rules' hearing in each case without exception, and the intermediary should be present to assist the parties and the court. A recent survey³³ found that such meetings took place in only 47% of trials where an intermediary had been used. It is clear that even if such meetings took place on the first day of trial (though is not recommended best practice), they were still likely to be of some use (P. Cooper [2009] Registered Intermediary Survey, City Law School). Defence advocates should not be suspicious of gaining information or assistance in this forum.

Problems are likely to be encountered in terms of availability of intermediaries; at March 2011 there were 112 'active'³⁴ intermediaries, registered through the Witness Intermediary Scheme operated by the National Policing Improvement Agency on behalf of the Ministry of Justice. There can be considerable difficulties in identifying the appropriate intermediary for the particular vulnerability faced by the witness/defendant. In the future, sufficient intermediaries should be registered so that there is a resource sufficient for the purpose.

³² http://www.cps.gov.uk/publications/docs/RI_ProceduralGuidanceManual.pdf

³³ "Tell Me What's Happening: Registered Intermediary Survey (City University Law School 2009)" <http://tiny.cc/cecd1>

³⁴ Active RIs are available to undertake work. 36 additional 'inactive' RIs are currently unable to accept work for a range of reasons.

Chapter 19: Intermediary/Psychiatric Reports and Witness Profiles

It is crucial that everyone involved in the trial process - including police officers carrying out ABEs, the CPS and solicitors, counsel and judges - should be aware of the possible need to obtain the assistance of intermediaries and psychiatrists/psychologists, and the mechanisms by which this may be achieved. Judges and advocates must be supported and equipped to identify relevant factors in the vulnerability of a witness or defendant (i.e. in comprehension, concentration, grasp of concepts such as time), or indeed whether they had - or ought to have had - a mental health diagnosis.

Where psychiatric nurses are available on-site (for example at the Central Criminal Court) they are able to provide judges with swift helpful assistance, and point defence teams towards sources of further assessment and reports. An in-house psychiatric nurse, if based at each of the larger Crown Court centres, could potentially operate a 'triage' system, identifying the cases most urgently requiring referral.

It should be noted that at present defence counsel is not required to disclose psychiatric reports about defendants which have been obtained by the defence. A change in approach should be considered: there can be no difficulty and much to gain in relevant parts of the report being disclosed, if doing so will inform the trial of vulnerabilities which should be allowed for. The sole purpose of disclosure is to assist in the management of the trial.

Profiles produced by Social Workers such as those employed by the Liverpool Investigations Support Unit tend to be fuller, more detailed and more explicitly personal than those produced by intermediaries. They should be shared with advocates on both sides, and with the judge.

Chapter 20: Communication and Questioning Methods

Appropriate communication and questioning methods are key to dealing effectively with vulnerable witnesses, whether their vulnerability lies in youth, learning disability or a mental health diagnosis. The WG recognises that questioning vulnerable witnesses and defendants is a specialist skill and should be recognised as such by practitioners, judges and training providers.

Child witnesses in particular may have very different communication foibles, even when compared to other children of the same age. Advocates should be alert to factors such as use of personal slang with which both advocate and jury will be unfamiliar. Essential preparation should include finding out and absorbing the developmental stage the witness is likely to have reached, and formulating questions accordingly. Where information is not available from the ABE interview etc., requests should be made to the judge at the PCMH for the information to be provided to the court and to defence counsel.

There is no reason why vulnerable witnesses cannot refresh their memory from any appropriate statement or interview. The provisions of Section 139 of the Criminal Justice Act 2003³⁵ should be employed wherever appropriate. The giving of evidence – whether in chief or cross-examination – should not be a memory test for any witness. Children are susceptible to leading questions, and frequently – though not invariably – cannot process ‘tag’ questions. Leading questions are a mainstay of the cross-examining advocate’s technique, and a change of culture is necessary. With effort, questions can be formulated in almost every situation which do not lead, but which nonetheless test the evidence.

The WG recognises the frequently perceived conflict between enabling a vulnerable witness to give his best evidence, and the pursuit of a fair and effective defence. An understanding of what constitutes a witness’ ‘best’ evidence will help inform the debate: best evidence is not necessarily merely the account given in the first complaint or on the ABE, but must essentially be truthful evidence about the events concerned in the trial. Obtaining best evidence may therefore result in a different account from that relied upon by the prosecution, and it is in these circumstances where appropriate and effective testing of the complainant’s/prosecution’s evidence is essential.

Particular care and preparation is necessary when considering how to put the defendant’s case to a child complainant. In *R v Barker*³⁶, the Court of Appeal recognised the need for an advocate to adapt his approach to employ forensic techniques suitable for questioning a child witness. The judgment, however, needs to be examined with considerable care: there is no suggestion on the part of the Court of Appeal that defence advocates should be prevented from putting the defendant’s case to a child witness, or from asking any other relevant questions that can only be dealt with by that particular witness. Key to a successful approach is recognising that one size does not fit all, and that where the advocate’s technique requires modifying, training should explore means of challenging evidence without confusing the witness. The real skill of formulating short, simple questions can be taught and learnt, and the practice in formulating such questions repays the effort – and sometimes, humility – involved.

³⁵ <http://www.legislation.gov.uk/ukpga/2003/44/section/139>

³⁶ <http://www.bailii.org/ew/cases/EWCA/Crim/2010/4.html>

Where the witness or defendant persistently fails to understand questioning, the fault usually lies with the advocate. Practitioners should therefore aim to:

- identify vulnerabilities and witness limitations at the earliest possible stage;
- carefully analyse the material that needs to be put to the witness/defendant;
- use short questions and simple language, allowing adequate time for comprehension;
- use a normal, non-aggressive tone;
- avoid tag questions, double negatives and confusing or complex phrasing;
- be aware of limitations in the witness'/defendant's grasp of abstract concepts such as time and the sequence of events;
- identify areas that can be better put to other witnesses; and
- identify areas of evidence that may be best dealt with not with the witness but by the parties putting before the jury agreed evidence from third parties (such as Social Services' records).

Witnesses and defendants with learning disabilities have particular needs. They may have learnt modes of behaviour leading to a need for approval, which can make them temper their responses merely to please the advocate. They may have low self-esteem and be unused to being taken seriously; hostile cross-examination can both frighten and undermine. They may feel anxious in formal situations, and experiences at the police station – where they may feel disbelieved, misunderstood, or not considered credible – may have lead them to mistrust the legal system.

Practitioners would benefit from a 'toolkit' for use in preparing lines of questioning, outlining common problems encountered when handling vulnerable witnesses and defendants, and proposing suggested solutions. The imperative when adapting and refining questioning techniques is primarily to allow effective testing of the evidence.

Giving evidence over a 'live link' is frequently the default provision for vulnerable witnesses. However, in the case of learning disabled adults this can be positively unhelpful: removing them from direct communication with counsel can hamper their understanding of questioning. It may also damage their sense of having been fully involved, and having had their 'day in court'.

The use of an intermediary can often assist both the judge and advocate – for example, an intermediary will object to confusing questions and prevent the need for the judge to do so.

Chapter 21: Coping Strategies

Consideration should be given to a child's capacity for concentration. Children are not expected to concentrate at school for longer than around 45 minutes: this offers a useful model for the maximum period for which a child or person with learning difficulties could be expected to concentrate during the trial. Children with learning disabilities are unlikely to be able to focus their attention for as long as 45 minutes. Judges have a role to play in ordering breaks, keeping a watch on the witness, and any other strategies that might assist a witness in giving evidence effectively. Those courts piloting the double-shift sitting³⁷ may be used for such trials, since shorter days are generally beneficial.

In grave cases, young defendants resident in secure training centres may have to travel some distance to the trial. This should be taken into account to avoid defendants being exhausted by the time the trial has begun.

Illiterate witnesses and defendants may have developed strategies to try and avoid revealing the extent of their weakness. Illiteracy is far more commonly encountered at court than is recognised. Where it is identified, effective cross-examination remains possible without undermining the witness by revealing their deficiency.

