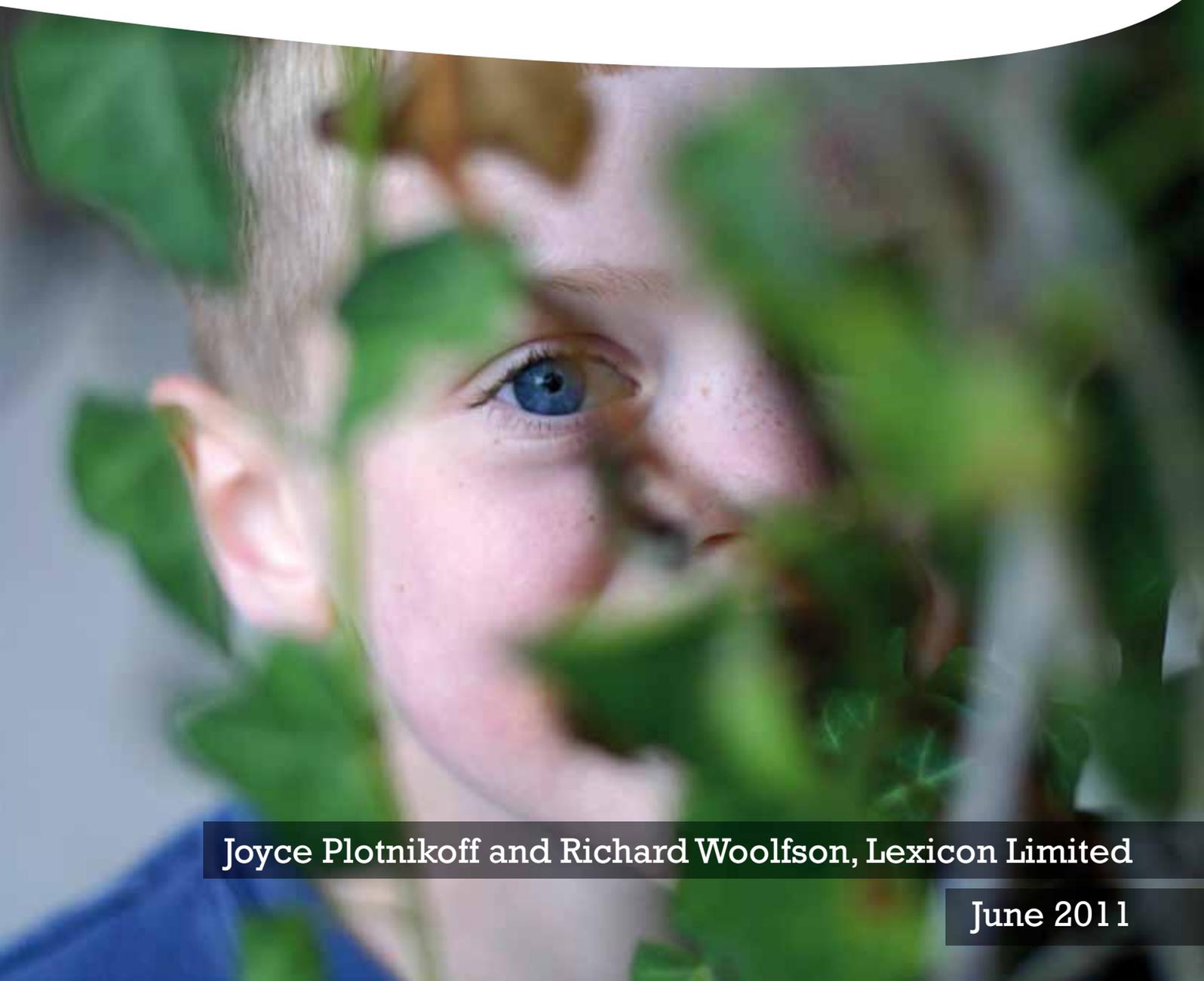


Young witnesses in criminal proceedings

A progress report on *Measuring up?* (2009)



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Young witnesses: the story so far

Numbers of young witnesses in criminal cases (many of whom are also victims) are increasing dramatically. There are no official figures for the number of children who actually give evidence, but around 48,000 were called to court in 2008/9¹, compared to around 30,000 in 2006/7², an increase of 60 per cent. Some are very young. In a 14 month period, children aged five and under were assessed by a Registered Intermediary in 114 cases (it is not known how many of these were involved in a trial)³. Almost all children give evidence for the prosecution. The government is responsible for helping them to give their 'best evidence', as set out in more than 40 policy documents. Enabling young witnesses to give their best evidence is essential to ensure fair trial outcomes, but it has to be done in a way that recognises they are children, not adults.

