Articles

Young witness policy and practice: messages for family courts

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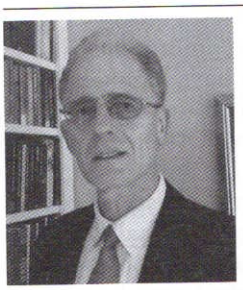

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Over 40 government policies affect young witnesses in the criminal justice system. This study, published by the NSPCC in February 2019, brings together policies on questioning, delay, support and safeguarding and compares them with views on practice expressed by 272 criminal justice personnel. These included 40 circuit judges, 24 barristers, 21 Crown Advocates, three higher court advocates and 48 intermediaries (independent communication specialists) from the Ministry of Justice register. This article highlights findings on four issues of relevance to family practitioners: 'Achieving Best Evidence' ('ABE') investigative interviews; training of advocates and judges; the impact of registered intermediaries; and pre-trial delay.

ABE video interviews

Family proceedings often rely heavily on ABE interviews of children but these are not conducted in all interviews of witnesses under 18. There are no statistics about the number and proportion of children who make these recordings, but it seems likely that a significant proportion do not do so.[1] In the past year, 14 out of 40 registered intermediaries (35%) accepted trial appointments for young witnesses whose police interviews had culminated in a written statement rather than a video.

Many intermediaries reported positive experiences of working with police officers at ABE. However, they also encountered variations in approach between and within forces. Only 27 of 47 intermediaries (57%) said there was almost always enough time for pre-interview planning and discussion with the interviewer:

> 'Police force X does not produce an interview plan, whereas force Y has a pro forma and its completion is mandatory. This means that the officers in force X rarely consider the importance of pre-planning some of the phraseology they intend to use.'

1 Reasons may include a lack of trained police ABE interviewers and/ or ABE suites; young witnesses opting out of being filmed; and investigators opting instead for a section 9 statement, e.g. where several offences are alleged over a period of time and it is thought to be easier to organise the narrative into a written statement.

Intermediaries found most officers were receptive to the recommended use of communication aids. Others, despite intermediary advice, were reluctant to let the witness show rather than tell, requiring the child to 'fail first with words before offering alternate modes'. Again, intermediaries reported differences of approach:

> 'Before I assessed one witness, known to be a reluctant communicator, the interviewer said there was absolutely no way she was permitting written responses read out by me. At the same period, in the same force, I worked with another officer who left every avenue open and allowed a vulnerable witness to write answers if necessary and have them read out.'[2]

In freeform comments about 'significant problems' affecting young witnesses, several judges criticised the quality of ABEs, describing them variously as sometimes 'of dismal quality', 'rambling' or 'poorly structured':

> 'What is needed is properly trained police officers who actually understand the provisions of ABE, where interviews are thoroughly planned, developmentally appropriate and child-centred rather than in generic formats; where there is proper information sharing and prompt disclosure; and where children's accounts are properly tested proximate to the original complaint, not months or years after.'

Policing is facing unprecedented pressures due to austerity. One in five police investigator positions is either vacant or filled with what the Police Inspectorate describes as 'untrained' officers.[3] Some forces had closed specialist police child protection teams and were moving to merged public protection units or even 'omnicompetent' policing where detectives respond to a wide range of investigations. A police trainer whose force had moved to the 'omni-competence' model felt this was driven by cutbacks, not by a move towards excellence. The trainer warned that expecting many more officers to respond to child abuse risked diluting standards of specialist training and described this as 'a perfect storm for disaster'. Intermediaries also expressed concern about the adverse impact on the quality of the ABE interview resulting from these police organisational changes. Although child sex abuse is a strategic policing requirement[4], the National Police Chiefs' Council could not provide a national profile of force approaches to child protection.

ABE interviewers of children, investigators and managers are expected to receive specialist training by way of a stand-alone course or as part of the College of Policing's Specialist Child Abuse Investigators Development Programme. Joint police and CPS Inspectorate reports have highlighted wide differences in training of ABE interviewers across forces that often failed to comply with guidance.[5] The Inspectorates recommend systematic quality assurance of ABE interviews, as do the National Police Chiefs' Council and College of Policing.[6] Police interviewees identified gaps between policies and standards of interviewer performance in ABEs: supervision and quality assurance were still not embedded. The National Police Chiefs' Council acknowledged that it was a 'point of contention' that it had no dedicated lead for

2 A practice commonly allowed at trial for vulnerable witnesses who are non-verbal for any reason or simply reluctant to answer certain questions verbally.