Some strategies counsel may be inclined to adopt to assist a vulnerable witness in coping with the trial may raise ethical questions. For example, a child may be reassured to be told we are not going to talk about [XX] at the moment, so that when the subject arises shortly after, they are disarmed and put at ease. However, this may amount to deceiving the witness: care must be taken not to mislead the witness in an effort to reassure them.

The (statutory) wording of the promise/affirmation is complex and archaic, and problematic for some children. Struggling to repeat the wording may damage the self-esteem of a witness to the extent of affecting the evidence they can give at trial. There can be no reason why the witness cannot be given the words in advance.

Learning disabled adult witnesses benefit from being seated near the judge, whose presence can be reassuring in an intimidating and unfamiliar court setting.

³⁷ Two separate shifts in each court room, with the first shift 9am-1.30pm and the second shift 2pm-6.30pm. Breaks to be taken in the middle of each shift.

Chapter 22: Training

This report amply demonstrates the clear and pressing need for training in how best to handle vulnerable people in court. We unequivocally recognise this as a specialist skill. There is no coordinated system of training, and a recent survey of current training provision from Circuits, Inns and other training institutions demonstrated patchy availability³⁸. It is a question of re-professionalising barristers, and calls for leadership from the top: the Bar Council/BSB should lead the co-ordination and regulation of training.

Following the statutory definition of competence in the Youth Justice and Criminal Evidence Act 1999, and the consequent rise in the number of child witnesses and those with learning disabilities being deemed competent, the number of cases involving vulnerable witnesses has increased. There has been a sea change in prosecution policy, meaning that cases relying heavily on evidence from vulnerable witnesses are now prosecuted wherever possible, consistent with the CPS Code for Crown Prosecutors.

These cases are not confined to allegations of sexual abuse. It was clear from evidence gathered by the WG that those with learning disabilities are frequently exploited in many areas of their lives – financially, sexually and physically. In addition, many defendants suffer from a degree of learning disability. No advocate can therefore assume that only those who practise in cases of sexual assault need this training: training should be compulsory for all practitioners from the earliest stages of the profession through to the most experienced advocates.

The WG advocates training that leads to certification, with no counsel having conduct of cases involving vulnerable witnesses or offenders unless certified. A system by which only advocates certified or ‘ticketed’ to take cases involving vulnerable witnesses – akin to the system for those qualified to prosecute or adjudicate on serious sexual offence cases – would allow for greater clarity and assure standards. It would also provide a clear indication to wider society that the Bar takes this topic very seriously – so much so that a higher level of professional training is required to deal with such cases. To remain certified, advocates should be expected to comply with the ring-fenced CPD requirement, and to attend a suitably accredited course every five years at least. The list of certified advocates should be kept up to date, and practitioners should be included on the list immediately having completed training.

We appreciate there are inevitable practical implications for restricting access to cases involving vulnerable people to certified advocates. There is a free market in the provision of legal services, and a very wide range of bodies would have to agree an accreditation system to give it legitimacy. These include the Legal Services Commission, the Law Society, ILEX Professional Standards, employers of barristers and the Bar Standards Board. It could also be argued that if the training recommended in this report is made compulsory for all advocates, there is no need for the accreditation or ‘ticketing’ system. Resolution of these matters is outside the power and remit of this WG, but the ATC will have its own view on the rigour with which advocacy training must raise and maintain standards. If the Bar could take the lead by recognising the importance of this topic by adopting certification, it would be a valuable first step.

The design of any training programmes should consider the following questions:

- Does the training directly address the training needs identified in this Report?
- What are the desired learning outcomes?

³⁸ J. Plotnikoff and R. Woolfson. Unpublished survey conducted for NSPCC-Nuffield Foundation seminar (June 2010). For more information, contact jplotnikoff@lexiconlimited.co.uk.

- Can the training be delivered in more than one format? Will those unable to attend 'live' training sessions have access to online training, or be able to view the essentials of the training course on DVD?
- Has an effort been made to use a variety of learning methods, with methods adopted because of their suitability to the course content and skills to be imparted?
- Has the training been prepared with appropriate reference to experts and specialists?

Possible Training Programme Structures

Training programmes should aim to provide a mix of formats e.g. lectures, 'live' training using actors where possible, and 'master classes' using experts. Groups should aim to include new practitioners together with more established advocates; this enables a useful mix of enthusiasm and confidence. During plenary sessions, groups should ideally be no larger than 6 trainees, with the most experienced practitioners evenly spread throughout the groups and encouraged to take a 'syndicate lead' role.

Evidence gathered by the WG suggests the following as possible structures for the development of training programmes:

- A series of 3 seminars spread over a period of 6 months:
 - ◆ Child witnesses/defendants (including use of intermediaries)
 - ◆ Hidden vulnerabilities (including learning disabilities, literacy etc.)
 - ◆ Particular difficulties arising in sexual offences.
- Each seminar to comprise three sessions:
 - ◆ One session providing information and context – perhaps with an expert present
 - ◆ One session providing practical exercises undertaken in small groups
 - ◆ One concluding plenary session, which could be split between the start and end of the seminar and could include a demonstration
- A series of 'master class' presentations, held at court locations such as the Central Criminal Court or Manchester Crown Court. These to demonstrate the skills of preparation for trial and conduct of examination in chief and cross-examination of vulnerable witnesses/defendants. Particularly experienced advocates should conduct these and the content could be based on a transcript of evidence elicited in an actual trial. A recent trial held at the Central Criminal Court provides a useful example of the kind of trial which might inform a 'master class': in 2010 WG member Johannah Cutts QC prosecuted a trial in which sexual allegations were made by three men with cerebral palsy. None of the complainants had a learning disability, but their physical limitations made communication more difficult than for an able-bodied witness of the same age. Such physically disabled members of the public may well be able and willing to play the role of the vulnerable witness in a training setting.
- A session in which a DVD of the examination of a witness, including common mistakes made by advocates, is shown to practitioners. This DVD to be stopped,

and a suitable expert (such as a child/adolescent psychiatrist) to outline problems and discuss possible solutions. The next part of the DVD to show the advocacy performance altered to address the problems first encountered; this is similar to one of the methods used to demonstrate the cross-examination of a vulnerable teenage witness in the Serious Sexual Offences Seminar created and provided by the Judicial Studies Board.

- An occasional talk from a respected and experienced advocate outlining a relevant case. The talk should cover difficulties faced when handling a vulnerable witness/defendant; how they had sought to address the difficulties encountered; and the outcome and lessons learned.

Online ‘e-Learning’ Training

It is clear that online ‘e-learning’ training offers a helpful solution to training large numbers of practitioners, particularly where resource constraints preclude conventional face-to-face training, and that the ‘new media’ should be embraced in the development of future training programmes. CPS in-house e-learning packages provide some helpful examples of what can be achieved. However, it is best suited to providing general skills in the early identification of vulnerabilities and the support and guidance on offer, rather than equipping practitioners with the practical skills to handle vulnerable witnesses and defendants. There is no substitute for providing trainees with the opportunity to rehearse the skills they have learnt in a court-room setting.

Cascade Training

There may be some benefits to a ‘cascade training’ approach. This consists of training provided to a core group, who then distribute training sessions at other locations drawing upon what they have been taught. It demands:

- a high level of commitment from those assisting in its delivery;
- relevant and practical course content;
- materials constantly updated as the cascade moves down;
- CPD accreditation, as an incentive (for trainers and delegates);
- considerable and dedicated central administrative support;
- constant evaluation; and
- maintaining momentum by actively managing delivery of the course.

Training Providers and Partners

Training should be provided by accredited trainers from the Inns, assisted by the Criminal Bar Association and relevant professional training bodies (such as the Royal College of Psychiatrists) where appropriate. The burden of training should be shared equally between the Inns.