In July 2009, the NSPCC and the Nuffield Foundation published a report, *Measuring up?*, setting out government policies and comparing them to the experiences of a sample of 182 young witnesses in 74 courts across England, Wales and Northern Ireland. **We concluded that the reality faced by young witnesses in court fell short of the standards set out in government policies and made 42 recommendations for improvement.**

In response to the recommendations, the Ministry of Justice drew up an Action Plan. Since then, there has been a change of government and the announcement of dramatic budget cuts. Some favourable early responses to our recommendations have been qualified or halted and the Coalition Government's position in respect of witness policy and its response to some *Measuring up?* proposals is not yet known.

This briefing paper revisits the recommendations and identifies progress made. It also highlights where further action is needed. It is based on discussions at two seminars held in June and September 2010 and a review of current criminal justice business plans and 'Big Society' policy pronouncements. The seminars were attended by senior members of the judiciary, legal profession and civil service. For an account of the discussions, see page 9.

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- 1 Crown Prosecution Service statistics (Witness Management System) released under a Freedom of Information request, July 2009. It is not known whether these children attended court or gave evidence and the validity of WMS data has yet to be confirmed.
 - 2 The Witness Service supported over 30,000 young witnesses at court in England and Wales: email to the authors from Witness Service Development, Victim Support National Centre, 6 October 2008.
 - 3 The intermediary special measure was created by section 29, Youth Justice and Criminal Evidence Act 1999. Since August 2009 the National Policing Improvements Agency (which operates and manages the Witness Intermediary Scheme matching service on behalf of the Ministry of Justice) has matched Registered Intermediaries to 114 cases where witnesses were aged 5 or under, the youngest being 23 months old. This equates to 7.62 per cent of the total number (1,495) of cases matched up until 17 November 2010.

Achievements: progress with *Measuring up?* recommendations

Offering support tailored to young witnesses' needs

1. Provisions in the Coroners and Justice Act 2009 to be implemented later this year will:
 - a. extend automatic eligibility for special measure to all those aged under 18;
 - b. remove presumptions about how categories of child witnesses will give their evidence and emphasise the need to give them an informed choice; and
 - c. enable courts to direct that a specified person accompanies the witness in the live link room, and that courts must take the witness's wishes into account.
2. National Standards set out in *Achieving Best Evidence in Criminal Proceedings* (ABE) have been revised to include safeguarding and other standards required of those who support young witnesses.
3. The Association of Chief Police Officers (ACPO) has reminded all forces of their obligations, under the Victims' Code, to inform witnesses about special measures and obtain their views. The special measures application form has been amended to include witnesses' views, concerns, requests and the steps taken to help witnesses express an informed view about special measures.
4. The Crown Prosecution Service (CPS) and Police Victim and Witness Care Delivery Unit has reviewed and updated its guidance relating to witness care officer training and distributed a young witness checklist and a Witness Care Manual of Guidance to all witness care units. A National Vocational Qualification in Witness Care is being piloted.
5. HM Court and Tribunals Service (HMCTS) has undertaken an audit of its court technology and has purchased more than 180 new screens.
6. HM Crown Prosecution Service Inspectorate is leading a criminal justice joint inspection on young witnesses, and the Ministry of Justice has agreed that young witnesses in adult courts should be a priority for the attention of the independent Commissioner for Victims and Witnesses.

Ensuring appropriate questioning at court

7. ACPO has taken action to raise awareness of the intermediary special measure. Intermediaries are trained professionals who facilitate communication with vulnerable witnesses in police interviews and when giving evidence in court.
8. The Judicial College (formerly Judicial Studies Board) has incorporated the report's findings about children's communication difficulties in its training and guidance for judges. For example, *Fairness in Courts and Tribunals* recommends avoiding 'tag' questions (the most persuasive form of leading question, for example 'He didn't touch you, did he?'). The guidance also encourages the judiciary to set ground rules for questioning young witnesses, as does the *Crown Court Bench Book – Directing the Jury*. These are important steps in promoting more consistent judicial control of inappropriate questioning.
9. The NSPCC and Nuffield Foundation have published *Good practice guidance in managing young witness cases and questioning children*, which provides clear guidance for the judiciary, law practitioners and others.
10. The CPS has agreed that alternative methods should be used to elicit information from witnesses who may be asked to demonstrate intimate touching on their body.