3 HM Inspectorate of Constabulary and Fire & Rescue Services (2018) 'PEEL: Police effectiveness 2017'.

4 Home Office 'Strategic Policing Requirement' (2015).

5 Criminal Justice Joint Inspection (2014) 'Achieving Best Evidence in Child Sexual Cases – A Joint Inspection' paras. 1.17–18; see also Criminal Justice Joint Inspection (2012) 'Joint Inspection Report on the Experience of Young Victims and Witnesses in the CJS'.

6 Criminal Justice Joint Inspection (2014) 'Achieving Best Evidence in Child Sexual Cases – A Joint Inspection' para 4.44, recommendation 2 and para 7.24, recommendation 6; National Police Chiefs' Council and College of Policing (2015) 'Advice on the Structure of Visually Recorded Witness Interviews' pages 2, 4, 6, 15.

ABE, especially as there were 'variations on how [ABE] is used within and between forces'.[7]

When cases involving ABE interviews reached court, only a minority of judges, lawyers and intermediaries reported being able to see and hear young witnesses clearly when watching the recordings.[8]

'Advocacy and the vulnerable' training

The most encouraging shift towards best practice had occurred in developmentally appropriate questioning of young witnesses at court. This was triggered by *R v Barker* [2010] EWCA Crim 4.in 2010 and strengthened by subsequent cases, Rules and Practice Directions and innovative 'Advocacy and the vulnerable' training designed on behalf of the Inns of Court College of Advocacy ('ICCA').[9] The criminal course has recently been adapted for family court practitioners.

Crown Court 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 advocates (75%) and 28 of 47 intermediaries (60%). Many judges linked these improvements to advocacy training. Positive feedback was confirmed by advocates who had taken the course. For example:

> 'complete about-face change, abandoning a lifetime's approach for a whole new world'
>
> 'vulnerable witness course was a complete revelation and culturally took a lot of adjustment'
>
> 'It has focussed my attention radically so that I can limit considerably the number of questions I need to ask'.

However, judicial comments reflected differences between circuits, not all of which had completed ICCA training. While one judge noted: 'The vast majority of advocates have been trained in dealing with young witnesses and do so appropriately', another commented that 'There are too many advocates on this circuit who have not had proper training'. A third, sitting in the Home Counties (where fewer Bar training sessions had taken place), observed that:

> 'While the best advocates are well trained and at the top of their game, the trouble is it's quite a diverse group, with some counsel inexperienced or incompetent. This places an enormous responsibility on the judge – it's a tightrope to walk.'

In 2015, the government announced that it had 'made it a requirement for all publicly funded advocates in sexual offences cases to receive training so that children and vulnerable witnesses are treated with the care they deserve'.[10] In fact, the government has taken no steps to make the 'Advocacy and the vulnerable' training compulsory, leaving a risk that those advocates most in need of training will not receive it. Ministry of Justice inaction had been met with dismay by three lead training facilitators (two for the Bar and one for solicitor advocates) interviewed for the study. While they described delegates attending the first sessions as really motivated, 'slowly it has become tougher' to engage their reluctant colleagues:

> 'The training is not required but we've said that it is close to mandatory. This is uncomfortable, because the Government has not taken action as promised.'

The study identified significant differences in judicial approach to young witness cases. Lead facilitators perceived a lack of

7 Email from National Police Chiefs' Council representative (2 August 2018). A representative of the NPCC advised that a portfolio lead on ABEs is to be appointed: NSPCC seminar 14 February 2019.

8 This problem was replicated when children gave evidence at trial: a substantial minority of judges said they did not have a clear view of young witnesses' facial expressions over the live link and/ or were unable to hear them clearly.

9 A suite of online training materials, hosted by ICCA, was launched in 2016: https://www.icca.ac.uk/advocacy-the-vulnerable.

10 HM Government 'Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan 2015' page 9.

follow-through from some judges and what was expected of trained advocates:

> '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.'

Experience of s 28 Youth Justice and Criminal Evidence Act 1999 pre-trial cross-examination was regarded as 'hugely influential' in embedding best practice in the three pilot courts (confirmed by surveyed pilot judges). One lead facilitator for the Bar said:

> 'The drilling down of details with s 28 judges, intermediaries and ourselves working collaboratively – "How do we break that question down?" – we got used to the style of it, so here, by the time of the [ICCA] training, most of our local delegates had really "got it". This was evident in comparison with advocates without s 28 experience.'

Lead facilitators were frustrated by an inconsistent judicial approach to draft questions caused by the delayed roll-out of s 28:

> 'I felt that we were breaking new ground. I tell barristers to draft every single word, and judges are saying to them in court that "a list of topics is fine".'
>
> 'It would have been helpful if judges had said, when Bar training was completed, "We require draft written questions to be submitted". It's a real disadvantage that they didn't.'