Specialist Bar Associations should have a part to play as part of their educational programme and lecture series. The Bar Council may be in a position to host some initial sessions of training. The Circuits should make a commitment to responsibility for making vulnerable witness/defendant training available, alongside the 2 hours annual minimum requirement for CPD.

Trainers conducting syndicate groups should make an assessment as to whether the practitioner has fully absorbed the learning outcomes and should be certificated to act as counsel in cases with vulnerable witnesses or defendants. Practitioners who are not certificated should be provided with sufficient information – linked to the programme’s learning outcomes – to establish where they have failed and how they can improve.

If appropriate, combined or ‘mirror’ training with the JSB would be highly beneficial.

A possible model training programme³⁹

A specification for a model training programme, based on the recommendations set out in this Report, has been prepared by the child/adolescent psychiatrist Dr Tony Baker in consultation with colleagues at Kingston University, and is set out below. It demonstrates how co-operation between the Bar, specialists in vulnerability (in this case those who deal with children, either at different stages of development or with additional mental health or learning disabilities) and training experts can produce a vigorous, demanding and potentially highly valuable training programme. It is a model that could be adopted for training in a variety of areas with which the WG has been concerned.

The WG is grateful to Dr Baker and his colleagues for taking up the challenge to meet our exacting requirements. The WG is confident that this is a workable and worthwhile model, and is working with bodies including the Bar Standards Board to establish appropriate funding streams.

³⁹ It should be noted that this is an example only of a programme which meets the recommendations in this Report. It is not put forward as the only possible model, and the WG encourages the development of other training programmes which meet the criteria.

Specialist Advocacy Training: A Draft Proposal

Introduction

Kingston University's Institute for Child Centred Interprofessional Practice (ICCIP) was established in 2008 to promote an interprofessional approach to practice development, training and research at all levels, and in every pursuit where children are the users or recipients of services that are intended to support healthy growth and to safeguard their welfare. The professions that are represented in the Institute include; health and social care; education; early years; psychology; youth justice; business and law. It also works in partnership with St. Georges Hospital and the Royal Holloway Centre for Abuse and Trauma Studies (CATS).

Dr. Tony Baker, Honorary Professor for ICCIP, Consultant and Child Psychiatrist and an expert witness in legal proceedings concerning children, approached ICCIP with the intention of developing a training scheme for barristers who may find themselves tasked with eliciting evidence from children and vulnerable persons (witnesses and defendants) in criminal proceedings.

Special measures are currently used within the Court environment to reduce the stress on such witnesses and defendants. However there is a need to ensure that the system for engaging witnesses in a question and answer session in a public forum regarding matters which are inherently distressing is not only effective in assisting a jury to determine the facts, but at the same time minimises the possibility of the process itself causing harm and preserving justice and fairness for alleged victims and defendants.

There are particular difficulties in managing this task with people who are young, immature, and emotionally vulnerable or who have special needs in respect of their understanding and ability to communicate. The training of advocates does not normally address the special knowledge and skills that are necessary for the preparation and carrying out of this most difficult of advocacy tasks.

ICCIP has created a team with Dr. Baker to develop training that could assist barristers, judges and intermediaries in eliciting evidence in the courtroom and also to address quality and practice issues in relation to the initial formal interview - Achieving Best Evidence (ABE) that is recorded and presented as the witnesses evidence in chief.

Aims and Objectives

The aims and objectives include:

- improving the outcomes for witnesses and defendants (*Measuring Up*, June 2009: Nuffield Foundation and NSPCC);
- improving practice and enabling advocates to elicit evidence effectively and ethically;
- imparting knowledge of relevant aspects of child development, especially cognitive, language and communication, emotional and moral development;
- identifying harmful practices that should be avoided;
- assisting with preparation for the examination of young vulnerable witnesses;
- enabling the special communication skills of those who need to undertake this very challenging task;

- enhancing the knowledge, skills and expertise of advocates and decrease performance anxiety;
- embracing the tension between demands for children's welfare and the pursuit for justice.

Training Proposal

It is proposed that the Specialist Advocacy Training course will take place over two whole days separated by four weeks.

The core curriculum will focus on two main aspects:

1. how children and vulnerable persons function psychologically in this context;
2. how advocates address their task in practice.

With regard to children and their development, it will be necessary to contextualise critical aspects of cognitive development, language ability and emotional responsiveness. It is proposed that course participants are introduced to children and young people (via a DVD presentation) at different developmental stages to illustrate the impact on communication of issues that may arise within a question and answer format.

The challenges for the advocates themselves when they alone have the responsibility for conducting this very particular task on behalf of their client are complex. There are ethical issues to address within the process and the training will continually reference these. Anxiety can be minimised by careful preparation and analysis of the existing evidence of witness statements and ABE interviews, which enables the advocate to assess the best approach to use in the examination of the witness or defendant.

Training will highlight how to conduct that preparation and analysis, what reference material to use, how to frame questions and how to present the defendant's case to the witness, especially where the defendant is a close relative of the witness. The training programme that is proposed aims to address all the above in a coherent, relevant way for course participants who are used to being 'instant experts' on case related topics. It is anticipated that the recipients of the training are sophisticated academic learners who can assimilate information quickly and apply their learning to their immediate task.

Day 1: Knowing the Child (birth to 19 years)

The programme on Day One will include a multimedia presentation to present children and adolescents in a relevant developmental framework that does not focus on the science (we are not training advocates to become psychologists!) but on the application of all that is known and researched in this field. This will be a summary which illustrates how these developmental and ethical issues can impact on communication in this particular situation; a situation which will probably be novel to the witness and the advocate. There will be a presentation about the psychological impact of traumatic experience of being a victim or witness to violent crimes (including crimes of a sexual nature) and how this may manifest in the courtroom as the witness is asked to give their recall of events which may still cause intense emotional reactions. The following is indicative of the content that will be included in Day One:

- addressing the challenge for advocates;
- setting the task in context;
- introduction to child development;
- emotional impact of trauma;
- the child in focus – illustration of developmental stages;

- the child in court – defendant versus witness;
- the child with additional needs.

Prepared lecture material will be supported by video materials to engage the trainees in thinking about the children they will meet and what may be happening in their minds while they are engaged in the legal processes. Participants will also be given reading material to support the learning process.

Online Exercise

During the intervening four weeks the participants will be required to engage in an online process to explore an information library which can provide them with relevant written and video material to support their learning.

Each person will be given a personal log-in password to a secure web site. Case material will be available for up to six cases involving young vulnerable witnesses and defendants with witness statements, records of interviews and ABE recordings. Intermediaries will be included in some of these cases. Participants will choose one of these cases to prepare for cross examination. The brief will be set out with clear instructions from the defendant.

In addition, a case will be presented on-line involving a child defendant and three child witnesses - for preparation for live cross examination of child actors on the second day.

Day 2: Advocates in Practice

The content of Day Two will focus on the advocate's practice. Participants will present their preparation for cross examination in small groups. This exercise will inevitably lead to engagement with peers which will strongly enhance the learning process. There will be input and discussion in relation to ethical issues in practice. Management of witness emotions and distress will also feature on this second day. Timing and pace, delays, interruptions, use of language, working with interpreters and intermediaries and pitfalls putting the defendant's case will all be within the curriculum.

Day Two content will include the following:

- peer to peer learning – small group learning re preparation for cross-examination;
- ethics;
- linguistics;
- intermediaries;
- managing witness emotions;
- advocates court practice;
- communicating effectively with child witnesses;
- plenary do's and don'ts – building a tool kit

In the afternoon a mock up court will sit and advocates will be given an opportunity to cross examine children (actors) via video link on the basis of their ABE interviews and witness statements in a serious case of alleged sexual assault and GBH/ABH. Participants will take their 'places' as jury members, judge, court clerk, advocates and solicitors.

Development and Delivery

The training programme will be developed by a group of people who are based at Kingston University (KU) with additional support from police advisers and barristers. It is hoped that a representative of The Bar Council or Advocates Training Council will also give guidance as the project takes shape. Realistic case material will be prepared which will demonstrate a range of features that are typical in practice.