Helping young witnesses feel safe

11. HMCTS is developing a method to assess and score each court's facilities so that courts will be better able to decide when a remote live link should be used instead of the young witness using the court's own live link.
12. ACPO has developed training modules for probationary officers and computer-based training for other officers to try and improve the response to young witnesses reporting intimidation.

Safeguarding young witnesses as a collective responsibility

13. HMCTS has undertaken to publish its young witness policies under the safeguarding 'umbrella'. This has been extended to cover vulnerable and intimidated adult witnesses and young defendants. The combined policy, setting out procedures which court staff should follow to ensure compliance, will be published shortly.

Challenges: further action needed

Ensuring appropriate questioning at court

14. Children's evidence must be tested. One of the biggest remaining challenges is how to ensure developmentally appropriate questioning of young witnesses at court. While Registered Intermediary appointments have increased, concern remains about uneven use around England and Wales, particularly in light of cuts to local CPS and police budgets. When the intermediary scheme was piloted, leading Criminal Justice System (CJS) professionals warned that the move to local funding would limit access to this special measure.
15. Current cross-examination methods often contravene principles for obtaining complete and accurate reports from children and may actually exploit their developmental limitations. Judges are advised in Judicial College guidance to agree ground rules with the parties in advance on the way children are to be questioned, but this rarely happens unless a Registered Intermediary is involved. Ground rules discussion should be routine, even in non-intermediary cases.
16. There is a need for greater consistency of approach in training. The Advocacy Training Council working group report *Raising the Bar* provides guidance on how to improve the handling of children and vulnerable adults at court. It identifies 'a clear and pressing need' for training at all levels. Following the report's publication in April 2011, the Criminal Bar Association plans to develop a DVD in conjunction with the NSPCC, to illustrate good practice when children are questioned, particularly the change of approach to putting the defence case signalled by the Court of Appeal in *R v Barker* (2010).
17. In addition, a checklist or code for questioning young and other vulnerable people at court should be developed, suitably endorsed and widely distributed for use in training and to inform ground rules discussions at court. The NSPCC and Nuffield Foundation's *Good practice guidance* on questioning children is the start of this process.
18. Consideration should be given to development of an appropriate procedure for complaining to professional bodies about developmentally inappropriate questioning where this persists following repeated judicial intervention.
19. Information about a particular child's development and communication skills should be provided by the party calling them as a witness, and this should be requested by the court if it is not supplied.

Avoiding delays in young witness cases

20. In 1989, the Pigot Committee recommended that courts should be able to take children's evidence at a preliminary hearing. Section 28 of the Youth Justice and Criminal Evidence Act 1999 allows for pre-trial cross-examination, but has not been implemented. There appears to be growing judicial support for the implementation of 'full Pigot' because delay in taking young witness evidence at trial is a chronic problem.
21. The previous government did not accept our recommendation that statistics relating to young witnesses should be collected and published. Without this information, which should include the number of young witnesses who give evidence and the time their cases take to reach disposition, we believe it will be impossible to resource young witness services appropriately.
22. Cases involving young witnesses take longer to reach trial than the norm, despite the fact that successive governments since 1988 have said that it is their policy to prioritise them. Delays and uncertainty have a negative impact on young witnesses. *Measuring up?* concluded that the best way to address this is to set early and fixed court dates and avoid adjournments. Collecting statistics about young witness cases would make it possible to track progress in reducing delay.
23. Delays at court, leading to children waiting to give evidence, still occur frequently, with the result that they do not start their evidence while they are fresh. One contributing factor is unreliable court technology which often delays or disrupts young witness testimony.

Helping young witnesses feel safe

24. The CPS accepted that greater use should be made of witness standby arrangements and remote links from other courts or non-court locations. Reasons justifying a remote link can now be recorded on the special measures application form. However, discussions at criminal justice conferences in 2010 and early 2011 indicate that its use remains rare and is routine in only one part of the country (Devon and Cornwall, where three NSPCC offices are equipped).
25. The security and comfort of young witnesses at court still need improvement. For example, the HMCTS audit indicated that nationally only 53 per cent of live link rooms had sufficient soundproofing to prevent those outside from hearing witness testimony. HM Courts Service Area Directors have been asked to prioritise the upgrading of live link rooms close to waiting areas to improve privacy, but funding is short.

26. There are concerns among the judiciary and HMCTS that special measures may be having a counter-productive effect on juries in some circumstances. The Nuffield Foundation has funded Professor Cheryl Thomas from the Faculty of Laws at UCL to undertake the first empirical research study of the impact of each special measure on jury decision-making.