Judicial training

To obtain a 'ticket' to try serious sex offences, circuit judges and Recorders must attend training. The Judicial College confirmed that High Court judges may attend Judicial College training but are not required to do so.[11] Twenty-eight of 39 circuit judges (72%) had received training on what constitutes developmentally appropriate questioning of young witnesses; 32 of 40 (80%) said more training on identifying children's communication problems would be helpful. One commented:

> 'I am very much of the view that the very limited training given to judges (and given only once some time ago, not repeated) was inadequate and I know that judges fall short. There are appointments being made at Recorder and circuit judge level which include people who have never been in a criminal Crown Court before. I know of a specific case where a person now a circuit judge with a class 2 ticket told me he had attended the vulnerable witness training course for the judiciary in another capacity and yet failed to identify and properly deal with a very young witness and a young and very vulnerable defendant in the lead up to a trial.'

A judge trainer acknowledged that 'the judiciary are not getting on board', expressing concern that some counsel ignore questions agreed at ground rules and 'ask their own unsuitable or inappropriate questions without correction by the judge'. A second judge trainer forecast that inconsistency would diminish as s 28 was rolled out:

> 'This will change judicial practice entirely. It's important that judges are in tune because advocates who go "off piste" need to be brought back sharply. Advocates handing in questions will become second nature: they will be more in tune with how to put their case.'

This judge trainer described communication as 'fundamental to and embedded in

11 This appears to be a change since 2015, when the Judicial College said High Court judges were required to attend Serious Sex Offence Seminars: J. Plotnikoff and R. Woolfson (2015) 'Intermediaries in the Criminal Justice System' page 169, Policy Press.

training but may not be specifically addressed. Judges are aware of the need to adapt their language but do not get trained in this as a separate skill'.[12]

Successful rollout of pre-trial cross-examination will require consolidation of 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.

Impact of registered intermediaries

Much of the shift towards developmentally appropriate questioning has been influenced by registered intermediaries, the special measure for vulnerable prosecution and defence witnesses rolled out in 2008 under s 29, Youth Justice and Criminal Evidence Act 1999. Intermediaries facilitate communication during questioning at investigative interview and trial, and contribute to planning how to obtain 'complete, coherent and accurate' evidence (s 16(5) of the Act). Anecdotally, intermediary appointments appear to be increasing in family proceedings[13], even though this is without legislative foundation and requires the exercise of judicial discretion.[14]

Intermediary appointments benefitted young witnesses beyond their presence during questioning in criminal cases. Judges reported that ground rules hearings were almost always held to plan questioning in intermediary cases (a requirement)[15], preferably before the day of the witness's evidence.[16] Accommodating needs requires witness-specific information[17] which judges should ask for if not provided.[18] Intermediaries advise courts based on their assessments: in cases without an intermediary, few judges received information about children's development or communication abilities, or applications for communication aids, a separate special measure[19] routinely invoked only when intermediaries are appointed.

Courts may 'dispense with the normal practice and impose restrictions . . . where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions'.[20] The Equal Treatment Bench Book encourages young witness evidence to be timetabled, with limits imposed on duration of cross-examination.[21] A minority of judges said they placed restrictions on questioning young witnesses or limited the length of cross-examination, but these steps were more likely in intermediary cases. Where restrictions were imposed and explained to the jury, most judges and lawyers were satisfied that an appropriate balance could be struck in furtherance of a fair trial.

Submitting draft questions for review is a requirement for s 28 pre-trial cross-examination,[22] is recommended in all

12 With the exception of a small group 'communication' course of 36 delegates (18 from courts, 18 from tribunals) divided into groups of six.

13 In public law family cases, judges have directed that intermediaries rather than advocates ask pre-agreed questions. This result in 'overwhelmingly clear and compelling' evidence in *A Local Authority and CM, CM and U, V, W and X (through their Guardian) and Y* [2016] EWFC B96).

14 Family Justice Council (2011) Guidelines in Relation to Children Giving Evidence in Family Proceedings. A participation direction can also be made for a vulnerable adult: Family Procedure Rules Pt 3A.

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

16 GRHs are considered good practice in young witness cases even without an intermediary: Criminal Practice Direction 3E.3. See also Judicial College 'Equal Treatment Bench Book' 2018, chapter 2, paras 48, 56. In s 28 cases, GRHs should be scheduled 'about one week' earlier than the pre-trial cross-examination: Criminal Practice Direction 18E.21(vii).

17 'The Witness Care Unit must offer a full needs assessment to victims who are required to give evidence to make sure they are supported in getting to court and giving their best evidence' (Ministry of Justice 'Code of Practice for Victims of Crime' 2015 'Duties on service providers for children and young people' para 2.2, page 74).

