Falling short?
A snapshot of young witness policy and practice


Joyce Plotnikoff and Richard Woolfson

February 2019
Joyce Plotnikoff DBE and Dr Richard Woolfson

Joyce and Richard are researchers and directors of Lexicon Limited (www.lexiconlimited.co.uk). They have worked on criminal, civil and family court issues and contributed extensively to judicial guidance and Criminal Practice Directions. Their publications relating to vulnerability include In their own words (2004); evaluations of the intermediary scheme (2007) and young witness support (2007); Measuring up? Evaluating implementation of government commitments to young witnesses (2009) and a related progress report (2011); and Intermediaries in the Criminal Justice System: Improving communication for vulnerable witnesses and defendants (Policy Press, 2015). In 2013, with Professor Penny Cooper, they co-founded www.theadvocatesgateway.org, a website providing free toolkits on case management and the questioning of vulnerable witnesses and defendants. They have conducted training for judges and practitioners from over 30 countries, most recently in relation to intermediary pilots in Australia and New Zealand.

Acknowledgements

We are grateful to all the 272 people who, in the course of this research, shared their views about policy, practice and the experience of children in the criminal justice system.

We would like to thank the following who commented on surveys and facilitated their distribution:

The Rt Hon Lady Justice Julia Macur DBE, Senior Presiding Judge, Adenike Adewale and Kate Arrowsmith (judiciary); Jonathan Bambro and James Esses (CPS Crown Advocates); Angela Rafferty QC (barristers); Deborah Piccos (Vice Chair of The Solicitors’ Association of Higher Courts Advocates, SAHCA); Amanda Lowndes, Claire Ross and Karen Douras (HMCTS Witness Champions); Marios Leptos, Charmaine O’Jon Gordon and Rhiannon Evans (Citizens Advice Witness Service); Vera Baird QC and Rachel Snaith (Police and Crime Commissioners); Andy Hunt (sexual assault referral centres); and Kim Doyle (independent sexual violence advisers). Frank Glen, Abigail Walker and Rachel Surkitt provided statistics about intermediaries from the National Crime Agency. The NCA also hosted a survey of intermediaries on Registered Intermediaries Online. Additional advice and statistical information were provided by Bob Weston, Allan Cox and Matthew Colahan of the Ministry of Justice.

We were greatly assisted by Almudena Lara, Michael Simpson and Andrew Fellowes of the NSPCC, who mentored this study from its inception, and by comments from three independent academic reviewers.
Foreword

In July 2009, Measuring up? Evaluating implementation of Government commitments to young witnesses, the study of children giving evidence as witnesses, by Dame Joyce Plotnikoff and Richard Woolfson was published by the Nuffield Foundation and the NSPCC. I had the pleasure and privilege of writing the foreword to that study and welcoming what had been achieved since their initial study in 2004, though acknowledging what remained to be done. I concluded by observing that if we had the good fortune of another study half a decade later, the study would show real change had been achieved.

We now have the benefit of another study, nearly a decade later. It has all the force and incisiveness of the earlier studies; everyone should be profoundly grateful to the authors for their achievement in this their third report on this critical subject. It is good to know that the overall policy is soundly based and there has in many respects been much real improvement – from interviews by specialist police officers at the start of the process to the success of the pilots for pre-recorded cross examination (after s.28 was brought into force) and the marked improvement in many cases of the cross-examination of child witnesses. However, as the study makes clear very much more still remains to be done.

It is disheartening to learn that neither the scale of improvement nor the delivery across England and Wales about which I was optimistic in 2009 has been realised. It is particularly unfortunate, as the authors demonstrate, that the treatment which a child witness will receive has not been joined up between the agencies. It is also unpredictable. Whilst in some cases it will be of the highest standards; in others it will be far from satisfactory. The fragmented picture presented is unacceptable in our system of justice.

Each part of the criminal justice system has been seriously affected by the severe and unjustifiable cuts imposed by the Government since 2010. The cuts in part help explain some of the shortcomings – the failure to provide proper resources for essential needs – for example the further development of judicial training and an increase in the number of intermediaries who support child witnesses. However, even if, as might well be the case, the cuts are not rolled back and resources remain inadequate, the study and the comprehensive recommendations set out a number of steps that could nonetheless be taken which would make a significant difference.

Some should be relatively straightforward. For example, there is no reason why the shortcomings in the technology required to prerecord evidence should not be rectified; this is not technology at the cutting edge, but well tried and tested. Similarly, there is no reason why Ministers and the Regulators cannot see that it is made a requirement for all who cross-examine children that they undertake appropriate training; inaction in this respect has let children down.

More difficult, however, is putting in place the necessary machinery for ensuring that there is proper delivery of uniform proper standards. As the recommendations make clear, there needs to be better provision of statistical information and, more importantly, proper mechanisms that ensure accountability for delivery of the underlying policy which is soundly based. There are many identifiable persons who have a role, including Ministers of the Crown, Chief Constables, Police and Crime Commissioners and the Board of HMCTS. Little progress however will be made unless each of these is properly held to account for the shortcomings for which each is responsible. Although the Victims Commissioner has a critical role in holding each to account, it should be the clear duty of each to set out every year not only the steps each has taken to ensure improvement but also to demonstrate that proper standards are being applied across the jurisdiction for which each is responsible. It is, in short, simply wrong in the 21st century that we do not put at the forefront of our system of justice the requirement that children who are the victims of crime or are witnesses to crime are treated throughout the criminal justice system in accordance with proper standards. Dame Joyce and Richard Woolfson have elicited the issues. They have made first class recommendations. The least we can do for such children is to require that the shortcomings identified by the authors be addressed, the recommendations be implemented by those who have that responsibility and the delivery of proper standards be achieved through holding those persons fully to account.

Lord Thomas of Cwmgiedd

29 January 2019
Contents

Abstract 6

1 Discussion and recommendations 7
  1.1 Background 7
  1.2 Methodology 8
    1.2.1 Limitations of the research 9
  1.3 Emerging issues 10
    1.3.1 Lack of leadership, ownership and accountability 10
    1.3.2 Unreliability of young witness numbers 12
    1.3.3 Absence of an ‘overarching’ approach to safeguarding children 13
    1.3.4 The move away from police child protection units 14
    1.3.5 Evolving cross-examination practice 15
    1.3.6 Intermediaries bring many benefits but are underused and under-resourced 16
    1.3.7 Failure to monitor delay 18
    1.3.8 Failure to utilise the full range of special measures 18
    1.3.9 Denial of opportunity to make an informed decision about how to give evidence 18
    1.3.10 Uneven access to support pre-trial 19
    1.3.11 Inadequate court facilities 19
    1.3.12 Difficulties in accessing information about young witness entitlements 19
    1.3.13 Problems with technology 20
  1.4 The way forward 20
  1.5 Recommendations 21
    1.5.1 HMCTS ‘Transformation’ programme 21
    1.5.2 Police forces, National Police Chiefs’ Council, Association of Police and Crime
    Commissioners and the Joint Criminal Justice Inspectorates (policing) 22
    1.5.3 Ministry of Justice (registered intermediaries) 22
    1.5.4 Ministry of Justice (status of training) 22
    1.5.5 Bar Standards Board and Law Society (entry level advocacy training) 22
    1.5.6 Bar Standards Board and Law Society (standards of professional conduct) 22
    1.5.7 Judicial College, Inns of Court College of Advocacy, Law Society and CPS
          (training provision) 23
    1.5.8 Criminal justice agencies and the Witness Service (support) 23
    1.5.9 Criminal justice agencies (safeguarding) 23
    1.5.10 HMCTS, the Witness Service and Ministry of Justice (feedback from young
          witnesses) 24
    1.5.11 Taking forward the findings 24
2 Delay

2.1 Key findings
2.2 Giving priority to young witness cases
   2.2.1 Perceptions of pre-trial delay
   2.2.2 The ‘Protocol to expedite cases involving witnesses under 10 years’
2.3 Fixed trial dates
2.4 Adjournments
2.5 Waiting to give evidence
   2.5.1 Section 28 and delay

3 Support

3.1 Key findings
3.2 Citizens Advice Witness Service and Outreach Service
3.3 Police and Crime Commissioners
3.4 Specialist local young witness schemes
3.5 Independent sexual violence advisers and sexual assault referral centres
3.6 Clarifying support roles and responsibilities
3.7 Providing information to young witnesses about court
   3.7.1 Other young witness resources
3.8 Giving the young person an informed choice about special measures
   3.8.1 Practising on the live link at the pre-trial court familiarisation visit
3.9 Less frequently used special measures
   3.9.1 Young witness choice about the supporter in the live link room
   3.9.2 Giving evidence in private
   3.9.3 Not being seen by the defendant over the live link: combined special measures
   3.9.4 Live link evidence from a remote site (away from the trial court)
3.10 Refreshing the young witness’s memory before giving evidence
3.11 Introductions to the young witness
   3.11.1 Questions about personal records or previous sexual history
3.12 Child-friendly facilities
   3.12.1 Police ABE suites
   3.12.2 Court waiting areas
   3.12.3 Live link rooms
   3.12.4 Court technology
   3.12.5 Seeing the defendant or members of the public on the live link
3.13 Victim Personal Statements
3.14 The ‘Child House’ pilot
5.7 Tailoring cross-examination to young witness needs  97
  5.7.1 Provision of information to the court  97
  5.7.2 'Every reasonable step'  98
  5.7.3 If cross-examination breaks down  100
  5.7.4 Inappropriate cross-examination or a breach of ground rules  101
  5.7.5 Dispensing with the intermediary for cross-examination  103
5.8 Perceptions of effective participation: young prosecution and defence witnesses and young defendants  105

6 Quality assurance and training  108
  6.1 Key findings  108
  6.2 'Achieving Best Evidence' interviews  109
    6.2.1 Respondents' views  109
    6.2.2 The 'licence to practice'  112
    6.2.3 Joint police and social worker training  113
    6.2.4 Technical quality of ABEs  113
  6.3 Training for advocates  115
    6.3.1 Status of advocacy training  117
    6.3.2 Rules of professional conduct and advocacy standards  118
    6.3.3 Advocacy training in the future  120
  6.4 Training for the judiciary  121
  6.5 Quality assurance of registered intermediary court work  123

Annexes
Annex 1 Methodology  125
Annex 2 Timeliness of Crown Court cases  128
Annex 3 Comments about court waiting rooms and live link rooms  129
Annex 4 Numbers of registered intermediaries  133
Annex 5 Registered intermediaries and vicarious trauma  135
Annex 6 Figures  137

References  140

Cases  150
Abstract

Best practice in delivering commitments to young witnesses in England and Wales is superb. In several respects, it has improved markedly since 2009, when the NSPCC and Nuffield Foundation published ‘Measuring up? Evaluating implementation of Government commitments to young witnesses’. With careful planning, young witnesses are interviewed by specialist police officers. Communication advice is provided by a registered intermediary, an independent communication specialist. The Witness Service and Outreach Service offer support and preparation for court. Children visit the court beforehand and practise on the live link. Trials involving them are expedited and evidence is tested in a developmentally appropriate way that remains fair to the defendant. All these steps – and others – are enshrined in policies set out in this report: none are delivered consistently. The study provides an overview of over 40 policies and guidance documents concerning young witnesses, along with 13 Inspectorate and Commissioner reports and case law. Comparing these with feedback from 272 criminal justice policy makers and practitioners, the authors conclude that the gap between best and poor practice is wider than ever. Failure to implement commitments inevitably undermines children’s ability to give their ‘best evidence’.

The sobering reality relies on data, yet there are no official statistics about numbers of young witnesses in the system. Indicative figures suggest a dramatic fall in numbers, for which no reasons could be identified.

In the last decade, the criminal justice system has suffered significant budget cuts, affecting the quality of young witnesses’ experience not just through system pressures but also, for example, through closure of almost all specialist young witness schemes, the shortage of intermediaries and a move away from specialist police child protection units. In this climate, accountability is crucial, yet the study failed to identify a single improvement emanating from systematic monitoring. Despite a plethora of policies, some recent, young witness issues have not featured on the agenda of the Criminal Justice Board, tasked with ensuring ‘each part of the criminal justice system is held accountable’ for delivering reforms.1 Without accountability, policies pay only lip-service to commitments to improve the justice system’s response to children.

---

1. 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).
1 Discussion and recommendations

This chapter sets the scene for the study and explains the methodology used. It discusses the issues emerging and the recommendations arising.

1.1 Background

Best practice in delivering commitments to young witnesses\(^2\) in England and Wales is superb. In many respects, it has improved beyond recognition since 2009, when the NSPCC and Nuffield Foundation published ‘Measuring up? Evaluating implementation of Government commitments to young witnesses’. With careful planning, young witnesses are skilfully interviewed on film by specialist police officers. Advice on the individual child’s communication is provided by an independent registered intermediary (a special measure under s 29, Youth Justice and Criminal Evidence Act 1999). The Witness Service’s Outreach Service (and – in some instances – independent sexual violence advisers) offer emotional support and preparation for court. Trial cases are expedited and children’s evidence is tested in a developmentally appropriate way that remains fair to the defendant.

However, the gap between the best and poor practice is wider than ever. As this study shows, best practice continues to improve and develop but some practice remains poor. The child may encounter a police interviewer with inadequate training who fails to plan the interview or consider assessment by an intermediary; the interview may not be video-recorded or, if it is, the child may not be seen or heard clearly; the child may not be offered support, a familiarisation visit to court, memory refreshing or the chance to make an informed choice about how to give evidence; the trial may be postponed; the child may give evidence in unsuitable facilities; and cross-examination is likely to result in less than ‘best evidence’ if the child encounters an ill-prepared or recalcitrant advocate and a passive judge. The sobering reality is that it is impossible today to predict with confidence the response of the criminal justice process to any individual young witness.

Criminal justice in the last decade has been marked by court closures, reductions in court staff, restrictions on legal aid and CPS budget cuts.\(^3\) These have affected the quality of the young witness experience not just through system pressures but also, for example, through the closure of almost all specialist young witness schemes (3.4); the shortage of registered intermediaries (5.3.2); and a move away from specialist police child protection units (6.2.1). Criminal Justice Inspectorates observe that austerity has resulted in agencies making ‘radical shifts in the way that they provided services’ and ‘the extent to which they were willing and able to participate in partnership working’\(^4\).

---

\(^2\) Children under 18 at the time of the hearing: s 16(1)(a), Youth Justice and Criminal Evidence Act 1999, as amended by s 98, Coroners and Justice Act 2009.

\(^3\) As of 2018, the CPS had experienced staffing cuts of more than 30% in the past five years. ‘Prosecution cannot take more cuts, says DPP’ The Times, 5 December 2018.

The profile of offending against children has also changed. The dangers of grooming and child sexual exploitation have been recognised. Reports of online child sexual abuse referred to the Metropolitan Police have increased by 700 per cent since 2014. ‘Peer on peer’ or ‘child on child’ abuse has increased; new potentially offending behaviour has emerged, such as ‘sexting’. Material from social media and smart phones is increasingly a feature of young witness investigations: scrutiny contributes to delay.

New bodies have been introduced since 2009, including the Victims’ Commissioner (whose reports are cited throughout in this study), the Citizens Advice Witness Service (3.2) and Police and Crime Commissioners or PCCs (3.3). The Criminal Justice Board, formerly chaired by the Lord Chief Justice, has been reconstituted under the Justice Secretary (1.3).

1.2 Methodology

In 2009, when ‘Measuring up?’ was published, the Ministry of Justice responded with an action plan. A progress report in 2011 found some improvements, but identified areas ‘in which the State is failing in its commitment to enable young witnesses to give their best evidence.’ In 2018, Lexicon Limited was commissioned by the NSPCC to evaluate changes in the experience of children in the criminal justice system since ‘Measuring up?’ and the progress report. The terms of reference called for the study to examine whether Government reforms and related initiatives enabled children to give their best evidence and safeguarded them within the criminal justice process or whether these had fallen short of policy commitments and necessary expectations, leaving children vulnerable to further trauma and potentially affecting justice outcomes. This research set out to bridge the gap between anecdote and evidence and to identify issues facing children and practitioners within the justice system. It will be followed by a study to capture through interview young witnesses’ experiences in the criminal justice system.

The report describes how the criminal justice system’s response to young witnesses has changed since the 2009 study and the 2011 progress report which followed. In doing so, the report:

- focuses on four areas identified by the 2011 progress report as requiring further action, namely delay (chapter 2); support tailored to young witnesses’ needs (chapter 3); safeguarding (helping children feel safe) (chapter 4); and questioning (chapter 5)
- provides an overview of over 40 policies and guidance documents concerning young witnesses, along with 13 Inspectorate and Commissioner reports and case law
- examines how these are interpreted in practice by criminal justice system personnel
- considers issues of training, accountability and quality assurance (chapter 6). The policies concern all young witnesses but the discussion of practice focuses on the Crown Court.

The research was carried out between January and August 2018. During this time, 62 interviews were conducted by phone or in person with: members of Government departments (many responsible for developing policy); the legal professions and associated organisations; the judiciary; charities and other bodies. Their views provided background to study issues and

---

6 ‘Online child sexual abuse referred to the Met up 700% since 2014’: The Guardian, 22 January 2018.
7 Not normally the subject of a police investigation if it occurs between two children under 18 in a relationship: ‘Sexting between children not automatically a crime, says CPS’: The Guardian, 10 October 2016.
9 ‘Measuring up?’ identified a need, ‘in some instances, for a fresh approach … to clarify responsibility for delivery of specific services and to improve accountability through monitoring’; page 154.
helped inform development of questions for practitioners. These were incorporated into surveys completed by 210 respondents reflecting on their experiences in young witness cases in the previous 12 months. Surveys were completed by judges; intermediaries; Citizens Advice Witness Service team leaders, Outreach team leaders and area managers; barristers, CPS Crown Advocates and solicitor advocates; Police and Crime Commissioners; HMCTS Regional Witness Champions; and independent sexual violence advisers and sexual assault referral centres. We are grateful to the organisations concerned for approval and distribution of surveys and to participants for their willingness to respond. For more information about the methodology and breakdown of responses see Annex 1.

There are some points to note about method and presentation of the analysis:

- surveys were conducted between April and July 2018. Surveys for specific groups were open for different ‘windows’ during this period because of the need of organisations to review and approve survey questions and differing distribution strategies (see Table 6 in Annex 1). The timing also meant that respondents’ views were sought prior to the availability of some key guidance (e.g. the Judicial College’s Crown Court Compendium updated in June 2018) and Court of Appeal decisions quoted in the report.

- not all respondents answered every question. Throughout the report we make clear the number and roles of those responding to each question. Percentages given are of the number responding to individual questions, provided that number is at least twelve.

- the range of ‘tick the box’ responses to many survey questions were ‘always or almost always’; ‘more than half the time’; ‘about half the time’; ‘less than half the time’; and ‘rarely or never’. For the sake of brevity, throughout the report the first and last of these are abbreviated to ‘almost always’ and ‘rarely’ respectively, and in many cases we report only the figures in these two categories.

- percentages are rounded to the nearest one per cent, with .5 being rounded up.

Chapters 2-5 below discuss the four key issues of delay, support, safeguarding and questioning. Chapter 6 addresses quality assurance and training. Chapter sections begin with quotes from policies and commitments; relevant Criminal Procedure Rules and Practice Directions (current as of April 2018); guidance; and case law. These authorities are followed by any available statistics and the views of interviewees and respondents to surveys about the issue in question. Chapters 2 to 6 begin with a summary of key findings in that chapter.

1.2.1 Limitations of the research

Collectively, we hope that the views of these 272 criminal justice professionals will inform discussion about gaps between policy and practice. However, we make no claims regarding the representativeness of the views expressed; some response numbers are small. While a total of 47 advocates (Crown Advocates, barristers and solicitor advocates) participated in the study, the response rate from barristers was particularly disappointing (12 replies to the online survey and 12 to a shorter paper questionnaire distributed at a conference, see Table 5 in Annex 1). As a result, barristers and Crown Advocates’ responses have been aggregated with those of solicitor advocates unless they diverged significantly (e.g. as they did in relation to perceptions of fairness about the effective participation of young defendants, see Table 4 in 5.8 below).

We had hoped to achieve a greater degree of consistency across the surveys for purposes of comparison. However, some distributing organisations requested changes and deletions to survey drafts. As a result, some questions were not put to specific groups of recipients (for example, the judiciary requested that we not ask judges about listing decisions or whether their practice had changed as a result of working with registered intermediaries). Anyone wishing to receive copies of the survey questions should contact enquiries@lexiconlimited.co.uk.

The scope of the study did not extend to a review of the literature on young witnesses.
1.3 Emerging issues

1.3.1 Lack of leadership, ownership and accountability

In the course of the study one senior civil servant, describing a vacuum in policy ownership, said ‘Implementation lives and dies on leadership’. Another said: ‘Traditional forms for driving forward commitments have fallen by the wayside’. Respondents to this study failed to identify a single improvement emanating from systematic monitoring of cases involving young witnesses.

The study identified policies:

- which the Government claimed, incorrectly, to have put in place. This occurred in relation to national rollout of s 28 pre-trial cross-examination (5.5) and mandatory specialist advocacy training for those undertaking publicly funded serious sex offence cases (6.3.1)
- where compliance was not monitored systematically, for example the policy to expedite trials involving children under 10 (2.2.2) or to enable young witnesses to practise on the live link during a court familiarisation visit (3.8.1)
- where, after approaching four Government departments, we could not identify responsibility for implementing a 2015 commitment, reiterated in 2017, to alert witnesses to their right to access pre-trial therapy (4.3.2).

The aim of the cross-governmental Criminal Justice Board, chaired by the Justice Secretary, ‘is to deliver swift and certain justice by driving improvements across the system’ and to ‘ensure each part of the criminal justice system is held accountable for delivering these reforms’.\textsuperscript{10} Despite these aims, the Board has not exercised leadership to ensure delivery of young witness policies. It has not published minutes on its website since July 2017.\textsuperscript{11} Previous minutes did not address young witness issues. The Ministry of Justice advised that there had not been a specific agenda item about young witnesses at more recent Board meetings; nor had the Board yet received information from Local Criminal Justice Boards identifying good practice initiatives or inter-agency problems in relation to young witnesses.\textsuperscript{12}

A significant challenge to accountability arises from the issuing of victim and witness policies in the name of ‘HM Government’. Such documents include ‘Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan 2015’; ‘Tackling Child Sexual Exploitation Report’ (2015); and ‘Tackling Child Sexual Exploitation: Progress Report’ (2017). These reports assign departmental or agency responsibility for some actions but not others. They are not attributed to authors and do not provide the contact details of those responsible for their content. (In desperation, we contacted the only email address – for anyone requesting a Braille copy – on one such report to enquire about responsibility. We received no reply.) A remarkably frank senior civil servant explained that such reports are produced by inter-Ministerial groups or implementation task forces which need not publish their membership. The 2015 reports cited above are annotated on the Internet as being ‘published under the 2010 to 2015 Conservative and Liberal coalition government’. The civil servant explained: ‘It’s safe to assume that such commitments are now defunct’\textsuperscript{13} but also observed that the commitment to victims in the Conservative Manifesto was ‘not driving things’ either as there had been no action

\textsuperscript{10} https://www.gov.uk/government/groups/criminal-justice-board, undated. Membership includes the Attorney General, Home Secretary, other Ministers of State, senior members of the judiciary, heads of the CPS and HMCTS, Chair of the National Police Chiefs’ Council, Commissioner of the Metropolitan Police and a representative from the Association of Police and Crime Commissioners. 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).

\textsuperscript{11} Correct as of 6 October 2018.

\textsuperscript{12} Email, Ministry of Justice Strategy Unit, 15 May 2018.

\textsuperscript{13} As there has been no official statement to that effect, we have nevertheless included these 2015 commitments in this study.
as yet on further ‘enshrining victims’ entitlements in law’.14 (After completion of research for this report, the Government published its cross-Government ‘Victims’ Strategy’ in September 2018.)

Longstanding concerns about the quality of ‘Achieving Best Evidence’ (ABE) interviews were reiterated in this project, but the National Police Chiefs’ Council has no lead officer with responsibility for ABE interviews (6.2.1).

An anomaly identified during the research concerned oversight of children in the criminal system in Wales. Criminal justice has not been devolved to the Welsh Assembly15, so the Children’s Commissioner for Wales cannot address these issues: they remain the responsibility of the Children’s Commissioner for England.16

In 1995, we queried whether investment in court technology masked the need for basic system changes on behalf of young witnesses.17 The same may apply in respect of young witnesses and the Government’s £1.2 billion ‘Transformation’ programme.18 This encompasses rollout of pre-trial cross-examination (s 28 Youth Justice and Criminal Evidence Act 1999)19 – a special measure potentially of huge benefit to young witnesses. The criminal justice element of the programme includes a ‘youth’ strand20 and a children and young people’s engagement group but it is unclear whether the programme will address other basic problems identified in this study.21 The House of Commons Public Accounts Committee has expressed concern that the ‘Transformation’ programme lacks ‘a clear sense of its priorities’ and inadequate consideration of vulnerable justice system users.22 We discuss the ‘Transformation’ programme further in respect of registered intermediaries (1.3.6).

The nine HMCTS regional Witness Champions are part of a multi-tier management structure, with witness care representatives at the levels of court, court clusters, court regions and nationally (a meeting of the nine regional Champions). Their responsibilities (additional to their ‘day job’) include planning and monitoring local service provision with other criminal justice agencies with ‘essential’ links to the Local Criminal Justice Board ‘to ensure that other agencies are meeting their obligations with regard to witnesses’.23 The study found that none of the Champions liaised with Local Criminal Justice Boards (4.4); only three felt their role related to delivery of Victims’ Code commitments or Witness Charter objectives (3.3); two said their role included monitoring young witness waiting times at court, although none received any statistics about young witnesses (2.5). None identified problems with live link practice sessions at court familiarisation visits in their areas, although this emerged as an endemic ‘rubbing point’ in the study (3.8.1). Four of the nine had received or passed on information about what worked well or was problematic for young witnesses in the previous year (4.4).

---

14 Conservative and Unionist Party Manifesto 2017 ‘Forward, Together: Our plan for a Stronger Britain and a Prosperous Future’ page 44.
15 In September 2017, the First Minister appointed Lord Thomas, former Lord Chief Justice, to chair a Commission on Justice in Wales.
16 Email from the Office of the Children’s Commissioner for Wales (18 April 2018) and the Office of the Children’s Commissioner for England (19 April 2018). No reply was received to a request to the English Commissioner on 20 April 2018 for information about Wales.
18 Ministry of Justice (31 March 2017) ‘HMCTS Improving the justice system’.
19 The Guardian (15 September 2016) ‘Courts to undergo £1bn digital reform after successful pilots’.
20 HMCTS (20 June 2018) ‘Reform projects explained’. The youth strand will look specifically at the needs of children and young defendants to ensure that we do not apply adult processes to children, but instead look at each stage of the process and shape a version of it that is appropriate for young people.
21 Details of how young witnesses will benefit from the reform programme were requested from the Ministry of Justice Customer Directorate (18 June 2018).
23 Extract from HMCTS intranet: email from HMCTS (22 January 2018).
The conclusion reached by a 2012 Criminal Justice Joint Inspection still has validity:

\[\text{[young witnesses] continue to be adversely affected by an absence of real focus on their needs \ldots the [CJS] system itself appears to be unable to maintain a consistent and acceptable level of care as cases pass through it.}\]^{24}

### 1.3.2 Unreliability of young witness numbers

It is impossible to design an effective system responding to the needs of young witnesses without information about the scale of the task. However, there are no official Government statistics about the number of children warned as witnesses, attending court or actually giving evidence. That is not to say there are no statistics about young witnesses: the problem is the plethora of sources and their reliability. In 2013, Lord Judge, the Lord Chief Justice, cited three:\(^{25}\)

- CPS statistics in 2008/9 indicated that about 48,000 children were called to give evidence at court in England and Wales
- ‘a couple of years earlier’ the Witness Service supported over 30,000 young witnesses at court in England and Wales
- in 2012, a Criminal Justice Joint Inspection\(^ {26}\) reported that ‘In a 12-month period around 33,000 children and young adults under the age of 18 years will be involved in giving evidence in a criminal trial’.

In 2012-13, Victim Support’s Witness Service supported 12,693 young witnesses; in 2013-14 the figure was 11,788.\(^ {27}\) In 2016, a Court of Appeal family judgment reported that ‘some 40,000’ young witnesses appear in criminal cases annually, but the judge and advocates in that case could not identify the source of that figure.\(^ {28}\)

The CPS provided us with the following unpublished figures from its Witness Management System (WMS):

**Table 1: Child victims and witnesses required to attend a trial-related hearing at court**\(^ {29}\)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Magistrates’ Court</td>
<td>10,603</td>
<td>10,313</td>
<td>10,053</td>
<td>9,003</td>
<td>7,253</td>
</tr>
<tr>
<td>Crown Court</td>
<td>5,286</td>
<td>5,418</td>
<td>5,449</td>
<td>5,380</td>
<td>5,065</td>
</tr>
<tr>
<td>TOTAL</td>
<td>15,889</td>
<td>15,721</td>
<td>15,502</td>
<td>14,383</td>
<td>12,318</td>
</tr>
</tbody>
</table>

However, the figures were heavily caveated:

- they refer only to cases handled by a Witness Care Unit which uses WMS. Not all cases are managed by Witness Care Units and a number of CPS Areas do not use WMS. It follows that there are many cases for which victim and witness information is not recorded.

---

28 McFarlane LJ in Re E (a child) (Evidence) 2016 EWCA Civ 473, para 46.
29 A child is defined as ‘a victim or witness aged under 18’. Trial-related hearings are trials, part-heard trials, Newton hearings (held when a defendant pleads guilty but disputes significant facts claimed by the prosecution which could affect sentencing), special reasons hearings or appeals against conviction. The vast majority of the hearings to which the figures relate are trials.
they do not constitute official statistics as defined in the Statistics and Registration Service Act 2007. As such, the CPS acknowledges that the data is subject to possible errors with data entry and processing.

The CPS figures obviously do not include young witnesses called by the defence, although it is generally accepted that these constitute a small proportion of the total.

The Citizens Advice Witness Service also provided us with relevant information. In the year to the end of March 2018, it recorded the attendance at court of a total of 7,618 young witnesses, comprised of 4,303 attendances in the magistrates’ court (56%) and 3,315 in the Crown Court (44%). These figures are smaller than the CPS estimates above but, once again, they come with caveats:

- some young witnesses attending court have not previously been referred to the Witness Service for pre-trial support. In the year to March 2018, Witness Service figures suggest that around one third of young witnesses attending court had not been supported previously (though they may have been supported by other organisations). Such young witnesses should nevertheless be entered on the Witness Service’s case management system, but the reliability with which the young witness flag is set for these witnesses is unknown. This could result in some undercounting of young witnesses.

- some young defence witnesses attending court may not come to the attention of the Witness Service although, as mentioned above, the numbers involved are likely to be small.

Even with concerns over accuracy, both sets of figures suggest that the number of young witnesses has fallen dramatically in recent years. A decline in the number of all cases disposed of (see Table 7 in Annex 1) does not account for the reduction in the number of young witnesses over the same period. The decline is particularly surprising because the Crown Prosecution Service (CPS) reported in 2017 that child abuse referrals from the police to the CPS, and the proportion charged, were at their highest volume since records began. One possibility is that a growing number of child abuse referrals are historical complaints not involving witnesses aged under 18. Enquiries to the National Police Chiefs’ Council, National Crime Agency, CPS and Ministry of Justice have not identified reasons for the apparent drop in numbers.

1.3.3 Absence of an ‘overarching’ approach to safeguarding children

Courts are no longer mentioned in the list of responsible organisations in ‘Working Together to Safeguard Children’. They were included in 2010 but subsequently omitted (4.2).

In 2005, a Joint Criminal Justice Inspection called for elements of CJS safeguarding policy and practice to be brought together into ‘overarching’ strategies. In 2009, ‘Measuring up?’ found ‘as yet, little evidence of the “overarching” approach the Inspectors called for’ (page 169). There has been no Joint Criminal Justice Inspection on safeguarding children since 2009 and none is planned. Even considered in isolation, the current safeguarding policies of individual organisations require revision. They should address information sharing, whistleblowing, etc.
procedures (a Government requirement\textsuperscript{38}), the needs of children as defendants as well as witnesses and how policy commitments will be monitored. Not all policies are published (4.3.1). Because of confusion about what constitutes ‘safeguarding’ responsibility in the criminal justice context, it would be helpful to include some practical examples.

Publication of an update of 2001 pre-trial therapy guidance was pending throughout the duration of this study. As noted in 1.3.1 above, despite enquiries to the Home Office, Department for Education, NHS England and Ministry of Justice, we were unable to determine whether the Government still intends to deliver the ‘outreach’ commitments from 2015 and 2017 promising that all witnesses will be ‘made aware that they can seek access to therapy if required’ (4.3.2).

In 2004 and again in 2009, in reporting young witnesses’ experiences, we concluded that courts and other criminal justice organisations could not be complacent about how well procedures are working if they do not hear from the young witnesses themselves.\textsuperscript{39} There is still no systematic way of obtaining their feedback. In this study, most judges and lawyers did not routinely hear what young people found helpful or problematic at court (4.4).

Since ‘Measuring up?’, the ethics requirements for direct research with young witnesses have become ever more demanding. While safeguards are essential to protect the interests of young interviewees, they should not be so restrictive that such research is impossible to conduct in future.

1.3.4 The move away from police child protection units

In 2017, the Government called for ‘a radically transformed police force’ able to cope with the demands of crimes like child sexual exploitation:

‘To do this we need a highly skilled and professional workforce that has the tools, capacity and capability to handle not only the crimes themselves effectively, but also the vulnerable victims they beset.”\textsuperscript{40}

A radical transformation is underway, but perhaps not as envisaged. In response to funding cuts, some police forces are moving away from specialist child protection units to merged public protection units or even ‘omni-competent’ policing where detectives respond to the broad range of investigative work (6.2.1). Any such shift has implications for the way vulnerable victims are handled. The study found that this move away from police specialism has already had an adverse impact on effective use of intermediaries. It also seems likely to affect the quality of ABEs, about which long-standing concerns surfaced again in this study, and other aspects of officers’ interaction with young witnesses. The National Police Chiefs’ Council could not provide a national profile of force approaches to child protection because chief officers have autonomy over their policing structures. However, its representative commented:

‘Under “Working Together” guidance, if relationships between agencies are affected by this change, this should be flagged up to senior managers to rectify, but there is no one-size fits all solution. Forces have to balance competing demands within budget to provide service to communities. These are therefore likely to be the result of difficult decisions put forward to chief officers in order to meet challenging demands.”\textsuperscript{41}

\textsuperscript{38} HM Government ‘Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan’ 2015, action 1.11.


\textsuperscript{41} Email from National Police Chiefs’ Council representative (2 August 2018).
A representative of the Association of Police and Crime Commissioners saw the development of ‘a fuller understanding of how forces nationwide are responding organisationally to child protection issues and crimes against other vulnerable communities’ as an issue that could be addressed jointly by the National Police Chiefs’ Council and Association of Police and Crime Commissioners ‘so that best practice can emerge as changes are made’.

**1.3.5 Evolving cross-examination practice**

The most dramatic shift towards best practice has occurred in the questioning of young witnesses at court, triggered by the Lord Chief Justice’s judgment in *R v B* in 2010 and strengthened by subsequent cases, Practice Directions and Criminal Procedure Rules. In 2010, barristers rejected the need for further training in respect of dealing with children. However, in 2013, following calls for a changed approach, the Bar Council announced that it would ‘support fully’ implementation of ‘required’ vulnerable witness training. In 2015, the Government stated that it had made it mandatory for publicly funded advocates in serious sex offence cases to have undertaken approved specialist training. No such requirement has been put in place (6.3.1). The fact that training is not compulsory leaves a risk that those advocates most in need of training will not receive it.