Offering support tailored to young witnesses' needs

27. Seven victim support schemes received some seed funding to launch a young witness service in 2010. However, around the country only a small proportion of young witnesses receive assistance from a specialist scheme and a few long-standing schemes have been discontinued since *Measuring up?* was published. A Ministry of Justice evaluation of specialist young witness schemes in 2007 found that 96 per cent of those they supported felt more confident about going to court. They received consistently higher levels of support than those in a comparison group receiving the usual level of service offered by the Witness Service. Following a *Measuring up?* recommendation, the NSPCC and Victim Support agreed a minimum level of service for support for young witnesses. However, many of Victim Support's court-based Witness Services cannot offer a home visit, a key ingredient in preparation for court, or continuity of supporter before and at trial, an important contribution to young witness comfort and confidence.
28. Booklets in the Young Witness Pack (given to young witnesses and their families) have been updated to explain that the material should be used with a supporter and to include guidance about the intermediary special measure. A decision to make Pack booklets available online only has been reversed. However, both the pop-up courtroom (particularly valuable with younger witnesses) and the DVD which were part of the Young Witness Pack have been discontinued due to cost. The Ministry of Justice initially accepted a recommendation to update the 1998 handbook for child witness supporters (also part of the Pack), but this is not being taken forward due to cost.

Local young witness protocols

29. *Measuring up?* recommended tackling young witness issues by linking them to specific targets, rather than encompassing them generally under the category 'vulnerable witnesses'. However, the Coalition Government has dismantled the targets regime and monitoring procedures. The narrowed focus for Local Criminal Justice Boards and loss of their central funding have resulted in the removal of vulnerable witness issues from local inter-agency priorities. Nevertheless, there is still an opportunity to improve levels of service and safeguard children through local multi-agency young witness protocols, incorporating routine feedback from young people and their parents and carers about their experiences in the CJS.

Conclusions

Some significant changes have been made to improve the experience of young witnesses as a result of our *Measuring up?* report, but there remain areas in which the State is failing in its commitment to enable young witnesses to give their best evidence.

Some recommendations require funding that is unlikely to be forthcoming in a time of public spending cuts. However a core message from *Measuring up?* is that outcomes in young witness cases could be improved without additional cost. Unless our criminal justice process responds appropriately to the needs of young witnesses, this vulnerable and much victimised group will continue to be denied full access to justice. Enabling the evidence of young witnesses through support, effective pre-trial and trial management and the control of unfair questioning are vital aspects of that response.

Other relevant research funded by the Nuffield Foundation

'Special measures' were introduced to assist vulnerable and intimidated witnesses give their best evidence. However there are concerns among the judiciary and HMCTS that special measures may be having a counter-productive effect on juries in some circumstances. The Nuffield Foundation has funded Professor Cheryl Thomas from the Faculty of Laws at UCL to undertake the first empirical research study of the impact of each special measure on jury decision-making. The project began in May 2011 and will continue until 2013.

Also funded by the Foundation, Professor Michael Lamb from the University of Cambridge has undertaken a research project to improve the quality of investigative interviews with children who may have been sexually abused, but are reluctant to disclose it. Professor Lamb and his team developed interview procedures that provided more emotional support than traditional methods, while still focussing on the cognitive factors that allow children to provide detailed accounts of abuse.

Reports from two *Measuring up?* seminars

Measuring up? Evaluating government commitments to young witnesses in criminal proceedings was commissioned jointly by the NSPCC and Nuffield Foundation and launched in 2009. The report compared government commitments to young witnesses with the experiences of 182 young people called to give evidence at 74 courts across England, Wales and Northern Ireland. The report, executive summary and associated *Good practice guidance in managing young witness cases and questioning children* can be found at www.nspcc.org.uk/measuringup.

In 2010, the NSPCC and the Nuffield Foundation held two seminars, hosted by the Foundation, at which senior members of the judiciary, legal profession, senior civil servants and others were invited to discuss progress against report recommendations.

The first seminar

Lord Justice Hooper chaired the first seminar in June, 2010. This addressed Recommendation 20 of the report, inviting the Judicial Studies Board, Crown Prosecution Service (CPS), General Counsel of the Bar, Criminal Bar Association (CBA), Law Society and Association of Chief Police Officers (ACPO) to raise awareness of the extent of children's communication problems with the objective of improving standards of questioning, controlling inappropriate questioning and ensuring that the intermediary special measure is used appropriately.