As this is a multi-media training course, it will include presentations about key issues that will be available on DVD and some of the material will be filmed at KU to illustrate age/phase issues relating to children and young vulnerable witnesses who have developmental or additional needs.

The course will require active input from participants and it is an aim that there will be opportunities for participants to share their own experiences to facilitate the learning process. We would want to see senior barristers joining younger colleagues in group discussions. It is hoped that there will be an opportunity to involve judges in this process.

The course will be designed to enable trainers who are lawyers to facilitate and deliver the training - subject to them being trained at KU to use the material. However, the online component will be managed by KU who will be responsible for ensuring that the supporting material continues to reflect developments in legal practice and remain relevant and up-to-date. Expert input will be provided through the recorded presentations. However, if there is a requirement for specialist input to training events, this can be discussed.

If the Mock-up Court element is to be implemented, there will be additional costs for the actors and their supporters.

The course may be accredited by the ATC/Bar Council for CPD. There may also be an opportunity for official recognition or possible accreditation by Kingston University.

Once agreement and approval by all parties is reached (regarding commissioning of the project), delivery could be available within an agreed time (approximately six months).

Options for further development

This training could be commissioned as a whole project which would then become the property of the client purchaser. KU would retain some IPR to enable it to develop similar training for other clients using the background data and principles.

The training could be developed and released to ATC/The Bar Council under license from KU, with a sliding scale of fees for each tranche of participants. In this model KU would retain IPR and would be able to license other client groups to access the training.

The proposed training offers a sophisticated model with high development costs for film material and IT for the on-line component. Those materials could be delivered off-line at lower cost but if it is anticipated that the take up of the training will be high, then the relatively higher expenditure for the on-line component becomes proportionately smaller – which would be reflected in lower fees for greater numbers participating.

The cost of producing realistic case material would be greatly lessened if actual case material could be made available for cases that have closed, but have been heard in the public domain. The commissioning agents may be able to bring some influence to bear in obtaining authority to release actual case material under very strict license.

The estimated costs for development of the training materials, the on-line set-up costs and delivery of training for future trainers is in the region of £58,000. A less sophisticated package could be made available for £45,000.

The decision about which model of training package to choose would depend on whether this is to be seen as a one-off enterprise with less than 100 overall participants or whether it is to be a continually evolving programme which could be delivered throughout the UK and Ireland to advocates and barristers in both Criminal Courts and Family Courts. The latter will become more relevant after the recent Judgement of Baroness Hale. It can be seen that if 100 people are to be trained for a total cost of £58,000 the cost for a two-day course separated by four weeks, with high-tech input would be £580 per head plus venue and trainer costs.

Conclusion

The task of eliciting evidence from any witness ethically and effectively is what training in advocacy is about. To be faced with the task of asking questions of very young children, via a video link and possibly with an intermediary, is a very daunting challenge for all involved. So too is the task of eliciting answers upon which a jury and court can rely when the person to be questioned has limited mental ability, impaired social and communication skills, for example on the Autistic Spectrum, or for whom the process of recounting a past experience triggers alarm, panic and extreme distress.

The only people qualified to address such witnesses are advocates, and in preparation for their task, we believe that advocates need to become experts in their own right in respect of child development issues that are precisely relevant to the task. The potential harm that the legal process can cause to vulnerable witnesses is known to be great. The training promises to give advocates enhanced knowledge, skills and expertise in the way they approach vulnerable witnesses and defendants so that justice is served with the least possible harm.

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Part Four: Recommendations

Recommendations for Training Providers

A comprehensive modular programme of training in vulnerable witness and defendant handling should be put in place for all criminal and family practitioners, both new and experienced. The Bar Council/BSB should take the lead in instigating a fundamental change of culture, in which advocates' practices are adapted on a witness by witness basis, rather than the witness being expected to fit into an advocate's 'usual' methods.

No training under this Report's provision should be instituted without approval from the Advocacy Training Council, so that standards are moderated and the training is true to the recommendations contained in this Report.

The training should become part of compulsory pupillage and New Practitioner training, in addition to CPD-accredited advanced training courses for those between 4-8 years' Call and more experienced advocates. Additionally there should be courses which practitioners of all levels could attend together.

Training courses should no longer be only training of advocates by advocates. The time has come for the Bar to draw upon the expertise available from medical, psychiatric, psychological and other disciplines. The key elements of all training in this field should be three-fold (and expert input should be obtained for all of these):

- **How to identify witnesses and defendants who may be vulnerable.** For example, for training in discerning when a witness has a learning disability the course will need to draw on non-legal expertise in that field and make reference to academic and research work in that area. The use of an expert in preparing and presenting the training (as modelled in the Kingston course) will be invaluable. Without some specialised knowledge of what to look for, the advocate is not properly equipped to discharge his duty pursuant to the Code of Conduct.
- **How to consider and obtain measures in terms of procedure.** These may include employing special measures or the use of an intermediary or other communication specialist to assist a vulnerable witness or defendant. These are not limited to statutory special measures, but should embrace an exploration of practical adjustments to the preparation of a case and the hearing of evidence.
- **How to make adjustments to practice,** such as preparing a young defendant for trial, and timing questions suitably for a learning disabled witness. Non-legal expert input is essential, as is the opportunity the construction of appropriate questions.

The programme should embrace a wide variety of methods of teaching. Elements of the programme should be suited to 'cascade training', to enable a large number of advocates to be reached. The use of actors, DVD's and expert input should be explored in all forms of this training.

The Bar Council/BSB, in partnership with the Inns of Court, should make available funds to develop the programme and provide dedicated administrative support for this category of training.

Co-operation and cross-fertilisation between the Judicial Studies Board, the ATC, the Bar Council/BSB and the Criminal Bar Association and other equivalent bodies should be actively pursued wherever possible.

Training should be open to non-Bar advocates requiring vulnerable witness or defendant handling skills but the focus of the programme, and priority for places, should be for advocates in private practice who do not have access to in-house advocacy training programmes.

Training groups should ideally be no larger than six participants per group, set within the context of a larger training session.

The ideal is for groups to comprise a mix of advocates, with New Practitioners training alongside the most experienced.

Leadership for the required change of culture will only be exhibited if the BSB ring-fences, as a minimum, 2 hours' CPD points annually to be dedicated to training in vulnerable witness/defendant handling, for all advocates practising in criminal or family law. The next stage is to give detailed consideration to a programme of 'ticketing' advocates who are to engage in cases where children or other vulnerable witnesses or defendants are involved. The WG has discussed making 'ticketing' a firm recommendation in this report. Despite inevitable hurdles, we do recommend that the BSB adopts such a system in order to encourage other providers or regulators of legal services such as the SRA to do likewise.

Professionals such as intermediaries and child/adolescent psychiatrists must not only be consulted during the development of training programmes (see Recommendation 4), but also involved during the delivery of the training. This will facilitate fruitful discussion of any practical problems that may arise, and enable barristers to ask questions of experts outside the confines of individual cases.

Recommendations for Practitioners

All advocates should be issued with 'toolkits' setting out common problems encountered when examining vulnerable witnesses and defendants, together with suggested solutions (see Part Five: Toolkits). Bodies including the ATC/CBA/FLBA should disseminate the 'toolkits', and they should be made available via the Bar Council website, the ATC website and those of appropriate specialist Bar associations.

The 'toolkits' should form the background to practical training exercises, and should be considered amongst the essential elements of trial preparation.

The executive summary of the 2009 NSPCC study should be compulsory reading for advocates (see Part Six: Further Resources.)

All vulnerable witnesses should be offered a pre-trial visit to court, with both advocates and the judge present. The visit should accommodate the needs of the witness. Consideration must be given to limiting anxieties: a child witness in an abuse case may be intimidated by contact with a male advocate.

The pre-trial visit could form part of a 'rapport' stage, during which advocates build an understanding of the communication needs, strengths and vulnerabilities of their witness/defendant. It should therefore be a priority, where possible, for the trial advocates to be present when a vulnerable witness visits court.

