# Managing young witness cases: the views of judges, advocates and intermediaries

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*Introduction*

The NSPCC study *Falling short? A snapshot of young witness policy and practice* (February 2019) brings together over 40 policies on questioning, delay, support and safeguarding and compares them with views about practice expressed by 272 criminal justice personnel. This article focuses on responses about questioning from 40 circuit judges, 24 barristers, 21 Crown Advocates, three higher court advocates and 48 intermediaries from the Ministry of Justice register.

*Advocacy and training*

Cross-examination tailored to the understanding of individual young witnesses had improved in the last year in the view of 31 of 40 judges (78%), 27 of 36 of advocates (75%) and 28 of 47 intermediaries (60%). Many judges linked improvements to innovative "Advocacy and the vulnerable" training led by the Inns of Court College of Advocacy (ICCA).[1] Advocates who completed the course were positive, e.g.

> ... complete about-face change, abandoning a lifetime's approach for a whole new world

> It has focussed my attention radically so that I can limit considerably the number of questions I need to ask.

However, ICCA lead facilitators felt follow-through was hindered by inconsistent judicial approaches:

> Our training was a really healthy discussion to mark the sea change in advocacy. We said "There are new rules and you've got to get to grips with them" ... Judicial College training does not convey the same message – it should be saying "You're not doing your job if you don't take control of this". There's a real danger this will wither away, with the edges rubbed off our new approach. I want this to have the clarity it needs from the judges.

"Ticketed" serious sex offence circuit judges and recorders must attend the relevant Judicial College course; High Court judges are not required to do so. Twenty-eight of 39 circuit judges (72%) had received training on developmentally appropriate questioning of children; 32 of 40 (80%) said more training on identifying their communication problems would be helpful. One judge trainer acknowledged that "the judiciary are not getting on board" but another forecast that inconsistencies would diminish as pre-trial cross-examination (s.28 of theYouth Justice and Criminal Evidence Act 1999) is rolled out. Successful integration of s.28 will require consolidated best practice across the judiciary and advocates. Without further training, there is a danger that best practice messages from the s.28 pilot courts will be diluted.

1 Launched in 2016: https://www.icca.ac.uk/advocacy-the-vulnerable.

*Ground rules hearings (GRHs) and draft questions*

Registered intermediaries (independent communication specialists)[2] have helped influence the change of approach. While 36 of 39 judges (92%) almost always held a GRH for planning purposes, as required in intermediary trials[3], this fell to 21 of 38 judges (55%) in cases with no intermediary, even though GRHs are good practice in all young witness trials.[4] Judicial guidance recommends discussing ground rules before the day of the witness's evidence.[5] Two-thirds of judges reported that this was more likely to happen in intermediary cases. Judges should seek child-specific information if not provided.[6] While intermediaries routinely provide assessment reports and recommend communication aids,[7] where no intermediary was involved most judges seldom received information about children's development/ communication or applications for aids.

Courts may

> impose restrictions ... where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions.[8]

Young witness evidence should be timetabled, with limits imposed on the duration of cross-examination.[9] A minority of judges placed restrictions on questioning young witnesses or limited the length of cross-examination, but they said these steps were more likely in intermediary cases. Where restrictions were imposed and explained to the jury, 85 per cent of both judges and lawyers were satisfied that an appropriate balance could be struck in furtherance of a fair trial. Submitting draft questions for review is required for pre-trial cross-examination[10], is recommended in all young witness cases[11] and is the main plank of ICCA training.[12] The study found that, beyond s.28, draft questions were more likely in intermediary trials: 32 of 39 judges (82%) almost always made this direction, compared to 22 of 38 (58%) who did so in cases without an intermediary. ICCA lead facilitators expressed frustration

> I tell barristers to draft every single word, and judges are saying to them in court that "a list of topics is fine."

2 A special measure for vulnerable prosecution and defence witnesses rolled out in 2008 under s.29 of the Youth Justice and Criminal Evidence Act 1999. Their role is to help obtain "complete, coherent and accurate" evidence (s 16(5)).