A discussion paper circulated before the seminar noted that cross-examination aims not at accuracy or 'best evidence', but at persuading witnesses to adopt an alternative version of events or discrediting their evidence. Communication problems among children generally are more prevalent than previously recognised.⁴ *Measuring up?* found that half of young witnesses reported not understanding some questions. In all, 65 per cent reported problems of comprehension, complexity, questions asked too

4 Around 50 per cent of children in some socio-economically disadvantaged populations have speech and language skills that are significantly lower than those of other children of the same age: Department for Children, Schools and Families (2008) *The Berrow report: A Review of Services for Children and Young People (0-19) with Speech, Language and Communication Needs*. Ten per cent have a clinically recognisable mental disorder: Office for National Statistics (2004) *Survey of the mental health of children and young people in Great Britain*. Rates of childhood autism are around 1 per cent, far higher than previous estimates: G. Baird et al (2006) *Prevalence of disorders of the autistic spectrum in a population cohort of children in South Thames*. *The Lancet*, 368 (9531) 210-5.

quickly or having their answers talked over.⁵ Lawyers may be unaware of the extent of such difficulties or regard such strategies as legitimate cross-examination techniques.⁶ However, they have been demonstrated to significantly decrease the accuracy of children's reports⁷ and may therefore thwart the fact-finding function of the criminal justice system.⁸ The seminar considered whether our system for cross-examining children was fit for purpose. One QC concluded:

'We've achieved the worst of all possible worlds. The current system is absolutely absurd.'

Controlling developmentally inappropriate questioning

There was general agreement that 'testing' should not mean 'trickery' and that advocates should approach the problem of questioning children in another way. Participants considered whether children's evidence could be tested in a developmentally appropriate way, while still ensuring a fair trial for the defendant. The seminar acknowledged that policies to ensure developmentally appropriate questioning were not robustly applied. For example, the *Equal Treatment Bench Book* encourages advance agreement between the judge and parties on the way children are to be questioned.⁹ In practice these discussions rarely happen, except in trials using the intermediary special measure (introduced by section 29, Youth Justice and Criminal Evidence Act 1999 to facilitate communication with children and other categories of vulnerable witness), when ground rules meetings 'must' be held.¹⁰ Policies describe what constitutes inappropriate questioning and when judiciary

5 Judicial Studies Board (2009) *Equal Treatment Bench Book* says children should be given full opportunity to answer: section 4.4.3. *Measuring Up?* (2009) found that 26 per cent of young witnesses reported their answers were talked over. In contrast, an undated Advocacy Training Council publication, *Report to BVC Providers on the common errors made by pupils in advocacy training sessions* cites as a common error "Allowing the witness to give a full answer...".

6 E. Henderson (2002) "Persuading and Controlling: The theory of cross-examination in relation to children." in H. Westcott et al (eds) *Children's Testimony: a handbook of psychological research and forensic practice*. Wiley. "You're looking ... to make sure they make mistakes. [...] Some counsel... give double negatives to kids. And the kids get it wrong ... But that is a valid technique that is used by very senior counsel and very successfully" (lawyer cited by Henderson p. 286.)

7 R. Zajac (2009) *Investigative Interviewing in the Courtroom: Child Witnesses under Cross-Examination*, in R. Bull et al., *Handbook of Psychology of Interviewing: Current Developments and Future Directions*, Wiley.

8 For example, R. Zajac (2009) op cit; K. Hanna et al, (2010) *Child witnesses in the New Zealand criminal courts: A review of practice and implications for policy*. Institute of Public Policy, AUT University.

9 Issues may include areas of agreement and any areas on which the child might be led; and the tenor, tone, language and duration of questioning and cross-examination: sections 4.4.2, 4.4.3 *Equal Treatment Bench Book*, (2009) op cit.

10 Special Measures Application Form, Section F1, CrimPRC(10)02(a).

and prosecutors should intervene¹¹ but there is no formal basis for complaint to a professional body about cross-examination that flouts guidance on questioning.¹² Judges attending the seminar stressed that adherence to good practice cannot easily be coerced and their ability to intervene is necessarily limited:

'I did intervene quite a lot but it's very difficult. The defence could argue I was interfering.'

'You can only interrupt or send the jury out so many times. If I interrupt four out of seven questions, I can't do it again... [and even if poor practice is brought to the attention of the head of chambers] they come back and do it in exactly the same way. Their role is to get the client off and they will.'