Practitioners and judges in cases with child witnesses should have access to source material setting out 'thresholds of comprehension' at various stages of child development. Such documents should be made available as a peer-reviewed and approved resource for advocates assessing the best way to approach a child witness or defendant's evidence. A subsidiary effect of the Model Training Programme being designed by Dr Baker's team in conjunction with the WG will be the provision of such source material.

The use of leading questions in cross-examining vulnerable witnesses, defendants and children - all of whom may not be able to unpack or have the confidence to disagree with assertions contained in leading questions - should be the focus of particular training input. The members of the WG take the view that there can be no objection to the use of leading questions which are an important tool in cross-examination per se, but if leading questions put to a vulnerable witness or defendant are not short and straightforward, they can be unfair.

The party calling a vulnerable witness must discharge a duty of disclosure going beyond the legal minimum. For example, there should be a presumption that third party material (such as Social Services files) will be

inspected by someone present at the trial, and not only inspected by a police officer or a CPS lawyer unable to be at the trial to see how the issues develop.

Where a witness or defendant has an established disability, both parties should consider drafting an Agreed Practice Note to assist the jury, setting out difficulties likely to be encountered during questioning. The Note should be provided in advance of the witness/defendant being called. It should be approved with the trial judge, who should call for such a note if the advocates have failed to prepare one.

Prosecution advocates conducting a PCMH should have viewed the ABE interview before the trial commences. This early preparation should be remunerated as a matter of course.

Practitioners should identify in advance areas which may be too complex to be put to the witness, and which should instead be put to a more appropriate witness such as a police officer or social worker. For example, it is not always necessary or indeed productive for either side to put an earlier inconsistent account given by a vulnerable witness to the witness in cross-examination, especially if the witness is unlikely to be able to appreciate what he/she is being asked to do. Areas of confusion might include remembering a particular occasion; agreeing or disagreeing with what it is alleged the witness said; providing an explanation for inconsistent statements; and appreciating that the question is intended to determine the extent to which the inconsistency is unjustified.

Practitioners should identify in advance areas which cannot be appropriately put to the vulnerable witness. The judge should deal with such matters with the jury, together with an explanation of why they cannot be put to the witness and whether any evidence has been given upon the topics by other witnesses (and see Recommendation 31). By way of example, if there are relevant and admissible comments on third party records such as Social Services files, there is rarely a need to put those to a vulnerable witness. The trial judge can explain to the jury why such agreed facts have not been put to the witness.

Practitioners calling vulnerable witnesses or defendants should be alert to inappropriate questioning, and ready to intervene where necessary. It is, however, preferable that such intervention should be from the judge, rather than the party calling the witness. Making such an intervention can be lightly explained to the jury, clarifying that the approach is being taken in order to enable the witness to best answer the questions, rather than as a criticism of the advocate conducting the questioning.

Recommendations for the Judiciary

Trial Management powers should be used to the full where a vulnerable witness or defendant is involved. It should be presumed that the judge will ensure the developmental stage of any child and the circumstances of any other vulnerable witness will be taken into account in the method and extent of questioning permitted. The judge should consider requesting a statement to be made by those having day-to-day contact with the vulnerable witness/defendant, and particularly involvement in decision-making on their behalf. The statement need not be made by a professional; a parent, guardian or social worker will suffice. The statement should cover areas such as particular communication or concentration needs and habits that may affect the trial. It should be used by all parties, and should form the basis of an Agreed Practice Note/Trial Protocol for the trial. Such Notes/Protocols may be initiated by either side or by the judge. Consideration of the need for such a document should be given at the PCMH.

Judges should be proactive in ordering breaks where appropriate, to preserve vulnerable witnesses/defendants from undue stress. However, evidence suggests that a changed line of questioning can be as effective as a break and that many witnesses would rather get through the evidence than have recurring breaks. Which strategy is best for a particular witness requires judgment and sometimes acting against the wish of the parties involved.

The JSB should give thought to the possibility of developing generic directions regarding vulnerable people in court, to ensure the jury is fully informed as to how a particular vulnerability may affect the witness or defendant. The Equal Treatment Bench Book should contain some 'sample directions' in this field, in the same format as the recently published and up-dated JSB Crown Court Bench Book.

As a common and usual courtesy, Judges should thank witnesses for making the effort to come to court (rather than thanking them for their evidence which may give the appearance of being partisan).

It would be a positive innovation in the judicial management of trials for defence counsel to be obliged to disclose at least parts of the defendants' psychiatric reports to the court, for example where there is no psychiatric issue in the case.

Where a practitioner has identified areas which cannot appropriately be put to the witness, the judge should put them directly to the jury, explaining the reason for this approach (and see Recommendation 24).

In the introduction to the evidence of a vulnerable witness or defendant, the judge should tell the jury that he and counsel for either side will intervene where questioning is considered to be confusing or inappropriate, so as to enable the witness to best answer the questions being asked.

Recommendations for Trial Management

When a child is giving evidence, the court should sit for no longer than 45 minutes without a break.

Consideration to similar restrictions should be given if a witness/defendant has other vulnerabilities limiting concentration.

Young defendants held in secure detention centres some distance from court should not be expected to attend court early in the morning. Consideration should be given by the Presiding Judges of the relevant Circuits to moving the case closer to the detention centre, rather than requiring the child to travel for many hours during the days when the case is being heard.

The promise/affirmation should be amended to simpler phrasing, and the witness should be allowed to see it before giving evidence.

Recommendations for Police

Police officers should have better and continuous training in handling ABE interviews. The CPS should be consulted as to the appropriate mode and content of training. The perceived decline in the quality of ABE interviews is a cause for concern.

The distinction between ABE interviews with children and those with other significant vulnerabilities should be examined with care before commencing an interview. The training of police officers needs to reflect the distinctions, otherwise long and often repetitive interviews result.

Police training to deal with vulnerable witnesses should be based on practical exercises. Where this is not possible, opportunities should be provided for police officers to interact with people with learning disabilities to build a better understanding of the complexities of their needs.

The CPS should be consulted at a sufficiently early stage to permit input into the ABE interview of a vulnerable witness.

The police should routinely consider whether an intermediary should assist with the ABE interview.

Police undertaking the ABE interview must familiarise themselves with essential details such as the layout of a house, names of siblings etc., prior to commencing the interview. Obtaining this information from a vulnerable witness can be time consuming, and draining for the witness.

Other Recommendations

Psychiatric nurses should be placed in large court centres and they should operate a 'triage' system, identifying witnesses/defendants most urgently requiring psychiatric referral/assessment.

The SRA should be approached as to whether there is scope for attaching a compulsory requirement in this field to solicitors' training.

HMCS should make their 'Going to Court' DVD available to schools as part of the Citizenship syllabus. It should also be published via the Law Society and Bar Council websites, in addition to the ATC website.

The CPS should put in place a procedure whereby a CPS lawyer is available to advise police officers as to the most appropriate special measures likely to be made available for a particular witness. No assurance should be given to a witness as to what special measures may be available, unless a lawyer has been consulted and has given advice.

Witness Service volunteers should receive training, ideally involving defence advocates, as to the purpose of cross-examination.

The Government should consider again introducing the 'full Pigot' recommendations regarding the pre-recording of cross-examination of child witnesses expeditiously after the allegation has been made. Professor John Spencer had made the powerful arguments⁴⁰ that such schemes are successfully in place in other jurisdictions, notably Sweden and Norway.