3 Criminal Procedure Rules 3.9(6) and (7); Criminal Practice Direction 3E.2.

4 Criminal Practice Direction 3E.3.

5 Criminal Practice Direction 3E.3; Judicial *College Equal Treatment Bench Book* 2018, ch.2, paras 48, 56. In s.28 cases, GRHs should be scheduled "about one week" earlier than pre-trial cross-examination: Criminal Practice Direction 18E.21(vii).

6 Judicial College *Equal Treatment Bench Book* 2018, ch.2, para 48; see also Ministry of Justice *Code of Practice for Victims of Crime* 2015, "Duties on service providers for children and young people" para 2.2, p.74.

7 Section 30 of the Youth Justice and Criminal Evidence Act 1999; Criminal Procedure Rule 3.9(7)(b)(vi).

8 Criminal Practice Direction para 3E.4.

9 Judicial College *Equal Treatment Bench Book* 2018, para 56. See also Criminal Procedure Rules 3.9(7)(b)(iii)) and 3.11(d)(i).

10 Criminal Practice Direction 18 E, para 4.

11 Judicial College "Crown Court Compendium" 2018 para 6, pages 10-19; Judicial College *Equal Treatment Bench Book* 2018 ch.2, para 123; *Lubemba* [2014] EWCA Crim 2064, para 35; *Dinc* [2017] EWCA Crim 1206.

12 https://www.icca.ac.uk/advocacy-the-vulnerable-training-delegate-online-preparation-stage-1.

*Dispensing with the intermediary for cross-examination*

Thirty-nine of 47 advocates (83%) said they had adapted their advocacy with young witnesses as a result of working with intermediaries. We were not permitted to ask judges this question, but in their freeform comments, only nine of 26 (35%) were unequivocally positive. This differed from our 2015 survey of 77 judges, in which almost all feedback was positive and two-thirds had changed their practice.[13] In this study, some judges felt that intermediaries may overstate the need for their presence at trial. Intermediaries say this is almost impossible to forecast: responses, even to carefully crafted draft questions, are unpredictable; much depends on the "communicative competence" of advocates and control exercised by the trial judge.[14] The intermediary's presence may contribute to "best evidence" in ways not apparent to those in court, for example, making children feel more confident and satisfying the court's obligation to "take every reasonable step" to facilitate witness participation.[15]

In a worrying trend,[16] in the previous year, eight of 39 judges (21%) had dispensed with the intermediary for cross-examination, even though the Equal Treatment Bench Book argues for retention for trial of those who have already assessed a witness.[17] Rulings to dispense with the intermediary must take account of the child's viewpoint, as required by s.19(3)(a) of the 1999 Act:

> In determining … whether any special measure … would or would not be likely to improve … the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular any views expressed by the witness.[18]

Judges concerned about making better use of intermediaries as a scarce resource could free up weeks of their time by fixing their trials and the date(s) on which they are needed.[19] The study highlighted inefficiencies when their availability was not requested or taken into account; when their trials were placed in warned lists, requiring them to hold several weeks in their diaries; and the lack of responsibility for notifying them of listing decisions.

*Inappropriate cross-examination*

Judges are responsible for controlling inappropriate questioning or breaches of ground rules.[20] Most said they would intervene to stop inappropriate questioning, sometimes asking for remaining questions to be written. Jurors should be given directions about a breach of ground rules "when that occurs".[21] Not all judges dealt with the matter in front of the jury:

> Send the jury out. Speak to counsel. Have a break. Smile sweetly at counsel.

> Before questioning, I often tell the jury about restrictions and explain why. If counsel then breach them – given that jurors know that there are restrictions in place – I see no reason to send the jury out, but simply stop counsel and tell them that the question is inappropriate and to move on, or to remind them of a particular ground rule … If inappropriate questioning persists, I tell the witness and jury that we will be taking a break and remind counsel – if necessary in strong terms – of the directions given. When the jury comes back, I will again direct the jury that I have placed restrictions on the questioning, the reasons why, and that it must not be held against the defendant.