Full credit must be given to the Inns of Court College of Advocacy (ICCA), responsible for the ‘Advocacy and the vulnerable’ course introduced in 2016. The study showed that most judges, lawyers and intermediaries thought that the tailoring of cross-examination to the understanding of individual young witnesses had improved in the last year (5.7.1). There is still a long way to go. The gap between the best and poorest advocacy is wider than it has ever been: the best is superb but some advocates still seem unwilling or unable to test a vulnerable witness’s evidence in ways that the witness understands. As of June 2018, almost half of the (revised) target number of barristers had not yet taken the ‘Advocacy and the vulnerable’ course (6.3.1). The study identified some significant differences in judicial approach to young witness cases. Lead facilitators for ‘Advocacy and the vulnerable’ training perceived a lack of judicial follow-through in respect of course principles. Judge trainers thought that inconsistencies would diminish when pre-trial cross-examination under s 28, Youth Justice and Criminal Evidence Act 1999 was introduced nationally (6.4).

Seventy-one of 84 judges and lawyers (84%) were satisfied that, where restrictions were imposed on cross-examination, there was still enough scope to test or challenge the young witness’s account. Nevertheless, there were tensions around testing a child’s evidence and differences in judicial approach to advocates who declined to ‘put their case’ (i.e. ask questions addressing the nature of the defence) to a young witness (5.6.3). The ICCA recognises that the ‘Advocacy and the Vulnerable’ course was only a starting point. Evaluation is now underway and the ICCA is considering how to build on this course, although it may not be feasible to replicate on a similar scale a programme that relied so intensively on *pro bono* effort.

In 2011, ‘Raising the Bar’ recommended that Bar training should no longer be the exclusive preserve of advocates but should draw on other disciplines. ICCA materials were developed with input from registered intermediaries who also provided feedback at pilot events in 2015, although they were not involved in delivering the course at rollout.

---

42 Email (22 October 2018).
46 Bar Council (1 July 2013) ‘Bar Council encourages creation of a required training programme for cross-examination of vulnerable witnesses’ press release.
47 The position may improve in light of the 2018 judgment in *RK* [2018] EWCA Crim 603 that the case can almost always be put ‘by simple, short and direct questions’.
Successful rollout of pre-trial cross-examination (s 28, Youth Justice and Criminal Evidence Act 1999) 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. Twenty-eight of 39 judges (72%) had received training on what constitutes developmentally appropriate questioning of young witnesses; 32 of 40 (80%) said more training on identifying communication problems would be helpful. Twenty-eight of 37 judges (76%) said they would rarely ask the remaining questions themselves if advocates were unable or unwilling to modify their questioning (5.7.4). The Judicial College confirmed that High Court judges may attend Judicial College training but are not required to do so (6.4).49

The need for additional judicial training in respect of young people has been acknowledged by Lord Thomas, then Lord Chief Justice:

“We continue to press the Ministry of Justice for further resources to extend the training of judges; it would, if resources permitted, be desirable to provide more extensive training in respect of evidence given by young defendants and witnesses.”50

The codes of conduct for each of the four branches of the legal profession set differing advocacy standards. These provisions are neither consistent nor specific about what might constitute inappropriate, exploitative or unethical behaviour in respect of cross-examination. No action has been taken to address these inconsistencies despite the criticism of a previous Lord Chief Justice51 and a Ministry of Justice recommendation.52 The study found little evidence of an effective complaints process (6.3.2).

1.3.6 Intermediaries bring many benefits but are underused and under-resourced

Judicial guidance considers that all young witnesses should ‘ideally’ be assessed by an intermediary.53 In the survey of lawyers, 39 of 47 (83%) said they had adapted their advocacy with young witnesses as a result of working with intermediaries (6.5). Involvement of an intermediary benefited young witnesses beyond the contribution to questioning. According to judges, cases with an intermediary were more likely to involve a planning meeting (known as a ground rules hearing or GRH) (5.4.1); review of draft questions (5.6.6); limits on the length of cross-examination (5.6.7); and restrictions on questioning (5.6.2). Children with an intermediary were more likely to have a pre-trial familiarisation visit to the court (3.8.1); adjustments to the way memory refreshing was conducted to accommodate their understanding (3.10); and introductions to the judge (3.11). Comparing Witness Service perceptions with those of intermediaries, children assisted by an intermediary were also better able to make an informed choice about how to give evidence (3.8). Judges gave examples of increased flexibility, many proposed by intermediaries, in enabling children to give evidence and to adapt proceedings if cross-examination broke down (5.7.2, 5.7.3). In cases without an intermediary, judges rarely received an application for communication aids or information about a child’s development or communication skills (5.7.1). Intermediaries are a scarce resource but much of their time is wasted through inefficient court listing. A more systematic approach, as recommended by

49 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.
50 R v Grant-Murray & Anor [2017] EWCA Crim 1228 para 226.
51 Lord Judge, Lord Chief Justice in R v Farooqi [2013] EWCA Crim 1649, para 109
the Victims’ Commissioner, would save costs, help ensure a more reliable service to vulnerable witnesses and free up intermediaries to take more cases (5.3.4).54

Ministry of Justice figures show the registered intermediary scheme is inexpensive. From assessment for the police interview through to attendance at trial may cost ‘in the region of £1150’; the National Crime Agency matching service costs in the region of £250k per annum.55 Nevertheless, the Victims’ Commissioner highlighted that registered intermediaries are ‘under-resourced’ despite being ‘... invaluable in providing access to justice for some of the most vulnerable victims and witnesses’.56 It is puzzling why the registered intermediary scheme does not feature in the HMCTS ‘Transformation’ programme, given its aim to ‘build a modern system’ that works for everyone including victims and witnesses.57 The Public Accounts Committee recommended that HMCTS respond by January 2019, identifying how it will evaluate the impact of changes on people’s access to justice ‘particularly in relation to those who are vulnerable’.58 We hope that this report will inform that response.

Low numbers of registered intermediaries and varying demand around the country mean that only a small proportion of young witnesses actually benefit from their assistance – a postcode lottery that is manifestly unfair for a national service. The study suggests that only between one in six and one in 10 young witnesses had intermediary assistance at the trial stage (5.3.4).

In 2017, the Ministry of Justice claimed to have doubled the number of registered intermediaries; however, turnover is high. Between 2011 and the start of 2018 the net increase was only 33, from 150 to 183 (Table 9 in Annex 4). Internal Ministry of Justice projections in 2017 estimated that 470 intermediaries were needed, covering both children and vulnerable adults. This is likely to be an underestimate, as delay in obtaining an intermediary is a main cause of police officers failing to submit a request. After a two-year gap in recruitment, 32 new intermediaries had been added by November 2018.59 Criminal justice agencies consider that the Ministry of Justice’s regional approach to recruitment is inadequate (5.3.2).

Registered intermediaries cannot operate effectively without the confidence of the judiciary. In a 2015 survey of 77 judges, almost all the feedback was positive.60 In this study, in freeform comments from 26 judges, only nine (35%) were unequivocally positive. In a relatively new development, eight of 39 judges (21%) in the previous year had dispensed with the intermediary’s presence at cross-examination of a young witness after receipt of the assessment report. They appear to have disregarded s 19(3)(a) of the Youth Justice and Criminal Justice Act 1999, and a similar commitment in Standard 4 of the 2013 Witness Charter, requiring the court to consider the witness’s views in determining whether any special measure would be likely to improve the quality of evidence. They may also have overlooked aspects of an intermediary’s contribution to communication that are not apparent to those in the courtroom (5.7.5). It was troubling that several judicial comments did not distinguish registered intermediaries for witnesses (paid at a fixed Ministry of Justice hourly rate of £38.36, a slight increase since the scheme was piloted in 2004) from what is perceived as the unregulated

57 Ministry of Justice (31 March 2017) ‘HMCTS Improving the justice system’.
Falling short? A snapshot of young witness policy and practice

The Ministry of Justice’s Quality Assurance Board for registered intermediaries may be unaware of judicial concerns as it does not seek systematic feedback from the judiciary or advocates. The Victims’ Commissioner pointed out that the Board, by its own admission, does not have sufficient resources to carry out its function ‘in an effective and consistent manner’.

1.3.7 Failure to monitor delay

Despite Government commitments dating back to 1988 to expedite young witness cases, their timeliness is not centrally monitored. This is true even of the ‘Protocol to expedite young witnesses under 10 years’, revised in July 2018 following a Ministry of Justice review indicating low compliance (2.2.2). Many respondents thought pre-trial delay in young witness cases had reduced in the last year (2.2.1) but only a minority thought such trials were almost always disposed of without adjournments (2.4). However, a comparison of time from charge to completion since 2011 in CSA cases involving physical contact (those most likely to involve a young witness) with other case categories suggested otherwise. CSA contact cases took longer, and their duration had increased over time (2.2).

Monitoring of young witness waiting times is also unsatisfactory. Twice-yearly surveys do not take account of actual waiting time if children are asked to come to court early (as is common) or need to return on another day. Respondents disagreed about the extent to which young witness evidence had a ‘clean start’, without waiting (2.5).

1.3.8 Failure to utilise the full range of special measures

Respondents indicated that certain special measures were rarely used: accompaniment of young witnesses by a neutral supporter of their choice (3.9.1); closing the public gallery during young witness evidence in sexual offence cases (3.9.2); combining special measures to preventing the defendant’s view of a child on the live link (3.9.3); and giving evidence from another court location or a non-court site. Availability of non-court remote live link sites was uneven, with some areas having none (3.9.4).

1.3.9 Denial of opportunity to make an informed decision about how to give evidence

Live link practice sessions conducted by the Witness Service are crucial in enabling young witnesses to make an informed decision about how to give evidence, but arranging them was a systemic problem, often due to a lack of available court staff. Only 25 of 86 Witness Service and Outreach Service team leaders and intermediaries (29%) thought that young witnesses were almost always able to practise on the live link during a pre-trial visit to court (3.8.1).

61 The judiciary is not alone: the Criminal Bar Association’s ‘Monday Message’ for 3 December 2018 discussed a barrister being paid £150 a day in the youth court and went on to claim that ‘Intermediaries in the Crown Court are paid five or six times this amount, often for little meaningful work’.
62 S 17(1) Youth Justice and Criminal Evidence Act (1999).
1.3.10 Uneven access to support pre-trial

The number of specialist local young witness services has diminished significantly. At their peak there were over 30 such services; only two were identified in this study (3.4). That being so, the support provided by the court-based Citizens Advice Witness Service and its Outreach Service (offering home visits to vulnerable witnesses) assumes even greater importance. In the year to April 2018, one-third of young witnesses supported by the Witness Service (n = 2,929) had not been referred before the day of trial. Of those referred pre-trial, 3,069 (52%) had attended a pre-trial visit in person but only 806 (14%) received enhanced support from the Outreach Service. In the view of 16 of 29 Witness Service and Outreach Service team leaders (55%), inadequate referrals and poor inter-agency communication were a ‘significant problem’ for young witnesses (3.2); only nine of 38 (24%) almost always received sufficient advance information about young witnesses’ communication and other needs before meeting them (4.4.1); 15 of 22 (68%) said better communication between agencies was needed to enable them to provide a more effective service (4.4). The current position falls far short of the ‘children’s advocate’ to ‘support the child through the whole of their journey through the criminal justice system’ called for by the Victims’ Commissioner (3.6).64

1.3.11 Inadequate court facilities

While nine of 30 (30%) of Witness Service team leaders described their courts’ waiting areas as very good or excellent, 11 (37%) considered them inadequate for children (3.12.2). None of the 29 who described their live link rooms felt they were child friendly; some were unfit for purpose. A specific concern raised in freeform responses was the lack of appropriate live link room seating for very young witnesses, given their increasing numbers (3.12.3). The forthcoming Court and Tribunal Design Guide will ‘define the principles and standards upon which we will base future building design’.65 Study findings should contribute to the design of improvements to existing facilities.

1.3.12 Difficulties in accessing information about young witness entitlements

The children’s chapter in the Code of Practice for Victims of Crime does not mention registered intermediaries or communication aids, simply cross-referring to the adult chapter. Nor does it cover all entitlements, such as being able to express a preference about how to give evidence, even though ‘any views expressed by the witness’ are a legislative consideration in determining the use of special measures66, or that young witness cases should be given priority67 or receive a fixed trial date (3.7). It is doubtful whether the distinction between ‘victims’ and ‘witnesses’ is meaningful in relation to children and enhanced Victims’ Code entitlements. For example, the Code entitles child victims to have their police statement video-recorded, whereas young witnesses can only ‘ask for’ their statement to be video-recorded (5.2.1). We did not find this distinction being drawn in practice.

Policies refer to the Ministry of Justice young witness booklets as ‘the Young Witness Pack’ but booklets are no longer branded this way, making them hard to find online. The availability of locally tailored information from Police and Crime Commissioners (PCCs) and courts was uneven (3.7).

65 HMCTS (20 June 2018) ‘Reform projects explained’
1.3.13 Problems with technology

National roll-out of s.28 pre-trial cross-examination (s.28, Youth Justice and Criminal Evidence Act 1999) was announced in July 2016 has not yet begun due to technical difficulties (5.5).

The study identified technological problems relating to the reliability of police video equipment and its use, for example where there was no camera operator present during an ABE interview. Despite guidance emphasising the need to quality assure ABEs to be used as evidence in chief, only 30 of 120 judges, lawyers and intermediaries (25%) could almost always see children’s facial expressions and hear them clearly in ABE interviews. Obtaining a clear view of communication aids could also prove problematic (6.2.4). Judges reported similar though less pervasive problems of seeing and hearing young witnesses clearly over the live link at trial (3.12.4). While the live link is intended to ensure that witnesses see only their questioners, many instances were reported of defendants or people other than questioners being visible on the witness’s live link screen (3.12.5).

1.4 The way forward

‘Joined up justice’ for young witnesses remains an undelivered vision. Calls in recent years for ‘the necessary revolution in our [young witness] processes’68; ‘systemic court reform’ to ‘ensure existing measures are properly implemented’69 and ‘cultural change in the courtroom’70 have not been fully answered. Despite the improvements reported here, it is disheartening that overall progress remains fragmented. The impact of cutbacks, such as those diluting the specialist police response to child protection, are worrying. However, not all problems can be attributed to the current economic climate or the culture of despair it has generated in the criminal justice system.71 No inter-agency body is actively taking a system-wide overview of policy delivery.

In 2014, a Ministry of Justice report considered the potential benefits of a review akin to that conducted by Judge Pigot for the Home Office in 1989.72 It recommended that these:

\[\text{should be considered once the outcomes of the pilot of pre-trial recorded cross-examination and other planned and ongoing programmes impacting on cases of sexual violence and/or child victims are known}.\]

Such a review is now overdue. The current policy structure is sound but, a decade after the fieldwork for ‘Measuring up?; delivery is failing.

---

71 As described by the anonymous author of ‘The Secret Barrister: Stories of the Law and How It’s Broken’ (2018) Pan Macmillan. Also, e.g. The Guardian (2 April 2018) ‘The UK justice system is in meltdown. When will the government act?’
1.5 Recommendations

1.5.1 HMCTS ‘Transformation’ programme

1 Access to justice. Expansion of the registered intermediary scheme should be addressed as part of the programme.

2 Digital infrastructure (the ‘Common Platform’). Development should include the ability to flag young witness cases so that:
   • their numbers can be counted and given the status of official statistics
   • the breakdown of timeliness data can include young witness cases (distinguishing s 28 and other young witness cases)
   • actual witness waiting times at court can be recorded systematically, taking account of witnesses’ arrival time at court and attendance on more than one day

3 Court facilities. Improvements to facilities funded under the programme should include provision of:
   • child-sized furniture
   • adjustable camera angles in live link rooms to obtain a clear view of the witness’s expressions on camera and accommodate a child in a child-size chair (rather than propping up the child on cushions to be at the right height for the camera)
   • ability to combine special measures to prevent the defendant’s view of the child on the live link
   • improved access to giving evidence from a non-court site.

4 Mapping provision of non-court remote live link sites should continue, to enable parts of the country with poor or no provision to be prioritised in development. Courts with poor waiting areas and live link rooms unsuitable for upgrading should be prioritised for remote link development and accommodation of s 28 technology.

5 Sound and vision in live link cases. Roll out of s 28 is part of the ‘Transformation’ programme. A checklist is being developed to ensure the sound quality of s 28 recordings. This should also address ensuring a clear view of the witness on screen and allowing the use of close-ups when communication aids are used or when the witness uses gestures. A similar checklist should be developed for all courts using live link technology, with appropriate training for court staff.

6 Scheduling and listing. Procedural reforms introduced by the programme should address:
   • systematically flagging of trials involving a young witness and, where appropriate, an intermediary as requiring a fixture. Where possible, the witness’s evidence should be timetabled to specific day(s) and times of day
   • taking into account the availability of an intermediary who has already assessed the witness when listing the GRH (at which the intermediary’s presence is required by Criminal Practice Directions 3E.2 and 18E.33) and trial
   • amending the plea and trial preparation hearing (PTPH) form to address fixtures and intermediary availability
   • where responsibility lies for communicating listing decisions to intermediaries.
1.5.2 Police forces, National Police Chiefs’ Council, Association of Police and Crime Commissioners and the Joint Criminal Justice Inspectorates (policing)

7 Statistics should be collected about the number of young witnesses interviewed annually and the proportion whose interviews are filmed under ‘Achieving Best Evidence’ guidance.

8 Police forces should address the need to see and hear young witnesses clearly in ABE interviews, and ensure the presence of a camera operator during the interview.

9 The National Police Chiefs’ Council and Association of Police and Crime Commissioners should survey police forces with the aim of creating a national profile of organisational responses to offending against children (and other vulnerable communities, where the response encompasses them) and identifying emerging best practice.

10 The Joint Inspectorates should examine the move away from child protection specialisms and its impact on ABE interviews and other aspects of police interactions with young witnesses.

1.5.3 Ministry of Justice (registered intermediaries)

11 Those with management responsibility for the registered intermediary scheme should link quality assurance procedures to feedback from judges, lawyers and witnesses for whom intermediaries are appointed, and produce a competency framework against which performance can be assessed.

1.5.4 Ministry of Justice (status of training)

12 The Ministry of Justice’s failure to implement its commitment to make the ‘Advocacy and the Vulnerable’ course compulsory for those acting in publicly funded serious sex offences has left the status of the training uncertain. It is essential all advocates working in these cases, and with young and other vulnerable witnesses and defendants, are trained. The Ministry of Justice should reconsider its decision to drop the training requirement.

1.5.5 Bar Standards Board and Law Society (entry level advocacy training)

13 New advocates should be trained in basic principles about the questioning of children and vulnerable adults. The Bar Professional Training Course authorisation framework, and the Law Society equivalent, should incorporate these principles.

1.5.6 Bar Standards Board and Law Society (standards of professional conduct)

14 The professional bodies should act on the Ministry of Justice recommendation that rules of professional conduct be reviewed to identify inconsistencies and propose ways to align them (‘Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence’ 2014, para 32).
1.5.7 Judicial College, Inns of Court College of Advocacy, Law Society and CPS (training provision)

15 Where advocates were unable or unwilling to modify their questions, three-quarters of judges in the study rarely asked the advocate’s remaining questions themselves. In order to control questioning, judges should be able to construct developmentally appropriate questions if advocates fail to do so. This is a core skill that requires practice: judicial training should involve formulating written questions.

16 Further consultation is needed between judicial and advocacy trainers to ensure consistency of messages. Judges, advocates and intermediaries should collaborate to produce training materials that address common problems, in particular the formulation of developmentally appropriate ways of ‘putting the case’ (accepting that questions always need to be tailored to the understanding of the individual child).

17 Seniority is not the same as skill. Deference to the status of High Court judges in this respect is inappropriate: they should be required to attend relevant Judicial College training.

18 The CPS should extend required accreditation on the ‘Advocacy and the vulnerable’ course from internal Crown Advocates to external advocates, including QCs, instructed in vulnerable witness cases.

19 Training on vulnerability and communication should address the effective participation of young and other vulnerable defendants.

1.5.8 Criminal justice agencies and the Witness Service (support)

20 Rates and timeliness of young witness referrals and communication flow about their needs to the Witness Service were inadequate. A pilot inter-agency exercise should be conducted to identify strategies to improve these aspects of support and referrals to the Outreach Service, with findings disseminated nationally.

21 HMCTS and the Witness Service should agree a national protocol to ensure that young witnesses are enabled to access practice sessions on the live link.

1.5.9 Criminal justice agencies (safeguarding)

22 To strengthen the safeguarding of children across the criminal justice system:

- courts should be restored to the list of organisations to which ‘Working Together’ applies
- stakeholders should develop overarching safeguarding principles in respect of children in the justice system and incorporate these, with examples, in a more consistent approach to individual safeguarding policies
- young witnesses should be made aware that they can seek access to therapy before trial if they wish (in compliance with existing policy)
- all safeguarding policies concerning children in the justice system should be published.
1.5.10 HMCTS, the Witness Service and Ministry of Justice (feedback from young witnesses)

Opportunities to obtain the feedback of young witnesses are notably lacking. We repeat the recommendation from ‘Measuring up?’ that a written invitation to provide feedback be given to all young witnesses (whether or not they have given evidence) when leaving court. They should have the opportunity to respond using social media. Greater effort should also be made to obtain systematic feedback about young witnesses’ experiences from secondary sources such as their carers, the Witness Service and registered intermediaries.

1.5.11 Taking forward the findings

This report brings together over 40 policies and guidance documents. This material should be used to develop:

- an audit checklist for use by Local Criminal Justice Boards, PCCs and local criminal justice organisations in monitoring effectiveness of delivery and providing information to the National Criminal Justice Board about performance
- a separate and easily available resource provided by the Ministry of Justice for young witnesses and relevant organisations, written in simple language, explaining what children and their carers can ask for
- the agenda for a Government-wide ‘Pigot-type’ review. This should take a fresh look at commitments to young witnesses, considering what needs to be updated or changed and developing an effective framework for their delivery. The review should address the problems described in this report and draw on research and innovative practice overseas.
2 Delay

2.1 Key findings

- Government policies to expedite young witness cases are not centrally monitored, even for the latest commitment prioritising cases involving children under 10 (2.2.2).

- The majority of respondents thought that delay from charge to completion in young witness cases had reduced in the previous year (2.2.1). 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 (2.2).

- Young witness trials were almost always assigned a fixed trial date (2.3) but adjournments were thought to be common (2.4).

- Demand for access to social media, emails and phone records contributed to pre-trial delay (2.2.1).

- Ministry of Justice twice-yearly surveys were an unsatisfactory method of measuring actual waiting time for young witnesses. Ensuring they have a ‘clean start’ to their cross-examination (i.e. that children did not wait while the judge dealt with other matters) remained a problem (2.5).
2.2 Giving priority to young witness cases

‘If you are a vulnerable or intimidated witness, the prosecution or the defence lawyer will ask the court to give the case priority when setting the times and dates of hearings. This is to minimise pre-trial delay and waiting times on the day of the trial’ (Ministry of Justice ‘Witness Charter’, Standard 9, 2013)

‘Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved. For example, despite many policies to give cases involving young witnesses priority, studies show that these cases usually take longer than the national average to reach trial ... Timetabling is therefore an issue that impacts upon best evidence and safeguarding. The judge should schedule responses and make orders as necessary at the first appearance in the magistrates’ court or preparatory hearing or plea and trial preparation hearing (PTPH) in the Crown Court, e.g. by prioritising vulnerable witness cases. Delay in a case involving a child complainant should be kept to an "irreducible minimum"’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, paras 46, 47, quoting R v B [2010] EWCA Crim 4).

Reducing delay between reporting and trial is crucial to ensuring that children are enabled to give the most complete and consistent testimony possible. Delay may affect not just memory but well-being; just over half of the young people interviewed for ‘Measuring up?’ described symptoms of stress and other difficulties in the pre-trial period (pages 139-140).

Policies to expedite young witness cases date back to 198874 and are frequently reiterated but have never been monitored centrally. ‘Measuring Up?’ (pages 32-36) found that pre-trial delay for young witnesses was longer, on average, than for all criminal cases, replicating findings in our previous research studies in 1995, 2004 and 2007.

Ministry of Justice timeliness figures show time intervals only by type of offence: they do not measure how long young witness cases take to come to trial.75 In ‘Investigating Child Sexual Abuse’ (2017), the Children’s Commissioner drew on data from the CPS case management system which flags ‘child abuse’, selecting cases where the Principal Offence Category is ‘sexual offences’.76 For these cases, CPS data for the median number of days from charging decision to finalisation were as follows:

<table>
<thead>
<tr>
<th>Year Range</th>
<th>Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012-2013</td>
<td>259</td>
</tr>
<tr>
<td>2013-2014</td>
<td>228</td>
</tr>
<tr>
<td>2014-2015</td>
<td>249</td>
</tr>
</tbody>
</table>

76 Children’s Commissioner (2017) ‘Investigating Child Sexual Abuse: The length of criminal investigations’ page 7. The Principal Offence Category is allocated at the conclusion of the prosecution proceeding against an alleged perpetrator to indicate the type and seriousness of the charges brought. It indicates the most serious offence with which the alleged perpetrator is charged at the time of finalisation. ‘Sexual offences’ comprise rape, sexual assault, unlawful sexual intercourse, incest, trafficking for sexual exploitation, possession of indecent material or extreme pornographic material, bigamy and gross indecency with a child. ‘Child abuse’ refers to any criminal offence which falls within the criteria set out in ‘Working Together to Safeguard Children’ and involves a victim under the age of 18, comprising physical, emotional and sexual criminal offences, and the neglect of a child. The CPS data are accurate only to the extent that the monitoring flags have been correctly applied.
The length of time from charging decision to finalisation has remained fairly constant over the years covered by the data. The Government did not respond formally to the Children’s Commissioner’s findings.

The CPS was unable to provide an update the Children’s Commissioner’s figures. However, we used Ministry of Justice figures to compare the average time from charge to completion in child sexual abuse offences involving contact with three other categories of case: indictable or triable-either-way cases other than child sexual abuse contact; all Crown Court cases; and all sexual offences. In each instance, child sexual abuse contact cases took longer than the other categories and their duration had increased over time, from 255 days in 2011 to 286 days in the first quarter of 2018. These timeliness figures for child sexual abuse contact cases are broadly consistent with those of the Children’s Commissioner in Table 2, even though they cover different 12-month periods, consist of means rather than medians and possibly include slightly different offences.

A primary aim of s 28 pre-trial cross-examination is to reduce pre-trial delay for young and other vulnerable witnesses. The process evaluation conducted by the Ministry of Justice at three Crown Courts in 2014 found that the time from charge to cross-examination of vulnerable witnesses was significantly shorter (100 days or more) than in a sample of comparison cases.

2.2.1 Perceptions of pre-trial delay

In the previous 12 months:
- 12 of 15 of barristers and solicitor advocates (80%) thought that young witness trials were almost always given listing priority
- 19 of 21 Crown Advocates (90%) said that they asked for listing priority to be given.

Our surveys asked about the period from charge to trial:

Figure 1: Views on change to delay between charge and trial

- Judges (n=40): 18% delay had increased, 80% delay had reduced or stayed the same
- Barristers, solicitor advocates and crown advocates (n=36): 19% delay had increased, 81% delay had reduced or stayed the same
- Intermediaries (n=47): 17% delay had increased, 30% delay had reduced or stayed the same

77 This was the most likely category to involve a young witness but some CSA contact offences do not involve testimony from a child, for instance in historical abuse cases and, of course, a child can be a witness to any offence.
78 See Table 8 in Annex 2.
79 Times for Crown Court cases in general increased from 192 to 202 days over the same period, peaking at 219 days in 2016.
80 The evaluation report does not specify how many of these witnesses were children, though anecdotal most witnesses in the pilot were under 16: J. Baverstock (2016) ‘Process evaluation of pre-recorded cross-examination pilot (Section 28)’ Ministry of Justice.
81 We were unable to ask this question of the judiciary.
Twenty-five of the 47 intermediaries who responded (53%) felt unable to say how delay had changed.

All nine judges from s 28 courts thought delay had reduced or stayed the same. Some intermediaries described cases being dealt with very quickly, within four to six months.

Three of five sexual assault referral centres and all seven independent sexual violence advisers expressed concern about pre-trial delay in recent young witness cases. Three advisers said their cases frequently took two or more years to come to court.

Examples of unduly delayed cases provided by intermediaries included the following:

‘I had a case recently where I had met the child when she was four for the ABE, but the trial was two years later. A date was set and I’d been asked to attend, before it was decided that too much time had elapsed and she wouldn’t remember’

‘I was at a trial yesterday with 13 year-old. It has taken two years to get the case to court and during cross-exam she had to reply “I can't remember” to several questions. Part way through, she turned to me and said, “I can hardly remember any of it”. It's completely unacceptable that children should have to wait two years and then be expected to recall information in minute detail’

Several judges also expressed concerns about delay, including one citing ‘a huge backlog of cases’. They highlighted third party disclosure as an ongoing problem, but also emphasised that changed police practice had caused pre-charge delay (discussed further in the following section) to escalate ‘inexcusably’, disadvantaging the defendant as well as the witness:

‘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, 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’

Several judges (especially those from s 28 courts) commented that cases could be managed effectively once they reached the Crown Court but one disagreed:

‘The importance of early trial has still not got through in some quarters. Perhaps cases involving witnesses under 17 should be allocated to one or two designated circuit judges at a particular court centre’.

---

82 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.

Increasing demand for access to the young witness’s social media, emails or phone records was seen as contributing to pre-trial delay:

- eight of 39 judges (21%) said such demands for access almost always occurred
- 17 (44%) said they happened more than half the time.

Judges saw considerable time being taken up by CPS review of these third party records:

> ‘There is still often significant delay in the investigation process. Last week (June 2018) I conducted a PTPH in a case which involved allegations of sexual conduct on two days in late December 2016 where the complainant was then 15 and the defendant then 17. It took 18 months from complaint (which was immediate) to PTPH. Trial will be approaching two years after the event. Apparently, the cause of the delay was investigating Facebook.’

### 2.2.2 The ‘Protocol to expedite cases involving witnesses under 10 years’

> ‘This protocol details the working arrangements between the police, the CPS and HMCTS to expedite cases involving very young witnesses to: a) maximise the opportunity for them to provide their best evidence b) minimise the stress and emotional impact of the criminal justice process’ (National Police Chiefs’ Council, Crown Prosecution Service and HM Courts and Tribunals Service ‘Protocol to expedite cases involving witnesses under 10 years’ 2018, para 2.1).

The under 10s protocol was issued in 2015 and revised in July 2018. It is the most recent iteration of policy to expedite cases involving young witnesses. (It ceases to apply when a s 28 application has been granted.) The Government’s ‘Tackling Child Sexual Exploitation: Progress Report’ (2017) contained a commitment to review its effectiveness. The Ministry of Justice’s unpublished review found that:

> ‘awareness of the protocol was low, as was compliance. In some areas there was a general feeling that pre-trial cross examination (s 28) and Better Case Management had superseded the protocol. However, in other areas where it was being applied, such as South Wales, we were told this was about all partners working together; for example, seeking pre-charge advice early and good communication between the magistrates and Crown Court to list cases. There was a general feeling that these cases are few and far between and therefore there is no reason why they cannot be prioritised. The counter arguments to that centred around the timescales being unachievable because of third party disclosure and a lack of available intermediaries.’

---

85 There are no published statistics about the number of witnesses under 10. However, in ‘Measuring up?’ 13% of witnesses were aged 10 and under. page 195. The Humberside Young Witness Service annual report 2016/17 noted that just over 15% of its witnesses were of primary school age or younger.
86 Email from Vulnerable Victim and Witness Policy, Ministry of Justice (28 March 2018).
The revision of the under 10s protocol issued in July 2018 did not introduce any requirement for monitoring compliance. If a case falls within the protocol, it requires only that:

‘the police supervisor overseeing the investigation will ensure that an action plan is produced detailing the actions necessary to expedite the investigation to a charging decision’.

Respondents’ views about the effectiveness of the under 10s policy varied. Sixteen of 18 Crown Advocates (89%) said they always asked for such cases to be expedited but this contrasted with the experience reported by others, as the following chart indicates:

**Figure 2: Views on whether cases involving a child witness under 10 were expedited**

<table>
<thead>
<tr>
<th></th>
<th>Rarely or never expedited</th>
<th>Almost always expedited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediaries (n=27)</td>
<td>7%</td>
<td>15%</td>
</tr>
<tr>
<td>Barristers and solicitor advocates (n=14)</td>
<td>14%</td>
<td>43%</td>
</tr>
</tbody>
</table>

The remainder thought such cases were sometimes expedited.

- 16 of 18 Crown Advocates (89%) always asked for such cases to be expedited
- six of 14 barristers and solicitor advocates (43%) said cases involving a child under 10 were almost always expedited
- only two of 27 intermediaries (7%) said such cases were almost always expedited while four (15%) said they rarely were.

We were requested not to ask judges specific questions about listing decisions but several reported delay in cases involving under 10s as a particular problem; some described this as giving rise to safeguarding issues. As discussed above, delay prior to charge was seen not only to render the under 10s protocol redundant but also to ‘make a mockery of it’:

‘I have just dealt with an eight year-old who waited nearly a year for trial because the police were looking at other complaints against the defendant. They need to understand that they just have to get on with the case with such a young child. In another case involving an eight year-old, neither CPS, defence nor judge appear to have sought an earlier trial date when offered a date at PTPH that was some five months away’

‘A witness was five at the time of the complaint but the case did not come to trial for 18 months – mainly because there was a massive delay before the case was commenced in the magistrates’ court’

Delay

The biggest cause of delay is the now usual practice of the police releasing suspects not on bail but ‘under investigation’ and then issuing a postal requisition. This is done to avoid the time restrictions on police bail. It 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.

Of 11 PCCs surveyed, five said that the under 10s policy was monitored locally. Two said this was done by local multi-agency groups and three said it was done by the police. However, one of these explained that local monitoring of the protocol is the responsibility of the officer in charge of the case who reports directly to their supervisor on a case by case basis: central monitoring had been avoided ‘as this may slow the procedure down’.

2.3 Fixed trial dates

“The cases where fixtures should be given ... should usually include the following: ii. Cases involving vulnerable and intimidated witnesses ... iii. Cases where the witnesses are under 18 ...” (Criminal Practice Directions Annex XIII Listing F.3).

‘... if you are a vulnerable or intimidated witness, or the witness of a serious offence, the trial date will be fixed to a specific day’ (Ministry of Justice ‘Witness Charter’ Standard 9, 2013).

‘The judge should schedule responses and make orders as necessary at the first appearance in the magistrates’ court or preparatory hearing or plea and trial preparation hearing (PTPH) in the Crown Court, e.g. by ... fixing young witness trials, not behind another trial or as a ‘floater’. In exceptional circumstances, floating the trial may be appropriate: the Inspectorates describe as good practice offering a young witness an earlier floating date to try to ensure that her evidence is given before her school examinations start. If there are child witnesses under the age of 10 years the initial case management hearing in the Crown Court must be held 14 days after sending and the trial should be fixed not more than 8 weeks from the date of plea’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, para 47).

Policy requires that, in conjunction with giving young witness cases priority, they should also be given a fixed date for the start of the trial. This provides greater certainty for the young person and enables arrangements associated with giving evidence to be put in place.

In the surveys of lawyers and intermediaries:

- 19 of 21 Crown Advocates (90%) almost always requested a fixed trial date for young witness cases
- ten of 15 barristers and solicitor advocates (67%) thought young witness trials were almost always given a fixture when first listed
- 17 of 30 intermediaries (57%) said their young witness cases were almost always fixed.

Several respondents pointed out, however, that young witness fixtures were occasionally ‘floated’ i.e. they were given a fixed date but not assigned to a trial judge or courtroom (listing is also discussed at 5.3.4 below). The manager of a young witness specialist service observed that

88 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.
a local court might fix one young witness trial with two other young witness trials ‘floating’ behind it. If other listed cases ended in a guilty plea or ‘went short’ the floaters could be assigned to any sitting judge; if not reached, they could take six or seven months to re-list. An independent sexual violence adviser reported the case of a 13 year-old whose first trial date was in May 2017 but was adjourned to December. On the way to court the family received a call that, as the case had been floated, it was going to be adjourned again to June 2018: ‘The child’s education is suffering and the family has been devastated’.