We have also considered the question of special advocates for vulnerable witnesses, who would have the non-partisan role of representing the witness as opposed to the role of prosecution counsel. Such provision would be an innovation which is unlikely to be on the political agenda in the near future but the concept deserves consideration – many vulnerable witnesses, in particular complainants in serious cases, have a substantial stake in the proceedings where aspects of their personal life are subject to scrutiny in public. A similar exercise was carried out by Baroness Stern and her team during the work done for The Stern Review⁴¹ published earlier in 2010. She looked at other jurisdictions where alleged victims in certain circumstances can have court appointed legal representation. Other jurisdictions offer useful comparators. In Ireland, the Sex Offender's Act 2001 introduced such advocates where the accused wishes to refer to evidence about prior sexual history of a complainant (despite the trial judge's leave being required before any such reference can be made). The complainant's position can be argued by the advocate during the application to adduce the evidence. Even if the application is successful, the special legal representative still has a role in assisting the court to limit the scope of cross-examination. In all criminal trials in France there are two decisions for determination: the verdict and the compensation (the latter being a civil decision). The victim in all criminal allegations can become a *partie civile* and be represented when the decision on compensation is made. These are instructive examples but are clearly far outside the remit of this report: we make no recommendations in this area except to hope (as did Baroness Stern) that the concept gains the discussion and thought we consider it deserves.

⁴⁰ Children's evidence: the Barker case, and the case for Pigot [2010] 3 Archbold News 5-8

⁴¹ http://www.equalities.gov.uk/pdf/Stern_Review_of_Rape_Reporting_1FINAL.pdf

Part Five: Toolkit

Why use this toolkit?

This toolkit is designed to assist barristers to play their part in ensuring vulnerable witnesses and defendants receive equal access to justice. It suggests strategies that could be deployed to overcome difficulties that may be encountered both when preparing for court and at court; sets out some common mistakes and suggested solutions; and provides details of sources of further information. It is in four parts:

1. Preparation before the trial
2. Questioning during the trial
3. Common problems and suggested solutions
4. Further resources (Part Six of this report)

It is hoped this toolkit will enable Counsel to handle vulnerable witnesses and defendant in a manner that is sensitive to their needs, whilst recognising that the primary purpose of calling witnesses remains to obtain evidence before the tribunal of fact, and then to rigorously test those parts of the evidence which are controversial.

Before the Trial

The following provides guidance on getting the most out of a conference or pre-trial witness interview with a vulnerable witness or defendant, and on preparing practically for the trial.

Introduce yourself and explain your role in the case. Ask who is to remain in the room and establish that this is acceptable to the witness or defendant. Sometimes supporting parents or carers may commence the session with the witness/defendant, but you may want to ask them to leave later in order to build a rapport. This has the added advantage of permitting a defendant to ask any questions he might have in privacy (this is likely to be less important for a witness).

If it is known, explain how long the session is likely to take and what will happen at the end of it. Try and keep it as short as possible to ensure that concentration is not lost. Consider breaking a conference with a defendant into separate parts – perhaps the first for rapport building, and the second to discuss the case in more detail.

Mitigate the unexpected or unusual. A vulnerable person will often find unexpected and unusual situations – such as sudden changes to an expected timetable – disconcerting and difficult to handle. Counsel should be aware of this, and put in place support or adjustments to mitigate this as far as possible.

Explaining the process. Take time to explain clearly to the individual what will happen during the court process at each stage, and what they will be questioned about in court. This will do a great deal to lessen anxiety.

Pre-Court familiarisation. Many people with learning disabilities associate formal settings with stressful or anxious circumstances. These will benefit greatly from a greater degree of court familiarisation. Witness Support (available for both prosecution and defence counsel) can help with arranging a pre-trial visit and accompanying the witness or defendant on the visit. This could be coupled with the opportunity to view the ‘Going to Court’ DVD.

Humanising the experience. If appropriate, make arrangements for judge and opposing counsel to meet the witness before the trial. This is particularly useful for ensuring potential intimidating figures are introduced in an informal and unthreatening environment.

Establish boundaries by being clear about what you can and cannot do for a witness/defendant, dispelling any illusions or preconceptions. Police Officers as well as parents/carers may inadvertently give

the wrong impression about what a barrister is permitted or prepared to do. It may difficult for a vulnerable person to easily shake off this information.

Manage expectations about special measures: Communicate clearly and effectively with the witness and their family to ensure they fully understand the purpose and extent of any special measures or adjustments.

Court vs. Video link: In considering special measures, ensure the witness is fully aware that they can give evidence in court if they wish, rather than through a live TV link (often the default choice). Giving evidence via a TV link may be unhelpful to adults with learning disabilities, hampering their effective communication because they fail to feel fully included in the trial process.

Special Measures Applications: Applications for the use of special measures should be properly supported by evidence, and made well in advance of the trial. It is crucial that you gather information for this at the earliest stages.

As far as possible, **ensure there are no background noises**. These can prove distracting, particularly to those with learning difficulties who may be oversensitive to noise. Aim to keep the situation as calm as possible.

A vulnerable person may have developed **an attachment to a particular object**, which can be as simple as a piece of string. They may wish to hold or fiddle with it during the interview. Research suggests that this action can aid concentration, and that removing the object may cause unnecessary distress.

It is not necessary to try and prevent repetitive movements such as rocking or flapping hand-gestures. These can be effective self-calming strategies.

Be aware of potential complexities. Advocates should be aware of the extreme complexity and variability of learning disabilities. Each witness (whether vulnerable by virtue of age, learning difficulty, or because of mental issues) will have needs that differ significantly from needs the advocate may have encountered elsewhere, and no assumptions can be made.

At this stage, Counsel should ensure a Trial Practice Note of boundaries is drafted for the use of advocates and the trial judge.

The Trial Practice Note/Trial Protocol may include the following topics:

- An agreed description of the nature of the vulnerability of the witness/defendant;
- A list of any particular developmental issues/milestones reached or unattained, which should be taken into account when questioning and in trial management;
- For those with learning disabilities/a mental health diagnosis, an outline of particular concerns which should inform questioning or trial management;
- How long the witness should expect to be questioned in one session, and what breaks will be taken;
- What arrangements are to be made for memory refreshment pre-trial;
- How a prompt start for the witness' evidence will be ensured;
- An agreed outline for the formulation of appropriate questions, for example:
 - ◆ Use short, single-subject questions
 - ◆ Pauses are required between questions
 - ◆ Questions should be written down and given to the witness, in addition to being put orally

- ◆ Accommodate a witness unable to read by referring orally to previous written statements/interview records
- An indication that all parties invite/expect judge to ensure agreed rules are complied with
- Any formulation to be given to the jury about the witness/defendant, and directions sought by either side where agreement cannot be reached.

Disclosure. Cases involving vulnerable people require particular attention to pre-trial matters such as disclosure by the prosecution. Late disclosure, with neither party having adequate time to consider the impact of the material, may lead to witnesses being unsettled and confused, where earlier disclosure may have allowed more time for investigation and contextualisation of apparently prejudicial material. This is particularly the case when considering third party material in the hands of doctors, Social Services Departments and educational institutions. Prosecution advocates must attend to this aspect of case preparation personally to be able to assure the trial judge in due course that all proper enquiries have been made.

Ensure you have a full appreciation of the physical environment at the court being used for the trial. This may lead to adjustments being made to better accommodate the witness/defendant.

Use those who know best: Parents and carers are likely to be best placed to advise on levels of concentration and understanding in a child or person with learning disabilities. Avoid assumptions about support and make your assessment on a case by case basis.

Avoid the 'mental age' misnomer: The tendency to refer to adults with learning disabilities as having a 'mental age' may be misleading and unhelpful - an adult with the 'mental age of ten' will have considerably more life experience than a child of ten years-old.

Identify early: Identifying vulnerabilities in a witness or defendant at the earliest opportunity before the commencement of the trial is crucial, to ensure they can be afforded any appropriate special measures and pre-trial support and preparation. Use the first contact you have to explore these matters as much as possible, and go on to conduct any necessary further research immediately afterwards.

Obtain essential information on the day-to-day life of the witness/defendant. This can include the names of any siblings, where they attend school, and where they may have been holiday. Where the complaint relates to a domestic setting, knowing the layout of the home environment is useful, since a young or vulnerable witness may use unusual terms for placement (for example 'the top of the stairs' may actually refer to the bottom steps). These strategies lay the foundation stones for an effective 'rapport' stage during the trial, allowing the advocate both to build a better understanding of the individual's capacity for understanding and communication needs prior to addressing the controversial evidence in court and putting the witness/defendant at ease. If defending, the prosecution should be able to supply this kind of contextual information so that your preparation is appropriately detailed.