The intermediary special measure

Measuring up? found that a Registered Intermediary was appointed for only one child at trial, even though the report estimated that 70 per cent may have benefitted from intermediary assessment. Several seminar participants reported good experiences with Registered Intermediaries. While appointments have increased, it was generally agreed that they remain under-used. This was attributed in part to cost but also assumptions and generalisations about children's communication abilities. A psychiatrist emphasised the need for courts to be informed about the individual child, particularly as many factors impeding communication are hidden and the child may look able or mature but is not. A judge acknowledged:

'Barristers don't have the remotest idea about children's development – and judges only have a little.'

A Registered Intermediary's primary responsibility is to enable complete, coherent and *accurate* communication between the witness and the court.¹³ Intermediaries may therefore advise the court, based on their assessment of the witness's abilities,

11 Equal Treatment Bench Book (2009) section 4.4.3, op cit; CJS (2007) *Achieving Best Evidence in Criminal Proceedings* sections 6.11, 6.17; CPS (2006) CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses page 17. John Spencer argues that the "overriding objective" that cases be dealt with "justly", embodied in Criminal Procedure Rule 1 (2005), 'means, in essence, that judges and magistrates are both bound and entitled to intervene to check a cross-examination which appears to be hindering the court from reaching a truthful outcome, rather than helping it to do so': J. Spencer (2010) *Evidence and Cross-Examination*, book chapter in press, Wiley.

12 Phone call, Head of Complaints and Hearings, Bar Standards Board 5.5.2010. Any such complaint would have to be based more generally, for example on conduct bringing the Bar into disrepute or conduct diminishing public confidence in the legal profession.

13 *Code of Practice for Intermediaries* (2005) Home Office.

that certain types of question (often those suggesting the desired reply) are likely to produce unreliable answers and that, in the interests of a fair hearing, alternative questioning styles should be used.

Leading questions

Participants discussed whether the use of suggestion when questioning children is integral to the defendant's right to a fair trial and whether defence advocates are hindered from putting their case if they cannot 'lead' the witness. An academic pointed out that the practice of 'putting the case' to the witness and acceptance of interspersing comments in questions dates back to before 1836 when counsel could cross-examine but not address the jury. 'Putting the defence case' is not required in all common law jurisdictions. Judicial training now asks judges to take account of children's susceptibility to leading questions, particularly those with 'tag' endings which are routinely used in cross-examination (for example, 'X never touched you with his willy, did he?', asked of a four-year old). Tag questions take at least seven stages of reasoning to answer and American Bar Association guidance advises that they should be avoided with children.¹⁴ The Court of Appeal in *W and M* (2010)¹⁵ said that 'It is generally recognised that particularly with child witnesses short and untagged questions are best at eliciting the evidence. By untagged we mean questions that do not contain a statement of the answer which is sought'. The seminar acknowledged that some judges do not follow good practice guidance on the control of inappropriate cross-examination techniques and this subject would benefit from wider discussion.

Participants discussed the Court of Appeal judgment in *Barker* (2010)¹⁶ which addressed the cross-examination of young witnesses. The Lord Chief Justice stated that children's evidence should be placed on the same level as that of all other witnesses and that cross-examination has to be adapted 'to enable the child to give the best evidence of which he or she is capable' while ensuring that the defendant's right to a fair trial is undiminished. When the issue is whether the child is lying or mistaken, the advocate should ask 'short, simple' questions putting the essential elements of the defendant's case, and 'fully to ventilate before the jury' evidence bearing on the child's credibility. Judges at the seminar pointed out that often, the defence case is simply that the prosecution version of events did not happen so there is little point in putting any alleged detail to a young witness; unfairness to the accused could be minimised by the judge explaining to the jury and to the defendant that

14 A. Graffam Walker (1999) *Handbook on Questioning Children – A Linguistic Perspective*. American Bar Association Center on Children and the Law.

15 *R v W and M* [2010] EWCA Crim 1926.

16 [2010] EWCA Crim 4, para 42.

cross-examination of a child/vulnerable witness is conducted in a different way, and setting out the differences.