Application of the ‘priority’ and ‘fixture’ policies first require young witness cases to be systematically flagged in court systems. As one intermediary observed:

‘I have occasionally had to contact listings to find out about arrangements and been told the court was unaware that a child witness is involved’.

The original ‘under 10s’ protocol did not address how such trials should be listed: the 2018 revision requires trials involving children under 10 to be given ‘high’ category status ‘to ensure the trial will take priority on the day’ and states that it is ‘preferable’ for those involving an intermediary to be fixed, rather than placed in warned lists (meaning that a case may start on any day within the period for which it is ‘warned’, often two weeks).

2.4 Adjournments

‘Once a trial date or window is fixed, it should not be vacated or moved without good reason’ (Criminal Practice Directions Annex XIII Listing F.8)

‘A trial date involving a young or vulnerable adult witness should only be changed in exceptional circumstances. By exerting tight control at an early stage, it will be less likely that an adjournment will be necessary to safeguard the rights of the defendant. Research indicates that at least one-third of young witness trials are adjourned, many of them more than once. This can have a detrimental impact upon witness recall and emotional well-being as well as on the fairness of outcomes ... If postponement is unavoidable, a trial involving a vulnerable witness should be re-listed in the shortest possible time. (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, paras 49, 51).

‘Measuring Up?’ found that over one-third of 170 young witness trials were adjourned once or more than once (page 36). In the current study, only 14 of 33 Crown Advocates, barristers and solicitor advocates (42%) and nine of 29 intermediaries (31%) said trials involving young witnesses were almost always disposed of without adjournment. Some intermediaries described particularly difficult experiences for children:

‘I recently had a trial vacated on a Friday for the following Monday which had been in my diary for 12 months. This was a case where there was no GRH ahead of the trial. The young witnesses had already been waiting for about two years and now the delay is even longer: unacceptable’.

2.5 Waiting to give evidence

‘HMCTS court staff must ... ensure wherever possible that victims giving evidence do not have to wait more than two hours’ (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, ‘Duties on Service Providers’ para 3.4, page 47)

‘If you are a vulnerable or intimidated witness, the prosecution or the defence lawyer will ask the court to give the case priority when setting the times and dates of hearings. This is to minimise pre-trial delay and waiting times on the day of the trial. All those involved in your case will make every effort to ensure that you are only asked to attend court on the day(s) on which you are required to give evidence. They will provide you with the time that you should aim to arrive at court to reduce any unnecessary waiting’ (Ministry of Justice ‘Witness Charter’ Standard 9, 2013); ‘Everyone involved in your case will seek to ensure that you do not have to wait more than two hours at court before giving evidence’ (Standard 13, which applies to all witnesses)

‘The capacity of a vulnerable witness to give evidence is likely to deteriorate if he or she is kept waiting. The inspectorates express concern that many vulnerable witnesses experience lengthy delays, exceeding court waiting time targets, even when a ‘clean start’ is scheduled for their testimony. This can be devastating both for the witness and the quality of the evidence ... An option is to schedule the start of a vulnerable witness trial in the afternoon (enabling the trial judge to deal with any outstanding issues), with the first vulnerable witness listed promptly at the start of the second day (with further directions for other vulnerable witnesses) ... If there is any risk that their evidence will not start on time, they should be advised to wait on standby. It is important to agree staggered witness start times, ensuring opening/ preliminary points will be finished when the first witness’s evidence is due to start; schedule testimony to start while the witness is fresh ...’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, paras 52-56).

‘Measuring up?’ found that 150 young witnesses waited on average 3.5 hours at magistrates’ or youth court and 5.8 hours at Crown Court: despite the Victims’ Code commitment, above, waiting times for victims were no shorter than for non-victim witnesses (page 40).90 ‘Measuring Up?’ also measured how long children actually waited to give evidence, taking account of the time they arrived at court and, if they did not give evidence on the first day, the total amount of waiting time including on subsequent days. The Ministry of Justice’s twice-yearly, two-week ‘Witness Waiting Time’ surveys do not measure waiting time this way. Waiting time starts from the scheduled court start time, or the time that the witness was asked to attend, whichever is later. Each attendance is counted separately, so that a witness who is not called on one day and has to return the next, or whose evidence is not completed in one day (within the survey period) is counted twice.

Survey results are not published but we obtained figures for the last three years through two Parliamentary Questions.91 These suggest that the target waiting time of less than two hours was achieved or only narrowly missed for children and for all witnesses in each of the last three years. The Ministry of Justice points out that the figures constitute management information, not official statistics, and caveats apply to their interpretation. While the results distinguish witnesses under 18, only the first 30 witnesses over the sample period are recorded at each

90 Our previous studies which measured actual waiting times reported that in 2004, 50 young witnesses waited an average of five hours; in 2007, 111 waited an average of over three hours.

site, therefore only a few children are captured by the survey and average waiting times do not necessarily represent that of all child witnesses.\textsuperscript{92} Concerns about the accuracy of the figures go further.\textsuperscript{93} Given these considerations, and the failure to measure children’s actual waiting times at court, the survey results do not provide meaningful insights into this aspect of young witnesses’ experiences.

Respondents were asked to what extent young witness evidence had a ‘clean start’, i.e. nothing else was placed in the judge’s list to be dealt with before the child was heard. While most judges thought the start of young witness evidence was not delayed, most lawyers and intermediaries disagreed (see Figure 1.3 in Annex 6).

One judge noted:

\begin{quote}
’Last week I had a child say, after two days waiting at court, “I’m not coming back again”’.
\end{quote}

Only one intermediary thought all children with whom (s)he worked had waited under two hours in the previous year. In contrast, seven said children had experienced a wait of two hours or more in almost every case. Many of these said their witnesses had waited between three and eight hours.

While 44 of 47 intermediaries (94\%) said young people almost always completed their evidence in a single day, 27 (57\%) said some young witnesses were not heard on the first day they attended court (as noted above, a situation not captured by Ministry of Justice ‘Witness Waiting Time Surveys’). The longest such wait was 72 hours:

\begin{quote}
‘I had the most appalling experience at Crown Court X this year where the children aged five and eight did not give evidence until the afternoon of the final day of the first week, having previously attended and been sent home’.
\end{quote}

The Equal Treatment Bench Book notes that ‘Problems result from the judge having to deal with other matters first’ and by ‘witness waiting times artificially extended by advice to arrive at the hearing early, in order to avoid seeing or being seen by the defendant’.\textsuperscript{94} Both of these were cited as problems by barrister and intermediary respondents, one of whom observed that in the Crown Court:

\begin{quote}
‘Quite often, a young witness is scheduled to give evidence on Day 1, first thing, as understandably it is felt they should get it over ASAP. But this can result in them arriving for 10am, only to wait for jury selection/swearing-in and for prosecution to open the case. If time runs out before lunch closure, the witness then waits till 2pm or later’.
\end{quote}

\textsuperscript{92} PQ 149930.

\textsuperscript{93} The tables attached to the response to PQ 147342 appear to be based only on the November survey each year. They show a breakdown by Crown Court and the number of survey witnesses at an individual court, ranging in 2017 from three to 94. The figures for the preceding two years show a similar range in the number of survey witnesses per centre. This conflicts with the Ministry’s description that only the first 30 attendances at each centre are included in the survey. The answer to PQ 149930 identifies waiting times for children in the survey in the years 2015 – 17. The numbers are very small (less than 250 in total for each year) and vary from court to court – some may not be represented at all if there were no young witnesses in the sample. It is not clear whether the sample consists of the first 30 witnesses that arrive at court during the sample period or the first 30 to be called into court. If the latter, this will produce a lower average waiting time.

A judge saw lack of judicial resources at the root of the problem:

‘A lack of judicial capacity puts pressure on listing to continue fixing cases at 10 am in advance of a young witness starting evidence at 10:30 AM. When these “short” cases take longer than predicted, there is inevitable delay for the waiting witness. The solution is increased judicial capacity’.

Even where an attendance time is agreed with the judge and advocates at a GRH, intermediaries found witnesses continue to be told to attend unnecessarily early:

‘Witness Care warn the child’s family for 9.30 am as a rule even though it has been agreed at the GRH that they would come later. This is unhelpful. Officers often phone witnesses to ask them to disregard instructions from Witness Care. However, getting conflicting advice from two sources can be confusing and unsettling to the family’.

A Witness Service team leader saw a need for:

‘Better consideration and case management (by court staff, legal advisers, magistrates and judges) to reduce unnecessary waiting. For example, have child witnesses give evidence first, give realistic warning times, allow children to wait elsewhere outside the court building, only warn them if absolutely necessary, enforce guidelines on cross-examination and do not allow prosecution/defence to call child witnesses without proper notice and process. In one case, a mother received a text to bring her nine year-old to court the next day’.

‘Measuring up?’ found that, of 129 young people giving evidence by live link, 62 (48%) experienced delays caused by technology problems. Responses to this study suggest this is still a problem: only 12 of 39 judges (31%), eight of 36 barristers, solicitor advocates and Crown advocates (22%) and 18 of 46 intermediaries (39%) described delays due to technology as rare. On the other hand, one judge, four advocates and one intermediary said these were almost always a cause of delay. The intermediary said:

‘Technology seems to be the biggest problem in terms of delay. On one occasion a young witness had had his hearing put back several times due to legal issues and on the day he finally got to court the equipment went down. We thought it was not going to be possible for him to give evidence that day. Fortunately, the engineer got it working again and he went on to give evidence at 3pm, having been in court since 9:30 am. He was asked if he wanted to go home and come back the next day, but he decided to wait it out as he had been geared up for the cross-examination to take place that day’.

A judge agreed:

‘The most significant cause of delay is issues with the equipment in the court, either because the equipment itself does not work or – less often – because of some incompatibility issue with the recording of the ABE’.

Only two of the nine HMCTS regional Witness Champions surveyed said their role included monitoring young witness waiting times at court. It is not clear how this is carried out: none of the Witness Champions received any statistics about young witnesses.
2.5.1 Section 28 and delay

The pre-trial cross-examination (s 28 Youth Justice and Criminal Evidence Act 1999) process evaluation collected data on waiting times for vulnerable witnesses in pilot and comparison cases. It found that waiting times appeared to be considerably shorter for s 28 pilot cases (in which cross-examination is scheduled separately before the trial), by several hours.95 Two of the three pilot courts (Leeds and Liverpool) routinely scheduled s 28 hearings before the start of the court day; this was not feasible in Kingston due to travel times in the London area. Some respondents speculated that courts at s 28 roll-out may be unwilling or unable to replicate early start times.

Five of the nine judges from s 28 pilot courts responding to our survey felt that, in the last 12 months, pre-trial delay for young witnesses had reduced; the other four said it had stayed the same. Several pilot court judges felt that, thanks to the s 28 procedure, delay before and at trial had ‘almost been eliminated’. 

---

3 Support

3.1 Key findings

- Of the children referred before trial to the Witness Service, 52 per cent made court familiarisation visits but only 14 per cent received enhanced support from the Outreach Service. The majority of Services’ team leaders saw inadequate referrals and poor inter-agency communication as a ‘significant problem’ (3.2). The number of specialist local young witness services had declined significantly. Only two were identified in this study (3.4).

- The children’s chapter of the Victims’ Code did not fully reflect all commitments. Ministry of Justice online young witness booklets were hard to find (3.7). Young witnesses for whom intermediaries were appointed seemed more likely to make an informed choice about how to give evidence (3.8). Access to live link practice sessions on court familiarisation visits was a systemic problem (3.8.1).

- Some special measures were seldom used: being accompanied by a neutral supporter of the young witness’s choice (3.9.1); closing the public gallery in sexual offence cases (3.9.2); combined special measures (i.e. preventing the defendant’s view of the child on the live link) (3.9.3); and giving evidence over a live link away from the trial court. Some areas had no non-court remote sites (3.9.3).

- Most young witnesses refreshed their memory before giving evidence and were not expected to watch their ABE interviews at the same time as the jury (3.10). The frequency with which young witnesses were introduced to judges and advocates prior to giving their evidence had increased but children’s pre-trial special measures meetings with prosecutors were not embedded in practice (3.11).

- Some courts’ waiting areas were described as very good or excellent, while others were identified as inadequate for children (3.12.2). Live link rooms were not considered child friendly, in part due to the absence of child-sized live link room furniture (3.12.3).

- A substantial minority of judges experienced problems in having a clear view of young witnesses’ facial expressions over the live link and in hearing them clearly (3.12.4). Some respondents reported instances in which the defendant or someone other than the questioner was visible on the witness’s live link screen (3.12.5).
3.2 Citizens Advice Witness Service and Outreach Service

The Government funds the Witness Service, which transferred from Victim Support to Citizens Advice in April 2015. Citizens Advice Witness Service provides a generic level of support to all witnesses and, in addition, an enhanced Outreach Service for vulnerable witnesses, including children. Its two-year contract has twice been extended for a further year. In March 2018, the Government announced plans to devolve commissioning of pre-trial support for witnesses in London to the Mayor’s Office for Policing and Crime by April 2019. This aims to ensure ‘a more seamless service’ for victims and witnesses before trial ‘where victim support would be provided by a single person rather than several agencies’.

The Witness Service accepts referrals from Witness Care Units, specialist police officers, other support agencies such as Victim Support, defence solicitors and self-referrals from witnesses. In a move away from pre-trial visits booked with individual Witness Services, Citizens Advice has introduced a National Contact Centre booking system. Witness Service teams provide their available time slots and receive information from the Centre about bookings. The Witness Service does not proactively ‘chase’ a witness for whom it has not received a referral. Witness referrals (defined as a request to provide support in advance of the trial day) are made in accordance with national and local protocols. When a referral has been recorded by the National Centre, it contacts the witness or parent/carer, usually by phone: up to three attempted contacts are made. Initial contact starts a needs assessment process. Offers of services differ depending on the needs of the person referred. Young witnesses are offered pre-trial preparation from the Outreach Service, at home or another location, unless initial contact is made with the witness less than five working days before the trial date. Responsibilities of the Outreach Service include:

- making one or more visits to the witness at home or agreed safe place, assessing needs and developing a tailored plan of preparation and support
- offering the witness a pre-trial visit and liaising with court-based staff
- assisting the court-based Witness Service volunteer in providing support on the day
- accompanying the witness while giving evidence when permitted and as appropriate
- ensuring that witnesses continue to receive assistance after court if necessary.

All seven Outreach Service team leaders said routine preparation of young witnesses included practising non-evidential questions and answers to help young people understand rules at court such as ‘it’s okay to say I don’t understand’, six almost always made a home or community visit to the witness; and four almost always advised young witnesses about stress reduction techniques.

---

97 Information in this section was provided by the Witness Service and also draws on the Citizens Advice Witness Service Manual (July 2017, unpublished).
99 The Witness Service is notified of all trials prosecuted by the CPS through the ‘list of witnesses attending court’ (LWAC) sent to the National Contact Centre via secure email. LWACs should identify the witness as a child but they are used for planning purposes only, not to trigger contact with the witness.
100 The Witness Service provides support to children under 16 years alongside a parent or carer.
Five felt they were almost always able to tailor support to the needs of the individual child. One highlighted the value of supporting young witnesses through a FaceTime or Skype connection, ‘a huge advantage’ in a rural area.

The Witness Service indicated that for trials that closed in the year to April 2018, it received 5,912 young witness referrals. The total number of young witnesses supported was 8,841. The difference between these figures represents 2,929 young witnesses (33% of those supported) who received support on the day of trial but had not previously been referred.

Referred witnesses, including those not receiving Outreach support, are offered a pre-trial visit at court, but if the witness is unable to attend information can be provided by phone (both are counted by the Witness Service as ‘pre-trial visits’).

Table 3: Young witnesses referrals to the Witness Service in the year to April 2018:

<table>
<thead>
<tr>
<th>Number of referrals</th>
<th>5,912</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number who received a ‘pre-trial visit’</td>
<td>3,127 (53% of referrals)</td>
</tr>
<tr>
<td>Type of visit</td>
<td></td>
</tr>
<tr>
<td>In person</td>
<td>3,069 (52% of referrals)</td>
</tr>
<tr>
<td>By phone*</td>
<td>58 (2% of referrals)</td>
</tr>
<tr>
<td>Number supported by the Outreach Service**</td>
<td></td>
</tr>
<tr>
<td>In magistrates’ court cases</td>
<td>391</td>
</tr>
<tr>
<td>In Crown Court cases</td>
<td>415</td>
</tr>
<tr>
<td>Total</td>
<td>806 (14% of referrals)</td>
</tr>
</tbody>
</table>

*37 calls related to magistrates’ courts and 21 to Crown Court
** Many of these will be included in the figures for pre-trial visits

Witness Service and Outreach Service team leaders were asked about significant problems in respect of young witnesses. Sixteen of 29 comments (55%) concerned inadequate referrals, insufficient familiarisation visits for ‘many, many children’ and poor inter-agency communication:

‘Lack of referrals from Witness Care Units, meaning the Witness Service are unaware of any needs or additional needs and children do not get to visit the court beforehand’.

Witness Service team leaders highlighted the possibility that explanations to carers were insufficient, with ‘many’ parents refusing Outreach on their child’s behalf: ‘We should have all children going through Outreach’. Only four of seven Outreach Service team leaders said that they almost always received referrals in time to see young witnesses before the day of trial. Others were concerned that when children were referred, there was often not enough time to prepare them adequately.

Previous research has identified the importance of ‘safety net’ procedures to identify young witnesses not initially referred and to find out why the witness’s carer declined support and renew the offer before the trial. These steps may be more difficult when operating a central referral system.

102 Email from the Witness Service (27 July 2018). The number supported is higher than the 7,618 attending court to give evidence, presumably because of guilty pleas, or other disposal, before the day of trial in some cases.
The Victims’ Code emphasises that, where possible, young witnesses ‘will get to meet the staff who will help you on the day of court’. The Outreach Service aims to provide the same supporter through initial contact, a familiarisation visit to the court and at trial. Two volunteers are allocated to Outreach cases, so that the back-up volunteer can take over if necessary. Six of seven Outreach Service team leaders said their volunteers almost always accompanied witnesses at pre-trial visits; five said the volunteers were almost always able to attend both the visit and the court on the day of the young person’s evidence. Lack of continuity was mostly due to a change of trial dates, though lack of volunteers or inflexibility across the Outreach team was also an issue. Witness Service records do not reflect how often the same supporter (whether court-based or Outreach) attends the child’s pre-trial familiarisation visit to the court and the day of the child’s evidence. However, in a recent survey of Outreach Service users, the ‘one supporter’ model was the most valued aspect of the service: 84 per cent of witnesses (not distinguishing children) were supported by the same volunteer on the day of trial and during preparation sessions, including pre-trial visits.

3.3 Police and Crime Commissioners

‘All child victims of crime are automatically eligible for the enhanced services provided to vulnerable victims of crime’ (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, ‘Duties on service providers for children and young people’ page 72)

‘…from 2014, we will be moving to a model where the majority of emotional and practical support services for victims of crime will be commissioned locally by PCCs’ Ministry of Justice ‘Victims’ Services Commissioning Framework’ 2013, page 5)

‘We will work through agencies, commissioners, and service providers to improve access to services for victims and survivors … We have funded the voluntary sector to deliver support to many more victims and survivors of abuse …’ (HM Government ‘Tackling Child Sexual Exploitation: Progress Report’ 2017, pages 10, 24).

PCCs were introduced in 2012 in every police area in England and Wales except London and Greater Manchester, where equivalent responsibilities lie with the Mayor. The PCC sets the strategic direction for its local police force and holds the chief constable to account for performance. It also decides how victims’ services are to be commissioned and provided in a PCC area. This may be through the voluntary sector, via grants or contracts. In 2017, £4.7m was allocated to PCCs (on top of core funding) to spend on local services for victims of childhood sexual abuse.

A 2017 review by the Victims’ Commissioner found that young victims were not informed about or did not receive all their Code entitlements, discussed throughout this report. Monitoring of compliance tends to be piecemeal. Only three of the nine HMCTS regional Witness Champions felt their role included delivery of Victims’ Code commitments or Witness Charter objectives. Of 11 PCCs, nine monitored compliance with the Victims’ Code. However, what constituted ‘monitoring’ varied across PCC areas, from ‘seeking reassurance from the Constabulary about compliance’ to ensuring ‘that the police fulfil their obligations and monitoring this on annual

105 Email from Citizens Advice Witness Service (27 July 2018).
basis through our scrutiny process. We also health check our own compliance on an annual basis’. Other PCC responses focused on monitoring commissioned services rather than specific police functions under the Code. Several mentioned working in partnership with the Local Criminal Justice Board, for example:

‘There have been discussions at the Local Criminal Justice Board about how we better hold each other to account for compliance with the Code, as at present no-one has the express responsibility for holding to account the collective criminal justice system to deliver against the Code – this is something that needs to be addressed if true accountability is to be achieved.’

Ten of 11 PCCs commissioned local support services used by young victims and witnesses. The most common included Victim Support, independent sexual violence advisers and domestic violence advisers, sexual assault referral centres and providers of therapeutic support. One PCC listed support for victims of crime with learning disabilities through the criminal justice process.

### 3.4 Specialist local young witness schemes

‘Arrangements for supporting child witnesses vary in different parts of the country. The police will be able to give advice about the best person to talk to’ (Ministry of Justice ‘Going to Court: for witnesses aged 5 to 11’ 2017, Introduction).

The Ministry of Justice advises that arrangements for young witness support varies according to where they live. Specialist services (some staffed by professional workers, others by volunteers or a combination of both) began to spring up in parts of England and Wales in the 1990s, funded through local and nongovernmental agency initiatives. At their peak there were over 30 such schemes; many achieved high rates of referral. In 2007, the Ministry of Justice commissioned an evaluation of three models of provision to identify key principles which might underlie any national procurement exercise for such services. No such exercise took place, though findings from that research informed 2009 Government guidance on setting up local young witness services. However, as specialist schemes failed to attract or retain funding, services began to close; for example, the NSPCC shut all its schemes other than that in Northern Ireland (funded principally by the Department of Justice).

None of the nine HMCTS Witness Champions or 11 PCCs identified specialist young witness schemes providing face-to-face pre-trial preparation in their regions. The study identified only two such services in England and Wales. The Humberside Safeguarding Children Boards Young Witness Service, established in 1995, was referred 247 young witnesses in the year ending March 2018 of whom 123 were supported at trial. The scheme’s supporters are drawn from the police and other relevant professions whose agencies are represented on the Local Safeguarding Children Boards. The Sussex Young Witness Service began in 2006 and is Victim Support’s only remaining specialist scheme. In the 12 months to July 2018, the Service’s part-time caseworker supported 60 young witnesses; 115 were supported by trained volunteers. Since August 2017, the Service has supported young witnesses only in Crown Court cases. The

Sussex scheme is funded by its PCC through money received from the Proceeds of Crime Act 2002; Humberside is funded jointly by the PCC and Local Safeguarding Children Boards.

An independent sexual violence adviser, commenting on the closure of a local specialist young witness scheme and the commissioning of sexual assault referral services by the PCC, expressed concern that the approach felt fragmented, and that ‘overloaded’ local officers may feel ‘less connected’ with the new processes.

3.5 Independent sexual violence advisers and sexual assault referral centres

Independent sexual violence advisers form part of the wider network of support to victims of sexual violence. They are trained specialists providing pastoral care and advice to victims from the investigative stage through to trial. When supporting those under 18, the Home Office stresses the need for essential, additional core skills and training ‘due to the differing processes and responsibilities of agencies in response to children’.111

There is no central register of these services. While each PCC area has access to independent sexual violence provision (either commissioned by PCCs, the NHS, local authorities or funded by charitable or grant-giving trusts), some such as Nottingham, have dedicated provision for children but others do not.112

Independent sexual violence advisers are often associated with sexual assault referral centres. In England, there are 47 such centres: children under 18 make up around one-third to a half of clients.113

3.6 Clarifying support roles and responsibilities

‘There should be an examination of ‘the respective roles of intermediaries, Independent Sexual Violence Advisers (ISVAs) and other “supporters” so that there is clarity on the role and purpose of each’ (Ministry of Justice ‘Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence’ 2014, para 58)

‘Every area has a Witness Care Unit which acts as a single point of contact for prosecution witnesses. (Sometimes police child protection units continue to deal directly with young witnesses and their families instead of the Witness Care Unit)’ (Ministry of Justice ‘Going to court and being a witness: a booklet for young witnesses (12-17 years)’ 2017).

While the Witness Service has produced guidance for its supporters114 and the Home Office has published guidance for independent sexual violence advisers115, no official guidance explains the different support roles and responsibilities. The Ministry of Justice is looking at how best

---

112 Email from LimeCulture (13 August 2018) which will train around 40 independent sexual violence advisers working with children in 2018.
to address this, for example through a revision of the Witness Charter or a Criminal Practice Direction issued by the Lord Chief Justice.\textsuperscript{116}

Observations from study respondents suggest such guidance is greatly needed. They identified misconceptions about roles, in particular that of registered intermediaries who are not supporters at all. As independent officers of the court, they facilitate communication but are not witness supporters. Terminology is important. Sometimes even Government policy describes intermediaries as supporters, as in the first Ministry of Justice quote above, or where it refers to intermediaries as providing ‘specialist support during a trial’.\textsuperscript{117} Similarly, guidance for Witness Service supporters refers to intermediaries as ‘professional supporters’.\textsuperscript{118} Problems highlighted during the study included an independent sexual violence adviser who was told she was not needed if an intermediary has been appointed, and an intermediary who was told that the Outreach Service would be ‘stood down’ in any case involving an intermediary.

Overarching guidance should address how the various roles can work together, illustrated by best practice. In an area with a pre-existing specialist young witness scheme (3.4 above), it was agreed that the Witness Service Outreach Service would deal with vulnerable adults only. In contrast, respondents gave examples of poor liaison, with ‘too many’ supporters accompanying an individual witness to court; contradictory information being given; ‘territoriality’ (insufficient consideration of who might be best placed to provide support on a case by case basis); and inconsistent practice between courts as to whether independent sexual violence advisers were permitted to accompany young witnesses giving evidence. Coordination was a particular issue where ‘external’ bodies were involved: two of five sexual assault referral centres and six of seven independent sexual violence advisers had concerns about the support received by young witnesses. The managers of two specialist local young witness services had met their counterparts providing independent sexual violence adviser services to explore how they could work together. The manager of one young witness service concluded:

‘further work is needed to ensure a seamless provision of service, avoid duplication and minimise the chance of victims “falling through the net”’.

It would be helpful if guidance provided examples of how to address overlapping responsibilities and how these may be experienced by the witness, for example needs assessments (initially a police duty but also ascribed to Witness Care Units, the Witness Service and independent sexual violence advisers) and acting as a ‘single point of contact’ with the witness, a responsibility of independent sexual violence advisers\textsuperscript{119} but primarily of Witness Care Units.\textsuperscript{120} These Units are the principal route of referral to the Witness Service, but ‘Measuring up?’ found that 40 of 74 Witness Care Units (54\%) did not deal with all young witness cases because specialist police units retained direct contact with some children (page 186). In the same way, four of nine PCCs in this study said their Witness Care Units did not deal with all young witnesses, with one explaining that ‘the route of contact will depend on the age and vulnerability of the young person’.

\textsuperscript{116} Email from the Ministry of Justice (6 August 2018).
\textsuperscript{120} https://www.cps.gov.uk/news/fact_sheets/witness_care_units/.
The Victims’ Commissioner has recommended that:

‘A single point of contact or children’s advocate should be made available for child victims of violent and sexual offences, and cases where the child is particularly vulnerable. This children’s advocate would support the child through the whole of their journey through the criminal justice system ... The children’s advocate should be a professional role with suitable training and accreditation to support children as well as having access to all aspects of the criminal justice system needed to provide a seamless service to the child’.121

3.7 Providing information to young witnesses about court

‘If you are asked to give evidence at the trial you are entitled to ... be told by the Witness Care Unit how you can get a Young Witness Pack that helps you understand what will happen when you give evidence to a court’ (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, chapter 3 ‘Children and young people’, para 2.10)

‘The Witness Care Unit ... Victims must be informed what to expect including how they can access the Young Witness Pack’ (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)

‘The Witness Care Unit (or in some cases the police), defence lawyers, HMCTS staff or the Witness Service will either give you information to help you prepare for attending court or indicate where this information can be found ... This should include ... the ‘Young Witness Pack’ if you are under 18 and giving evidence in court; Information about the Victims’ Code if you are a victim in the case ... the support available at court ... ’ (Ministry of Justice ‘Witness Charter’ Standard 11: Information about the court and court process, 2013).

In 1998, we led a multi-agency team which produced the Young Witness Pack, published by the NSPCC and ChildLine. This consisted of free, developmentally-appropriate materials for children attending Crown, magistrates’ or youth court (including a ‘pop-up’ courtroom); a booklet for parents; and a handbook for child witness supporters. In due course, updates and publication (except for the handbook, which has not been re-published) were taken over by the Ministry of Justice. The final print versions were produced in 2010. Thereafter, due to cutbacks, a subset of three booklets became available solely online.

Three updated booklets were placed online in 2017, on a GOV.UK page entitled ‘Going to court as a victim or witness’.122 Scrolling down the page, the subheading ‘Child witnesses’ has links to:

- ‘full guidance on how to prepare your child for court’ ['Your Child is a witness']
- ‘guidance for 5 to 11 year olds’ ['Going to Court']
- ‘guidance for 12 to 17 year-olds’ ['Going to Court and Being a Witness'].

The policy commitments quoted above all refer to the ‘Young Witness Pack’, as does an ‘EasyRead’ version of the ‘Witness Charter’, advising children to ‘ask for a copy of the Young

Witness Pack\textsuperscript{123}, but the booklets are no longer branded this way. Anyone searching for the Pack or not already in possession of the links would have difficulty in finding the booklets online. They do not appear in the results of a Google search on ‘Young Witness Pack’, even on the Government publications home page.\textsuperscript{124} However, searching for ‘young witness information’ produces links to the three booklets.

The Ministry of Justice materials are intended for the child and supporter to work through together. For example, the introduction to the booklet for five to 11 year-olds says:

‘You should read this book with the assistance of a grown up who knows about court procedures and can answer the young witness’ questions. The supporter can then pass on information about the young witness’ needs at court to the police, Crown Prosecution Service and court staff.’\textsuperscript{125}

The printed Young Witness Pack was still available at the time of ‘Measuring up?’. Of 182 young witnesses, 127 (70\%) received booklets, mostly by post. The involvement of a supporter made a marked difference as to whether children found the material informative. Of the children who had no-one in a support role, 31 of 80 (39\%) described the material as helpful, compared with 34 of 40 (85\%) who had a supporter or police officer go through the booklets with them, and who described the material as helpful (pages 62–63).

The Witness Service describes support for young witnesses as including provision of Young Witness Pack materials.\textsuperscript{126} The Outreach Service uses them with children though, as indicated above, they had contact with only 14 per cent of children referred to the Witness Service. Of seven Outreach Service team leaders, six printed out copies of the booklets to give to young witnesses and their carers; five also provided links to the materials online.

### 3.7.1 Other young witness resources

The ‘Child witnesses’ section on the GOV.UK page also provides links to:

- the Witness Service
- Childline
- the NSPCC young witness service in Northern Ireland.

A link should be added to Victim Support’s interactive courtroom\textsuperscript{127} and other young witness pages.\textsuperscript{128} A judge suggested that children should also be made aware of the informative three-minute YouTube video of a ‘friendly judge explaining the live link to a young witness’.\textsuperscript{129} An Outreach Service team leader recommended two short YouTube videos (although not aimed at children) made by the University of Derby.\textsuperscript{130}

Standard 11 of the Witness Charter (2013) indicates that witnesses should be given the explanatory DVD ‘Going to Court’ by the Witness Service at the pre-trial visit or watched online.


\textsuperscript{124} https://www.gov.uk/government/publications?keywords=&publication_filter_option=all&topics=SB%5D=all&departments=SB%5D=all&official_document_status=all&world_locations=SB%5D=all&from_date=&to_date


\textsuperscript{126} Email from Witness Service (12 May 2018).

\textsuperscript{127} https://www.youandco.org.uk/going-court/interactive-courtroom.

\textsuperscript{128} We alerted the Ministry of Justice to these issues in an email (30 January 2018). No action has yet been taken to amend GOV.UK links.

\textsuperscript{129} HH Judge Rosa Dean introduces the live link: https://www.youtube.com/watch?v=K5T7nROxh8.

\textsuperscript{130} ‘Introduction to the Magistrates’ Court’ https://www.youtube.com/watch?v=WeNDacw05NA; ‘The Crown Court’ https://www.youtube.com/watch?v=tZYv_v_sR-s.
It is unclear whether this DVD is still actively distributed; it is available on YouTube\textsuperscript{131} but not on the link provided in the Witness Charter. An NSPCC DVD for young witnesses, ‘Giving evidence: what’s it really like?’ made in 2000, is not available online.

Twenty-three of 48 intermediaries (48\%) provided young witnesses with a personalised\textsuperscript{132} ‘going to court’ booklet. These may include a picture of the child and (from the Internet) of the judge and advocates, if these can be identified in advance.

Nine of 11 PCCs provided information to young victims and witnesses in their locale. These included:

- a service for those under 21 affected by crime, whether or not reported\textsuperscript{133}
- local websites; an online victims’ directory including information specifically for young victims; a ‘Victim Information’ pack with information for young people, including an ‘augmented reality video explanations of entitlements, getting support and the criminal justice system’; an interactive ‘Victim’s Journey’ app; Easyread publications; and a ‘Safety Sense’ colouring book
- social media channels to reach children and young people and receive referrals to the service if a young person chooses to get in touch through this method
- multi-agency campaigns including around child sexual exploitation
- a ‘Trauma Teddy’ scheme in which a child is given a teddy bear following an incident and consent is confirmed with the parent/guardian to receive a follow-up support call from the Children and Young People’s Coordinator who will complete a victim needs assessment, coordinating relevant support if required.

Four of nine HMCTS regional Witness Champions said courts in their region had created local information sheets or other such material for young witnesses. Criminal Practice Direction 3F.29 now permits, with the court’s permission, the taking of photographs of court facilities ‘such as a live link room, to assist vulnerable or child witnesses to familiarise themselves with the setting’. A useful model for courts, witness services and PCCs to consider is that of County Durham Youth Offending Services, which has created a ‘Going to Court’ leaflet for young people subject to criminal proceedings, developed with the assistance of a registered intermediary. This is available in a generic version but it can also be customised by ‘dropping’ local photos into the template\textsuperscript{134}.

### 3.8 Giving the young person an informed choice about special measures

‘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’ (s 19(3)(a) Youth Justice and Criminal Evidence Act 1999)

‘The police will … seek your views on special measures that might help you give your best evidence during the investigation and court stage’ (Ministry of Justice ‘Witness Charter’ Standard 4, 2013)

\textsuperscript{131} https://www.youtube.com/watch?v=aUOc0Sa1WMM.

\textsuperscript{132} Intermediaries personalise the booklets in various ways, for instance by including a picture of the child, the judge and the advocates.

\textsuperscript{133} http://voicenorthants.org/cyp/about-voice/.

Witnesses have been found to give better evidence when they have a choice about the way in which it is given. This especially applies to vulnerable witnesses, many of whom need preparation and support in order to be able to make an informed choice. Wherever possible, vulnerable witnesses should have an active role in choosing how to give their evidence. The most appropriate method of doing so will depend not only on the individual’s objective capacity but also on what they wish to do, taking into account the options that are available for them’ (Ministry of Justice ‘Achieving Best Evidence in Criminal Proceedings’ 2011, para 4.84).

‘What has been done to help the witness express an informed opinion about special measures? Care must be taken to explain to the witness what is meant by special measures, what measure(s) may be available, and what they would involve for the witness. What views has the witness expressed about his or her eligibility? whether special measures would be likely to improve the quality of his or her evidence? the measure(s) that you propose? The views, concerns and requests expressed by the witness, or on his or her behalf, must be set out in detail’ (HM Courts and Tribunals Service ‘Application for a Special Measures Direction’ parts B5 and 6).