Begin preparation of questions for the hearing early. Whether preparing cross-examination or calling a witness or defendant in chief, it is never too early to begin formulating a draft series of questions. Preliminary preparation of this kind is a useful precursor to a conference with a client or meeting with a witness. Ensure that prepared questions are brief, containing no commas or semi-colons. Dividing questions into clear topics, and explaining or introducing what kinds of questions will be asked in each topic, can be a useful approach to simplify questioning. Early thought can also be useful to identify, in advance, areas which may be too complex to be put to the witness, and which could instead be put to a more competent witness such as a police officer or a social worker. You may want to flag up to the trial judge where this approach is being adopted.

Consider the physical positioning of the witness while making preparations for court. It may be helpful for witnesses to be positioned near the judge, whose presence and assistance can be reassuring for vulnerable children and learning disabled adults intimidated by the formal and unfamiliar trial process. Alternatively, it may be more helpful for the witness to be positioned nearer the questioner, so that strategies such as lip-reading can be better facilitated. Simple thought about these practical considerations can save last minute rearrangement.

Use of witness profiling or an intermediary. Consider all options available that would enable a young child or a child with learning difficulties to give evidence effectively, such as through the use of witness profiling or an intermediary.

For children in particular, the following guidance from the *Measuring Up?: Good Practice in Managing Young Witness Cases* report is useful:

- List Cases for an early fixed date and avoid adjournments.
- Enquire about children's level of understanding.
- Consider the full range of measures in light of the child's wishes and needs.
- Consider the potential benefits to recall and stress reduction if a young witness is accompanied by a known and trusted supporter.
- Timetable all stages of children's evidence as possible in advance.
- Request that court familiarisation visits take place before the day of the trial.
- Request that they see their statement for the purpose of memory-refreshing before trial.
- Consider the witness's access to the building and suitability of waiting areas.

During the Trial

The following provides guidance to assist practitioners with formulating their questioning methods during the trial.

Ensure that where necessary there has been a pre-hearing meeting (for example with the intermediary), or that the PCMH form/Practice Note for Trial Boundaries has been dealt with.

Introductions are essential: meet vulnerable witnesses before they are called. There is no reason why both defence and prosecution counsel should not do this together, whether or not the judge considers it appropriate to join in for a particular witness. Where children are involved bear in mind in particular the following:

- Prosecutors are expected to introduce themselves to young witnesses before trial and to answer their questions.
- Encourage young witnesses to let the court know if they have a problem.
- Explain that the judge or magistrates can always see the witness over the live link.
- Avoid asking young witnesses at trial to demonstrate intimate touching on their own body.
- Ensure ahead of time that equipment is working, recordings can be played and that camera angles will not permit the witness to see the defendant.

From *Measuring Up?: Good practice guidance in managing young witness cases and questioning children* (July 2009)

A list of brief points to consider when formulating lines of questioning is provided overleaf. These include:

- Do's - helpful strategies to assist
- Don'ts - pitfalls to avoid
- Other issues to consider
- Assistance when questioning child witnesses

Do's: helpful strategies to assist

Talk calmly, in a natural voice.

Keep gestures to a minimum, as they may be a distraction. If gestures are necessary, accompany them with unambiguous statements or questions to explain.

Follow a structured approach.

Use clear, simple language and only necessary and common words and phrases.

Use the individual's name at the start of each question so they know they are being addressed, and to encourage them to focus in on the question.

Cue the individual in to the language you are about to use by 'signposting', preparing them for instructions or questions that might follow. For example: "John, I am going to ask you a question..."

Use more detailed 'signposting' questions, such as "John, we are going to talk about your home now..."

Ask one short question (accommodating only one idea) at a time.

Use closed questions. For example: "Susan, tell me what you saw happen in the shopping centre around 10 o'clock" is likely to be a more profitable approach than "Susan, tell me what you saw yesterday."

Consider whether backing up questions with the use of visual aids or supports might assist.

Allow the individual thinking time to respond to each question: processing information may take the witness or defendant extra time.

If you decide to repeat a question following an answer, explain why you are doing so to allay any fears that the first answer to a repeated question was wrong.

If there is no response at all, try rephrasing the question or adopting a different approach.

Be led by the child's choice of vocabulary for objects or body parts, particularly for the genitals.

Be led by the child's choice of vocabulary for those in authority (for example, some children may be used to calling teachers 'Mr' and 'Mrs', and would be reassured by the same language. Others may find it less intimidating to use first names)

Where a vulnerable witness or defendant is obviously distressed, assess whether changing a line of questioning to something less challenging could be as effective as suggesting a break.

Achieving clarity in questioning can help a child understand the process of evaluating evidence:

- ◆ You told the PC X it happened in your bedroom
- ◆ You told X it happened in the bathroom
- ◆ They cannot both be true.

Don'ts: pitfalls to avoid

Avoid using an aggressive tone of voice.

Avoid exaggerated facial expressions or tone of voice, which may be open to misinterpretation.

Avoid negative questions, which are harder to process.

Avoid suggestive speech: "I suggest to you that...", "I believe you told us...", "Isn't it a fact that..." or tag questions like "You stayed at home that day, didn't you?" Be aware that children may be more susceptible to being misled by leading questions.

Avoid restricted choice questions.

Avoid questions with long preambles.

Avoid using irony, sarcasm, idiom or metaphor.

Avoid open questions: closed questions are more likely to be understood. For example, asking "Tell me what you saw yesterday" may be too vague, leaving the individual unable to judge exactly what the interviewer needs to know. Better would be: "Tell me what you saw happen in the shopping centre around 10 o'clock..."

Don't rely on children - even adolescents - to admit that they do not understand or cannot follow your line of questioning.

Children - particularly those who are very young - should not generally be permitted to respond by nodding or shaking their heads: this may signal a loss of concentration.

Other issues to be taken into account

The vulnerable witness or defendant may not necessarily make eye contact or give expected signals.

Be aware that they may have better expressive language skills than receptive language skills.

Concept words - such as those dealing with time or spatial awareness - may pose particular difficulties. Potentially problematic questions include "How many times?" or "Was he standing in front of you?"

Consider whether the 'piggy backing' technique might be confusing.

Be aware that responses may well be made without any understanding of the implication of what is being said. A vulnerable witness or defendant may try to please an authority figure by agreeing with the questioner.

Some vulnerable witnesses or defendants may do all they can to conceal their lack of understanding. Both children and adults with learning disabilities may have developed 'coping strategies' that disguise their level of understanding. These might include nodding to show they understand, when in fact they do not. It is crucial to recognise the importance of correctly interpreting gestures, including being alert to counter-intuitive body language.

Those with learning disabilities may not have autonomy in their personal lives, and are likely to be used to depending on others to make decisions. This dependency can manifest itself in a need for approval, and the tendency to tell others what they think they want to hear. Expressing their own feelings may be very difficult because they may have not been encouraged to think about their own needs, or supported to develop those skills.

Be alert for echolalia (repeating or 'echoing' words or phrases that someone else has just said). This may well indicate they are merely repeating your words without understanding their meaning.

Be alert to literal interpretation of figurative speech (such as “Can you paint me a picture of the events...”), particularly by younger children and those within the autistic spectrum.

With child witnesses or defendants bear in mind the following particularly:

Use simple, common words and phrases.

Repeat names and places often.

Ask one short question (one idea) at a time.

Follow a structured approach, signposting the subject.

Avoid negatives.

Avoid “I suggest to you that...”, “I believe you told us...”, “Isn’t it a fact that...”

Ensure ahead of time that equipment is working, recordings can be played and that camera angles will not permit the witness to see the defendant.

Avoid ‘tag’ questions.