Advocacy training

Professional bodies do not treat the questioning of vulnerable witnesses as a special skill,¹⁷ a fact complicated by the number of bodies involved in the delivery of training, and differences in course content. The first profession-wide quality assurance standards will be established by the Joint Advocacy Group.¹⁸ To date, these expert advocates to deal 'appropriately with vulnerable witnesses' without any further detail. A survey of training organisations conducted for the seminar by Joyce Plotnikoff and Richard Woolfson in May 2010 showed that advocacy training on this subject was uneven, with some Bar Circuits and Inns of Court doing nothing because it is neither required nor recommended. Participants saw a need for small-group training involving role-play as well as conference demonstrations and supporting DVD material. The CBA and the NSPCC agreed to develop such a DVD. It was suggested that viewing should be compulsory for those who want to be deemed competent on this subject. A QC recommended the move to a "gold standard" checklist or code on questioning young witnesses, endorsed by the necessary bodies. The Nuffield Foundation and NSPCC's *Good Practice Guidance on questioning children*, endorsed by several key groups, was seen as a useful start to this process.

There was some support for 'ticketing' advocates (fulfilling a training requirement before taking on vulnerable witness cases) in order to raise standards. However, it was pointed out that many lawyers who start their career dealing with young witnesses and defendants in the youth court could be ruled out by a ticket requirement. At the other end of the scale, the CPS has a system for ticketing prosecution advocates in rape cases but there is no equivalent for the defence. Some judges saw the need for a more robust approach:

'Until the Bar accept the need for specialisation, the situation won't improve.'

'We won't get this right until defence counsel are ticketed. Some shouldn't be doing it.'

17 The CPS, Law Society, CBA and Council for Circuit Judges disagreed with a proposal to set up accredited panels of young witness practitioners, favouring instead 'education not accreditation': Ministry of Justice (2009) *Government response to the Improving the Criminal Trial Process for Young Witnesses Consultation*. The Joint Advocacy Group discussion paper (2010) *Quality Assurance for Advocates* supports further exploration of a proposal "to allow bolt-ons to existing competencies that would enable advocates to be ticketed via robust and independent accreditation" paras. 3.7.3-4.

18 Bar Standards Board, Solicitors Regulatory Authority and Institute of Legal Executives (December 2009) *Consultation on standards for criminal advocates at trial B3(2)*, Advocacy Standards.

A barrister involved in professional training concluded:

'Advocates only learn when they're under threat. There's a need for training across the professions and from juniors to senior silks.'

Alternatives to the current system

The seminar concluded by considering whether there were alternatives to the current system for taking children's evidence. In 1989, the Pigot Committee recommended that courts should have discretion to order that children's evidence be taken at a preliminary hearing and, in exceptional cases, that advocates' questions be relayed through a specialist child examiner who enjoys the child's confidence.¹⁹ Section 28 of the Youth Justice and Criminal Evidence Act 1999 (not yet implemented) allows for pre-trial cross-examination, but without the child examiner provision. Seminar participants agreed that pre-trial delay continues to cause problems and there is still a need to take children's evidence at an early hearing. It was argued that disclosure could be managed and expedited to accommodate this process and a second, later, cross-examination could be allowed if necessary. The seminar heard that the judiciary and Bar in Western Australia supported taking children's evidence at pre-trial hearings which has greatly speeded up the process and made trials more efficient. Some commentators considered that a pre-trial provision would comply with the Article 6 right to a fair trial and indeed may be required by European law.²⁰ In light of the *Framework Decision on the Rights of Victims* (2001)²¹, in 2005 the Court of Justice of the European Communities held Italy to have failed to implement its obligation under EU law, because it had no mechanism to take the evidence of young children before trial.²²

The following points emerged:

- Questioning must be developmentally appropriate to the young witness. A checklist or code for questioning young and other vulnerable people at court should be developed, suitably endorsed and widely distributed for use in training and to inform ground rules discussions at court. It may be inappropriate to put the defence case to the child in cross-examination. This should be dealt with in

19 Home Office (1989) *Report of the advisory group on video-recorded evidence*. Chairman His Honour Judge Thomas Pigot, QC.

20 For example, L. Hoyano (2010) Coroners and Justice Act 2009: special measures directions take 2: entrenching unequal access to justice? *Criminal Law Review*; J. Spencer (2010) Children's Evidence: the Barker Case, and the Case for Pigot. 3 *Archbold News* 5-8.

21 Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings; Official Journal L82, 22 March 2001. This required EU Member States to put in place mechanisms enabling the evidence of vulnerable victims to be given without them having to appear in open court.

22 *Criminal Proceedings Against Pupino*, Case C-105/03 [2006] QB 83; noted [2005] *Cambridge Law Journal* 569.

a different way, as set out in *Barker*. The Criminal Bar Association is developing guidance for advocates in conjunction with the NSPCC. Clarification is needed as to the judge's role in explaining this modified approach to the defendant and the jury.