‘Measuring up?’ found that 141 of 172 young witnesses (82%) were content with arrangements for them to give evidence but many said they had been given no choice and 26 (15%) did not give evidence the way they wanted (pages 89-90).

Results from this study suggest that enabling young people to make an informed choice about how to give evidence continues to be a problem. The special measures application form quoted above stresses the importance of seeking the witness’s view about how to give evidence, but this is not addressed in the children’s chapter of the Code of Practice for Victims of Crime.

Although the live link was first introduced in 1988135, by 1995 children were still more likely to give evidence behind a screen in court.136 In consequence, s 21 of the Youth Justice and Criminal Evidence Act 1999 created the ‘primary rule’ that young witnesses in sex offence, assault or kidnapping cases would give evidence by live link. This ensured greater use of live links but restricted young witness choice. The Coroners and Justice Act 2009 amended s 29 to offer the young witness ‘opt out’ provisions, but use of the live link remains the presumption.

Preconceptions about the possible adverse impact of live link evidence on juries had a dampening effect on early use of live links. By 2014 this view was still prevalent among some judges and advocates.137 The Joint Inspectorates warned that young witness choice may be influenced if they are told giving evidence by live link could affect the outcome. A judge in the survey took the view that:

‘The impact of a child’s evidence can be best assessed by a jury if they see the witness face-to-face. Cruel as it may sound, a few tears may carry more weight with a jury.’

135 The live link was introduced by s Criminal Justice Act 1988; eligibility was extended by the Criminal Justice Act 1991.
To date, research shows no consistent difference to jury perceptions or conviction rates whichever special measure is used.\(^{138}\) A recent overview of research on live links and pre-recorded testimony by child witnesses, found that, 'broadly speaking', such studies have:

\begin{quote}
'demonstrated that – contrary to many people’s misplaced confidence in their ability to do so – jurors are not in fact significantly better able to reach the truth and discern signs of deception when children testify in open court as compared to testifying via live-link or pre-recorded testimony. Moreover, while some – but by no means all – studies have suggested that jurors may prefer children’s testimony to be delivered live in court, there is no clear evidence that this impacts in any significant way upon verdict outcomes. The existence of group deliberation appears to be key in this respect, reducing any pre-deliberation propensity on the part of individual jurors to rate less highly the credibility and likeability of child witnesses who give evidence via live-link or pre-recorded video'.\(^{139}\)
\end{quote}

The process evaluation of the s 28 pre-trial cross-examination pilot courts identified 'little difference in the rates of conviction at trial for s 27 [the comparison group] and s 28 cases (46% and 54% respectively)'.\(^{140}\) On the contrary, choice gives witnesses some control over the process which can contribute to the quality of their evidence.\(^{141}\) Cheryl Thomas’s project ‘Juries, the Digital Courtroom and Special Measures’ is examining juror perceptions of young witnesses’ evidence and whether these differ when such evidence is given under each special measure; it will assess actual jury conviction rates involving young witnesses as the main complainant.\(^{142}\)

The intermediary survey asked how young witnesses gave evidence and about their preferences. Of 48 responses:

- 41 (85%) said young witnesses almost always gave evidence by live link at the trial court
- 38 (79%) considered that young witnesses almost always gave evidence the way they wanted; the rest said this happened at least half the time.

In contrast to most intermediaries’ perceptions, only 13 of 38 team leaders for the Witness Service and Outreach Service (34%) thought that young witnesses were almost always able to make an informed choice about how they gave evidence. Others identified problems:

\begin{quote}
‘Child witnesses often express that they do not want to be seen, but screens are not offered to them. They are also often told that they cannot be seen on the live link’.
\end{quote}

Comparing Witness Service perceptions with those of intermediaries, it appeared that children for whom an intermediary was appointed were more likely to have their preferences heard.

\begin{flushright}
\begin{tabular}{ll}
139 & V. Munro (2018) ‘The Impact of the Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review’ Crime and Justice Social Research, Scottish Government. This overview noted that ‘findings in respect of child witnesses are complicated by the interaction of mode of evidence delivery with factors such as the perceived emotionality of the child, his or her age and level of understanding, and jurors’ preconceptions regarding the reliability of children’s memory, particularly over time’. \\
140 & J. Baverstock (2016) ‘Process evaluation of pre-recorded cross-examination pilot (Section 28)’, Ministry of Justice, page 60. \\
142 & Perceptions will be examined under controlled case simulation conditions conducted with real juries at court and through immediate post-verdict surveys of juries at court in cases involving young witnesses and intermediaries. The end date of the project is May 2019.
\end{tabular}
\end{flushright}
Nevertheless, intermediaries were aware that some young people could be influenced to give evidence in a certain way by police officers, prosecutors or supporters:

“There is pressure for teenagers to use the live link. I’ve worked with a few who wanted to be in court using screens as they did not want the whole court to be able to see them. Witness Service staff on familiarisation visits have tried to persuade them otherwise, but all these witnesses who have wanted to go into court have done so successfully, in the knowledge that if, once the trial had started, it was too difficult to remain in court they could change to a live link as recommended in my report.”

Ten of 11 intermediaries with experience of s 28 pre-trial cross-examination said this special measure had almost always been appropriate for the individual child’s wishes and circumstances. However, the s 28 process evaluation warned that there had been a tendency for practitioners in the pilot areas to assume s 28 was always in the child’s best interests, without facilitating informed decision-making by the witness and carer.143

3.8.1 Practising on the live link at the pre-trial court familiarisation visit

‘If you are asked to give evidence at the trial you are entitled to … visit the court before the trial to see what it looks like. You should see the court room and practice using Special Measures equipment like video links or screens around the witness box depending on what the court has ordered’ (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, chapter 3, para 2.10, Children and young people)

‘The Witness Care Unit must … as part of the needs assessment, offer the victim a pre-trial visit to the court to familiarise themselves with the court room and to practise using special measures equipment’ (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)

‘The Witness Care Unit (or in some cases the police), defence lawyers, HMCTS staff or the Witness Service will either give you information to help you prepare for attending court or indicate where this information can be found. This should include: … the opportunity to visit the court before the trial. If the judge or Bench has accepted your special measure application to give evidence using the live TV link, you can practise using this facility during your visit’ (Ministry of Justice ‘Witness Charter’ Standard 11, 2013)

‘In order to be able to express an informed view about special measures, the witness is entitled to practise speaking using the live link (and to see screens in place). Simply being shown the room and equipment is inadequate for this purpose’ (Criminal Practice Direction 18B.4).

‘Measuring up?’ found that of 129 young people using the live link, only 17 (13%) had practised on it before giving evidence. Policy recognises the importance of doing so, to enable witnesses to make an informed decision about how to give evidence. However, this study confirmed that practising on the link remains an archetypal inter-agency ‘rubbing point’.

When a witness is referred to the Witness Service National Contact Centre, a live link practice session can be requested and will be flagged to the relevant court’s Witness Service team. (If the visit is requested for a witness under 18 but no practice session is asked for, the Centre does not automatically enquire whether one is required). Citizens Advice advised that liaison ‘always’ takes

place between Witness Service team leaders and HMCTS to ensure a staff member is available to operate the equipment, but it acknowledged that the opportunity ‘cannot be guaranteed as it relies on HMCTS staff availability’. Pre-trial visit time slots are for times when the courts are not sitting for this reason.

Our surveys revealed a systemic problem in respect of the availability of live link practice sessions:

- only 12 of 38 Witness Service court-based and Outreach Service team leaders (32%) and 13 of 48 intermediaries (27%) thought that young witnesses almost always practised on the live link during their pre-trial visits
- 20 Witness Service and Outreach Service team leaders (53%) highlighted difficulties in arranging practice sessions arising from the lack of available court staff, especially in the lunch hour
- two of five sexual assault referral centres and three of seven independent sexual violence advisers reported problems in obtaining practice sessions
- however, despite the prevalence of problems around court staff availability, none of the nine HMCTS regional Witness Champions surveyed identified problems with live link sessions in their areas.

Thirty of 47 intermediaries (64%) said they were almost always present at pre-trial visits and 15 (32%) almost always spoke to the Witness Service before it took place. (Intermediaries are not responsible for arranging visits though some do so when it might not otherwise happen or be scheduled to accommodate their availability.) A Witness Service team leader observed:

‘The live link is only set up for a young witness if an intermediary has been involved and specifically requested this.’

Difficulties in securing practice sessions through the Contact Centre sometimes resulted in intermediaries calling an individual court’s Witness Service directly, or prompting the police or prosecutor to do so:

‘I ask the police officer to phone the [Witness Service at the] court to arrange the visit, asking for a time when the court isn’t sitting and explaining that the witness needs to practise answering questions across the live link. Clearly I am encouraging “system sabotage”, but it mostly works.’

Intermediaries also identified unfamiliarity with the commitment to practice sessions among some police officers and personnel from the courts and Witness Service because of ‘an assumption that seeing the live link room is enough’. Available court time varies among locations but is always limited:

‘Crown Court X will only allow practice of the live link at 9.00 am, not lunchtime, and trying to get a witness there for that time, especially as many of my witnesses are in care, is a nightmare’ (independent sexual violence advisor)

Some courts only offer visits at 1-2pm, so recently I’ve had to use four days to do pre-trial visits as I have four young witnesses in the same case. Children are also having to take more time out of school’ (intermediary).
There is no policy prohibiting Witness Service personnel from operating live link equipment but permission for this depends on local arrangements and training. One intermediary allowed us to reproduce this ‘thank you’ to a Witness Service team leader whose volunteers took on this role:

‘Having A and E work the live link equipment worked brilliantly, as there was no rush to accommodate the court staff’s lunch break and we could take it at the witness’s pace. This is the first time I’ve experienced the Witness Service being allowed to do this so I’m sure you must have worked hard behind the scenes to get agreement. This was among the best pre-trial visits I’ve been involved with and a great example of how the Witness Service and intermediary can work together in the best interests of the witness’.

3.9 Less frequently used special measures

The Youth Justice and Criminal Evidence Act 1999 provides a range of special measures for vulnerable witnesses. The study explored the approach to those less commonly used.

3.9.1 Young witness choice about the supporter in the live link room

‘A special measures direction for the witness to give evidence by live link may also provide for a specified person to accompany the witness (Crim PR 18.10(f)). In determining who this should be, the court must have regard to the wishes of the witness. The presence of a supporter is designed to provide emotional support to the witness, helping reduce the witness’s anxiety and stress and contributing to the ability to give best evidence … An increased degree of flexibility is appropriate as to who can act as supporter. This can be anyone known to and trusted by the witness who is not a party to the proceedings and has no detailed knowledge of the evidence in the case. The supporter may be a member of the Witness Service but need not be an usher or court official. Someone else may be appropriate’ (Criminal Practice Direction 18B.1, 2, based on Coroners and Justice Act 2009, s 102).

The Coroners and Justice Act 2009 introduced this element of young witness choice, following the finding in ‘Measuring up?’ that 85 of 129 young witnesses (66%) giving evidence by live link were accompanied by someone they had not met before the day of trial (page 102). Respondents to this study confirmed that young witnesses were still unlikely to be accompanied by a neutral person of their choice (other than a Witness Service or Outreach supporter):

- 19 of 38 judges (50%) said this rarely happened. Only one judge said the child was almost always accompanied by their own choice of supporter
- 41 of 48 intermediaries (85%) said that they and the young person were rarely accompanied by a neutral person chosen by the child
- 31 Witness Service team leaders said that, of the various options about who accompanied children in the live link room, the most likely was a Witness Service or Outreach volunteer. A supporter chosen by the witness (irrespective of who else was in the live link room) was the least likely possibility
- five of seven independent sexual violence advisers and one of five sexual assault referral centres reported instances of young witnesses being denied a supporter of their choice to accompany them.
3.9.2 Giving evidence in private

‘A special measures direction may provide for the exclusion from the court, during the giving of the witness’s evidence, of persons of any description specified in the direction … A special measures direction may only provide for the exclusion of persons under this section where the proceedings relate to a sexual offence or it appears to the court that any person other than the accused has sought, or will seek, to intimidate the witness …’ (s 25(1) and (4), Youth Justice and Criminal Evidence Act 1999).

‘Measuring up?’ noted that complaints about courts’ reluctance to hear children’s evidence in privacy in England and Wales dated back to 1925 and that, despite the 1999 special measure, the public gallery was cleared for only one of 56 eligible young witnesses (page 87). The position is unchanged. Research in 2017 found that:

‘Barnardo’s practitioners have been involved in advocating either for galleries to be closed or for live link screens to be tilted so that the public cannot see the victim. However, allowance for this was reported to be very rare’.145

In this study, 34 of 38 judges (89%), and almost all lawyers and intermediaries, said the public gallery was rarely or never closed during young witness evidence in sexual offence cases. Only one of 21 Crown Advocates reported having applied for this: the application was refused.

3.9.3 Not being seen by the defendant over the live link: combined special measures

‘Special measures need not be considered or ordered in isolation. The needs of the individual witness should be ascertained, and a combination of special measures may be appropriate. For example, if a witness who is to give evidence by live link wishes, screens can be used to shield the live link screen from the defendant and the public, as would occur if screens were being used for a witness giving evidence in the court room’ (Criminal Practice Direction 18E.2).

The option of combining two special measures, screens and the live link, has emerged since the ‘Measuring up?’ study. A 2017 HMCTS facilities audit found that TV screens in 45 per cent of courtrooms in Crown and magistrates’ Courts ‘could not be adjusted to ensure privacy at the time of the audits’ (i.e. could not be turned off for the purpose of combined special measures) but the audit noted that ‘Court staff will make alternative arrangements to ensure privacy as necessary’.146

An application for combined special measures is appropriate where a vulnerable witness wishes to use the live link but is afraid of being seen by the defendant. It is unclear to what extent young witnesses are advised of this possibility, but it appears to be infrequently used:

146 The audit is unpublished: email from HMCTS Victims and Witnesses Engagement Group (18 September 2018). We are grateful to HMCTS for allowing us to reproduce this and other findings.
Figure 3: Frequency of judicial use of combined special measures

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Almost always (n=39)</td>
<td>10%</td>
</tr>
<tr>
<td>More than half the time</td>
<td>5%</td>
</tr>
<tr>
<td>Less than half the time</td>
<td>18%</td>
</tr>
<tr>
<td>Rarely (n=39)</td>
<td>67%</td>
</tr>
</tbody>
</table>

Only eight of 21 Crown Advocates (38%) had made an application for combined special measures.

Judges identified difficulties in achieving combined special measures due to the way live link screens are installed on courtroom walls:

‘In a case where the young witness did not want the defendant to see her, I refused the prosecution application for her to come into court to give evidence from behind a screen. She was too young and I took the view that it was inappropriate. Instead we moved the defendant and dock officer to a position in the courtroom where they were unable to see the screen. An agreed direction was given to the jury to explain why we had moved people into different positions’

‘In a multi-defendant rape case, I achieved combined special measures ad hoc, by a stroke of luck. In the building there was a TV/video screen on a trolley. I had this positioned with its rear to the dock, so that everyone in court, save the defendants, could see the screen. This created awkwardness for the advocates (who had to turn round to see it) and inevitable prejudice for the defendants, which was difficult to dispel’.

This judge identified inability to provide combined special measures as a safeguarding concern:

‘This double special measure is good in theory, but almost impossible to achieve in practice. The legislators did not think this through. It requires addressing urgently, because some courts will find it literally impossible to put the measure in place given the set-up of the equipment at present’.

Of nine HMCTS regional Witness Champions, seven monitored the availability of combined special measures. Eleven of 31 intermediaries (35%) said obtaining the combination was almost always problematic. Depending on what was feasible in the court in question, intermediaries have obtained judicial permission for the live link screen seen by the defendant to be switched off; for the defendant to be moved out of view of the screen (if necessary, out of the dock); or for the defendant’s view through the glass wall of the dock to be screened with cardboard and masking tape. However, the biggest difficulty they identified was court staff’s unfamiliarity with the provision:

‘Court staff sometimes come up with a lot of reasons as to why combined special measures can’t be achieved – but if there is a strong and proactive judge there is usually a way it can happen’.
While intermediaries said that there was almost never a problem in obtaining the basic special measure of a courtroom screen to block the witness’s view of the defendant and vice versa\(^{147}\), a Witness Service team leader identified a particular difficulty about interpretation of the provision:

\[
\text{‘At this court there is an issue with using screens because these go around the defendant only. This means the witness is visible to everyone in court, including the defendant’s family and friends in the public gallery. This can cause distress and we have been trying to improve this for years. The legal advisers claim the law states screens are to protect from the defendant only, not those in public gallery. Young people aged 15 to 17 may be granted screens instead of the link, so may not have the protection expected.’}
\]

### 3.9.4 Live link evidence from a remote site (away from the trial court)

‘By March 2015 we will ... give vulnerable witnesses greater opportunity to give evidence from a location away from court that better supports them to give their evidence, with at least one such location available in each court region’ (HM Government ‘Our Commitment to Victims’ 2014, page 7)

‘To reduce the trauma that children and vulnerable people may feel from their experience of the criminal justice system and to ensure that they get the support they need to feel safe and respected we have ... given children and vulnerable witnesses greater opportunity to give evidence from a place where they feel comfortable, rather than having to go to court, with at least one such location available in each court region ... By September 2015, [we will] increase use of special measures [by] expanding out-of-court provision and monitoring this’ (HM Government ‘Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan 2015’ page 9; Action 2.6, page 26)

‘We have improved the experience for children and vulnerable or intimidated people in the criminal justice system ... We have created around 20 operational sites across England and Wales, so that vulnerable witnesses can give evidence away from the courtroom and court building’ (HM Government ‘Tackling Child Sexual Exploitation: Progress Report’ 2017, page 25).

In ‘Measuring up?, 12 of 129 young witnesses (11%) giving evidence by live link did so from a remote site away from the trial court; these were a mix of court and non-court locations (pages 86, 92).

One judge in this study observed: ‘The gold standard is that no child comes to the court building’. However, only a small proportion of young witnesses appear to have this option: a specialist young witness service said that just ten young witnesses used the local remote link facility over an eight-month period. HMCTS does not have a complete log of non-court remote locations but availability remains uneven: for example, one respondent reported that there were no remote link sites within the West Midlands. Some areas are worse off than formerly: when the NSPCC ran specialist young witness schemes with remote link sites in the South West, young witnesses rarely attended a trial court. When these schemes closed, children reverted to court attendance.

---

\(^{147}\) S 23(1) of the Youth Justice and Criminal Evidence Act 1999 allows for use of a screen to prevent the witness from seeing the accused, provided the screen does not prevent the witness from seeing or being seen by the judge, jury, advocates, interpreter or anyone appointed to assist the witness.
Of five Citizens Advice Witness Service Area Managers, two had more than one site in their region; the other three had none. Nine of 11 PCCs had one or more non-court remote live link sites in their area. Five described these as ‘fully used’. Others attributed underuse to technical problems and the need for a national protocol (subsequently developed). Reporting that a rural remote link site was not used to full capacity, one PCC explained that it was nevertheless of ‘great importance, helping to ensure victims and witnesses from this area can access this if needed’. Another noted that some remote sites are unsuitable for ‘all vulnerable victims’, but mobile kit can be taken to the person’s location.

In the previous year, Crown Advocates had been unlikely to request remote link use:

- only six of 21 (29%) had applied for a young witness to give evidence from a non-court remote site
- ten (48%) had applied for a witness to give evidence from another court.

Other respondents confirmed that young witnesses were unlikely to give live link evidence remotely:

- 27 of 38 judges (71%) said evidence from another court location was rare
- 28 of 38 (74%) said young witness evidence was rare from non-court sites
- 34 of 48 intermediaries (71%) agreed that children rarely gave evidence from a remote site.

Seven of 25 intermediaries (28%) reported that there were almost always difficulties in obtaining this special measure, sometimes simply because there was insufficient awareness of its availability:

‘Let’s have more remote locations. It is beneficial and reduces so much stress for the witness. I did a case via live link from a sexual assault referral centre. It wasn’t until the judge at the GRH said there was a link room there that anyone knew (including the child’s independent sexual violence advisor and the police officer who was there regularly). Before then, because the live link room at the court was too scary for the child, she had insisted in giving evidence in court behind screens, but had little understanding of what this really meant. I was able to manage the environment at the remote link far better (even to the extent that a dog was brought in to help calm her).

Only two PCCs described their remote live link sites as specifically equipped for use by children and young people. One said:

‘All of the sites have been designed to make the experience for young people and children as comfortable as possible. The décor is subtle and each centre has a games console and other toys to make the young people and children feel at ease.’

The two Citizens Advice Witness Service area managers with experience of remote links identified the following problems with their use: witness statements not being available; poor communication with HMCTS, ‘mixed up’ bookings and being notified of remote link use so late that a volunteer was not available; equipment failures; witnesses’ concerned about security of the building where the remote link was located; long waiting times to give evidence; and prosecutors not introducing themselves to witnesses over the link. Some respondents thought that underuse may result from judges preferring to have young witnesses come to court to meet them in person (see 3.11 below).

148 HMCTS, Citizens Advice, CPS and the National Police Chiefs’ Council produced a National Remote Sites Protocol in 2018. This is not publicly available.
The Sussex Young Witness Service provided the following example of the challenges presented by an anxious eight-year old whose parents were also witnesses. The serious sexual assault trial was to be heard at a Crown Court some distance away; the child was reluctant to attend court and her parents felt that requiring her to attend would cause her to ‘close down’. The Service’s caseworker made home visits to build up rapport and respond to questions and concerns. The caseworker applied for the girl to give evidence locally via remote link, which was granted, and arranged a pre-trial visit at this location. Her parents had to give evidence at the trial court which was a further source of anxiety for both them and the child who had been having separation anxiety since the incident. It was agreed that her aunt would bring the girl to the remote link and she was accompanied by the caseworker while giving evidence.

3.10 Refreshing the young witness’s memory before giving evidence

‘If you are asked to give evidence at the trial you are entitled to … see your video recorded or written statement shortly before the trial to help you remember what you said when you told the police what happened to you. The police will arrange this for you. If you made a written statement, it will be available for you on the day. If you made a video recorded statement, arrangements will be made for you to view this separately before the trial’ (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, chapter 3, para 2.10, Children and young people)

‘Witnesses are entitled to refresh their memory from their statement or visually recorded interview’ (Criminal Practice Direction 18C.1)

‘Vulnerable witnesses should not be required to watch a DVD of the ABE interview at the same time as the judge and jury. It is both tiring and distressing for them. There is no legal requirement that they do so. Arrangements should be made for them to watch it separately and in advance … These matters should be covered at the ground rules hearing’ (Judicial College ‘Equal Treatment Bench Book’ chapter 2, para 77, 2018).

‘Measuring up?’ found that, of 88 young people giving evidence whose ABE interview was used as their evidence in chief, only 40 (45%) watched it for the purpose of memory refreshing before trial (page 68). The witness is not supposed to watch the ABE ‘immediately before giving evidence’ because the first viewing ‘can be distressing or distracting’ (Criminal Practice Direction 18C.1).

It is not a legal requirement that witnesses watch their ABE interview at the same time as the jury but this became the established procedure when ABE interviews were first played as evidence in chief. It often resulted in young witnesses being tired and/or distressed by the time cross-examination began. Intermediaries have been instrumental in ensuring this practice is largely abandoned: 37 of 39 judges (95%) and 41 of 47 intermediaries (87%) said that, in the previous year, children were rarely required to watch their ABEs at the same time as the jury.

Forty-two of 47 intermediaries (88%) said young witnesses almost always saw their ABEs before the day of their evidence. Of 31 court-based Witness Service team leaders, 16 (52%) said memory refreshing took place at the court familiarisation visit half the time or more (although ‘Measuring up?’ suggested this might result in ‘emotional overload’ – page 69).

Intermediaries may have to remind officers to arrange memory refreshing. If the young witness is likely to need assistance during the process, intermediaries may also have to ask CPS to authorise the intermediary’s presence at refreshing and request arrangements to be discussed at the GRH (Criminal Practice Direction 18C.1 states: ‘it may be that the assistance of the
intermediary is needed to establish exactly how memory refreshing should be managed’). Thirty-four of 47 intermediaries (71%) said they were almost always present when memory refreshing took place.

Twenty of 44 intermediaries (45%) almost always recommended adjustments to the way memory refreshing was conducted. These have included taking breaks and:

- using symbols for ‘good listening’ and ‘good looking’ to direct a child non-verbally to pay attention to the evidence
- setting up an activity for a child in front of the laptop, with the intermediary and officer facilitating play during less important parts, then directing the child’s attention to the screen at key evidential points
- the witness listening to the interview e.g. letting the witness cover the screen with a scarf, letting a six-year-old listen while in a play tent
- reading a summary from the transcript
- the child watching the disclosure elements only.149

The study identified that most ABEs require editing (6.2.3 below). A judge warned that there was ‘no guarantee’ that editing took place in time for young witnesses to watch the edited version before the trial for the purpose of memory refreshing.

3.11 Introductions to the young witness

‘The ground rules hearing should cover, amongst other matters … when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness …’ (R v Lubemba [2014] EWCA Crim 2014, para 43)

‘Allow time for introductions and take account of the witness’s wishes. Prosecutors are expected to meet the witness and defence advocates may find it useful to do so. Accompanying the advocates at such a meeting can be a useful opportunity for judges to introduce themselves and to ‘tune in’ to the witness’s level of communication. Where justified by the circumstances, some trial judges have met the vulnerable witness with the advocates before the day of the witness’s evidence’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, para 56)

‘Providing assistance before and at court is especially important where witnesses are vulnerable and/or intimidated. One measure which should be considered for all such witnesses is a pre-trial special measures meeting. This gives the prosecutor an opportunity to introduce him/herself and to help the witness to make a properly informed decision about which special measures might assist them to give best evidence in advance of the day at court. It can also be used to inform the witness about the matters covered in this guidance … Be aware of the particular needs and requirements of vulnerable witnesses and those with learning difficulties or mental health issues. If the witness has an intermediary or other supporter then they should be involved when you speak to the witness in order to assist the witness’ (CPS ‘Speaking to witnesses at court’ 2018, paras 2.2, 3.4(a))

In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties. This seems to us to be an entirely reasonable step to take to put the witness at their ease where possible (R v Lubemba [2014] EWCA Crim 2064, para 43).

Of 172 children who gave evidence in ‘Measuring up?’, 118 (69%) met the prosecutor but only 14 (8%) were introduced to the judge or magistrates; these meetings were greatly appreciated (pages 82, 84). Introductions also enable the judge and advocates to ‘tune into’ the witness’s communication.

Practice has improved significantly, though it remains uneven. The involvement of an intermediary may have made the child’s introduction to the judge more likely (see Figure 14 in Annex 6).

Judges with non-court remote sites in their area praised this provision but noted the challenges it presented in respect of introductions and other matters:

‘Another cause of delay arises when the judge and counsel need to go and see the child witness face-to-face before they give their evidence. It is a balancing exercise between the time it takes to get to and from the remote site (during which time the child is waiting) and the benefit of this taking place face-to-face rather than via the video link’.

While some intermediaries were able to arrange introductions before the day of the child’s evidence, they were much more likely to take place on the day. A Witness Service area manager confirmed this may be a reason for underuse of remote links:

‘Judges like to meet the child on the day of trial. This can’t happen if the child is remote. We have suggested that they meet a day or two before but this has proved too difficult to arrange. Also, where children are granted the remote link and the parent is also a witness but have not been granted the remote link, the parent has to attend court. In this circumstance the parents want to be with their children, so the child ends up on the video link from the court’.

Judicial introductions generally take place in the presence of the advocates. Most advocates took part in introductions:

- ten of 15 barristers and solicitor higher court advocates (67%) almost always introduced themselves in person to young witnesses
- all 21 Crown Advocates said they did so.

However, experience of pre-trial special measures meetings with prosecutors was uneven:

- nine of 18 Crown Advocates (50%) said introductions almost always took place at a pre-trial special measures meeting under ‘Speaking to Witnesses at Court’ guidance
- in contrast, 39 of 48 intermediaries (81%) said such meetings with prosecutors rarely happened in their cases (as quoted above, the intermediary is expected to be present).

Seven of 19 Crown Advocates (37%) had encountered difficulties in holding such a meeting with young witnesses before trial. Sometimes the problem was finding a date to suit all those involved. Others admitted having rarely or never attended such meetings or that, if held, Crown Advocates were not included. One Crown Advocate was proactive in this respect:
‘I try and dovetail the special measures meeting with the pre-trial visit. It means communicating with the Witness Service Outreach team to ensure I can be available if at all possible.’

3.11.1 Questions about personal records or previous sexual history

‘Where third party material about a particular witness has been disclosed to the defence as being capable of undermining the prosecution’s case or assisting the defence case (such as social services, medical or counselling records) then that particular witness should be informed of the fact of such disclosure... Where leave has been given for a particular witness to be cross-examined about... their sexual history under section 41 Youth Justice and Criminal Evidence Act 1999 then that particular witness should be informed that such leave has been given’ (Crown Prosecution Service ‘Speaking to Witnesses at Court’ para 3.4(d)(ii) and (iii), 2018)

‘Consideration should be given to the place in cross-examination when questions about third party material should be put to the witness. A witness who does not anticipate being asked questions arising from third party disclosure, such as GP records, may become very distressed. Where such questions were asked at the start of cross-examination, in some instances the witness was unable to go on to answer questions relating to the current alleged offence’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, para 140).

Questions about the witness’s previous sexual history (s 41, Youth Justice and Criminal Evidence Act 1999) or arising from personal records held by third parties require prior judicial permission. Laura Hoyano’s 2018 study of s 41 applications describes the number brought in respect of children under the legal age of consent ‘as striking’. As quoted above, CPS guidance permits the prosecutor to alert the witness in general terms that they might be asked about these subjects:

- 11 of 18 Crown Advocates (61%) told the witness, where appropriate, that the judge had given permission for cross-examination about third party records or previous sexual history
- 11 of 47 intermediaries (23%) had experienced young witnesses being cross-examined about social services, medical, counselling or other records or about the young person’s previous sexual history. However, only four of the 11 recalled the prosecutor alerting the young witness about such questions prior to cross-examination.

Eighteen Crown Advocates indicated other matters that were discussed at a pre-trial meeting with young witnesses:

- 15 (83%) told the young witness (s)he can ask for a break
- 13 (72%) said the prosecutor can object if questioning is inappropriate, and the judge will decide if the questions need be answered
- 12 (67%) advised witnesses that (s)he can disagree with the cross-examiner

150 L. Hoyano (2018) ‘The Operation of YJCEA 1999 section 41 in the Courts of England & Wales: views from the barristers’ row. An independent empirical study commissioned by the Criminal Bar Association’ (section 132, which goes on to note that ‘the subject matter of these applications warrants further study’).
• 12 (67%) told witnesses they could ask to refresh their memory during their evidence. However, 42 of 46 intermediaries (91%) said no prosecutor advised young witnesses that they could ask to see their statement or ABE again during their evidence.

• 12 (67%) explained the general nature of the defence case.

For one Crown Advocate, these matters were covered on the day of trial:

'I cover all of these, but usually on the day they give evidence, rather than at a special measures meeting.'

Another (apparently dismissing the importance of speaking directly to the witness) questioned whether such discussion even was necessary:

'A lot of this will be covered by the GRH / screening of questions.'

One judge complained that prosecutors deferring such meetings until the day of the young witness’s evidence interfered with the child having a ‘clean start’ to cross-examination, although the proposed solution adds to the length of time the child is waiting at court (see 2.5):

'The protocol directing prosecutors to speak to witnesses causes delay. Prosecutors still think that they should undertake that task in the court’s time, i.e. after time listed for the trial to commence. Witnesses should be at court early enough to be seen by counsel (not necessary in all cases) before the time shown on the court list. To enable this to happen transport assistance should be given to get the witness and accompanying adult to court. This also avoids stress for the witness and others.'

3.12 Child-friendly facilities

3.12.1 Police ABE suites

‘Police forces should review Achieving Best Evidence suite provision, capacity and accessibility with children in mind ...’ (Criminal Justice Joint Inspection ‘Achieving Best Evidence in Child Sexual Abuse Cases - A Joint Inspection’ 2014, recommendation 3, paragraph 5.14)

Of 11 PCCs, eight said their ABE video suites had been reviewed in the past two years for capacity, seven for accessibility and five for child-friendly furniture and décor.

3.12.2 Court waiting areas

HMCTS is investing over £200m to modernise the court estate as part of the ‘Transformation’ programme. Its facilities audit for victims and witnesses in 2017 found that 21 per cent of Crown and magistrates’ courts had a separate waiting room for children.151

We asked Witness Service team leaders about the ‘child friendliness’ of their waiting facilities. Of 30 responses, nine (30%) described facilities as very good or excellent. One referred to:

151 The audit is unpublished. Email from HMCTS Victims and Witnesses Engagement Group (18 September 2018).
‘a children’s waiting room with child specific furnishings and colours, a separate rest room with soft furnishings, separate discreet link rooms, its own bathroom and kitchen’.

However, 11 (37%) felt that their waiting areas were inadequate for children in some respect. Intermediaries, who have experience across different courts, also provided feedback with some court facilities considered very good. Several intermediaries rated the contribution of the Witness Service as important as the facilities. Some judges highlighted poor waiting rooms and ‘small and claustrophobic’ live link rooms in their list of ‘significant problems’ for young witnesses. They also drew attention to courts lacking a separate entrance to bring children into the building to avoid confrontation with the defendant.

A full list of comments about waiting rooms and live link rooms (the following section) has been provided to HMCTS and to the Witness Service (see Annex 3).

3.12.3 Live link rooms

The 2017 HMCTS facilities audit identified that 51 per cent of live link rooms used for criminal cases were either soundproofed or their location ensured privacy. HMCTS advised that court staff will make alternative arrangements to ensure privacy, for example, using alternative rooms.152

None of the 29 Witness Service team leaders responding to the survey felt their live link rooms were child friendly. Most intermediaries thought poor link rooms far outnumbered the good ones. In many cases, the same live link room was used for children and adult witnesses. A specific concern was the lack of appropriately sized live link room furniture given the rising numbers of very young witnesses.

3.12.4 Court technology

Judges were asked how well they could see and hear young witnesses who gave evidence on the live link at court. Out of 39 responses:

- 26 (67%) almost always had a clear view of the witness’s facial expressions
- 23 (59%) could almost always hear the witness clearly.

Despite courtroom equipment upgrades, some judges still criticised the reliability of technology and lack of IT support, classing technology in the category of ‘significant problems’ for young witnesses. The placement of screens could also have an adverse impact:

‘The TV screens in court are far away from the jury and counsel. The impact of the evidence on the TV screen is reduced because of this’.

Sound in the live link room was described by some intermediaries as occasionally problematic, due to acoustic gaps (‘Silence means I don’t always know whether the court has heard a response or not’) or distraction caused by the noise of typing or shuffling of papers in court.

The quality of recordings is crucial for s 28 pre-trial cross-examination. We were advised by a s 28 pilot court that it is feasible for the camera to do a ‘close up’ (crucial when communication aids are used) but this facility is rarely employed as it depends on the skill and confidence of court staff operating the equipment.

152 Ibid.
3.12.5 Seeing the defendant or members of the public on the live link

The principal purpose of the live link is to ensure that the witness does not see the defendant, but ‘Measuring up?’ identified 15 young witnesses (12% of 129 who used the link) who saw the defendant on their TV screen (page 94). In this study, 15 of 31 Witness Service team leaders (48%) and 14 of 47 intermediaries (30%) reported instances in which the defendant or people other than the questioner were visible on the witness’s live link screen. Intermediaries found some court staff willing to address this while others said it could not be corrected:

‘I’ve worked in courts where the camera view of the prosecutor includes a view of the public seating and in one instance also the defendant. I’ve worked with court staff to remove this issue by changing where the public sit, changing the camera set up etc. but I think there must be many other cases where the trial goes ahead with vulnerable witnesses viewing people in the courtroom that could cause them great distress.’