Avoid “Do you remember...?” questions.

Avoid restricted choice questions.

Speak slowly and give children enough time to answer.

Don’t rely on children (even adolescents) to say if they don’t understand.

Check directly on the child’s understanding.

Be aware that concept words are particularly problematic.

Be alert to literal interpretation by younger children and those with autistic spectrum disorders.

From Measuring Up?: Good practice guidance in managing young witness cases and questioning children (July 2009) (Edited for the purposes of this report: for full guidance visit http://www.nspcc.org.uk/inform/research/findings/measuring_up_guidance_wdf66581.pdf)

Adults with Learning Disabilities & Mental Health diagnosis

Pre-Trial preparation

Impact of medication on witness’ performance

Obtain information on medication & its effect at particular times in cycle (i.e. monthly depo injections), to identify best time of day/month to assimilate and respond to questions.

Impact of imminent trial on witness’ mental health state.

Obtain up to date medical recommendations regarding management of current episode.

Unavoidable last minute change of counsel.

Original counsel should personally explain to witness - if necessary by message - that they are still ‘helping someone else’, and introduce replacement. New barrister must confirm this, with reference to original counsel, when introducing themselves.

During Trial

Witness reacts unexpectedly to a question, as a result of their illness. This might include bipolar elation on one day followed by acute depression the following day, or a diagnosis of paranoid schizophrenia.

Do not draw any particular conclusions from this – the witness is likely to be experienced in/ aware of how their mood alters, regardless of question topic. Outline to the witness the various topics which will need to be explored because of the nature of the case. Where possible or necessary emphasise ‘this is not about you.’

Effect of medical treatment on witness’ presentation and performance, for example slow/slurred speech or delayed cognitive processes.

Follow agreed pre-trial advice where this has been anticipated. Where it has not been anticipated Counsel should consider either:

Direct questions: “How are you?”; “You seem tired/distracted. Is there anything the court should do?”

Or

Request a break in order to obtain advice.

Children (including those with learning disabilities)

Pre-Trial Preparation

Write down as many short simple questions in advance as you can, particularly those which you need to ask in order to put your case.

Decide how long you think your cross-examination should be for the age of the witness

Identify any areas of challenge or useful points which may be too complex for the witness but which can easily be put to another witness such as a police officer or a social worker and then commented on in your speech. Explain to the judge beforehand what you intend to do.

(NB: Formal educational, psychological and social care assessment reports should be sought to assist formulation of the ‘trial plan’. Consider the use of an Intermediary.)

Child likely to spend a disproportionate amount of time in court building in comparison with time spent giving evidence and therefore be avoidably tired and tense.

Rigid timetabling of child’s appearance (i.e. early morning/after lunch). This timetable should not be altered to accommodate court business.

Unavoidable, last minute change of counsel.

Original counsel should personally explain to witness - if necessary by message - that they are still ‘helping someone else’, and introduce replacement. New barrister must confirm this, with reference to original counsel, when introducing themselves.

During Trial

Child not responding or behaving at expected level for age threshold.

Follow agreed pre-trial advice which should have identified this and offered solutions (educational formal assessments should assist). Talk normally to the witness. Imagine you were asking questions of a younger cousin or niece or nephew and use the same language. In the very brief rapport stage, ask non-threatening questions about topics such as age, family or recent birthdays.

Child’s behaviour/responses become disruptive/withdrawn.

Follow pre-trial advice and reassure the child (repeatedly) that you are listening carefully to them. Watch the

child for signs of distress but don't be too proactive about offering a break. Try changing to something unchallenging to settle them again.

The child's answers indicate confusion.

Divide your questions into clear topics telling the witness in advance what you are going to ask about. Make sure that having said you are going to move on, you don't then go back to a topic.

The child stops speaking

Try not to let them just nod or shake their heads in answer to questions. This may lead to them stopping any verbal responses, particularly very young witnesses. Ask them a question to which they have to give an answer such as how they got to court or how old they are at their next birthday.

The child is slow in answering

If they are slow in answering, consider whether the delay signals lack of understanding or a pause to consider a response before hastening to repeat the question.

The child does not provide the answer you were anticipating

Listen carefully to responses. Beware of merely repeating a question because it is not the answer you anticipated. Try using alternative phrasing.

The child appears unsure or distressed after answering a question.

Ensure that you are not applying undue pressure to obtain the answer you were anticipating. Avoiding using interrogatories such as "Didn't you?"

Part Six: Further Resources

Good practice guidance for law practitioners working with young witnesses, based on the findings of the NSPCC Report *Measuring up?* (Plotnikoff and Woolfson, July 2009)

http://www.nspcc.org.uk/inform/research/findings/measuring_up_guidance_wdf66581.pdf

Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings, Plotnikoff and Richard Woolfson (Jul 2009)

http://www.nspcc.org.uk/Inform/research/Findings/measuring_up_wda66048.html

Autism, a guide for criminal justice professionals: Guidance produced by the National Autistic Society, providing background information about autistic spectrum disorders (2008).

<http://www.autism.org.uk/working-with/criminal-justice/autism-a-guide-for-criminaljustice-professionals.aspx>

Intermediary Procedural Guidance Manual

http://lcjb.cjsonline.gov.uk/area15/library/intermediaries/Intermediary_Procedural_Guidance_Manual.pdf

CPS Core Quality Standards

http://www.cps.gov.uk/publications/core_quality_standards/

Sections of relevance for vulnerable witnesses and defendants:

Standard 5: Case Preparation

[5.7(d) and 5.13(g)] - Timely preparation of an application for any special measures to enable witnesses to give their evidence effectively.

Standard 6: Case presentation We will present our cases fairly and firmly

[6.2(c)] - Arrive at court in time to meet witnesses; explain trial process including any special measures agreed by the court.

[6.4 c)] Treat witnesses and defendants in court respectfully and asks the court to intervene to stop inappropriate questioning of prosecution witnesses.

CPS Prosecution Guidance: Victims and Witnesses Who Have Mental Health Issues and/or Learning Disabilities

http://www.cps.gov.uk/legal/v_to_z/victims_and_witnesses_who_have_have_mental_health_issues_and_or_learning_disabilities_-_prosecution_guidance/

CPS Code for Crown Prosecutors

<http://www.cps.gov.uk/publications/docs/code2010english.pdf>

Safeguarding Children Guidance on Children as Victims and Witnesses

http://www.cps.gov.uk/legal/v_to_z/safeguarding_children_as_victims_and_witnesses/

MIND Prosecutor's Toolkit: 'Achieving justice for victims and witnesses with mental distress: a mental health toolkit for prosecutors and advocates'

http://www.mind.org.uk/campaigns_and_issues/current_campaigns/another_assault/improving_peoples_court_experiences

About Learning Disabilities www.aboutlearningdisabilities.co.uk
Contains numerous articles written by experts.

Ann Craft Trust: www.anncrafttrust.org

Organisation working with staff in the statutory, independent and voluntary sectors to protect people with learning disabilities who may be at risk from abuse.

Association for Real Change: www.arcuk.org.uk

A membership organisation which supports providers of services to people with a learning disability to promote real change

The British Institute of Learning Disability: www.bild.org.uk

National charity committed to improving the quality of life for people in the UK with a learning disability.

The Downs Syndrome Association: www.downs-syndrome.org.uk

An organisation that focuses on all aspects of living successfully with Downs syndrome.

Foundation for people with learning disabilities: www.learningdisabilities.org.uk

Works to promote the rights, quality of life and opportunities of people with learning disabilities and their families.

Mencap: www.mencap.org.uk

Supports people with a learning disability and their families and carers.

National Autistic Society: www.NAS.org.uk

Supports people with autism and their families.

People First: www.peoplefirstltd.com

Organisation run by and for people with learning disabilities to raise awareness of, and campaign for, the rights of people with learning disabilities.

Voice UK: www.voiceuk.org.uk

National charity supporting people with learning disabilities and other vulnerable people who have experienced crime or abuse.