18 Judicial College 'Equal Treatment Bench Book' 2018, chapter 2, para 48.

19 S 30, Youth Justice and Criminal Evidence Act 1999; Criminal Procedure Rule 3.9(7)(b)(vi).

20 Criminal Practice Direction para 3E.4.

21 Judicial College 'Equal Treatment Bench Book' 2018, para 56. Limits on duration are authorised by Criminal Procedure Rules 3.9(7)(b)(iii)) and 3.11(d)(i).

22 Criminal Practice Direction 18 E 'Annex for s 28 ground rules hearings at the Crown Court' para 4.

young witness cases[23] and is the main plank of 'Advocacy and the vulnerable' training.[24] Submission of draft questions in non-s 28 cases was more likely where intermediaries were appointed, though intermediaries noted this needed to be timetabled to ensure they were not asked to review questions just prior to cross-examination.

Children with an intermediary were better able to make an informed choice about how to give evidence because they were more likely to have a pre-trial familiarisation visit to court and to practise on the live link. Lady Justice Hallett has emphasised that: 'Advocates must adapt to the witness, not the other way round'.[25] At trial, judges said children benefitted from adjustments[26] recommended by intermediaries, eg letting a four year-old giving evidence on a rocking horse in the live link room; restricting questions to five at a time, followed by short breaks; face-to-face cross-examination in the live link room, sometimes with both counsel and the judge and sometimes just the cross-examiner; allowing the mother (not a witness) to sit with her child in the live link room; and allowing children to be accompanied by a calm dog (one judge said this had 'a marked effect on the quality of evidence').

Delay

The length of time taken by prosecutions involving young witnesses may affect the family court in parallel proceedings. Government policies to expedite young witness cases are not centrally monitored, even for the latest commitment prioritising cases involving children under 10.[27] The majority of respondents thought that delay from charge to completion in young witness cases had reduced in the previous year. However, statistics showed that charge to completion in child sexual abuse ('CSA') offences involving physical contact, those most likely to involve a young witness, took longer than other categories of case and their duration had increased over time.

Demand for access to social media, emails and phone records contributed to pre-trial delay. Judges observed that changed police practice[28] to avoid the time restrictions on police bail[29] had caused pre-charge delay to escalate 'inexcusably':

> 'The principal delay is between reporting and charge. The police appear to have limited real understanding of how to investigate cases or their disclosure obligations. Notwithstanding the disclosure protocol and good practice model[30], local authorities similarly have little understanding of disclosure and neither the police nor the local authority follow the time limits set out in the protocol. The CPS are massively under-resourced and reluctant to take hard decisions. I have been told by the CPS last week that every single case that they are sent has to be returned to the police with an action plan because it is not fit for a charging decision to be made. As an example, I am aware of a case in which both defendant and complainant were 14. Sixteen months has so far elapsed in which schooling for both – including their GCSE year – has been significantly disrupted as they shared a class. To date, no decision on charge has yet been made.'
>
> 'The biggest cause of delay is the now usual practice of the police releasing

23 Judicial College 'Crown Court Compendium' 2018 para 6, page 10–19; Judicial College 'Equal Treatment Bench Book' 2018 chapter 2, para 123; *R v Lubemba* [2014] EWCA Crim 2064, para 35; *R v Dinc* [2017] EWCA Crim 1206.

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

25 *R v Lubemba* [2014] EWCA 2064 para 45.

26 'Every reasonable step' must be taken to facilitate participation: Criminal Procedure Rule 3.9(3)(b).

27 National Police Chiefs' Council, Crown Prosecution Service and HM Courts and Tribunals Service (2018) Protocol to expedite cases involving witnesses under 10 years.

28 The Policing and Crime Act 2017 introduced a new pre-charge bail limit of 28 days which came into effect in April 2017. One extension of up to three months can be authorised by a senior police officer.

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30 Crown Prosecution Service (2013) 'Protocol and good practice model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings'.

suspects not on bail but "under investigation" and then issuing a postal requisition. This has added months to the delay in charging, even in cases with very young witnesses. This practice should be stopped in all cases but it must be stopped soon where there are young witnesses. Directions should be given to the police and the CPS that, where an investigation is to continue in a case where there is a young witness, the suspect must be released on bail.'

Conclusion

In most aspects of young witnesses' interaction with the justice system, the study found gaps between best practice as envisaged by 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.[31] The Criminal Justice Board is tasked with ensuring 'each part of the criminal justice system is held accountable' for delivering reforms[32]: despite the plethora of policies, young witnesses have not featured on its agenda in recent years. The study failed to identify a single improvement emanating 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.

31 There are no official statistics but unofficial sources all indicate a decline. For example, 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.

32 https://www.gov.uk/government/groups/criminal-justice-board, undated. HM Government 'Our Commitment to Victims' 2014 said that by April 2015, the Criminal Justice Board 'would hold agencies to account for what they have done at a national level' (page 9).