3.13 Victim Personal Statements

‘You are also entitled to make a Victim Personal Statement. The Victim Personal Statement lets you explain in your own words how you feel the crime has affected you’ (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, chapter 3, para 1.4, Children and young people).

Respondents were asked about obtaining Victim Personal Statements in young witness cases:

- 25 of 39 judges (64%) and 19 of 44 Crown Advocates, barristers and solicitor advocates (43%) and said this always almost happened
- 16 of 40 intermediaries (40%) had assisted the police to take a victim personal statement from a young witness in the previous year.

3.14 The ‘Child House’ pilot

‘We have provided Police Innovation Funding of £7.15m over two years to London Metropolitan Police and Mayor’s Office for Policing and Crime, in conjunction with NHS London, to pilot the “Child House” model. This model was pioneered in Iceland, and provides one location for children who have been abused to get a range of support they need across health, social care and support with police interviews. The bid will fund two initial ‘Child Houses’ in London ... We are also providing funding of £752,000 over two years to Durham PCC to conduct a proof of concept of the way in which the “Child House” model could best be adapted for their local needs’ (HM Government ‘Tackling Child Sexual Exploitation: Progress Report’ 2017, p 3).

In London, the Children and Young People’s Haven Service opened in 2016, providing forensic medical examination and emotional support to children reporting recent sexual abuse. In 2018, it began piloting video-recorded ABE interviews conducted by a clinical psychologist on one
day a week. Following research in 2015\textsuperscript{153}, plans are also underway for a London ‘Child House’ pilot, drawing not only from the ‘Barnahus’ model\textsuperscript{154} from Iceland and Scandinavia but also from Child Advocacy Centres in the US and Canada.\textsuperscript{155} The Lighthouse, London’s Child House (a single location rather than two, as indicated above) is targeted at children and young people who experienced sexual abuse more than a week previously. It will operate across the boroughs of Barnet, Camden, Enfield, Haringey and Islington. The ‘one stop shop’ model means that all medical, advocacy, social care, police and therapeutic services will be available in one place. The Child House service is due to open in autumn 2018 and will also pilot ABE interviews conducted by a clinical psychologist, available six days a week. The initiative is funded by the Home Office, NHS England, the Mayor’s Office for Policing and Crime and the Department for Education. NHS England has commissioned services: health and wellbeing services will be provided by University College London Hospitals, The Tavistock and Portman and NSPCC.\textsuperscript{156} The pilot project will be evaluated by the Evidence and Insight team at the Mayor’s Office for Policing and Crime.

The protocol between the Metropolitan Police and the Havens for ABE interviews included criteria for requesting registered intermediary assistance. This focused on children with significant communication difficulty e.g. pre-schoolers aged four and under and those with learning disability, neuro-developmental disorder or speech and language disorders outside the expertise of the clinical psychologist. Some teething problems emerged regarding the respective roles of the psychologist/interviewer and the intermediary, for example separate but potentially duplicative assessments of the young person’s communication needs and misunderstanding of the intermediary’s unique role in the trial process. A meeting was scheduled for August 2018 to amend the protocol in light of pilot cases, with the intention of applying the revised guidance to the Child House pilot.

Durham Police is piloting a child advocacy scheme providing access to psychological support, but investigative interviews are still conducted by police officers. The pilot is being evaluated by the University of Durham.


\textsuperscript{154} EU Promise (2017) ‘Barnahus Quality Standards’

\textsuperscript{155} National Children’s Advocacy Center. https://www.nationalcac.org/.

\textsuperscript{156} Email from Child House Implementation Lead, University College London Hospitals NHS Foundation Trust (30 July 2018).
4 Safeguarding

4.1 Key findings

- Some objectives of ‘Working Together to Safeguard Children’ are relevant to young witnesses but a specific reference to ‘court’ responsibilities was dropped in 2013 (4.2).

- Criminal justice organisations’ safeguarding policies did not address a consistent set of issues, making it hard to distinguish respective responsibilities. None of the policies included whistleblowing provisions to protect those who raise safeguarding concerns (4.3). Some policies were not in the public domain (4.3.1).

- Instances were reported of young witnesses being discouraged from seeking pre-trial therapy. It was not possible to determine whether the Government still intended to deliver a commitment that all witnesses would be informed that they could access therapy if required (4.3.2).

- The study failed to identify any systematic procedures for obtaining feedback from young witnesses. Most judges and lawyers did not routinely receive feedback about what young people found helpful or problematic at court (4.4). Only nine of 38 (24%) Witness Service and Outreach Service team leaders almost always received sufficient advance information about each young witness’s level of communication and other needs before meeting him or her (4.4.1).
4.2 HM Government’s policy on ‘Working Together’ and the courts

‘Everyone who works with children has a responsibility for keeping them safe ... everyone who comes into contact with them has a role to play in identifying concerns, sharing information and taking prompt action’ (HM Government ‘Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children’ July 2018, para 16, page 11).

‘Working Together to Safeguard Children’, the Government’s statutory guidance on inter-agency working, was first published in 1999 and has been updated regularly, most recently in July 2018. The definition of safeguarding includes ‘protecting children from maltreatment’ and ‘taking action to enable all children to have the best outcomes’.157 These two objectives are particularly relevant to young people in the court process. Judicial guidance acknowledges that:

‘Individuals may have distressing experiences at court as a result of an accumulation of procedural failures and the way they are questioned. In safeguarding and other thematic reports on children, victims and vulnerable witnesses, the Criminal Justice Inspectorates highlight the risk of secondary abuse from the criminal court process’.158

As noted above, ‘Working Together’ applies to everyone who works with children. The 2010 version referred explicitly to courts’ safeguarding responsibilities:

‘Everyone shares responsibility for safeguarding and promoting the welfare of children and young people, irrespective of individual roles. Nevertheless, in order that organisations and practitioners collaborate effectively, it is vital that all partners who work with children – including local authorities, the police, the health service, the courts, professionals, the voluntary sector and individual members of local communities – are aware of, and appreciate, the role that each of them play in this area’ (para 2.10, emphasis added).159

In 2013, however, courts were dropped from the ‘Working Together’ list of responsible organisations. This omission has continued in subsequent revisions.

159 http://www.workingtogetheronline.co.uk/documents/wt_2010.PDF.
4.3 Scope of CJS safeguarding policies

‘Judges and magistrates have a role in safeguarding vulnerable people at court in ways which further the overriding objective (that criminal cases be dealt with justly\(^{159}\) and do not interfere with judicial independence’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, para 23).

By March 2015, the Government will ‘create a new expectation that all organisations that have safeguarding responsibilities should have internal whistle blowing policies’ (HM Government ‘Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan’ 2015, action 1.11).

In 2005, Joint Inspectorates warned that they could provide only a partial picture of how well children were safeguarded at court because their remit did not extend to the exercise of judicial discretion.\(^{161}\) Recent Judicial College guidance states that ‘Safeguarding is most at risk when responsibilities are unclear’.\(^{162}\) However, its description of judicial responsibility, above, appears qualified: balancing the obligation to safeguard a young witness against the need to preserve judicial independence. If a judge is constrained from acting in these circumstances, it is not clear who else has authority to take safeguarding action in respect of a child witness.

CJS organisations’ safeguarding policies do not address a consistent set of issues, making it hard to distinguish respective responsibilities in relation to stages of the criminal justice process or groups of children. For example, the HMCTS policy focuses on children as witnesses rather than as defendants.\(^{163}\) Only three of nine HMCTS regional Witness Champions considered that safeguarding children had an impact on their role: even the three positive responses were general, for instance ‘ensuring access to the pre-trial visit is facilitated’ and ‘improving the experience of children in court and showing the options of giving evidence’.

None of the CJS policies for safeguarding children include whistleblowing provisions.\(^{164}\) The CPS has a general whistleblowing policy and procedure\(^ {165}\) but these are not referenced in its safeguarding children policy. In contrast, for example, the Department for Education requires schools to have a child protection policy and appropriate whistleblowing procedures for staff with safeguarding concerns.\(^{166}\) It also signposts school staff to the NSPCC’s whistleblowing procedures and more general whistleblowing options if for any reason staff do not feel comfortable with their school’s internal processes.

4.3.1 Publication of CJS safeguarding policies

The Government appears to favour publication of safeguarding policies: how else are members of the public expected to know about safeguarding obligations? For example, the NHS publishes its safeguarding policy as part of its Freedom of Information responsibilities: ‘As part of the national safeguarding team assurance, we evaluate our work regularly and publish our findings in NHS England’s Safeguarding Update’ (NHS England).\(^ {167}\)

---

160 Criminal Procedure Rule 1.1.
164 See https://www.gov.uk/whistleblowing.
Within the criminal justice system, the CPS first published a safeguarding policy in 2008\(^{168}\); the Judicial College followed suit in 2013.\(^{169}\) However, safeguarding guidance for HMCTS issued in 2014\(^{170}\) and for the Witness Service in 2017\(^{171}\) are not in the public domain. The Witness Service advised that ‘[Ministry of Justice] restriction re the policies is that they are solely used internally and not shared with any external organisation.’\(^{172}\)

### 4.3.2 Pre-trial therapy

'Concern has been expressed that witnesses, and in particular child witnesses, have been denied therapy pending the outcome of a criminal trial for fear that their evidence could be tainted and the prosecution lost ... Whether a child should receive therapy before the criminal trial is not a decision for the police or the CPS ... The best interests of the child are the paramount consideration in decisions about the provision of therapy before the criminal trial ...' (CPS, Department of Health and Home Office 'Provision of therapy for child witnesses prior to a criminal trial: practice guidance' 2001, paras 1.1, 4.3-4.7)

'The police or any other service provider acting as the main point of contact in the case, should inform the victim that pre-trial therapy is available if needed, and, if requested, will be facilitated. The relevant service provider must also refer the victim to specialist organisations where appropriate and available' (Ministry of Justice 'Code of Practice for Victims of Crime' 2015, chapter 3 'Duties on service providers for children and young people' para 1.3, page 73)

'You are entitled at any time during the investigation and trial to speak to someone specially trained to listen to you and help you get over the crime. This may be called therapy or counselling and is often provided by a specialist organisation' (Ministry of Justice 'Code of Practice for Victims of Crime' 2015, chapter 3 'Children and young people', para 1.7, page 63)

'Safeguarding concerns should not be over-ridden because of pressures arising elsewhere in the justice system process. Whether the witness should seek pre-trial therapy is not a decision for the police, prosecutor or court; the best interests of the witness are the paramount consideration' (Judicial College 'Equal Treatment Bench Book' 2018, chapter 2, para 27)

By March 2015, the Government will 'signpost victims to guidance which clarifies the role of pre-trial therapy' (HM Government ‘Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan 2015’ para 2.5)

'We will ensure that all witnesses are made aware that they can seek access to therapy if required, to provide emotional support both before and after trial, including by revising the Provision of Therapy to Child Witnesses in a Criminal Trial guidance to make clear that the interests of the witness in criminal proceedings are paramount in ensuring there is access to therapy both before and after trial' (HM Government ‘Tackling Child Sexual Exploitation: Progress Report’ 2017, page 35).

---

\(^{170}\) HM Courts and Tribunals Service (2014) ‘HMCTS Safeguarding Policy for Victims and Witnesses: The Criminal Courts’ addressing e.g. listing strategy and the need for ushers working with vulnerable witnesses to have police checks; see also HM Courts and Tribunals Service ‘Reasonable Adjustments Guidance (Equality Act 2010) – For staff working with disabled court and tribunal customers’ (2013).
\(^{172}\) Email from Citizens Advice Witness Service (15 March 2018).
Access to pre-trial therapy for young witnesses is a key aspect of safeguarding. In each of our previous young witness studies, including ‘Measuring up?’, we identified instances in which children’s families were advised that they could not or should not seek therapeutic support before the young person gave evidence. In this project, three of five sexual assault referral centres and four of seven independent sexual violence advisers reported recent instances of a young witness being discouraged from obtaining pre-trial therapy (these respondents did not identify the source of this misleading advice). One centre cited the example of a young witness who waited three years to give evidence and had been prevented from accessing therapy in this period.

In April 2018, the CPS confirmed that an update of the 2001 pre-trial therapy guidance was underway but had been delayed ‘in part due to the NHS clearance process’.\(^{173}\) However, despite enquiries to the Home Office, Department for Education, NHS England and Ministry of Justice, we have been unable to determine whether the Government still intends to deliver the ‘outreach’ elements of the 2015 and 2017 commitments listed above, promising that all witnesses will be ‘made aware that they can seek access to therapy if required’.

### 4.3.3 Safeguarding concerns about a young witness

Seven of 40 judges (18%) had had a safeguarding concern about a child in the previous 12 months. (Some examples they provided have been included elsewhere in this report.) Twelve registered intermediaries (26% of 47 responses) had experienced safeguarding concerns about a child. Most instances resulted from poor coordination at court. For example:

> ‘I have a trial starting in two weeks for a child with Usher Syndrome. She has very poor vision, is deaf, and recently had cochlear implant. The GRH was very good as we worked out all the positioning for the signer/lip speaker and everyone else involved. The highly complex court visit was done with myself and the signer. Then I was called by Witness Care to ask if I could go to a different court. I took me days to resolve the problem and I only got confirmation that it was to stay at the court after talking to the listings manager. Good job I spoke with the defence, who were all set to go to a different court in a different county altogether’

> ‘A young boy with Asperger’s traits was extremely anxious before attending magistrates’ court. This was exacerbated by what then happened. He was left waiting for four hours after viewing his ABE for memory refreshing. He wished never to see the defendant (his father) and was reassured that this would not happen. When he was called, the first thing he saw was the defendant walking across the courtroom and sitting in full view. I had to jump up and block the boy’s view. I didn’t move until the court listened to my concerns. By the time his questions came, he was so stressed and tired that he gave one-word answers and left as quickly as he could. I left feeling like he had really been let down’.

Respondents from sexual assault referral centres pointed to the absence of multi-agency discussions for some young witnesses they dealt with, including examples of ‘peer on peer’ abuse where the perpetrator and victim were left in the same class at school.

\(^{173}\) Email from CPS Policy (5 April 2018).
4.4 Feedback and inter-agency liaison

‘Judges and magistrates should ensure that there is a mechanism for requesting and acting upon regular feedback from those responsible for the welfare of vulnerable witnesses and defendants about what local arrangements work well and what could be improved, and encourage the use of local surveys for this purpose’ (Judicial College ‘Equal Treatment Bench Book’ 2018, para 158).

Judges and lawyers were asked if they routinely received feedback about what young people found helpful or problematic at court:

- 33 of 40 judges (83%) did not routinely receive such feedback
- 23 of 33 (70%) Crown Advocates, barristers and solicitor advocates said the same. Crown Advocates were no more likely to receive feedback than the others.

Six of 11 PCCs received feedback about what young witnesses found helpful or problematic, though not always directly from young people and carers. Other sources included police officers; the Witness Service; independent sexual violence advisers; and various inter-agency groups on which the PCC was represented including Local Criminal Justice Board subgroups. A recent review of victims’ satisfaction with PCC-funded support services in 21 PCC areas found:

’some divergence in terms of capturing satisfaction information from victims under the age of 16 years. In Dorset, victims under the age of 16 years are not eligible for the survey run by their funded provider Victim Support. On the other hand, both Kent and Cambridgeshire stated that where children are supported, contact is made via a parent or guardian.’

We asked HMCTS regional Witness Champions whether they received or passed on information about what worked well or was problematic for young witnesses. Four of nine had done so in the previous year, though only one had received comments directly from or about young witnesses. These four Witness Champions had liaised with the Witness Service and CPS; two had contact with Witness Care Units; and one had contact with a designated witness liaison judge. None had liaised with Local Criminal Justice Boards.

Witness Service and Outreach Service team leaders and registered intermediaries were asked if they had given feedback to others in the criminal justice system in the previous year about what young witnesses found helpful or problematic. Intermediaries were underused as a source of information:

- just three of 47 intermediaries (6%) had been asked to provide such feedback
- in contrast, 25 of 38 Witness Service and Outreach Service team leaders (66%) had done so.

When asked what would enable them to provide a more effective service, Witness Service and Outreach Service team leaders identified the need to streamline good practice across courts and improve facilities, but the major concern, expressed by 15 of 22 (68%), centred on better communication between agencies. Problems included lack of feedback from stakeholders when the Witness Service raised problems but some team leaders highlighted an even more fundamental difficulty.

‘Unable to give feedback to others in the CJS here, as we are not invited to any court user group meetings or witness liaison meetings’.

4.4.1 Receiving and passing on information about the individual witness

Witness Service and Outreach Service team leaders were asked how often they received sufficient advance information about each young witness’s level of communication and other needs before meeting him or her: only nine of 38 (24%) said this almost always happened. Others acknowledged their frustration at being ‘the last to be informed, if at all, about the needs of young people’:

‘We are not told at all about which special measures are in place and have to figure it out ourselves on the day. This impacts on the service we provide, as we try to ensure young witnesses use a different entrance but if we have no referral or advance information, we are unable to ensure this happens’

‘We are not provided with information regarding young witnesses; it is up to us to call Witness Care to find the information out’.

Being informed of GRH decisions, for example about the scheduled start of the child’s evidence, was also problematic. Of 31 court-based Witness Service team leaders, only nine (29%) said they were routinely notified about such decisions.

Where the Witness Service identifies issues that affect the witness’s court appearance, for example, a need for special measures, these should be passed onto the relevant agency with the consent of the witness. Team leaders occasionally considered that a young witness required intermediary assistance, though one commented that their recommendation ‘is usually not followed up on’, while another described having ‘had to get in touch with the WCU or the officer in charge to insist’ on an intermediary. Yet another described a five year-old who came to Crown Court without an intermediary:

‘He was too scared to give evidence so the defendant, his father, won the appeal’.

Twelve of 37 Witness Service and Outreach Service team leaders (32%) encountered difficulties in referring young witnesses to other services after they give evidence. One commented:

‘Many young witnesses are told they’ll have to figure out post-trial support for themselves (no offers of assistance from those who wanted them at court’.

5 Questioning

5.1 Key findings

- There are no statistics about the number and proportion of young witnesses who make ABE interviews, but some children did not benefit from this special measure (5.2.1). Registered intermediaries (independent communication specialists) identified differences between, and even within, forces in pre-ABE joint planning with interviewers (5.3.3).

- Registered intermediary recruitment had not kept pace with increasing demand. Despite a Ministry of Justice claim in 2017 to have doubled their numbers, the 150 on the register at the start of 2011 had only increased to 183 by the start of 2018. Criminal justice agencies described the Ministry’s regional recruitment strategy as inadequate. Inefficient court listing of registered intermediary cases compounded the problem of limited availability (5.3.2).

- In cases with an intermediary, judges surveyed were more likely to: hold a GRH (5.4.1) and to do so before the day of the child’s evidence (5.4.3); require submission of draft questions (5.6.6); and impose restrictions on ‘putting the case’ (5.6.3) and limits on the length of cross-examination (5.6.7).

- In the previous year, 21 per cent of surveyed judges had dispensed with the intermediary’s presence at cross-examination after receipt of the report, apparently ignoring commitments in the Youth Justice and Criminal Evidence Act 1999 and the Witness Charter to take account of the witness’s wishes (5.7.5).

- Where restrictions on cross-examination were imposed and explained to the jury, most judges and lawyers were satisfied that there was still enough scope to test or challenge the young witness’s account (5.6.4).

- Jury directions to disregard myths and stereotypes about sexual offence complainants were common but were usually given at the end rather than the start of the trial. If a myth or stereotype was introduced, Crown Advocates thought that interventions were not routine (5.6.8).

- Most judges, lawyers and intermediaries thought that the tailoring of cross-examination to the understanding of individual young witnesses had improved in the last year (5.7.4).

- Most Crown Advocates and judges felt that young defendants were enabled to participate as effectively as young witnesses, but barristers and solicitor advocates disagreed (5.8).
5.2 ‘Achieving Best Evidence’ investigative interviews

The Ministry of Justice guidance ‘Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures’ was published in 2011 and is out of date. A revision was prepared in 2016 but publication was unaccountably withheld. A further update is now pending.

5.2.1 Young witnesses’ entitlement to have their statement video recorded

“When you give your witness statement to the police you are entitled to … have your statement video recorded to make it easier for you to tell the police what happened” (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, para 1.3, chapter 3, Children and young people)

“Witnesses under 18 years old and all other vulnerable and intimidated witnesses can ask for their statement to be video recorded…” (Ministry of Justice ‘Witness Charter’ Standard 3, 2013).

A special measures direction may allow a ‘video recording of an interview of the witness to be admitted as evidence in chief’ (s 27, Youth Justice and Criminal Evidence Act 1999). Such police interviews are conducted in accordance with Ministry of Justice ABE guidance. However, not all children benefit from this special measure. In 2009, ‘Measuring up?’ found that, of 182 young witnesses, only 55 per cent had made ABE interviews, ranging from 68 per cent of those in the Northwest to only 43 per cent in London and the Southeast (page 194). No statistics are collected about the numbers of children who take part in an ABE interview in England and Wales but it seems likely that a significant proportion do not do so. In the past year, 14 out of 40 registered intermediaries (35%) accepted trial appointments for young witnesses whose police interview had culminated in a written statement rather than a video recording.

The quality of ABE interviews is discussed below (6.2.1).

5.3 Registered intermediaries

“The courts are greatly indebted to intermediaries … who have laid the groundwork for this development of the procedural law by the courts in a manner that has been so beneficial” (Lord Thomas, Lord Chief Justice, R v Rashid [2017] EWCA Crim 2, para 73)

“… registered intermediaries … delivered an important and high quality service, without which many vulnerable victims and witnesses would not be able to give their best evidence” (Ministry of Justice Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence 2014, para 56).

“… registered intermediaries are invaluable in providing communication assistance for vulnerable victims and witnesses, giving them a voice in the criminal justice system and

176 Reasons may include a lack of trained police ABE interviewers and/ or ABE suites; young witnesses opting out of being filmed; and investigators opting 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.
in turn, providing them with equality of access to justice. Police and CPS users of the Witness Intermediary Scheme are positive about the impact of registered intermediaries’ (Victim’s Commissioner ‘A Voice for the Voiceless: A Review for the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses’ 2018, para 9, page 7).

Intermediaries (independent communication specialists) are a special measure for vulnerable witnesses (s 29, Youth Justice and Criminal Evidence Act 1999). They facilitate communication at the investigative interview and trial, and contribute to planning how to obtain ‘complete, coherent and accurate’ evidence (s 16(5)). Registered by the Ministry of Justice, they have become a new profession in the justice system in a relatively short time. Their influence can be seen, for example, in Court of Appeal decisions about developmentally appropriate cross-examination, in Criminal Procedure Rules and Practice Directions about the management of vulnerability and in Advocate’s Gateway toolkits (www.theadvocatesgateway.org). Many innovations which began with intermediaries now benefit vulnerable people across the CJS, whether or not an intermediary is involved. These include GRHs; limitations on leading questions where witnesses may give an unreliable response; requiring the submission of draft questions for review by the judge; and showing vulnerable witnesses their police interview pre-trial instead of requiring them to watch when it is played to the jury. Judges have exercised their discretion to appoint intermediaries for some young and other vulnerable defendants and in family cases (outside the scope of the Ministry of Justice scheme), even though there is – as yet – no legislative authority to do so.

5.3.1 Children’s eligibility for intermediary assessment

‘If you are considered to be a vulnerable victim … the use of communication aids, such as alphabet boards or assistance from registered intermediaries … are available’ (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, chapter 1 ‘Enhanced entitlements’ para 1.14, page 15)

‘If the police need to interview a victim, they must consider … the need for a registered intermediary to help the victim to communicate their evidence effectively’ (Ministry of Justice ‘Code of Practice for Victims of Crime’ 2015, Duties of Service Providers, para 1.4, page 41)

‘The police will also assess whether you are a vulnerable or intimidated witness and seek your views on special measures that might help you give your best evidence during the investigation and court stage, such as being assisted by a Registered Intermediary’ (Ministry of Justice ‘Witness Charter’ Standard 4, 2013)

‘Communication needs … are common to many witnesses and defendants under 18 … In light of the scarcity of intermediaries, the appropriateness of assessment must be decided with care … Whilst there is no presumption[176] that [those under 18] will be assessed by an intermediary … assessment by an intermediary should be considered for witnesses and defendants under 18 who seem liable to misunderstand questions or to experience difficulty expressing answers, including those who seem unlikely to be able to recognise a problematic question (such as one that is misleading or not readily understood), and those who may be reluctant to tell a questioner in a position of authority if they do not understand’ (Criminal Practice Directions 3F.24-26)

177 Criminal Practice Direction 3F.5 (2014) created a presumption of intermediary assessment for children under 11. This has since been removed. For analysis of the changes to this Direction, see L. Hoyano and A. Rafferty ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] Crim LR 93
All young witnesses under 18 are eligible to be assessed by a registered intermediary. Fieldwork for ‘Measuring up?’ took place as national rollout of the registered intermediary scheme was completed. Intermediaries were appointed for only two children in that study, although the research suggested that 74 of 106 children (70%) may have benefitted in areas where the special measure was available (pages 128-132). Research for the Education Policy Institute in 2017 indicates that four in ten children are recorded as having special educational needs and disabilities.178

Despite the Victims’ Code obligation on the police to consider intermediary use, quoted above, underuse of intermediaries is a recurrent theme of recent reports:

- the Ministry of Justice reported in 2014 that, in sexual offence cases, ‘the greatest area of concern was the purported under-use of registered intermediaries by the police and CPS, and the courts’179
- a Joint Inspection the same year found that intermediaries were ‘not generally being used during the interview process, even for very young children’ and that the cost of intermediaries in complex cases ‘could be very challenging for forces’180
- in 2018, a decade after national rollout, the Victims’ Commissioner highlighted ‘a lack of awareness by the police and CPS of the existence of registered intermediaries, their role and how to work effectively with them’ and documented shortages of intermediaries to work with older children.181

Policies do not require the intermediary role to be explained to young people and their parents/carers. ‘Measuring up?’ found that it was not routinely discussed, a finding reiterated by the Victims’ Commissioner in 2017.182 Entitlements set out in the Victims’ Code chapter for ‘Children and young people’ do not name either intermediaries or communication aids. The young person is simply cross-referred to ‘a full list of special measures’ in chapter 1, for adults. Emphasis in the children’s chapter is on the child asking for communication assistance:

‘When you give your witness statement to the police you are entitled to ... ask for someone to help you understand the questions you are being asked [and] to be told about special measures if you might have to give evidence to the court ...’.183

182 ‘Are We Getting it Right for Young Victims of Crime?’ (2017) page 36.
5.3.2 Number and demand

‘[We will] increase the provision of intermediaries for vulnerable witnesses by December 2015’ (HM Government ‘Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan 2015’ Action 2.7)

‘We have doubled the number of registered intermediaries. There are now around 200 to support children and vulnerable or intimidated witnesses in giving their best evidence at police interviews and in the trial process’ (HM Government ‘Tackling Sexual Exploitation Progress Report’ 2017, page 25).

At the start of 2011 there were 150 intermediaries on the Ministry of Justice register. By the start of 2018 this had risen to 183, a net increase of 33: 146 intermediaries had joined the register but 113 had left (see Table 9 in Annex 4). After a two-year gap in recruitment, 32 new intermediaries had been added by November 2018.

The register is organised by fields of expertise. As of March 2018:

- 155 intermediaries were registered to accept appointments for witnesses under the age of 18
- of these, 91 (59%) were recorded as ‘active’ i.e. available to accept cases
- these 91 intermediaries were requested to assess around 4,500 young witnesses annually, of which about 4,300 requests (96%) were matched.

National Crime Agency figures revealed the changing pattern of demand for intermediaries between 2012 and 2017:

- there was a seven-fold increase in demand for intermediaries for children (see Table 10 in Annex 4)
- there was a 398 per cent increase in the number of intermediary requests for children aged four and under, from 123 in 2012 to 612 in 2017
- the proportion of young witness requests each year that were not cancelled but where no match could be made peaked at 15 per cent in 2015, but fell to four per cent in 2017 (see Table 11 in Annex 4).

The proportion of intermediary requests for a child that relate to sexual offences has remained fairly constant at about two-thirds of requests (see Table 12 in Annex 4).

The level of demand for registered intermediaries has continued to vary across the country:

- in 2014, the number of appointments in some of the smallest police force areas exceeded that of forces serving the most populous areas in the country
- in 2017, the number of requests per 1,000 crimes was lower in some of the largest urban police force areas such as London and Greater Manchester than in more rural areas such as Cumbria. Vulnerable witnesses in these areas were ‘less likely to benefit from the services of a registered intermediary than those in other areas’.

184 The National Crime Agency Witness Matching Service provided the figures in this section.
In March 2018, police and CPS leads wrote to a Justice Minister to repeat concerns (previously expressed in 2016) about waiting times to obtain an intermediary, cancelled and unmatched requests and ‘the critical need for more registered intermediaries across England and Wales’.\textsuperscript{188} The letter highlighted:

- analysis carried out by the Ministry of Justice in 2014, concluding that up to 400 registered intermediaries were needed to meet demand. This projection was updated in 2017 to 470
- the difficulty of raising awareness of the contribution of intermediaries ‘when there are insufficient numbers to meet the anticipated demand’
- opposition to the Ministry’s plans for staggered local recruitment exercises: ‘Targeted incremental recruitment may well work to sustain numbers once there are enough registered intermediaries to meet demand, but it is not sufficient now’.

The Ministry of Justice held the first recruitment exercise for two years in January 2018 in the East Midlands: 16 candidates began training in July 2018. A further recruitment exercise was planned for London and the South East in the autumn.

The police and CPS leads’ letter to the Justice Minister noted that delay in obtaining an intermediary was a likely cause of police officers failing to submit a request, ‘a new concern and one that is particularly troubling’. A judge from a major metropolitan court said:

\begin{quote}
‘I have never yet seen an ABE in which an intermediary was used by the police, irrespective of the age or ability of the child’.
\end{quote}

A senior CPS lawyer described problems resulting from police failure to seek an intermediary at the outset:

\begin{quote}
‘It is so important for the police to instruct an appropriate intermediary at the right time. I have seen cases in which no intermediary has been instructed, but it has been obvious from the ABE that the witness has communication difficulties and one ought to have been. That causes difficulties both with the reliability of the account in the ABE (was the witness really giving their best evidence in the ABE without an intermediary?) and also for the CPS, in finding an appropriate intermediary at the midway stage. The system works so much better if the same intermediary is instructed from the initial ABE account through to court and provides consistency and support to the victim or witness’.
\end{quote}

Vicarious trauma as a possible contributor to high turnover of registered intermediaries, and provisions for support of intermediaries in Australia are discussed at Annex 5.

\textbf{5.3.3 Police and registered intermediary joint working at the ABE stage}

A crucial precursor to joint ABE planning is the involvement of the interviewing officer in the intermediary’s assessment of the witness’s communication abilities: 42 of 48 intermediaries (88%) were accompanied by the interviewer at their assessments, though sometimes this required explaining the potential benefits to those who had not worked with an intermediary before.
Intermediaries must make their ‘declaration’ (oath) on film at the start of the interview. The wording is complex and some intermediaries feel it is inappropriate and unnecessary for the child to be present: 18 of 47 (38%) made their declaration on film before the child entered the video suite.

Many intermediaries reported positive experiences of working with the police at ABE:

‘Most officers are very aware of children’s communication needs as indicated by their request to plan, be in the assessment, their comments on the child’s communication in the assessment and their reflections on this and how it will impact on the way they ask questions in the ABE’.

However, intermediaries 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’.

Intermediaries found most officers receptive to the recommended use of communication aids, but some, despite intermediary advice, were reluctant to let the witness show rather than tell, requiring the vulnerable witness to ‘fail first with words before offering alternate modes’. Again, intermediaries reported differences of approach, even within forces:

‘Attitudes towards written responses vary greatly, even within the same force. 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 answer questions by writing if necessary and have them read out’.189

Intermediaries were asked about their interventions during the ABE: 37 of 47 (79%) almost always felt able to intervene if a communication problem arose during the interview but even for experienced intermediaries this could be challenging:

‘I worked with an officer who had had no training in interviewing children. I helped her plan the questions for a 10 year-old boy, but in the interview she went off piste and asked “Show me how he punched you”. Before I could intervene, the boy hit himself very hard in the face. I ended up facilitating so much I was almost out of role’

‘Intervening in an ABE, especially due to wording issues, can be difficult. Not all interviewers appreciate suggestions made openly and may find wording advice easier to take on board in breaks. Also, it may not be clear what the interviewer is actually asking about, so it is difficult to offer advice. Very occasionally they will ask for help with wording’.

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

‘Where the court directs an intermediary will attend the trial, their dates of availability should be provided to the court. It is preferable that such trials are fixed rather than placed in warned lists’ (Criminal Practice Direction 3F.28)

‘The judge should schedule responses and make orders as necessary at the first appearance in the magistrates’ court or preparatory hearing or plea and trial preparation hearing (PTPH) in the Crown Court, e.g. by … obtaining availability dates not just for witnesses but for any intermediary or named supporter, and dates to avoid for exams or other important events … Organisation of court listings has a detrimental effect on the availability of intermediaries. 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’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, paras 47, 88).

National Crime Agency figures for CPS intermediary requests at the trial stage do not distinguish those where no intermediary has previously been involved and those where an intermediary had been appointed for the ABE. To help fill in this picture, intermediaries responding to our survey provided their appointment profile for the previous 12 months. Forty-four intermediaries recorded a total of 1,707 appointments:

- 1,473 were initiated before the ABE interview, of which 347 (24%) continued from interview through to the trial stage
- 234 of the total number of appointments (14%) were initiated at the trial stage in cases where no intermediary had previously been appointed.

In sum, these 44 intermediaries were appointed for 581 young witnesses at the trial stage. If the 44 were typical of the 91 active intermediaries for young witnesses, the total number of trial appointments was around (91/44) x 581 = 1,202. Combining this with the Witness Service figure of 7,618 young witnesses attending court in 2017/18 (see 1.3.2) suggests that intermediaries were appointed for about one in six young witnesses at trial (around 16%). Using instead the CPS figure for the same year of 12,318 young witnesses attending court produces an intermediary appointment rate for young witnesses of just under 10 per cent.

In our surveys, 27 of 39 judges (69%) and 22 of 35 lawyers (63% of Crown Advocates, barristers and solicitor advocates) considered that an intermediary was almost always available if required for a young witness needing communication assistance at trial. However, some judges highlighted the difficulty of late appointments at the trial stage:

‘The most significant problem is the late appointment/instruction of an intermediary or, as I recently experienced, a wholesale failure to consider the need for an intermediary. Late instruction means that there is no availability [information] for the intermediary at the PTPH and this is often because it is as late as the PTPH that consideration is given to instruction of an intermediary’.

Judicial reports of the frequency of intermediary appointments in the previous year varied:

- 22 of 39 judges (56%) said that an intermediary was appointed in half or fewer of their young witness cases
- 17 (44%) said an intermediary was appointed in more than half of their cases
• one said there had almost always been an intermediary in his or her young witness cases in the previous year.

Intermediaries are a scarce resource. Many are employed in other capacities, limiting their ability to provide a flexible service to courts. Intermediaries described frequent and last-minute scheduling changes as a major source of frustration; uncertainty over organising their schedules led many to accept fewer referrals than would be possible if their time was booked more efficiently. When an intermediary cannot attend a trial and has to be replaced, a further assessment by the second intermediary is required, increasing delay, cost and the burden on the witness.

The listing problems have three elements. The first concerns cases listed without taking account of their availability. The party requesting appointment of an intermediary in s 28 pre-trial cross-examination cases is expected to provide availability dates at the PTPH (Criminal Practice Direction 18E.26), but there is no such obligation in other cases:

• 12 of 39 judges (31%) said they rarely received intermediary availability dates when listing a GRH or trial, compared with 10 judges (26%) who almost always received this information
• seven of 20 Crown Advocates (35%) said that CPS almost always provided the intermediary’s availability dates to the court, whereas five (25%) said this rarely happened
• just one of 13 barristers and solicitor advocates (8%) said the court almost always had a registered intermediary’s dates available when listing a trial or GRH
• 18 of 46 intermediaries (39%) were rarely asked for their available dates for a GRH and 12 (26%) were rarely asked for their availability dates for a trial.