*Perceptions of effective participation: young prosecution witnesses and young defendants*

The Court of Appeal confirms that *Lubemba* principles apply not only to vulnerable witnesses but to young defendants.[22] However, judges and lawyers had differing perspectives on whether they thought both groups were enabled to participate equally effectively. While 18 of 20 Crown Advocates (90%) were satisfied this was the case, only 23 of 40 judges (58%) and eight of 27 barristers and solicitor advocates (30%) agreed.

Judges and advocates concerned about the treatment of young defendants highlighted the absence of a regulated defendants' intermediary scheme, as recommended by the Law Commission,[23] and the impression of "unfair bias" caused by Criminal Practice Direction 3F.13.[24] Further disadvantages included the failure to apply restrictions to ensure fair questioning; not asking prosecutors to submit draft cross-examination questions; a lack of automatic access to special measures;[25] poor or no support; facilities that were not child friendly, including routine use of the dock in adult courts; and limited breaks, "treated as if we are just 'indulging' the defendant".

*Conclusion*

In most aspects of young witnesses' interaction with the justice system, the study found gaps between policies and children's experiences as described by practitioners. There was a lack of ownership and accountability: one senior civil servant commented: "Traditional forms for driving forward commitments have fallen by the wayside". Government departments could not explain, for example, an apparent dramatic fall in young witness numbers.[26] In another such example, the National Police Chiefs' Council could not provide a national profile of force approaches to child protection, though some forces were closing specialist police child protection teams and moving to merged public protection units or even "omnicompetent" policing (where detectives respond to a range of investigations). The Criminal Justice Board is tasked with ensuring "each part of the criminal justice system is held accountable".[27] Despite the plethora of policies, young witnesses have not featured on its agenda in recent years. The study found improvements, but not one that emanated from systematic monitoring.

The full report, recommendations and foreword by Lord Thomas, former Lord Chief Justice, can be found at: *https://learning.nspcc.org.uk/media/1672/falling-short-snapshot-young-witness-policy-practice-full-report.pdf.*

13 J. Plotnikoff and R. Woolfson (2015) *Intermediaries in the Criminal Justice System*, Policy Press, p.283.

14 J. Plotnikoff and R. Woolfson (2017) "Dispensing with the 'safety net': is the intermediary really needed during cross-examination?" *Archbold Review*, Issue 6, pages 6-9.

15 Criminal Procedure Rule 3.9(3)(b).

16 Some judges confused registered intermediaries for witnesses regulated by the Ministry of Justice and unregulated intermediaries for defendants.

17 Judicial College *Equal Treatment Bench Book* 2018, ch.2, para 101.

18 See also Standard 4 of the Ministry of Justice Witness Charter (2013).

19 Judicial College *Equal Treatment Bench Book* 2018, ch.2, paras 47, 88: "Court listings that book their time more precisely, and with greater certainty, would result in more registered intermediaries being available for work. This in turn would improve waiting times for victims and witnesses to be matched to appropriate intermediaries".

20 Criminal Practice Direction 3E.1, 4.

21 Criminal Practice Direction 3E.4.

22 Lord Chief Justice, *Grant-Murray* [2017] EWCA Crim 1228 at [227].

23 Law Commission (2016) "Unfitness to Plead" vol. 1, Law Com No. 364, para 2.72.

24 This acknowledges courts' inherent powers to appoint intermediaries but warns that such appointments confined to the defendant's evidence will be rare and "for the entire trial extremely rare".

25 Section 47, Police and Justice Act 2006 (creating s.33A-C of the Youth Justice and Criminal Evidence Act 1999) provides for defendants under 18 to give evidence by live link in certain conditions: much narrower than for witnesses and the provision is seldom invoked.

26 There are no official statistics but a range of unofficial sources all indicate a decline e.g. in 2012 a Criminal Justice Joint Inspection reported around 33,000 young witnesses whereas in 2018 the Witness Service recorded 7,618 young witnesses attending court.

27 *https://www.gov.uk/government/groups/criminal-justice-board*, undated; HM Government *Our Commitment to Victims* (2014) p.9.