- Intermediaries may propose alternative approaches to specific types of suggestive and other questions where these risk producing unreliable answers from the witness. Guidance is needed to achieve greater consistency of approach in responding to such suggestions.
- Information about children's development and communication skills should be sought by the party calling them, and requested by the court if not supplied. Routine advance discussion and agreement between the judge/magistrates and parties on the way a young witness is to be questioned is required when an intermediary is used and should be encouraged in other cases involving children.
- Consideration should be given to developing a procedure for complaining to professional bodies about developmentally inappropriate questioning where this persists following judicial intervention. (This could be linked to the introduction of authoritative guidance on developmentally appropriate questioning – see above.)
- There is a need for greater consistency of approach by advocacy training providers (see *Raising the Bar*, Advocacy Training Council, April 2011) and this needs to be taken up by other professional bodies.

The second seminar

The second Nuffield Foundation seminar, held in September 2010, addressed the remaining report recommendations and was chaired by Helen Edwards, Director General of Justice Policy in the Ministry of Justice.²³ Barbara Esam of the NSPCC and speakers representing the Ministry of Justice, ACPO and HM CPS Inspectorate reported on actions taken in response to most of the recommendations.

In 2009, Government departments, led by the Office for Criminal Justice Reform (OCJR) within the Ministry of Justice, developed an Action Plan responding to the recommendations of *Measuring up?* and those of the *Report of a Joint Thematic Review of Victim and Witness Experiences in the CJS*.²⁴ While most recommendations were positively received when *Measuring up?* was published, some favourable early responses have since been withdrawn or qualified, some as a result of budget cuts.

23 An account of the seminar was published in Issue 7, August 6, 2010 Archbold Review: J. Plotnikoff and R. Woolfson 'Cross-examining children – Testing not trickery'.

24 Criminal Justice Joint Inspection, HM CPS Inspectorate, HM Inspectorate of Constabulary and HM Inspectorate of Court Administration (2009).

Key recommendations of *Measuring up?* were addressed to the OCJR, now replaced by the Criminal Justice Reform Directorate.²⁵ Its work is driven by the new Crime and Criminal Justice Strategy Board, chaired jointly by the Home Office and Ministry of Justice.²⁶ Other members include the Chief Executive of the CPS (which has led recent young witness policy initiatives) and the Director General of the Attorney General's Office. The Attorney General has signalled that his office will confine itself to delivering legal advice and will withdraw from 'trying to be a policy lead' (his description of its role under the previous Government).²⁷ A number of recommendations to the OCJR related to Local Criminal Justice Boards. In March 2010, the OCJR accepted Recommendations 38 (to invite Boards to address the Government's 'safeguarding children' agenda and to promote multiagency young witness protocols²⁸); and 42 (to explore ways to acknowledge the contribution of deserving young witnesses). The OCJR 'accepted in principle' Recommendation 1 (to invite Boards to address young witness issues and link them to specific targets); and agreed to consider Recommendations 2 (to clarify where responsibility lies for delivery of services and how these should be funded); 22 (to invite Boards to monitor time to trial and waiting times at court in young witness cases); and 41 (to publicise entitlements for young witnesses and invite their feedback). However, the Coalition Government has withdrawn central funding from Boards and their future role is likely to be significantly circumscribed.

No details of the Coalition Government's young witness policy had been announced at the time of the second seminar. Participants discussed the Ministry of Justice 'high-level review of policy, provision and funding' of the victim and witness agenda²⁹, to include local commissioning of services. Participants expressed concern about the application of the 'Big Society' approach to young witness support. In particular, many were worried about differences in local service levels being regarded by Government as the 'justifiable' price of fulfilling its ideological objectives.³⁰ Practitioners were worried that 'localism should not mean a 'free-for-all' and expressed fears that the shift in approach would mean 'things will go backwards'. Civil servants reassured the audience that, if local commissioning is taken forward, 'minimum standards would be recommended'.

25 Email from the Office of Director General Law, Rights and International, Ministry of Justice (17.8.10).

26 Ibid.

27 'Top law officers to be stripped of policy making roles, says Dominic Grieve', *The Guardian* (7.7.10).

28 See, for example, Humberside Young Witness Service's multi-agency protocol, listed in Appendix I of *Young Witness Support: It's in your hands* (Office for Criminal Justice Reform, 2009) in the CD accompanying the guidance.

29 Email from Victim and Witness Unit, Criminal Policy Directorate, Ministry of Justice (17.8.10).

30 Ministry of Justice *Update: Bulletin for LCJBs* (August 2010).



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