While intermediaries provide their availability dates to the police and CPS if requested to do so, court use of this information appeared erratic:

• ten of 46 intermediaries (22%) said their availability dates were almost always taken into account
• six (13%) said this rarely happened
• of the other 30, 10 (22%) ten each said dates were taken into account ‘more than half the time’, ‘half the time’ and ‘less than half the time’.

Intermediaries were unclear as to whether their information was reliably passed on or, if it was, simply disregarded in listing decisions.

The second aspect of the listing problem arises when intermediary cases are placed in warned lists, requiring intermediaries to hold several weeks clear in their diaries. It is preferable for trials with an intermediary to be fixed (Criminal Practice Direction 3F.28, quoted above), with a specific date and time for the vulnerable witness’s evidence. Only 17 of 30 intermediaries (57%) said that young witness trials were almost always given a fixed date when first listed (discussed further at 2.3). A more systematic approach would result in considerable cost savings, help ensure a more reliable service to vulnerable witnesses and defendants and free up intermediaries to take more cases.

The third issue concerns the lack of clear lines of responsibility for notifying intermediaries of listing decisions. Police officers, CPS, Witness Care Units and sometimes advocates and listing officers may all play a part in letting intermediaries know when they are required to attend court. Intermediaries reported that information often ‘fell through the cracks’. Often, their attendance was only possible with rapid re-shuffling of their other work.

The Victims’ Commissioner drew on findings from this research to recommend that Her Majesty’s Courts and Tribunals Service (HMCTS) reviews its listings practices with a view to
ensuring that trials involving an intermediary are fixed where possible, and that vulnerable victims and witnesses are informed more precisely of the date and time when they will give their evidence.191

### 5.4 Ground rules hearings

#### 5.4.1 GRHs where an intermediary is involved

> ‘Facilitating the participation of any person includes giving directions for the appropriate treatment and questioning of a witness or the defendant, especially where the court directs that such questioning is to be conducted through an intermediary. Where directions for appropriate treatment and questioning are required, the court must ... set ground rules for the conduct of the questioning ...’ (Criminal Procedure Rule 3.9(6) and (7))

> ‘Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge or magistrates, advocates and intermediary before the witness gives evidence. The intermediary must be present ...’ (Criminal Practice Directions 3E.2)

> ‘Central to the effective management of a case involving child witnesses will be the ground rules hearing which should, amongst other things, establish the style limits and duration of questioning child witnesses, and seek to guard against repetitive cross-examination’ (Judicial College ‘Crown Court Compendium’ 2018, para 6, pages 10-18, 10-19).

GRHs are a major innovation, allowing judges to clarify what is expected of those questioning young and other vulnerable witnesses and to make other case management decisions. They emerged from practice in the first intermediary pilot trials, adopting judicial guidance from California on questioning children about ‘what would and would not be allowed ... stressing that if questions were developmentally inappropriate, the judge would intervene’.192

Despite the requirement quoted above to hold a GRH in a trial involving an intermediary, they are not yet universal:

- 36 of 39 judges (92%) almost always held a GRH in an intermediary case (surprisingly, in light of the requirement, one judge did so less than half the time)
- 42 of 47 intermediaries (89%) said that a GRH was always or almost always held in their young witness cases.193

Failure to hold a GRH affected other aspects of the intermediary role at the trial stage, not just questioning:

---

191  Victims’ Commissioner (2018) ‘A Voice for the Voiceless: The Victims’ Commissioner’s Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses’ page 68; recommendation 8 page 82. We also raised concerns about inefficient court listing of intermediary cases with the Ministry of Justice scheduling and listing project team (part of the ‘Transformation’ initiative) and the scheduling and listing working group chaired by the Deputy Senior Presiding Judge.


193  This did not include s 28 pre-trial cross-examination cases where GRHs, to date, have always taken place, whether or not an intermediary is involved.
‘It can be difficult when adjustments need to be made to the way that the memory refreshing is going to be conducted and you haven’t had the GRH to discuss the issues’.

On occasion, GRHs were held without the presence of the intermediary appointed in the case; more frequently, the intermediary was present but was not an active participant. Criminal Procedure Rule 3.9(7)(a) states that ‘where directions for appropriate treatment and questioning are required, the court must invite representations by the parties and by any intermediary’. However, only 14 of 46 intermediaries (30%) said they were almost always invited to discuss their recommendations at the GRH. In contrast, 37 of 39 judges (95%) said they almost always invited intermediaries to discuss key recommendations.

Intermediaries often consider it useful when advocates collaborate effectively with them out of court. However, only 17 of 43 lawyers (40% of Crown Advocates, barristers and solicitor advocates) said they almost always engaged in planning with the registered intermediary out of court.

The majority of intermediaries felt advocates’ observation of ground rules during cross-examination had improved in relation to questioning and other adjustments (see Figure 6 in Annex 6).

5.4.2 GRHs where no intermediary has been appointed

‘Discussion of ground rules is good practice, even if no intermediary is used, in all young witness cases and in other cases where a witness or defendant has communication needs …’ (Criminal Practice Directions 3E.3).

Criminal Practice Directions have extended GRHs beyond intermediary cases to any trial where directions for appropriate treatment and questioning are required. The Court of Appeal expects ground rules to be discussed in all vulnerable witness cases except in ‘very exceptional circumstances’. However, there are no statistics about GRH use. A Ministry of Justice report in 2014 found:

‘no data about the number of GRHs being held, whether on the mandatory or best practice basis, or about their effectiveness in ensuring that issues and needs of child victims are taken into account in case management’.

A GRH was much less likely to be held in young witness cases where no intermediary was appointed (the vast majority of young witness trials). As noted in the previous section, 36 of 39 judges (92%) almost always held a GRH in a case involving in an intermediary, but this fell to 21 of 38 judges (55%) in cases without an intermediary; seven (18%) said a GRH was held less than half the time in non-intermediary cases.

This picture was confirmed by lawyers: only 18 of 46 Crown Advocates, barristers and solicitor advocates (39%) reported that GRHs were almost always held in young witness cases without an intermediary.

194 R v Lubemba [2014] EWCA Crim 2064, paras 42–43
5.4.3 Holding the GRH before the day of the witness’s evidence

‘… Discussion [of ground rules] before the day of trial is preferable to give advocates time to adapt their questions to the witness’s needs …’ (Criminal Practice Direction 3E.3)

‘To ensure a fast time-table can be adhered to, pre-planning is necessary … schedule a ground rules hearing at least a week before the day of trial to give advocates time to adapt their questions to the witness’s needs … If deferred until the day of the witness’s testimony, ensure that the hearing does not add to the witness’s waiting time …’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, paras 48, 56).

GRHs are increasingly used not only to consider the form and content of cross-examination questions, but also to plan other details of the witness’s involvement, including memory refreshing (3.10 above) and timetabling the witness’s evidence. A judge highlighted the ‘imperative’ need for the GRH to set strict times for the arrival and departure of defendant and witness, to reduce the risk of confrontation, as ‘a separate entrance is not by itself sufficient’.

To be meaningful in addressing all relevant GRH agenda items, discussions should take place before the day of the witness’s evidence, as indicated above. In s 28 pre-trial cross-examination cases, the GRH should be scheduled ‘about one week’ earlier than the s 28 hearing (Criminal Practice Direction 18E.21(vii)). It is unclear whether this schedule will be maintained on s 28 roll-out. A QC and advocacy trainer with experience in s 28 pre-trial cross-examination expressed concern about some judges who, when s 28 was rolled out, proposed to hold GRHs on the same day as the s 28 hearing.

In non-s 28 cases, judges reported that GRHs were more likely to take place in advance of the day of the child’s evidence if an intermediary was involved (see Figure 7 in Annex 6).

In contrast, only 31 of 83 intermediaries, Crown Advocates, barristers and solicitor advocates (37%) thought that GRHs almost always took place before the day of the witness’s evidence. Intermediaries said their requests for a GRH to be scheduled in advance of trial were often unsuccessful. GRHs delayed until trial often meant that their recommendations were not fully discussed, adjustments could not be put in place in time and witnesses could not be given advance notice of judicial decisions about how they would give evidence (confirmation that witnesses will be allowed to give evidence according to their wishes contributes to their confidence). An intermediary described how the position was exacerbated where young witnesses were warned to attend court on the same day as the GRH:

‘The child realistically is not going to be cross-examined that day, so [this practice] has cost me a lot of time emailing and calling counsel, the case worker and Witness Care to advise them that the child should be warned for Day 2, with an immediate start, rather than waiting on Day 1 to be sent home again and return on Day 2’.

Some judges stressed the importance of an early GRH particularly in ‘big’ or complex cases, but warned of the risk that the trial judge and/or counsel would not attend or could change. Where such a change occurred, only three of 40 intermediaries (8%) said there was almost always an opportunity to discuss their report and ground rules with the new participants.

Two judges mentioned the benefits of email groups (themselves, prosecution and defence advocates, solicitors and the intermediary) as an effective means of advance planning and reducing the amount of detail to be addressed at the face-to-face GRH.

196 For GRH agenda items, see Criminal Procedure Rule 3.9(7); R v Lubemba [2014] EWCA Crim 2064; and https://www.theadvocatesgateway.org/images/toolkits/ground-rules-hearings-checklist-2016.pdf.
5.4.4 Written ground rules

“It may be helpful for a trial practice note of boundaries to be created at the end of the [ground rules] discussion. The judge may use such a document in ensuring that the agreed ground rules are complied with’ (Criminal Practice Direction 3E.3).

A written note of ground rules agreed at the GRH can provide a sound basis for judicial and intermediary interventions during cross-examination. Such a written record is also invaluable if there is a change of judge or advocates between GRH and trial. Intermediaries often created their own note of GRH decisions but did not do so on behalf of the court. Formal written ground rules were not produced routinely following the GRH:

- 13 of 39 judges (33%) almost always directed production of written ground rules, whereas 12 (31%) rarely did so
- only 10 of 86 intermediaries, Crown Advocates, barristers and solicitor advocates (12%) said someone other than the intermediary almost always produced written ground rules at the end of the hearing.

5.5 Pre-trial recording of cross-examination (s 28 YJCEA 1999)

‘By March 2015 we will … set out a programme for national roll-out of pre-trial cross-examination for child victims, subject to the evaluation of the pilots … By March 2017 we will … complete the national roll-out of pre-trial cross-examination for child victims, subject to the evaluation of the pilots’ (HM Government ‘Our Commitment to Victims’ 2014, page 7)

‘We will ensure that child victims and victims of sexual violence are able to be cross-examined before their trial without the distress of having to appear in court’ (Conservative and Unionist Party Manifesto 2017 ‘Forward, Together: Our plan for a Stronger Britain and a Prosperous Future’ page 44)

‘We have commenced full national roll-out of video recording of all vulnerable/intimidated witness cross-examination. This will improve the experience of child and adult survivors of sexual abuse giving evidence, allowing them to do so in advance of the full trial and for their evidence to be recorded and played back at the trial’ (HM Government ‘Tackling Child Sexual Exploitation: Progress Report’ 2017, page 35, emphasis in original).

It is nearly 30 years since Judge Pigot proposed that children’s evidential interviews and cross-examination be captured on video before trial.197 Enacted as sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999, the aim was to play the recordings at trial so that the witness need not attend. The potential for evidence in chief to be replaced by a s 27 video recording of the police interview was first implemented by s 32(AX(3), Criminal Justice Act 1988 before being incorporated into the 1999 Act, but the s 28 provision for capturing cross-examination before trial was shelved. In 2013, following adverse reports of cross-examination in child sexual exploitation trials, the House of Commons Home Affairs Committee expressed its frustration:

Falling short? A snapshot of young witness policy and practice

We are at a loss to understand why the Ministry of Justice, 14 years after the Act was passed, has still failed to implement this measure. If the Lord Chief Justice, Lord Judge, with his unrivalled experience, can find no reasonable legal obstacle to [its] immediate implementation ... then there can be no justifiable argument for continuing to subject highly vulnerable victims to cross-examination in court given the highly publicised risks this clearly carries.\(^{198}\)

Following the Committee’s intervention, the provision was finally piloted in 2014 for young witnesses (initially those under 16, later extended to under 18s) and some vulnerable adult witnesses at the Crown Court in Liverpool, Leeds and Kingston upon Thames. It was evaluated for the first 10 months.\(^{199}\)

In July 2016 — in response to Ann Coffey MP’s tenth query about s 28’s status — Justice Minister Mike Penning finally announced national roll-out.\(^{200}\) Plans have proceeded in fits and starts, with a dispute at one point between the Lord Chancellor and the Lord Chief Justice about the terms of reference.\(^{201}\) Roll-out has not yet begun, despite the Government’s 2017 policy announcement quoted above. The first stage, due to begin in the autumn of 2017, was halted. Pilot courts had created s 28 recordings on disk: national roll-out requires recordings to be stored in and retrieved from ‘the cloud’. In May 2018, Justice Minister Dr Philip Lee informed the House of Commons Justice Committee that the delay was caused by concerns about the quality of technology to play back video-recorded cross-examination:

‘... our supplier’s solution has still not met the required quality standard whilst keeping this very sensitive material safe and secure. It is absolutely critical that we get this right, which is why the board overseeing the project ... took the decision that due to the nature of these issues we are not yet able to fix a timescale for roll-out. We continue to press our suppliers to deliver a viable solution, as well as working on contingency plans and very much hope to begin roll-out later this year.’\(^{202}\)

5.5.1 Respondents’ experience with pre-trial cross-examination

At the end of the process evaluation, lead judges at the three pilot courts were keen for the measure to be adopted nationally: one commented that it ‘could be one of the single most beneficial improvements in delivering justice’ to vulnerable witnesses.\(^{203}\) In this project’s judicial survey, nine judges from s 28 courts spoke with enthusiasm about its benefits, in addition to reducing delay:

‘There is a calmness to proceedings as well as the early involvement of the young witness and the protection of them from difficult cross-examination’

199 Ministry of Justice (2016) ‘Process evaluation of pre-recorded cross-examination pilot (section 28)’.
200 Minister for Policing, Fire, Criminal Justice and Victims, Hansard (6 July 2016) col 1016.
201 ‘Justice Secretary locked in extra-ordinary stand-off with England’s top judge over rape trials’ The Independent (23 March 2017).
202 ‘Question mark remains over cross-examination support for vulnerable witnesses’ The Law Society Gazette (16 May 2018).
In s 28, any breach of ground rules is easy to control as cross-examination can be edited to exclude discussion with counsel.’

Thirteen of 48 intermediaries (27%) had been appointed in a s 28 case in the previous 12 months. Of these:
- seven (54%) felt that GRHs were more thorough than in non-s 28 cases
- six (46%) said they had more time to review questions
- seven (54%) said cross-examination was shorter.

Most intermediary experiences with s 28 were positive:

‘S 28 tends to be a better experience, especially for younger children as all parties are solely focused on this cross-examination. Much less likely to be delays; more carefully prepared; adjustments discussed and agreed; more likely to meet both counsel and judge; less chance of postponement and waiting around. Downsides: the idea that witnesses are incapable of answering more than a few questions; the idea (increasing) that ground rules are only about sorting questions and so not appreciating all the other input of intermediaries during questioning; technology still less than adequate in many cases; and helping witnesses understand that this is not the trial, which may be many months away and who may have fears about contact with the defendant in the meantime’

‘I work mostly with those under 12 and the s 28 has always been excellent. The dates rarely change, only in a couple of instances where there are records outstanding, but this usually happens at the GRH so there’s no need for child to be sent home. The GRH is thorough and I am given equal “air time”. I rarely have to intervene in cross-examination as we have been so thorough. The child does not wait long at all: they are always first thing in the morning so have no time to get anxious during the day. I also think the atmosphere is more relaxed as everyone can be very tense in a trial and the atmosphere in the room when we meet the judge and counsel is noticeably calmer, which is so good for the child’.

In contrast, some intermediaries saw little difference with their other cases, especially where undue delay remained a factor. Aside from the advantage of children not having to return to give evidence, they emphasised that other benefits depended crucially on the quality of judicial case management.

While non-s 28 judges lamented the ‘regrettable’ delay to implementation of s 28, two expressed concern about the way it operated, particularly in respect of limiting cross-examination (see 5.6.4 below). Two of four Crown Advocates with s 28 experience also had concerns about fairness:

‘S 28 is probably a good thing but its impact is limited by the often long delay between the s 28 cross-examination and the end of the trial. Furthermore, the s 28 hearing has to be fair to all sides, a too “soft” approach might in fact backfire if the jury is left with the impression of artificiality’

‘I am in favour of avoiding a long delay between complaint and trial especially in the case of a young witness, so s 28 is a good idea in principle. However, no matter what safeguards are in place to protect the defence (e.g. jury directions), there are bound to be cases where something happens after the recording is made that materially affects it in terms of what the defence would have asked had they been aware of that before. I struggle to see how a defendant can have a fair trial when a witness cannot be
challenged about something significant which takes place after the s 28 hearing even if that something (if relevant) can be admitted by way of agreed facts’.

A barrister commented:

‘It felt entirely disconnected from the trial and very difficult to get any sense of a trial, and the relevance of the evidence’.

Research comparing transcripts from s 28 and non s 28 young witness cases has demonstrated the benefits of the s 28 process:

‘Defence lawyers’ questions in the s 28 condition comprised fewer words, clauses, false starts, multiple negatives, and temporal and numeric attributes than in the non s 28 condition. When questioning younger children, lawyers used fewer words, clauses, references to ‘before/after,’ and passive voice’.

5.5.2 Other potential benefits of s 28 pre-trial cross-examination

Pre-recording children’s cross-examination eliminates the need for a young person to give evidence twice. The recording can be played as often as necessary. The Government does not count how often young witnesses give evidence more than once, but 10 of 31 Witness Service team leaders (32%) supported young witnesses in the previous 12 months who had done so; 18 of 48 intermediaries (38%) had been appointed in such cases. There would be a particular benefit in extending s 28 to young witnesses giving evidence in the youth court, where appeals to the Crown Court (essentially a re-hearing) are reportedly quite common.

Plans for initial national roll-out do not include formally testing s 28 cross-examination from remote link sites. Lord Judge, former Lord Chief Justice, has argued that young witnesses need not be physically present at court. His remarks were quoted in a Ministry of Justice report in 2014, which noted that the s 28 pilot:

‘will not enable flexible and creative testing of the provision, as current plans are to base the scheme in the courtroom environment rather than using facilities away from a court house ... Pending the outcome of the pre-trial recording of cross-examination pilot it is recommended that further work be undertaken to raise awareness and encourage greater use of live links and other special measures that would enable victims and witnesses in sexual violence cases to give evidence and be cross-examined from outside of the court room’.

Three of 11 PCCs said that one or more of their remote link sites would be equipped for s 28 when it is rolled out. However, pre-trial cross-examination from a remote site (the witness’s care


home) has already been recorded using police mobile equipment to a s 28 pilot court. (Remote links are discussed further at 3.9.4).

5.6 Testing young witness evidence

5.6.1 Changing the approach

‘Where directions for appropriate treatment and questioning are required, the court must ... set ground rules for the conduct of the questioning, which rules may include a direction relieving a party of any duty to put that party’s case to a witness or a defendant in its entirety ... [and] directions about the manner of questioning’ and ‘if necessary, directions about the questions that may or may not be asked’ (Criminal Procedure Rules 3.9(7)(b)(i), (ii) and (iv))

‘All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination ... When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate ‘putting his case’ where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions’ (Criminal Practice Direction para 3E.4).

In 2009, 111 of 172 children (65%) interviewed for ‘Measuring up?’ said they did not understand questions asked in cross-examination, that the pace was sometimes too fast or their answers were interrupted (page 109). The 2011 progress report concluded that one of the biggest remaining challenges was how to ensure that cross-examination of young witnesses was developmentally appropriate (page 5).

Cross-examination is integral to the adversarial court process but its purpose is described in contradictory ways. Former Lord Chief Justice Lord Judge saw the objective as ‘to investigate the truth by questions which must be clearly understood by the witness’.207 Barrister and commentator Dr Emily Henderson has summarised the advocates’ view of traditional cross-examination as an opportunity:

‘to present the case to the fact-finders both by persuading the witness to make certain responses and by blatant rhetoric. Convention states that obfuscation, obstruction and suggestion are all legitimate, indeed integral, aspects of cross-examination. This is why all the techniques researchers revile appear so prominently in advocacy handbooks for young lawyers’.

Since ‘Measuring up?’, judicial guidance describes the approach to children’s evidence as having ‘altered dramatically’.209 This sea change was triggered by the Lord Chief Justice’s landmark judgment in R v B (2010), reinforced by other key decisions210 and confirmed by Criminal Procedure Rules and Practice Directions emphasising judicial responsibility to enable witnesses and defendants to give their best evidence, control questioning and ensure that directions are complied with. Messages have been reinforced by Advocates’ Gateway toolkits and ‘Advocacy

and the ‘Vulnerable’ training, including the ‘20 Principles of Questioning’. For example, it is now widely acknowledged that ‘tag questions’ combining negative and positive statements (e.g. ‘He didn’t do it, did he?’) are highly persuasive and require at least seven complex stages of reasoning. Starting with Judicial College guidance in 2010, judges have been asked to control the use of tag questions for children.

Judges may not just impose restrictions on questioning: in certain circumstances, they may ask questions themselves. The Court of Appeal has confirmed that:

‘There is nothing wrong in principle with a trial judge asking questions of witnesses in order to assist the jury. That indeed is one of the fundamental functions of the trial judge.’

Judges cannot force advocates to ask a question, though they may be persuasive in encouraging them to do so. In a case in which cross-examination broke down after 15 minutes, the Court of Appeal saw ‘no grounds for criticism’ of a judge who asked a 14-year-old some of the defence advocate’s questions but declined to ask those that were ‘mere comment or would unproductively inflame the witness’. Judges need not adopt the questioning style of the cross-examiner. In a case where the defence contended ‘that the judge asked questions of the complainant that constituted oath helping’, the Court of Appeal said that ‘the judge did no more than was necessary pursuant to his duty of fairness’.

5.6.2 Experience with limiting cross-examination of young witnesses

Survey responses indicated a diversity of judicial approaches to cross-examination of children. At the most basic level, in accord with guidance and case law:

- 23 of 38 judges (61%) said they almost always asked the defence to put the case simply and directly
- 23 of 47 lawyers (49% of Crown Advocates, barristers and solicitor advocates) agreed that judges almost always did so
- 34 of 46 lawyers (73% of Crown Advocates, barristers and solicitor advocates) said judges placed restrictions on questioning more than half the time.

5.6.3 Putting the case (or not) to a young witness

In conventional cross-examination, lawyers put their case to the other side’s witness, giving him or her the opportunity to respond. In practice, the advocate ‘putting the case’ usually attempts to cast doubt on the witness’s evidence by asking leading questions suggesting the answer – typically proposing that the witness is mistaken, lying or has been told what to say.

This section explains how the Court of Appeal’s viewpoint on this issue changed during the course of our study. Following Lubemba in 2014, in limited circumstances advocates were permitted or required not to ‘put the case’ to a young or otherwise vulnerable witness. The

214 R v Inns [2018] EWCA Crim 1081 para 35. However, this case warned against the judge appearing to cross-examine the defendant, as did R v Marchant [2018] EWCA Crim 2606. For discussion of the limitations on the judge’s role, see L. Hoyano ‘Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants’ [2015] Crim LR 105.
Court of Appeal’s emphasis shifted in its 2018 judgment in RK, which clarified the defence’s general duty to put the case where possible. It should be noted that our respondents answered our survey questions before the decision RK. The implications of Lubemba and RK are discussed below.

Where the defence lawyer has been restricted from putting the defendant’s case directly to a prosecution witness, he is allowed:

‘to tell the jury of challenges to the witness’s evidence, in a form and at a time agreed with the judge and the party calling the witness ... In this way, failure to cross-examine in such circumstances is not taken as tacit acceptance of the witness’s evidence’.

In R v Lubemba (2014), Lady Justice Hallett, Vice President of the Court of Appeal, warned advocates that:

‘They cannot insist on any supposed right to “put one’s case” or previous inconsistent statements to a vulnerable witness. If there is a right to put one’s case (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness.’

This judgment had unintended consequences. Where advocates are prevented from asking leading questions, they may prefer not to put their case to the witness at all rather than do so in a simple and direct form. Some advocates at GRHs began to indicate that they would not put their case to young witnesses or even to cross-examine them, but would instead take advantage of the provisions to explain this course of action to the jury. Intermediaries felt that most of these witnesses had been denied the opportunity to answer simple questions in response to the defence case and expressed frustration that ‘the baby is being thrown out with the bathwater’.

As more advocates began to indicate reluctance to put the case, judges in s 28 pre-trial cross-examination courts countered that it was always possible to do so:

‘In this system, the advocates regularly instructed are alert to the way that the cases should be conducted and are good at adapting to this and therefore to the needs of the child. I have never had to stop someone from putting their case. I have had some applications that the defence do not want to or cannot do so and wish to tell the jury this, but I have always found that it can be put in a simple and straight forward way without causing any distress to the witness.’

The problem was addressed in ‘Advocacy and the vulnerable’ training, in a video lecture by HHJ Cahill QC who emphasised that the above passage in Lubemba does not give defence advocates ‘carte blanche’ to avoid putting their case:

---

218 R v Lubemba (2014) EWCA Crim 2064, para 45.
Falling short? A snapshot of young witness policy and practice

‘... a case can usually be put to a witness and counsel not putting it is not doing his or her duty. It is the duty of counsel to ensure that one way or another, with the agreement of the judge and the intermediary, if there is one, it is put in a user-friendly way.’

Judge Cahill concluded that, even if counsel declines to put the question in the way suggested by the judge:

‘That does not, however, then give you the opportunity to be able to say to the jury that “I have not been able to put my case”, because you have.’

In this study, most judges said they were unlikely to accept a submission that the defence was unable to put the case to the young person. Crown Advocates, barristers and solicitor advocates thought such submissions were somewhat more likely to succeed (see Figure 8 in Annex 6).

A minority of judges said they may place restrictions on putting the case to the young witness, though this was more likely to happen in cases with an intermediary (see Figure 9 in Annex 6). Seventeen of 45 intermediaries (38%) thought that judges in their cases placed restrictions on putting the case more than half the time, but 14 (31%) said this rarely happened.

A judge and advocacy trainer whom we interviewed in 2015 called for ‘resilient judges’ to put the case to a witness if the defence advocate failed to do so. In this study, judicial practice varied as to whether the judges were prepared to put the case themselves if the defence declined: 25 of 37 judges (68%) said they rarely put the case themselves if the defence failed to ask the key question(s) while seven (19%) said they almost always did so.

Responses of Crown Advocates, barristers and solicitor advocates also presented a picture of diverse practice in this respect: 23 of 40 (58%) said judges rarely put the case themselves if the defence declined to do so, but three (8%) said judges almost always put the case in such circumstances.

Kama Melly QC has observed that where the defence failed to put the case to the witness, this presented a concern for prosecutors that was unresolved:

‘For those of us who prosecute, what should you do if the defence doesn’t put the case, but comments on it? There’s a fear that a vulnerable witness isn’t getting the chance to explain something that could be explained’.

In our survey, nine of 14 Crown Advocates (64%) said that, if the defence declines to put the case and the judge does not do so, they did not ‘put the case’ either.

Melly concluded that prosecutors should be more pro-active in ensuring the witness has a ‘right of reply’, requiring prosecutors to think through the defence strategy in respect of agreed facts and make better use of re-examination, including in s 28 pre-trial cross-examination cases:

‘The prosecutor needs to think beyond “Let’s just make this an easy process for the witness” ... There’s often no obligation for witnesses to elucidate inconsistencies raised in third party material/ disclosure (e.g. school or care records) because this tends to go in routinely as agreed facts. In some cases, in my view, prosecutors are too quick to admit these facts without giving the witness the right of reply and opportunity to deal

---

222 Ibid page 32.
with the inconsistencies. There’s a concern that where we just focus on making the evidence-giving as painless as possible we run the risk of losing sight of what the legal system is for, which is to convict the guilty and acquit the innocent. How do we allow vulnerable witnesses to be challenged or for the evidence to be challenged without being directly confrontational?²²⁴

The Court of Appeal clarified expectations about putting the case to a vulnerable witness in R v RK (2018).²²⁵ Lady Justice Hallett used this opportunity to correct the misunderstanding resulting from her judgment in Lubemba. At the trial in RK, defence counsel had declined to cross-examine a three-year old witness even though an intermediary’s assistance was available. The Court of Appeal concluded that the failure to cross-examine did not undermine the safety of the conviction, but Lady Justice Hallett firmly refuted the practice of advocates declining to ‘put the case’ to young children and warned trial judges to ‘think very carefully before approval’ of such a step:

‘We first question what we are told is becoming an increasing practice for defence advocates to decide they will not cross-examine a vulnerable, particularly a child, witness. We understand the concern to protect a child witness and the desire of a defence advocate to avoid any suggestion of confronting a child witness. However, if a child is assessed as competent and the judge agrees the child is competent, we would generally expect the child to be called and cross-examined, with the benefit of the range of special measures we now deploy. There is no reason to distress her or cause her any anxiety and therefore no reason to avoid putting the defence case by simple, short and direct questions. Although this court has in the past doubted the right to put every aspect of the defence case to a vulnerable witness, whatever the circumstances, it has not questioned the general duty to ensure the defence case is put fully and fairly and witnesses challenged, where that is possible.’²²⁶

5.6.4 Striking a balance

Where restrictions were imposed on cross-examination and explained to the jury, most judges and lawyers were satisfied that an appropriate balance could be struck in furtherance of a fair trial:

• 32 of 38 judges (84%) were satisfied that there was still enough scope to test or challenge the young witness’s account
• 39 of 46 lawyers (85% of Crown Advocates, barristers and solicitor advocates) described themselves as similarly satisfied.

However, three judges expressed concern. One said:

‘The questions children are asked have, of course, to be asked in a way that a child can understand, but I feel it is to the advantage of a defendant for it to be too restrictive to the extent that it seems pointless and potentially capable of being perceived as unfair to a defendant.’

²²⁴ K. Melly QC ‘The Variations and subtleties surrounding and adapting “Putting your Case”: Barristers and intermediaries working together to keep the balance between the needs of witnesses and the Overriding Objective in the criminal trial’ Intermediaries for Justice conference (9 May 2018).
²²⁵ R v RK [2018] EWCA Crim 603
²²⁶ R v RK (2018) EWCA Crim 603, para 27. See also Criminal Law Week 18/43/3, CA, L. Hoyano (November 2018) ‘Putting the Case in Every Case’ Counsel.
The other two judges commented on ‘balance’ in the context of the forthcoming roll-out of s 28, though neither came from a s 28 pre-trial cross-examination court:

‘I have watched s 28 proceedings and have a certain degree of knowledge about them. What I have seen has not impressed me … The questions that I have seen under s 28 are utterly anodyne and do not test the witness in any way shape or form. Why? Not every child tells the truth; not every child is accurate. Their accounts should be tested and they can be tested perfectly effectively – it is a question of adapting the context in which those questions are asked and the language and tone used. If a child can understand a question asked in the ABE and they have given an intelligible answer, then they can understand a question that challenges that answer provided, as the Court of Appeal has repeatedly said, that the questioner adapts the questions to that particular child’s needs’

‘There has been a change of culture and an awareness of the need to approach things in accordance with the Advocates’ Gateway toolkits. That is all positive. However, advocates and judges have become almost so conditioned in their approach that there is a risk that young witnesses are not being challenged sufficiently and this could lead to injustice. By injustice I mean not just to the defendant but also potentially to the young witness if the jury feels that the defendant has not had a fair trial because he is precluded from challenging the young witness. This may become even more apparent with the advent of s 28. It is a difficult balance but it may be getting close to tipping point’.

The minority of dissatisfied lawyers who were worried about whether defendants were being disadvantaged by the way vulnerable prosecution witnesses were questioned included a Crown Advocate who took issue with one of the forms of challenge now in use:

‘I do not agree with the suggested question “You said A and Mr X said B. Is Mr X telling the truth?”. Why should a young witness be told what someone else has said? Equally I think there is an over-sensitivity about asking whether something was a lie/ made up. Most younger witnesses (from perhaps age seven upwards) would, in my view, be able to cope with this question as long as it was not asked in an aggressive or overbearing way’.

One barrister regarded the new approach to cross-examination as a ‘meaningless and pointless exercise’:

‘Regrettably, the whole regime is premised upon the notion that the allegation is correct, that the vulnerable witness should be able to speak as to the allegation and the defence should be grossly restricted in how to challenge it. Better, in the circumstances, to let the prosecution say what the complainant’s case is and the defence to say what the defendant’s case is. If one can’t be adequately challenged, why should the other be?’.
5.6.5 Submission of written questions in advance of cross-examination

‘In appropriate cases and in particular where the witness is of very young years or suffers from a disability or disorder it is expected that the advocate will have prepared his or her cross-examination in writing for consideration by the court’ (Criminal Practice Direction 18 E ‘Annex for s 28 ground rules hearings at the Crown Court’ para 4).

‘Judicial interventions in questioning can be minimised if the approach to questioning is discussed in advance at a ground rules hearing and adhered to by the advocates. It is now quite common (and expected) for advocates to be directed to disclose their proposed questions in writing to the judge in advance of the ground rules hearing. Those are then discussed at the ground rules hearing and approved or amended as appropriate’ (Judicial College ‘Equal Treatment Bench Book’ 2018 chapter 2, para 123).

‘... advocates may be required to prepare their cross-examination for consideration by the court. This applies to all cases, not just those in the section 28 pilot scheme’ (Judicial College ‘Crown Court Compendium’ 2018 para 6, page 10-19).

Submission of draft questions for review is a main plank of the ‘Advocacy and the vulnerable’ training course and a requirement for s 28 pre-trial cross-examination. Judges at pre-trial cross-examination pilot courts reported that the process often helps keep cross-examination to less than an hour; as a result, trials were shorter.227 Lady Justice Hallett has commended extending submission of draft questions beyond s 28, first in Lubemba228 in 2014 (where the witness, aged 10, was ‘perfectly competent and capable’) and then in Dinc229 in 2017 (involving a witness of 14 on the autism spectrum):

‘There is nothing inherently unfair in restricting the scope, structure and nature of cross-examination and/ or in requiring questions to be submitted in advance, in any case involving a child witness or a witness who suffers from a mental disability or disorder. The practice has been approved by this court on many occasions; it is the judge’s duty to control questioning of any witness and to ensure it is fair both to the witness and the defendant. Far from prejudicing the defence, it is the experience of many trial judges that the practice ensures that defence advocates ask focussed and often more effective questions of a vulnerable child witness’.

5.6.6 Experience of draft questions

Submission of draft questions for review has been unevenly adopted beyond s 28 cases. Survey respondents indicated that a judicial direction requiring draft questions was more likely in cases with a registered intermediary:

- 32 of 39 judges (82%) said they almost always requested submission of draft questions in advance of young witness cross-examination in cases with an intermediary
- 22 of 38 judges (58%) reported doing so in cases without an intermediary

---

228 R v Lubemba [2014] EWCA Crim 2064, para 35.
229 R v RK [2017] EWCA Crim 1206, Ground I.
12 of 46 lawyers (29% of Crown Advocates, barristers and solicitor advocates) thought judges almost always required draft questions, although 15 (33%) said that judges almost always requested draft topics instead.

15 barristers and solicitor advocates (56% of 27) said they almost always provided intermediaries with their draft questions in advance.

Defence advocates are expected to serve proposed questions not just on the court but also on the prosecution230: 17 Crown Advocates (81% of 21) said they received draft questions from the defence half the time or more.

While almost all intermediaries offered to review draft questions (surprisingly, not universal practice), the offer was only taken up by judges about half the time. Only one in six intermediaries almost always had the opportunity to discuss questions with lawyers out of court (see Figure 11 in Annex 6).

Only four of 47 intermediaries (9%) reported that judges almost always reviewed draft questions before they did. Intermediaries said they often spent time modifying long lists of questions only for the judge later to strike out many as irrelevant, repetitive or, for some other reason, outside the scope of the intermediary’s review.

An intermediary described what occurred when the judge directed that defence counsel need not provide draft questions for review because he was ‘very experienced’:

‘The judge directed that questions should be in simple language and contain just one point, but limited my role to alerting him if the eight year-old witness indicated that she didn’t understand a question. The defence advocate ignored almost all my recommendations. The witness had to say at least six times that she didn’t understand the question. The judge intervened to urge that questions “be broken up, using simpler vocabulary”. The advocate struggled with this. The witness showed exceptional presence of mind and strength in answering questions that were, eventually, asked. However, a different witness might have gone to pieces, having been repeatedly asked questions they didn’t understand’.

Only five of 45 intermediaries (11%) said they almost always received questions for review before the GRH and in sufficient time to prepare their comments. The remainder experienced problems in at least some of their cases:

‘[Even in s28 cases] I do not always receive questions before the GRH as is supposed to happen. I often arrive and the GRH is postponed as the questions have not been submitted or I have to do it quickly before the meeting takes place. Sometimes it is much better to do it face-to-face with the defence barrister as I can get a better idea of what it is they want to know’

‘While the judge may direct questions be given to me beforehand, getting hold of them is another issue. Often they arrive the evening before the trial. Once defence gave them to me at 9.45 am with the trial starting at 10, and then sent a message via the usher to ask if I’d finished yet. I explained the situation to the judge who gave me as much time as I needed’.

Some judges concurred that advocates did not always provide questions in time for the GRH. One advised:

‘I have started directing at the plea and trial preparation hearing that proposed questions from defence advocates are provided to the named intermediary 10 days before the first day of the trial’.

A barrister observed that late submission of draft questions was just one symptom of the current pressures facing Crown Courts: this responsibility may be overtaken by more urgent priorities for counsel such as addressing prosecution disclosure, complying with judicial orders for skeleton arguments on points of law and meeting one's client for the first time if instructed the night before.

5.6.7 Limiting the duration of questioning

‘Where directions for appropriate treatment and questioning are required, the court must ... set ground rules for the conduct of the questioning, which rules may include ... directions about the duration of questioning’ (Criminal Procedure Rule 3.9(7)(b)(iii))

‘The court may limit the examination, cross-examination or re-examination of a witness’ (Criminal Procedure Rule 3.11(d)(i))

‘It is important to ... schedule each stage of the witness’s evidence, including breaks. Duration should be developmentally appropriate and limits may be imposed ... ; scheduling children to give evidence for short periods, with breaks, and in the mornings. As a general rule, a young child will lose concentration after about 15 minutes, whether or not this becomes obvious. In most cases a child’s cross-examination should take no more than an hour and usually considerably less ...’ (Judicial College ‘Equal Treatment Bench Book’ 2018, para 56).

Limiting the overall length of cross-examination was a minority judicial practice, but appointment of an intermediary appeared to make such a direction more likely (see Figure 10 in Annex 6). Just 18 of 94 Crown Advocates, solicitor advocates and intermediaries (19%) said judges almost always set a time limit to the cross-examination of young witnesses.

Fourteen of 47 intermediaries (30%) thought that the length of cross-examination had reduced in the previous year; none thought it had increased.

Four of the nine judges at s 28 courts almost always imposed time limits, whether or not an intermediary was involved. One judge explained that setting time limits in such cases was unnecessary:

‘The GRH managing of questions required in the s 28 scheme usually results in short cross-examinations and the checking of written cross-examination is helpful in this regard’.
5.6.8 Myths and stereotypes (the dangers of assumptions)

‘By March 2016 [we will] continue work to dispel myths and stereotypes throughout the handling of the case, including at trial’ (HM Government ‘Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan 2015’ Action 2.10)

‘There is a possibility that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge should alert the jury to guard against this. This must be done in a fair and balanced way ... The judge ... should warn the jury against approaching the evidence with any preconceived assumptions’ (Judicial College ‘Crown Court Compendium’ 2018, para 7, 20-3).

In 2013, the Home Affairs Select Committee expressed ‘deep concern’ about examples of language used in court that stereotyped child victims of sexual exploitation. Issues highlighted by the Crown Court Compendium to be brought to the jury’s attention include the fact that there is ‘no one classic response’ to the trauma of a serious sexual assault and that ‘a late complaint does not necessarily mean it is a false complaint’.

In our surveys, 37 of 38 judges (97%) and 28 of 35 lawyers (80% of Crown Advocates, barristers and solicitor advocates) said that, in relevant cases, judges almost always directed the jury about myths and stereotypes. Directions may be given ‘at the outset of the case and/or as part of the summing up’:

- 15 of 38 judges (39%) and nine of 36 lawyers (25%) said instructions were almost always given at the start of the trial
- 22 judges (58%) and 26 lawyers (72%) said they were almost always given at the end.

Introduction of a stereotypic comment about the complainant’s behaviour did not always trigger an intervention, according to Crown Advocates:

- four of 16 (25%) said that judges almost always intervened if the defence introduced a myth or stereotype
- eight of 17 (47%) Crown Advocates said they almost always intervened if the judge did not do so.

Judicial guidance prohibits parties from adducing ‘generic expert evidence of the range of known reactions to non-consensual sexual offences’. In light of this, the 2013 version of CPS ‘Guidelines on Prosecuting Cases of Child Sexual Abuse’ was amended to remove reference to the possibility of challenging ‘myths and stereotypes’ about child sexual abuse by ‘adducing expert evidence where appropriate’ (para 77).

Some myths and stereotypes may already exist in the minds of jurors in young witness trials in England and Wales. However, it is not clear how often such misleading notions are introduced by the defence and go unchallenged or how effective are judicial directions and interventions. Practice in New Zealand is therefore of interest. Since 2008, courts have regularly admitted what has been termed ‘counterintuitive’ expert psychological evidence in child sexual abuse trials. It is called to counter what might otherwise be the intuitive reaction of jurors to evidence of the way a complainant responded to sexual abuse. Counterintuitive evidence educates juries about commonly held misconceptions about child sexual abuse: most frequently, patterns of

---

231 Judicial College (2018) ‘Crown Court Compendium’ para 1, page 20-1. This addresses myths and stereotypes in all sexual offence cases, not just those involving children. Rape myths and stereotypes were the subject of Parliamentary debate on 21 November 2018: https://hansard.parliament.uk/Commons/2018-11-21/debates/8BF93744-89C2-426C-98E3-CF8C5839C028/RapeMythsAndJuries.


delayed reporting but also, for example, continued contact between children and offenders.\textsuperscript{234} The expert does not comment on the facts of the individual case and the prosecution must not link the expert’s evidence to the circumstances of the complainant, to ensure that it is not used in a diagnostic or predictive way. Appellate courts have upheld the use of this evidence.\textsuperscript{235} New Zealand Judge Nevin Dawson commended the use of counterintuitive evidence:

'It is now so uncontroversial that this evidence is usually s 9 (an agreed admission of facts) and is read out in court to the jury, usually at the beginning of the trial, without the need for an expert witness to appear. It has reached a point where defence lawyers realise that there is nothing to gain by attempting to cross-examine the expert witness on counterintuitive evidence.'\textsuperscript{236}

Sir John Gillen, discussing myths and stereotypes in Northern Ireland sex offence trials, recommends research to identify their impact on juries but also favours showing jurors ‘a prescribed film from an authoritative source at the outset of the trial’ which ‘would have the benefit of uniformity in the sense that cases would not depend upon the capacity of individual judges to sell the concept ...’\textsuperscript{237}

5.7 Tailoring cross-examination to young witness needs

5.7.1 Provision of information to the court

‘When you report a crime to the police, you are entitled to ... talk to the police to help you work out what support you need. This is called a “needs assessment”’ (Ministry of Justice ‘Code of Practice for Victims of Crime: Children and young people’ 2015, chapter 3, para 1.1)

‘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)

‘Where directions for appropriate treatment and questioning are required, the court must ... set ground rules for the conduct of the questioning, which rules may include ... directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer’ (Criminal Procedure Rule 3.9(7)(b)(vi)).

Many respondents thought the tailoring of cross-examination to the understanding of individual young witnesses had improved in the past year. This was the view of:

- 31 of 40 judges (78%)
- 27 of 36 of Crown Advocates, barristers and solicitor advocates (75%)
- 28 of 47 intermediaries (60%).

236 Email from Judge Nevin Dawson (27 June 2018).
Accommodating needs requires witness-specific information. ‘Measuring up’ detected a disparity between young witness issues identified by parents and awareness of these matters on forms completed by Witness Care Units and police officers (page 25). Judicial decisions about how children should be questioned are informed by intermediary assessments where these are available but the task is much more challenging in the absence of an intermediary report. The Victims’ Code, quoted above, requires Witness Care Units to conduct a ‘full needs assessment’. However, not all young witnesses have contact with a Witness Care Unit (see 3.6); background information may not be reliably passed to the court. Judicial College guidance wishes judges to be proactive in seeking information if it is not provided:

‘Be aware that the Inspectorates warn that police and Witness Care Unit needs assessments are often inadequate, with a detrimental effect in criminal cases which progress to trial. Be alert to the possibility that needs have not been considered or identified and ask for information to be updated if necessary.’

In young witness cases without an intermediary:

- 16 of 39 judges (41%) said they rarely received information about a child’s development or communication skills; a further 14 (37%) said this happened half the time or less
- 15 of 44 lawyers (34% of Crown Advocates, barristers and solicitor advocates) said they rarely received this information; a further 21 (48%) said it happened half the time or less.

Provision of aids to facilitate communication is a separate special measure (s 30 of the Youth Justice and Criminal Evidence Act 1999). It is routinely invoked when an intermediary is appointed but rarely otherwise. Survey responses showed that, in young witness cases in which no intermediary was involved:

- 27 of 39 judges (69%) said they rarely received an application for communication aids; a further 10 (26%) said this happened less than half the time
- 23 of 46 lawyers (50% of Crown advocates, barristers and solicitor advocates) said they had rarely seen such applications.

5.7.2 ‘Every reasonable step’

‘In order to prepare for the trial, the court must take every reasonable step … to facilitate the participation of any person including the defendant’ (Criminal Procedure Rule 3.9(3)(b)).

In freeform answers, 18 of 40 judges (45%) gave examples of unusual adjustments that they had made to accommodate young witnesses; many of these were proposed by registered intermediaries. Examples included:

- a four year-old giving evidence in the live link room while sitting on a rocking horse
- use of a mobile live link from the child’s home
- restricting questions to five at a time, then taking a short break
- providing paddles or sticks of different colours for children to raise if they did not understand question ‘on the basis that they do not verbally say “I don’t understand”’

238 For the ‘Witness Care Unit Young Witness Checklist’ (undated), see: https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Witness%2520Care%2520Unit%2520Young%2520Witness%2520Checklist.pdf.
240 For other ‘flexibility’ examples recommended by intermediaries, see http://lexiconlimited.co.uk/wp-content/uploads/2018/03/Consolidated-list-of-a-more-flexible-approach-October-2017.pdf.
accommodating a child with an obsessive-compulsive disorder which included regular hand washing. ‘I directed if he needed to, he would point to a card only he and his intermediary could see and he would be allowed to leave without saying anything, escorted by an usher to a toilet facility nearby’. Similar arrangements included letting a child with urinary urgency go to the toilet without seeking permission first and arranging access to a shower at court for a child at risk of soiling.

- face-to-face cross-examination in the live link room, sometimes with both counsel and the judge and sometimes just the cross-examiner. On occasion, counsel ‘joined in playing with toys with the child’
- letting a ‘deeply traumatised’ witness, using the live link, to write down her answers and have them read out by the usher, with whom the witness had a good rapport
- allowing the witness’s mother (not a witness) to accompany the child while giving evidence in the live link room, and permitting a police liaison officer to wait outside the link room ‘so she was readily accessible if the witness was suddenly distressed, and needed the comfort of someone with whom she had built up a rapport’
- having vulnerable witnesses at Truro Crown Court accompanied by a trained therapy dog241 in the waiting room, live link room or in court. The dogs are provided through a national charity and are brought to court by their handler/owner. ‘It has had a marked effect on the quality of the evidence and reduced the stress associated with the court experience’.

Some judges commented on their experience of engaging directly with the witness ‘by allaying their fears, principally by showing the human side of the system’. In one such case, the judge sat on the floor and blew bubbles with the witness:

‘We had been told that it would make the two children happier and more relaxed if they got to know us all a little beforehand, and when they asked if they could move the furniture round in the TV room to get a better position and picture, we all did this together which the children seemed to think was fun and this seemed to relax them’

‘I always get vulnerable witnesses to repeat the phrase “I am in control”:’
  Judge: “Who is in control?”
  Witness: “I am in control.” (I hope this gives them a sense of power to stop proceedings if it’s getting too much.)
  Judge: “You have only to say, ‘I need a break’ and you will have a break.”’

One judge described an innovative departure from process in an appeal against conviction (heard by a judge and two magistrates, not a jury) in which the eight year-old complainant was too distressed to appear over the live link:

‘The witness was given time with the parents, including being taken for a walk outside court. None of this was sufficient to convince the complainant to answer questions. I approached this by moving the court into the witness waiting room. Counsel for the appellant asked his written questions in those circumstances, with everyone dressed informally. The child successfully gave evidence.’

---

241 The NSPCC young witness scheme in Northern Ireland has a therapy dog, but Truro may be the only criminal court in England and Wales with such a scheme. A judge in a different English court noted that a proposal for a ‘facility’ dog had been ‘poorly thought through’ and ‘has therefore currently been shelved’. However, the witness’s own calm dog – and on at least one occasion, that of the intermediary – has accompanied the witness at ABE and/or during cross-examination.
One intermediary described acting as an ‘interlocutor’ for a shy three year-old, an intermediary role first described in the 1989 Pigot report ‘where it is absolutely impossible for counsel to communicate successfully with a child’ \(^{242}\) The witness met the advocates more than once but was reluctant to communicate with them. After two GRHs, defence counsel’s questions were agreed between the judge, intermediary and defence. Moving counsel into the live link room had not ‘worked’ for the child during the pre-trial visit, so it was agreed that the intermediary, who had a positive rapport with the child, would ask counsel’s questions during play in the live link room. There were no interventions from the judge or further questions from the defence or prosecution and the witness responded to all questions asked.

### 5.7.3 If cross-examination breaks down

> ‘When necessary, the processes have to be adapted to ensure that a particular individual ... is not disadvantaged as a result of personal difficulties, whatever form they may take’ (Lord Chief Justice in *R v Cox* [2012] EWCA Crim 549, para 29)

> ‘If needs change or become more apparent, it may be necessary to hold a further ground rules hearing and revisit ground rules agreed at an earlier stage’ (Judicial College ‘ Equal Treatment Bench Book’ 2018, chapter 2, para 121).

In freeform responses, nine of 39 judges (24%) and 19 of 46 intermediaries (41%) indicated that, in the past year, they had experienced the cross-examination of a young witness breaking down or coming close to that happening. At the time of ‘Measuring up?’, such instances would simply have meant the end of the case. Now, judges can use their discretion to take a more flexible approach. Actions have included changing the order of witnesses; letting the witness return on a different date; moving the witness from the live link to behind a screen in court, or vice versa, where the witness did not cope well with the first option; and letting a close relative (a non-witness) sit with a child who was ‘not comfortable with the Witness Service supporter’:

> ‘A female witness, aged 16, wanted to come into court so I directed screens. She was unsure about how she would cope in court when there were jurors and lawyers in it (as opposed to it being essentially empty during her court visit). I directed (and she was told) that at any stage she could ask to stop and I had a TV link room waiting for her if necessary.’

In addition to the steps identified by judges, intermediary recommendations when questioning broke down included further discussion of ground rules; review of questions and the introduction of different communication aids; and the judge asking the advocate’s remaining questions (and, in one instance, the intermediary doing so):

---

\(^{242}\) Home Office (1989) ‘Report of the Advisory Group on Video Evidence’ section 2.33. Intermediaries have acted as interlocutors in family proceedings. Assessment and methods of questioning were commended by the judge in *A Local Authority and CM, CM and U, V, W and X (through their Guardian)* and *Y* [2016] EWFC 896).
Questioning

‘The witness was extremely confused by a question related to a piece of evidence shown to her. The judge asked me to try and help her understand. Sadly, I was also confused. But by taking it very slowly, and asking her short, simple questions, she explained that that piece of evidence was not what she had spoken to the police about. Problem solved.’

Thirteen of 46 intermediaries (68%) said judges were almost always receptive to their suggestions to enable a witness to continue; others said judges were receptive more than half the time. However, three of 19 intermediaries (16%), recalling at least one specific case in the previous year where cross-examination had broken down, said the case in which the problem occurred was dismissed without trying alternative steps to enable the witness to continue.

5.7.4 Inappropriate cross-examination or a breach of ground rules

‘The judiciary is responsible for controlling questioning. Over-rigorous or repetitive cross-examination of a child or vulnerable witness should be stopped. Intervention by the judge, magistrates or intermediary (if any) is minimised if questioning, taking account of the individual’s communication needs, is discussed in advance and ground rules are agreed and adhered to ... If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance’ (Criminal Practice Direction 3E.1, 4).

Judges were asked what action they took if there was repeated inappropriate questioning or breaches of ground rules. In freeform (unprompted) answers, ten of 39 judges (26%) described such occurrences as rare. These included three of the nine judges from s 28 courts, who highlighted preparation of draft questions as having almost eliminated such problems, along with the ability to edit s 28 recordings if discussion with counsel was necessary. A judge from a non-s 28 court also described difficulties as ‘very rare, as I always ask for questions to be submitted in writing’.

Most judges said they would intervene to stop inappropriate questioning, sometimes asking for remaining questions to be written out:

‘The vast majority of advocates have been trained in dealing with young witnesses and do so appropriately and follow the rules. I have not had an advocate breaching the rules or asking inappropriate questions intentionally. Occasionally, an inappropriate question is asked. This is usually with a young person in his/her late teens where it has not been necessary to have an advance list of cross-examination questions. I will then take a break in the trial, explain the problem to counsel and, if necessary, require a list of questions to be prepared. I have not had counsel persisting with inappropriate questioning or breaches of ground rules’.
Falling short? A snapshot of young witness policy and practice

The Criminal Practice Direction quoted above suggests that the jury be given directions about a breach of ground rules ‘when that occurs’. Some judges dealt with the matter in front of the jury while others sent the jury out:

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

‘Before questioning, I often tell the jury that restrictions have been placed on questioning and explain why. If counsel then breach those restrictions – given that the jury know that there are restrictions in place – I see no reason to send the jury out, but will simply stop counsel and tell them that the question is inappropriate and to move on, or to remind them of a particular ground rule. I do this simply, quickly in a couple of words; often it is enough to say simply; “No, Mr X; move on to another topic”. 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 in, I will in brief terms 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’.

However, one judge pointed out that it was not easy to send the jury out ‘too often’ to reprimand the advocate because ‘the jury picks up on this. I anticipate that some counsel try to use this to the client’s advantage’.

Judges and lawyers were asked what would happen if the advocate was unable or unwilling to modify questions appropriately. In these circumstances:

- 28 of 37 judges (76%) said they would rarely ask the remaining questions themselves, although four (11%) said they almost always did so
- 25 of 40 lawyers (63% of Crown Advocates, barristers and solicitor advocates) reported that judges rarely asked the remaining questions in these circumstances.

Judges were asked to what extent the involvement of an intermediary reduced the need for their own intervention if questioning of a young witness was inappropriate. Views varied markedly:

- 12 of 39 judges (31%) thought intermediary involvement almost always reduced the need for judicial intervention
- another 13 (33%) thought it did so half or more of the time
- four (10%) thought it did so less than half of the time
- 10 (26%) thought it rarely did so.

Intermediaries were asked about judicial responses when there had been a breach of ground rules or cross-examination was inappropriate for any reason in the previous 12 months:

- 13 intermediaries (28% of 47) thought judicial intervention had increased while 25 (53%) thought it had stayed the same
- no intermediary thought prosecutors’ interventions had increased whereas 31 (66%) thought these had stayed the same.

Intermediaries were also asked about their own interventions if ground rules were breached or cross-examination was inappropriate, bearing in mind that control of questioning is a judicial decision. Most felt the need to intervene had stayed the same or decreased (see Figure 12 in Annex 6). Twenty-two (54%) thought they were backed up by the judge when they intervened but 28 (70%) considered they were rarely backed up by the prosecutor.
5.7.5 Dispensing with the intermediary for cross-examination

‘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’ (s 19(3)(a), Youth Justice and Criminal Justice Act 1999)

‘The police will ... seek your views on special measures that might help you give your best evidence during the investigation and court stage, such as being assisted by a Registered Intermediary ... Your information will be used ... to ensure that arrangements are made to meet your needs if you are called to give evidence in court’ (Standard 4 ‘Witness Charter’ Ministry of Justice 2013)

‘It may be suggested that the intermediary is not needed at trial because:

The interview was conducted without the need for an intermediary. Communication during the trial process is more challenging than the investigative interview, leading to greater stress and potentially more opportunities for miscommunication

An intermediary was present at the interview but apparently took no active part. This is often because the intermediary had already provided advice to the interviewer about how to adapt his or her questions and therefore did not need to intervene.

The advocates will comply with guidance in the intermediary’s report. In practice, many advocates find it more difficult to adapt key questions than they anticipate. It can also be difficult to keep in mind all aspects of questioning that may be problematic for the individual witness. An intermediary who has already assessed the witness’s communication is able to alert the court to any problems or loss of concentration’ (Judicial College ‘Equal Treatment Bench Book’ 2018, chapter 2, para 101).

Applications for the intermediary special measure are the result of police officers or CPS lawyers (or, on occasion, the judge or the defence) concluding that such assistance is appropriate where witnesses seem unlikely to identify when they do not understand a question or, even when they do, that they may be unable to tell someone in a position of authority.243 ‘Measuring up?’ suggested that most children, across age groups, fall into one or other category: 61 of 111 young witnesses (55%) experiencing problems during cross-examination felt unable to tell the court, even though most had been advised they could so (page 111).

The Equal Treatment Bench Book, quoted above, argues for retention for trial of an intermediary who has already assessed the witness. However, in the previous year eight of 39 judges (21%) said they had dispensed with the intermediary’s presence for cross-examination after receipt of the report. Some considered that intermediaries may overstate the need for their presence at trial:

‘Intermediaries can be very useful in the right case. However, whenever they are asked to consider whether a child needs an intermediary they almost always say yes. In my experience some of the children for whom an intermediary is recommended could equally give evidence without.’

In other freeform comments, several judges took the view that, following an informative intermediary report and effective planning at the GRH, the intermediary may be unnecessary during the witness’s evidence. Reports elaborating on the abilities of the individual witness were

valued, but any seen as consisting largely of general principles from Advocate’s Gateway toolkits undermined the case for the intermediary’s retention:

‘I find working with intermediaries often very unhelpful as they often add little or nothing to the court and counsel’s understanding of dealing with young children. It is clear that child witnesses should be asked short questions, using simple language, that do not involve leading or tag questions and that they need regular breaks to maintain their concentration. In real terms the intermediaries’ reports that I have read rarely, if ever, say more than this’

‘In most cases (where the witness does not have additional problems due to mental health issues or learning disabilities and is not 11 or under) the intermediary’s help is most useful in vetting questions and providing assistance for me to set ground rules. In such cases (particularly when questions are written) the intermediary will often do nothing at all during the witness’s evidence … I am more than ready to implement my ground rules and ensure they are followed. As long as all judges are trained and ready to implement and enforce ground rules then an intermediary in such circumstances, at trial, is in fact unnecessary’ (However, this judge went on to describe judicial training as ‘inadequate’).

One judge’s criticisms included that ‘the assessment is often made when the intermediary has not watched the witness’s DVD’. In fact, Ministry of Justice guidance does not permit the intermediary to do so.244 (This was just one of several judicial comments indicating some misunderstanding of the intermediary role.)

Communication is a dynamic process, reliant on many factors, not merely wording. One judge may have overestimated his or her ability to monitor what was happening with a witness in the live link room:

‘I decided that the intermediary was not necessary because I was in a position to ensure the witness’s comfort’.

Another judge declined to hear from the intermediary but required a witness with mental health and self-harming problems to be brought to court to be ‘assessed’ by the judge in chambers. Judges, of course, have discretion to decide which special measures to allow, but their decisions should be fully informed. It is essential that any decision to dispense with the intermediary takes account of the child’s viewpoint, as required by s 19(3)(a) of the Youth Justice and Criminal Justice Act 1999 and Standard 4 of the Ministry of Justice’s Witness Charter (2013) quoted above. Only one judge who had dispensed with an intermediary for trial appeared to have considered the effect on the child:

‘The intermediary’s report, an effective GRH and a written list of questions substantially reduces the utility of the intermediary during the actual trial, subject to the impact of their presence on how confident the child feels in answering questions, which I am not in a position to assess’.

The intermediary’s presence may contribute to ‘best evidence’ in ways that may not be apparent to those in court, for example making the child feel more confident. Intermediaries find it almost impossible to forecast the degree of need for their assistance at trial because an

244 Ministry of Justice (2015) ‘Registered Intermediary Procedural Guidance Manual’ para 3.15(i), page 23: ‘If the police have already conducted an ABE interview or taken a statement from the witness before the referral, then the RI conducts the assessment before they watch the ABE or read the statement...’
individual witness’s response, even to carefully crafted draft questions, is unpredictable – not least because so much depends on the ‘communicative competence’ of the advocates and the degree of control exercised by the trial judge.\textsuperscript{245}

The presence of an intermediary who has assessed the witness, built up a relationship of trust and who can alert the court to any problems (arising not just during questioning but while the witness is waiting or during breaks) satisfies the court’s obligation to ‘take every reasonable step’ to facilitate witness participation.

Quality assurance of registered intermediary performance is discussed at 6.5 below.

5.8 Perceptions of effective participation: young prosecution and defence witnesses and young defendants

‘In order to prepare for the trial, the court must take every reasonable step ... to facilitate the participation of any person, including the defendant’ (Criminal Procedure Rule 3.9(3)(b))

‘The child-centred approach is supported by ... the Equality Act 2010, which puts a responsibility on public authorities to have due regard to the need to eliminate discrimination and promote equality of opportunity. This applies to the process of identification of need and risk faced by the individual child and the process of assessment. No child or group of children must be treated any less favourably than others in being able to access effective services which meet their particular needs’ (HM Government ‘Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children’ July 2018, para 14, page 11)

‘We confirm, if confirmation is needed, that the principles in \textit{Lubemba} apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness’ (Lord Chief Justice, \textit{R v Grant-Murray and anor} [2017] EWCA Crim 1228, para 226).\textsuperscript{245}

Judges, Crown Advocates and other lawyers had differing perspectives as to whether young defendants were enabled to participate as effectively as young prosecution witnesses in the criminal justice process:

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges</td>
<td>23 (58%)</td>
<td>17 (43%)</td>
<td>40</td>
</tr>
<tr>
<td>Barristers and solicitor advocates</td>
<td>8 (30%)</td>
<td>19 (70%)</td>
<td>27</td>
</tr>
<tr>
<td>Crown Advocates</td>
<td>18 (90%)</td>
<td>2 (10%)</td>
<td>20</td>
</tr>
</tbody>
</table>

Some judges described steps they took to ameliorate the anxieties of young defendants, including letting them sit behind their counsel and giving regular breaks; but one acknowledged ‘the pressure of being on trial is a burden which is difficult to overcome’. Judges who felt the position of young defendants was inequitable expressed themselves forcefully in their freeform

\textsuperscript{245} 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.

\textsuperscript{246} At para 227, the Court of Appeal accepted ‘that further improvements can be made to the procedure so as to ensure a proper focus on the needs of a vulnerable defendant at the earliest possible stage in the proceedings’ and asked the Criminal Procedure Rules Committee to review the form used for the PTPH.
responses. The most significant concern related to the absence of a regulated intermediary scheme for vulnerable defendants, the subject of a Law Commission recommendation.247 Instead, Criminal Practice Direction 3F.1.3, while acknowledging the courts’ inherent powers to appoint an intermediary, warns that such appointments confined to the defendant’s evidence will be rare ‘but for the entire trial extremely rare.’ The Direction did not elaborate on the foundation for making such decisions.

Some judges thought that the lack of a formal defendant intermediary scheme gave an impression of ‘unfair bias’, compounded by instances where young defendants’ communication needs were not identified by legal representatives, or ‘only at a late stage’ or where their counsel ‘failed to seek appropriate orders to assist’. Judicial comments included:

‘Intermediaries are not usually made available during the course of the whole trial, and the same level of support that is provided to a witness giving evidence during a part of the trial is not available to the defendant. Although solicitors (if they are present) and counsel will be able to assist the defendant during breaks, they cannot provide minute by minute support to ensure defendants understand the case against them. I have concerns that if a defendant’s ability to follow the case against him is limited, then his ability to give evidence, even with an intermediary at that stage, is limited too. That is not to say that I do not appreciate the financial and practical ramifications of having an intermediary throughout a case’

‘A young witness has the benefit of being assessed by a specially trained police officer and/ or an intermediary before being interviewed and his ABE evidence in chief is recorded as early as possible in the process. A young defendant does not have this. He has only his accredited legal representative at the police station and an appropriate adult. As far as I am aware, it is not necessary for either to be specially trained in dealing with young people. It is exceptionally rare for an interviewing officer to have a defendant assessed by an intermediary before interview. If the defendant is not charged immediately and is, as is usual, released “under investigation” he will not have any legal representation until charged months later and is granted legal aid. That means that months will go by before the preparation of his defence can begin. The prosecution will often have additional evidence that was not available at interview and so the young defendant will be asked to recall things that happened many months ago. The young witness has the assistance of the police, victim support, witness care, CPS, and often care workers/ counsellors. The young defendant has a legal representative and an advocate (sometimes the same person). If not, then often only counsel will be present at trial. The appropriate adult is often the young defendant’s relative, often with his/her own problems or communication difficulties and is of little use. It is difficult to get an intermediary for a young defendant’.

Some judicial concerns related to a possible imbalance because restrictions imposed to ensure young witnesses were questioned fairly (5.6.4 above) tended not to be applied to young defendants. Judges also identified other matters where they thought young defendants were dealt with less fairly than young witnesses for the prosecution. These included a lack of automatic access to special measures248; poor or no support; and facilities that are not child friendly, including routinely being confined in the dock in adult courts. Concerned judges also pointed out that, unlike developing practice with young witnesses, cross-examination questions to be asked by the prosecutor of young defendants are rarely reviewed in advance.

247 Law Commission (2016) ‘Unfitness to Plead’ vol. 1, Law Com No. 364, para 2.72. This recommendation was supported by the Council of HM Circuit Judges and the Prison Reform Trust.

248 S 47, Police and Justice Act 2006 (creating new section 33A-C, Youth Justice and Criminal Evidence Act 1999) provides for defendants under 18 to give evidence by live link if certain conditions are satisfied. The conditions are much narrower than for witnesses and are seldom invoked.
As with judges, those advocates concerned that young defendants did not have parity highlighted the lack of access to intermediaries to facilitate communication, with some applications ‘treated with scepticism and hostility’. Others felt the developmental status of young defendants was ‘rarely considered’:

‘The same safeguards are absolutely not applied to defendants. They are very rarely granted intermediaries or afforded the same protection against difficult questioning. Nor are trials adequately modified to their needs. Defendants are treated as second class witnesses in my view, despite allegedly being on the same footing’.

These advocates highlighted other inequities:

- lack of guidance to ensure that police interviews under caution are developmentally appropriate
- judges being ‘less inclined to insist prosecution counsel pre-draft questions for approval than defence advocates’
- lack of support for young defendants in the dock at Crown Court
- the treatment of breaks, ‘treated as if we are just “indulging” the defendant’.

Overall, these advocates felt the whole approach differed:

‘Courts are less prepared to assist because there is less emphasis on making sure young defendants can participate and very little focus on treating them in the same way one would a young prosecution witness’.

Many fewer young witnesses appear for the defence than for the prosecution, though again there are no statistics. Eighteen of 20 Crown Advocates (90%) felt that young defence witnesses were enabled to participate as effectively as young prosecution witnesses. However, 17 of 27 barristers and solicitor advocates (63%) were unhappy about the lack of parity between the treatment of young defence and young prosecution witnesses. A Crown Advocate noted that the lack of facilities for video-recorded interviews resulted in them having to give evidence in chief as well as being cross-examined at trial.

One judge identified a safeguarding concern in relation to a young defence witness with autism giving evidence concerning his parents.
6 Quality assurance and training

6.1 Key findings

- Most judges and lawyers said that ABEs routinely needed to be edited for trial. While lawyers were likely to watch the ABE before trial, judges seldom did so (6.2.1).

- Only four of 10 PCCs reported that their forces still had dedicated child protection teams. The National Police Chiefs’ Council could not provide a national profile of force approaches.

- Respondents identified a continuing gap between policies and interviewer performance in ABEs, and differing practice in respect of quality assurance and refresher training. However, the National Police Chiefs’ Council had no dedicated lead for ABE interviews (6.2.1).

- Only a minority of judges, lawyers and intermediaries reported being able to see and hear young witnesses clearly when watching ABE interviews (6.2.4).

- In 2015, the Government stated that it had made it a requirement for publicly funded advocates in serious sex offence cases to have undertaken approved specialist training. No such requirement has been put in place (6.3.1). Advocates stood little risk of being the subject of a formal complaint for inappropriate questioning of a vulnerable person (6.3.2).

- To obtain a ‘ticket’ to try serious sex offences, circuit judges and Recorders must attend training. High Court judges are not required to attend. Eighty per cent of surveyed circuit judges said more training on identifying communication problems would be helpful (6.4).

- The Ministry of Justice’s Quality Assurance Board for registered intermediaries does not seek feedback from the judiciary or advocates. Eighty-three per cent of surveyed lawyers said they had adapted their advocacy with young witnesses as a result of working with intermediaries. However, feedback about intermediaries from judges provided a mixed picture (6.5).
6.2 ‘Achieving Best Evidence’ interviews

6.2.1 Respondents’ views

The ‘communicative competence’ of a young witness is heavily dependent on the skills of the questioner, in the first instance a police interviewer. In freeform comments about any ‘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’.

Most judges and lawyers said that ABEs routinely needed to be edited for trial:

- 32 of 40 judges (80%) said editing of ABEs was almost always necessary
- 29 of 36 lawyers (81% of Crown Advocates, barristers and solicitor advocates) agreed.

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. Approaches to the investigation of child abuse are changing, without a research context. A briefing for the national policing lead for child protection and abuse investigation concluded:

“No UK based evaluations of the police response to child protection could be identified; in essence, we do not know what works”.

We asked PCCs about responsibility in their local force for child sex abuse investigations and ABE interviews. Of ten responses, only four had dedicated child protection teams. One of these noted that while the child protection unit dealt with child sexual abuse, specially trained officers from neighbourhood policing teams and ‘24/7’ teams were also able to conduct ABE interviews:

“As officers from all departments have the potential to have victims and witnesses under the age of 18, a range of officers from all teams have received the specialist interview training.”

Of the other six:

- four had public protection teams dealing with children and vulnerable adults
- one had a safeguarding investigation unit and a paedophile online investigation team
- one had ‘moved to an omni-competent detective model of investigation due to the increase in this type of vulnerability-related workload’.

Some police officers interviewed for the study thought that the move to ‘omni-competent’ policing of child protection (where detectives deal with child protection alongside the generality

of other investigative work) was gathering momentum. (We have since learned of at least two others adopting the ‘omni-competent’ model and a further six which have public protection units dealing with children and adults). The National Police Chiefs’ Council acknowledged that forces were responding to other factors affecting policing, including financial constraints, training and the recruitment and retention of detectives, but could not comment on whether there was an increasing move away from specialist child protection teams:

“We have not completed any benchmarking with regard to which forces have dedicated teams over omni-competent officers. Each chief officer has autonomy over their policing structures and know their own financial position. Although child sex abuse is a strategic policing requirement, there is no mandated capability or capacity measure that can supersede the autonomy of each chief officer on how to deploy their resources within their force. The economies of scale and complexities associated with larger forces may mean a different approach is taken but this would likely have oversight by senior managers and training would still be required for officers.”

The College of Policing is changing its approach to take account of these pressures. It advised that, in future, investigative learning will shift towards core, rather than crime-specific, skills. While specialist training will remain, ABE training will also be integrated into core learning, in recognition that the volume of crime involving vulnerable people is greater than police specialist units can deal with and that there is a ‘resilience gap’ due to difficulty in filling specialist roles.

A police trainer in a force that had moved to the ‘omni-competence’ model felt this was driven by austerity, not by a move towards excellence. The trainer warned that expecting much larger numbers of officers to respond to child abuse risked diluting standards of specialist training and described this as ‘a perfect storm for disaster’. Intermediaries expressed concern about the adverse impact on their effectiveness, and the quality of the ABE interview, resulting from these police organisational changes:

‘The request may come from an officer in charge who doesn’t understand how we work and probably isn’t going to be the interviewing officer due to not being ABE trained. It can then take time to identify a suitable interviewing officer. The officer with you at your assessment is not the interviewer, with all the potential poor outcomes from that scenario. If you are lucky enough to get an ABE-trained officer, due to them not doing specialised roles, it may be two years since their training and this is their first ABE with a young witness and an intermediary. In this scenario, they are busy panicking about the ABE and really don’t have the automatic skills and knowledge to follow advice or adapt their language on the hoof’.

The quality of the ABE is crucial to its evidential importance as the young witness’s evidence in chief. 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 (SCAIDP). Training may be provided by police officers, their professional bodies or, as a result of cuts to crime training budgets, by outsourced

---

254 Email from National Police Chiefs’ Council representative (2 August 2018).
255 In 2018, the College completed seminars for specialist interviewers who have done ABE training, using modern slavery and CSE as case studies, to improve skills. These products are available to police training departments for continuing professional development. Other related strands of work have included vulnerability training for 10,000 ‘first responder’ officers in seven forces, and updating specialist training for child abuse investigators and senior leaders, with interactive training modules for those taking the College’s specialist child abuse investigation development programme.
providers. The College of Policing provides ABE training guides and assessment criteria but does not specify the length of the training or who should deliver it. It is left to forces to conduct ‘due diligence’ on the qualifications of trainers from private companies. Chief Officers from individual forces are responsible for quarterly assessment of their establishment against individual role profiles, including SCAIDP, and submit capacity numbers to the National Police Chiefs’ Council for collation.256 These statistics showed an increase in skills of child sex abuse investigators between 2015 and 2017, but the Council has not been able to repeat the exercise due to limited staffing capacity.

Joint police and CPS Inspectorate reports in 2012 and 2014 highlighted that training of ABE interviewers across forces differed widely and often failed to comply with guidance:

‘The starting point is to ensure that those most suited to this type of evidence gathering are trained and accredited by their force’.257

The 2014 report recommended systematic quality assurance of ABE interviews, consisting of self-evaluation by interviewers assessed regularly by interview advisers or accredited supervisors; local joint arrangements ‘to systematically monitor performance and drive improvements’; and, where ABEs are to be used as evidence in chief, monitoring by police supervisors and CPS to ensure that the ABEs are of ‘sufficient visual and sound quality’.258 These Inspectorate recommendations about quality assurance were reinforced by the National Police Chiefs’ Council and College of Policing in 2015259, and will be reiterated in the forthcoming revision of ‘Achieving Best Evidence’. Research consistently reveals that improvements in interviewing practice are obtained only when well-structured and extended training is conducted over time with follow-up supervision and feedback.260

The College of Policing acknowledged that the ‘weak link’ in respect of ABEs is the lack of supervision and quality control, especially where managers of ABE interviewers are not investigators or interviewers in their own right. The College is scoping a piece of work on what support ABE managers need to supervise effectively.261

Police interviewees identified a gap between policies and standards of interviewer performance in ABEs: supervision and quality assurance are still not embedded. PCCs were asked if their police force routinely took steps to quality assure ABE interviews in light of Joint Inspectorate recommendations.262 Seven responded:

- six said that ABE interviewers carried out self-evaluation
- five said interview advisers or supervisors assessed these self-evaluations
- six said supervisors monitored and reviewed ABE interviews and plans, and were involved in developing interview plans for complex investigations.

One PCC acknowledged that ‘None of these routinely apply’.

256 Email from National Police Chiefs’ Council representative (2 August 2018).
261 In future, forces may be subject to OFSTED or other inspections where they deliver products under the Police Education Qualification Framework. In that case it will be the force, not the individual, that is subject to inspection: discussions with the College of Policing in March 2018.
A Freedom of Information request in 2017 revealed that only eight out of 25 police forces in England and Wales (32%) had conducted ABE officer refresher training (considered a ‘mandatory’ requirement) in the previous four years. In our survey of PCCs, six out of nine said ABE refresher training was compulsory; however, only three said it happened annually. One noted that no official refresher training was given following initial ABE training:

‘Although it is something we would like to see, there is no opportunity at present to be able to do this with the current resources we have. However, there are one-off CPD events.’

Joint Inspectorate reports encouraged feedback to ABE interviewers from CPS lawyers. Crown Advocates surveyed for this project were asked if they had trained police ABE interviewers in the previous 12 months: only one of 14 had done so.

The National Police Chiefs’ Council acknowledged that it was a ‘point of contention’ that it had no dedicated lead for ABE, especially as there were ‘variations on how [ABE] is used within and between forces’.

6.2.2 The ‘licence to practice’

'We will … professionalise the police response to child sexual abuse and raise the status of officers carrying out these challenging roles by piloting a new licence to practice for specialist child abuse investigators and ensure the police are equipped with the skills required to interview vulnerable victims and witnesses by delivering improved training to specialist investigators in Achieving Best Evidence (ABE) interviews’ (HM Government ‘Tackling Child Sexual Exploitation: Progress Report’ 2017, Objective 1, page 28).

The ‘licence to practice’ initiative was triggered by a 2016 report revealing ‘fundamental deficiencies’ in the Metropolitan Police Service’s response to child abuse and sexual exploitation. In response, the Home Secretary proposed a licence to practice, as in the case for firearms officers, so that only registered officers with specialist skills would be able to investigate offences against children and vulnerable adults.

There is a need to distinguish investigators and ABE interviewers in respect of the ‘licence to practice’ commitment; this can be the same person but may not be, depending on the organisation of the force. The College of Policing is still at the early stages of establishing the model for the licence to practice regime. The approach was piloted with managers of child sexual abuse investigations in three forces, completed in March 2018. Requirements for a system that allows gaining and maintaining the licence include establishing a compliant training regime and development of materials for use in regular continuing professional development, to be quality assured by the College. It is moving away from the traditional ‘course’ approach to ‘encourage ownership of professional development by the individual and line manager’. It is unclear whether it will extend the licensing approach to ABE interviewers. It noted that, in evaluating the benefits that can be achieved:

263 Ibid recommendation 11.
264 Freedom of Information requests submitted by Alison McCullough, former police officer.
265 Email from National Police Chiefs’ Council representative (2 August 2018).
267 ‘Police will need licence to practice for child sex abuse cases, says Rudd’ The Guardian, 30 November 2012.
268 Discussions with the College of Policing in March 2018.
'much depends on the extent to which a licence can drive consistency. The bigger an audience, the harder to achieve consistency ... ABE, for example, already has an extensive training requirement, so we would need to be convinced that applying a licence to this function within a role would add value.'

6.2.3 Joint police and social worker training

A representative of the Association of Directors of Children’s Services highlighted a move away from joint training of social workers and police officers in respect of child protection investigations and interviews. Police officers with a view of national practice confirmed this shift: cost to both police and social services was seen as the major cause, along with the move away from police specialist units. A senior officer described this development as ‘much regretted’, calling for ‘a broader joint training strategy for police and social services around investigations and evidence’.

The withdrawal of local authorities from joint training was seen as having a knock-on effect on parallel criminal and family proceedings and the lack of coordination between them. A Crown Court judge criticised the ‘lack of infrastructure to enable the protocol on joint directions hearings with the family court to take place’.

6.2.4 Technical quality of ABEs

’In such cases [ABE interviews], the person taking the statement will ensure that the recording is of sufficiently good quality to be used in court as evidence if necessary’ (Ministry of Justice ‘Witness Charter’ Standard 3, 2013)

‘Interviewers should try to ensure that the child’s facial expressions, gestures and body language, as well as any drawings, pictures, photographs, symbols, dolls, figures and props, are visible to the interviewer and to the camera. This will require at least two cameras and an operator ... The equipment operator must remain in control of the recording equipment at all times during the interview process until the final recorded media (DVD or VHS) is ejected. It is their responsibility to ensure that the quality of the recorded media is acceptable ... A good, clear picture of the witness’s face may help the court to determine what is being said and to assess the emotional state of the witness. Every reasonable effort should be made to ensure the definition and quality of the image of the witness’s face throughout the interview’ (Ministry of Justice ‘Achieving Best Evidence in Criminal Proceedings’ 2011, paras 3.109, M.2.1, M.3.3)

‘The intermediary’s role is transparent and therefore must be visible and audible to the judge and advocates at the time of cross-examination and in the subsequent replaying’ (Criminal Practice Direction 18E.38).

Of seven PCCs responding to a question about what steps their forces took to quality assure ABE interviews in light of Joint Inspectorate recommendations269, just four said supervisors routinely reviewed ABE interviews prior to trial where it was intended to play the recording as evidence in chief. Many judges and others felt that ABEs were deficient technically. As Figure 4 shows, only a minority reported that they routinely saw and heard young witnesses clearly in ABE recordings:

Where the witness was only a small image on-screen in an ABE interview, some judges felt this reduced the impact of the evidence and the jury’s ability to assess it:

‘The cameras are badly positioned as are the microphones. It is often difficult, if not frankly impossible, to properly see and hear the child. As a result of the failings of the initial interview, the prosecution is often faced with a choice between effectively re-examining the child all over again to obtain clarity, or to leave an incoherent muddle to the jury.’

Intermediaries noted that, while the Criminal Practice Direction quoted above requires them to be visible on screen, it is unclear whether this is satisfied if they appear only in the ABE’s ‘picture-in-picture’ overview of the interview room:

‘In some cases, the witness doesn’t want someone sitting so close to them. Some want you to be (too) close, which can be jumped on by defence as you may be seen to be unduly comforting the witness. For a very young child, an adult next to them can take the focus off the child visually. They are better occupying the main screen themselves, so that their facial expression etc can be concentrated on’.

Intermediaries were also asked whether ABE recordings gave a clear view of any communication aids used by the young witness: only 14 (30% of 47) said this was almost always the case. Sometimes intermediaries held up a communication aid to the camera or asked the witness to do so to ensure it was captured on the ABE. This was important because, contrary to the ABE guidance quoted above, sometimes there was no camera operator in the monitoring room or, even if there was, the operator did not always zoom in on a young witness moving around or where aids were used. Where there was no monitoring officer present, intermediaries reported instances where the child was off camera for much of the interview.

While lawyers were likely to watch the ABE before trial, judges seldom did so:

- 34 of 40 judges (85%) said they rarely watched the ABE video before the trial
- 31 of 36 lawyers (86%) almost always watched the ABE before trial, including 17 of 21 Crown Advocates (81%).
6.3 Training for advocates

‘Publicly-funded advocates will have specialist training in handling victims before taking on serious sexual offence cases.’ (Conservative and Unionist Party Manifesto 2017 ‘Forward, Together: Our plan for a Stronger Britain and a Prosperous Future’ page 44).

In 2013, the Home Affairs Select Committee recommended specific training of the judiciary and advocates, arising out of widely publicised, lengthy and aggressive cross-examination in some child sex exploitation trials. Judge Peter Rook QC was asked to chair an interdisciplinary group to devise a new ‘Advocacy and the vulnerable’ course on behalf of the Advocacy Training Council (now the Inns of Court College of Advocacy – ICCA). Judge Rook’s innovations encompassed pan-profession collaboration, facilitators required to pass ‘training for trainers’ (a departure from advocate trainers often selected on the basis of seniority) and, above all, a radical change of approach:

'It is widely acknowledged that children and vulnerable witnesses are unable to cope with the demands of the adversarial process which can and often do increase any existing damage to their psychological and emotional well-being. This is far from a level playing field and therefore justice cannot be seen to be done. The [Advocacy and the vulnerable] course aims to help advocates to employ developmentally appropriate language as part of their cross-examination techniques, in order to obtain “best evidence” from a vulnerable witness' (emphasis in original).

In an approach described as ‘determined and collaborative’, governance and implementation are overseen by a Bar Council working group representing ICCA and those delivering the training: the Inns of Court, Circuits, Law Society, Criminal Bar Association and CPS. A suite of online training materials, hosted by ICCA, was launched in 2016. The course begins with eight hours of work on materials accessed online, the core element of which is the preparation of draft cross-examination questions for three vulnerable complainants, two of them children. Stage two is a three-hour face-to-face training session at which draft questions may be discussed, along with principles of ‘signposting’ and question construction; delegates ‘practise’ role play cross-examination of a six-year old; and facilitators challenge whether some questions are needed at all. The final stage consists of delegates viewing four films in their own time via a specially created portal, after which they are automatically accredited as having completed the course.

Although would-be facilitators had to pass their training, the course for delegates is not a pass/fail exam. One judge familiar with the course felt that ‘Registration on completion can’t be regarded as a certificate of competence’.

We spoke to three lead facilitators, one for the Solicitors’ Association of Higher Court Advocates and two for Bar circuits; we also observed training. The Bar has trained over 300 facilitators to deliver the ICCA course; three of six Bar circuits had trained all their criminal advocates. The consistent presence of a lead facilitator (an unpaid and labour-intensive role) at training sessions was crucial. For the training to be taken seriously, it was also considered vital to exclude

273 ‘ICCA is embarking on a wholesale review of the materials for early 2019’ email from the Inns of Court College of Advocacy (13 August 2018).
advocates who registered but failed to submit their draft questions for review a week in advance. Training in the Southeast Circuit (London) has been organised by the Inns of Court. The strategy in circuits outside London differed. Some have been chambers-based: after selection and training, facilitators deliver the course within their own chambers, accompanied throughout by a lead facilitator. One such lead facilitator felt that, because juniors and QCs knew one another, it was easier for the juniors to challenge the seniors than would have been the case in a more formal setting. In contrast, in at least one other circuit, a small number of facilitators delivered the course to barristers across the circuit at multiple sessions, again always accompanied by a lead facilitator. This lead facilitator thought the trainers became ‘more competent and confident’ with experience.

In our surveys of barristers, Crown Advocates and solicitor advocates, 42 of 48 lawyers (88%) reported having received vulnerable witness training, including 19 of 21 Crown Advocates (90%) trained in-house. The lead facilitators for the Bar and solicitor advocates interviewed for this project agreed that the training was well received. This positive feedback was confirmed by those to whom training had been delivered:

- ‘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’.

A recent study based on interviews with 50 judges identified that most felt that the way advocates dealt with vulnerable witnesses was ‘largely improving’. This was attributed to experience in s 28 cases and more generally to the positive impact of ICCA training in promoting specialist skills for effective communication. The research noted that younger advocates may be better disposed to learning and applying new skills.

As noted in section 5.7.1 above, most judges in our survey thought cross-examination tailored to the understanding of individual young witnesses had improved in the past year; several specifically linked this to advocacy training. However, there were perceived differences between circuits, not all of which had completed ICCA training at the time. 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 judge, 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’.

6.3.1 Status of advocacy training

‘By March 2015 we will devise a requirement that to be instructed in cases involving serious sexual offences, publicly-funded advocates must have undertaken approved specialist training on working with vulnerable victims and witnesses’ (Ministry of Justice ‘Our Commitment to Victims’ 2014, page 7)

‘... we have 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’ (our emphasis, HM Government ‘Sexual Violence against Children and Vulnerable People National Group Progress Report and Action Plan 2015’ page 9).

Despite the Government’s indication that a specialist training requirement is now in place, it has taken no steps to make it compulsory.

When launched, the ICCA course was targeted at the Bar and solicitor advocates.275 The initial estimate of the number of barristers to be trained was around 14,000.276 ICCA advised us that there are no records of practitioners by areas of practice and the target has been revised downwards to around 5,000: as of June 2018, around 2,700 had undertaken the training.277 The Law Society has made the training available to solicitors. As of May 2018, 385 solicitors had completed the course (it is unclear how many were solicitor advocates).278 Its sessions run in small groups, with fewer participants than most Bar courses. It has set no target number to be trained as it does not know how many members are advocates in sexual assault cases. The CPS has delivered the ICCA course in-house to Crown Advocates who were expected to complete it by May 2018; it will then be extended to other prosecutors.279 The Solicitors’ Association of Higher Court Advocates has run two courses, for eight family lawyers.280

The ‘Advocacy and the vulnerable’ website states that ‘in due course’ the training ‘will become mandatory’ for advocates undertaking publicly funded work for serious sexual offence cases involving vulnerable witnesses.281 Ministry of Justice inaction thus far has been met with dismay by lead facilitators. While they described delegates attending the first sessions as really motivated, ‘slowly it has become tougher’ to engage reluctant barristers:

‘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’.

While Bar courses are free, the Law Society charges £175 plus VAT to those conducting criminal advocacy under a legal aid contract (more for others). A Law Society representative said this makes the uncertainty over the status of training particularly problematic:

---

277 Email from Inns of Court College of Advocacy (28 June 2018).
278 Information about training for solicitor advocates and solicitors was provided by a lead facilitator on behalf of the Solicitors’ Association of Higher Court Advocates (23 March 2018) and Law Society Membership Services (4 May 2018).
279 Emails from CPS Policy on 5 April and 25 May 2018. In 2015–6, CPS also delivered training on its ‘Speaking to Witnesses at Court’ policy. This consisted of a digital eLearning course on the CPS’ Prosecution College, face-to-face classroom-based modules for court-based lawyers and paralegals, and an eLearning version on the CPS’s digital learning platform for the Bar (the external Prosecution College, “ePC”).
280 Email from Solicitors’ Association of Higher Court Advocates (23 July 2018).
281 https://www.icca.ac.uk/advocacy-the-vulnerable.
In 2017, Lord Thomas, then Lord Chief Justice, emphasised that expectations of advocates questioning vulnerable witnesses or defendants required ‘specific training’, including:

‘the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. An advocate would in this court’s view be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks’.283

Later the same year the Lord Chief Justice went further, classifying the failure to undertake specialist training as potential ‘misconduct’, despite it not yet being a professional requirement:

“We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training. That consequence should help focus the minds of advocates on undertaking such training, whilst the Regulators engage on the process of making such training compulsory.”284

6.3.2 Rules of professional conduct and advocacy standards

Rules in the trial process ‘apply whether the advocate in question is a barrister or solicitor, and to the extent that the rules of professional conduct of either profession are not consistent, they should be made so’ (Lord Judge, Lord Chief Justice in R v Farooqi [2013] EWCA Crim. 1649, para 109)

‘It is recommended that rules of professional conduct be reviewed to identify inconsistencies and propose ways to align them for the purposes of trials of sexual violence cases’ (Ministry of Justice ‘Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence’ 2014, para 32).

No action has been taken in response to these calls for professional conduct rules to be made consistent.285

282 Email from Membership Services, Law Society (6 May 2018).
283 R v Rashid (Yahya) [2017] EWCA Crim 2, para 80.
285 A call reiterated in ‘The Gillen Report: Preliminary report into the law and procedures in serious sexual offences in Northern Ireland’ (2018). This recommends that the Department of Justice ‘take this matter up’ with the Bar Council and the Law Society, which ‘would further spur the step’ that they are taking to introduce mandatory training’ for members (sections 14.182-3).
Judge Peter Rook QC described questioning that exploits a witness’s developmental limitations as ‘wholly inconsistent with a fair trial’ which ‘also contravenes the Codes of Conduct of the Bar and solicitors’. However, the codes of conduct for each of the four branches of the legal profession (legal executives, solicitors, solicitor higher court advocates and barristers) set differing advocacy standards. These provisions are neither consistent nor specific about what might constitute inappropriate, exploitative or unethical behaviour in respect of cross-examination. Only solicitor advocates are required to be able to identify vulnerable witnesses, use appropriate questioning techniques and comply with relevant judicial directions.

The Quality Assurance Scheme for Advocates (QASA), due to start in 2011, stalled as a result of strong opposition. Announcing the demise of QASA in 2017, the Bar Standards Board described its new approach as removing prescriptive regulation but putting ‘clear arrangements in place to address instances of poor practice or non-compliance’. The Board’s Handbook does not contain specific provisions relating to cross-examination. The new regulatory regime encourages the profession to ‘self-regulate’, creating new obligations on barristers to self-report serious misconduct and report serious misconduct by others. Judges (or anyone else) can refer a barrister’s conduct to the Board if they have concerns about breaches of ground rules or inappropriate behaviour.

During the course of the study, examples of poor questioning that went uncorrected despite judicial intervention were brought to our attention. At present, however, it seems that advocates stand little risk of being the subject of a formal complaint for inappropriate questioning of a vulnerable person. Only one of 40 judges (3%) had made a complaint about an advocate in the past year. This judge had admonished counsel directly: ‘I have not complained to an external body’. Two of 36 Crown Advocates, barristers and solicitor advocates (6%) had complained about advocacy in a young witness case in the previous 12 months. One of these concerned a youth court sexual abuse case, ‘where the defence advocate continually went outside the remit of the ground rules, and also outside the submitted list of approved questions’. The other advocate had co-defended in a case where ‘the advocate was not appropriately trained in vulnerable witness advocacy’. These complaints do not appear to have reached a professional regulator. Neither the Bar Standards Board nor the Solicitors Regulatory Authority had received any complaints concerning questioning of young witnesses in recent years.

The 2018 study on judicial perceptions of the quality of criminal advocacy found that some judges thought ‘regulators’ actions may be constrained by the difficulty of identifying or defining what amounts to serious shortcomings in advocacy’. That study also revealed widely differing judicial views about the appropriate response to poor advocacy; overall, most judges favoured informal feedback to advocates.

While there is no recognised specialism in advocacy with young witnesses, the Bar Standards Board has recently introduced a new provision for youth court advocacy, consisting of registration for this specialism plus self-certification of competence. The Board intends to sample a proportion of CPD records to assess competence, which could be demonstrated by attendance at specialist training or simply reading available materials (CPD no longer requires a minimum number of hours). The Solicitors Regulatory Authority has not made a similar

288 N. Rose (29 November 2017) ‘Six years after it was due to begin, BSB pulls the plug on QASA’ Legal Futures.
290 However, the SRA noted that it does not record reports in the detail required to extract information regarding inappropriate cross-examination of witnesses aged under 18; email from Information Governance Officer, Solicitors Regulation Authority (17 April 2018).
commitment to registration of youth court practitioners. However, the Bar Standards Board notes that:

‘In order to have the greatest impact, any regulatory action needs to apply equally to all advocates, irrespective of profession. We are committed to working with the other regulators to consider what that response should be.’

6.3.3 Advocacy training in the future

The Bar Standards Board’s professional statement sets out expectations for competence at the start of a barrister’s career after pupillage. The Bar Professional Training Course uses these to set its curriculum. A lead facilitator for the Bar saw the need to extend the basics of ‘Advocacy and the vulnerable’ to entry-level professional training:

‘Twenty years ago I was taught by observation. My hope is that this new approach becomes embedded. It shouldn’t be an add-on but part of the common currency of chambers – that pupils will be taught these messages, with some formal training. There will also be a need for refresher training. Bar Professional Training Course providers should include the basic rules, e.g. Judge Cahill’s video and the “20 Principles of Questioning”.

The Bar Standards Board is reviewing the curriculum and assessment strategy as part of a major programme of training reform. The Board’s Bar Professional Training Course authorisation framework is likely to be in place from January 2019. If ICCA receives permission from the Inns of Court, its parent body, it will apply to the Board to become an Authorised Education and Training Organisation to deliver a new Bar Professional Training Course from 2020:

‘Whether or not the Board prescribes that vulnerable witness training and/or the cross-examination of children should be part of the teaching, ICCA is committed to incorporating this training from the outset. We will include elements of the “Advocacy and the Vulnerable” course and teach new advocates the difference between a traditional and robust cross-examination and one that requires a different approach and much subtler skills of challenge. We will also address the Board’s Youth Proceedings Competences which require specialist skills of advocates engaged in cases involving children and young people.’

295 Eight providers run the BPTC in England and Wales: BPP Law School (Manchester, Leeds and London); Cardiff Law School; City Law School; City University London; Manchester Metropolitan University; Northumbria University, Newcastle, and Nottingham Law School, Nottingham Trent University.
296 Bar Standards Board (July 2018) ‘Future Bar Training: Consultation on the proposed rules for the training framework for the Bar’. Its working group is ‘alive to the importance of developing the particular skills needed in working with young and vulnerable people, as well as the need to ensure that this is happens at the most appropriate points in the training pathway’. Email from Bar Standards Board Head of Training Supervision and Examinations (I March 2018).
297 Email from the Inns of Court College of Advocacy (13 August 2018).
6.4 Training for the judiciary

‘... we conclude that child sexual exploitation offences are an area on which further specific guidance and training of the judiciary would be appropriate ...’ (House of Commons Home Affairs Committee ‘Child sexual exploitation and the response to localised grooming’ 2013, para 93).

In order to obtain a 'ticket' to try serious sex offences, Crown Court judges, Recorders (judges who sit part time in the Crown Court) and district judges sitting in the youth/ magistrates’ court must attend a two-day induction Serious Sex Offences Seminar, followed by refresher training every three years. High Court judges, who do not require a ticket, may attend but are not required to do so. Some High Court judges have had little experience of sexual offence cases or dealing with young witnesses prior to their appointment to the Bench, a concern that applies also to some circuit judge and Recorder appointments, as discussed below.

Responding to concerns expressed by the Home Affairs Committee in 2013, Lord Judge, then Lord Chief Justice, proposed new ‘bespoke training’ on managing vulnerable witness cases for judges. This was delivered in 2013-2014 as an additional day’s training to over 700 judges. In 2016-17, when roll-out of s 28 pretrial cross-examination appeared to be imminent, half-day circuit seminars usually allocated to judicial sentencing were used instead to provide s 28 training. This programme, which referenced some of the ‘Advocacy and the vulnerable’ materials but did not require the same preparatory work, was described by one judge as ‘ICCA lite’. After this financial year, further s 28 training will be provided when the scheme is rolled out, at least for those unable to attend the first time.

Of judges surveyed for this project:
• 28 of 39 judges (72%) reported having received training on what constitutes developmentally appropriate questioning of young witnesses
• 25 of 27 (93%) had received this training in the previous three years; the remaining 12 (31% of the 39) did not identify the year of their training.

Most judges acknowledged that the training had had an impact on their practice.

Figure 5: How much had training improved judges’ ability to identify inappropriate questioning of a young witness (n=27)?

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A lot</td>
<td>56%</td>
</tr>
<tr>
<td>A little</td>
<td>37%</td>
</tr>
<tr>
<td>Did not help</td>
<td>7%</td>
</tr>
</tbody>
</table>

---

Thirty-two of 40 judges (80%) said more training on identifying such 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 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.’

Lead facilitators for the Bar and solicitor advocates who were interviewed for the study perceived a lack of follow-through from some judges and what was expected of delegates completing the ‘Advocacy and the vulnerable’ training:

‘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’.

Lead facilitators also identified a problem with Recorders (part-time judges) as a group, both in respect of getting them to take the ‘Advocacy and the vulnerable’ course and because the Judicial College Recorders’ course ‘does not deliver the same message’.

Experience of s 28 pre-trial cross-examination was regarded as ‘hugely influential’ in embedding best practice in pilot courts (confirmed by surveyed judges with experience of s 28). One training 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.’

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 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’.299

From April 2019, the Judicial College is changing induction training for judges in their first fee-paid role to include ‘judge craft’ skills on the business of judging and on communication. A judge trainer said: ‘So many don’t have these skills but the challenge is sheer numbers’.

6.5 Quality assurance of registered intermediary court work

A new training programme for a small number of registered intermediary candidates was piloted in the summer of 2018. This was delivered by experienced registered intermediaries, judges and criminal justice professionals. At the time of writing, a review of the course, its design and procedures for evaluating candidates had not yet taken place and a scheme for mentoring them was still to be developed, although the Ministry of Justice has acknowledged the need to address ‘central provision’ to ‘further ensure that the new registered intermediaries have the support they need’.300

Quality assurance was, however, a subject raised by respondents to this study. The Ministry of Justice’s Quality Assurance Board (which, unaccountably, does not include a former registered intermediary among its members) seeks routine feedback from the police and CPS but not from the judiciary, advocates or witnesses for whom registered intermediaries are appointed. The Victims’ Commissioner observed that the Board ‘by its own admission, does not have sufficient resources to [quality assure the work of those on the register] in an effective and consistent manner’.301

Crown Advocates, barristers and solicitor advocates were asked if they had adapted their advocacy with young witnesses as a result of working with intermediaries: 39 of 47 lawyers (83%) said they had. One QC said:

‘The best registered intermediaries transform the way we deal with a vulnerable witness and some are outstanding’.

In 2015, two-thirds of 77 judges reported that ‘working with intermediaries has changed their own practice’.302 We were unable to ask this of judges surveyed in this study, but freeform answers about intermediaries from 26 judges provided a mixed picture. Nine judges (35%) were

299 With the exception of a small group ‘communication’ course of 36 delegates (18 from courts, 18 from tribunals) divided into groups of six.
300 Letter from Lucy Frazer MP, Justice Minister, to Assistant Chief Constable Emma Barnett (5 April 2018).
unequivocally positive, describing intermediaries as ‘excellent and very effective’, ‘helpful and reasonable’ and ‘potentially very useful’:

‘We find them invaluable. This week we have an eight year-old giving evidence. He speaks three languages, all poorly. Counsel simply did not have the skills to ask questions. The intermediary helped agree all the questions’

‘I have nothing but positive experiences of working with intermediaries when properly instructed, and their reports and interventions greatly assist advocates in the formulation of questions and the subsequent conduct of cross-examination’.

Other judicial comments were more mixed:

‘Like all those involved in the criminal justice system, the ability and usefulness of intermediaries is variable. They can be invaluable. Sometimes they add little or nothing to the role a judge would, in any event, undertake. An intermediary is only truly necessary when there is a material and witness-specific problem which requires expertise beyond that acquired by (in this centre) endless experience of the judges’.

A few judges were simply critical:

‘I have grave concerns about whether intermediaries really are necessary in many cases, and even graver concerns about whether they further the interests of justice’.

Although the survey concerned young witnesses, some judges’ criticisms related to intermediaries for defendants. It is possible that some of the ‘pushback’ against the registered intermediary scheme was coloured by the strength of these comments. (Anecdotally, in conversations with judges we are often struck with the failure of some to differentiate registered intermediaries and the unregulated position of intermediaries for defendants). Criticisms centred round the unwillingness of defendants for intermediaries to accept appointments restricted to the defendant’s evidence, which was seen as cost-driven.303 For other judicial comments about registered intermediary performance, see ‘Dispensing with the intermediary for cross-examination’ (5.7.5 above).

Freeform comments from Witness Service personnel and registered intermediaries about one another’s roles included some that praised collaboration in assisting young witnesses while others revealed misunderstandings and opportunities for improved liaison. Both bodies described as helpful discussions in advance of the witness’s pre-trial court visit, to ensure that information was communicated appropriately. Some regional intermediary groups and local Witness Services had explored mutual training opportunities. The independent organisation Intermediaries for Justice is working with the Witness Service to improve liaison.

303 For an explanation of this position, see: http://www.communicourt.co.uk/frequently-asked-questions/.
Annex 1  Methodology

Sixty-two interviews were conducted by phone or in person; interviewees comprised 28 members of governmental bodies, ten Crown Court judges, seven legal practitioners and associated organisations and 16 others, including charities, intermediaries, academics and an MP. Their views provided background to issues addressed by the study (some comments are quoted in the report) and helped inform the development of questions for practitioners. These were incorporated into surveys which invited respondents to reflect on their experiences in young witness cases in the previous 12 months. While most questions provided ‘tick the box’ answers, there were also opportunities to add freeform comments. There were only 12 responses to the online survey for criminal barristers; these were supplemented by 12 replies to a shorter paper survey distributed at a Criminal Bar Association conference (see Table 6 below). With this exception, surveys were accessed online at secure, password protected websites using SmartSurvey software. Responses were anonymous and all respondents indicated their consent to the use of their answers in this report. There were 210 responses to these surveys which break down as follows:

Table 5: Numbers of responses to surveys

<table>
<thead>
<tr>
<th>Group surveyed</th>
<th>Number who responded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediaries</td>
<td>48</td>
</tr>
<tr>
<td>Judiciary</td>
<td>40</td>
</tr>
<tr>
<td>Citizens Advice Witness Service team leaders: court-based</td>
<td>31</td>
</tr>
<tr>
<td>Barristers</td>
<td>24</td>
</tr>
<tr>
<td>Crown Advocates (Crown Prosecution Service)</td>
<td>21</td>
</tr>
<tr>
<td>Police and Crime Commissioners</td>
<td>11</td>
</tr>
<tr>
<td>HMCTS Regional Witness Champions</td>
<td>8</td>
</tr>
<tr>
<td>Citizens Advice Witness Service team leaders: Outreach Service</td>
<td>7</td>
</tr>
<tr>
<td>Independent sexual violence advisers</td>
<td>7</td>
</tr>
<tr>
<td>Citizens Advice Witness Service area managers</td>
<td>5</td>
</tr>
<tr>
<td>Sexual assault referral centres</td>
<td>5</td>
</tr>
<tr>
<td>Solicitor higher court advocates</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>210</td>
</tr>
</tbody>
</table>

304 The surveys were all completed between April and July 2018.
Table 6: Method of survey distribution

<table>
<thead>
<tr>
<th>Group surveyed</th>
<th>How surveys were distributed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediaries</td>
<td>Survey link provided on Ministry of Justice ‘Registered Intermediaries Online’</td>
</tr>
<tr>
<td>Judiciary</td>
<td>Distributed by Judicial Office to judges they contacted who agreed to participate</td>
</tr>
<tr>
<td>Citizens Advice Witness Service Outreach Service team leaders and area managers</td>
<td>Distributed by Citizens Advice central office</td>
</tr>
<tr>
<td>Barristers</td>
<td>Link to online survey in Criminal Bar Association ‘Monday Message’ for 4 weeks Shorter paper survey distributed at Criminal Bar Association conference ‘Vulnerability in the CJS’ 5 May 2018</td>
</tr>
<tr>
<td>Crown Advocates</td>
<td>Distributed by CPS Policy</td>
</tr>
<tr>
<td>Police and Crime Commissioners</td>
<td>Distributed by chair of Association of PCCs</td>
</tr>
<tr>
<td>HMCTS Regional Witness Champions</td>
<td>Distributed by HMCTS</td>
</tr>
<tr>
<td>Independent sexual violence advisers</td>
<td>Distributed by LimeCulture Community Interest Company</td>
</tr>
<tr>
<td>Sexual assault referral centres</td>
<td>Distributed by Department of Health</td>
</tr>
<tr>
<td>Solicitor higher court advocates</td>
<td>Distributed by Solicitors Higher Court Advocates Association</td>
</tr>
</tbody>
</table>

Responses from the judiciary came from all seven court regions. The 40 judges sat at 29 of the 77 Crown Court centres: nine judges sat at the three s 28 pre-trial cross-examination courts.

The 21 Crown Advocates came from all CPS areas other than Wales. The position of CPS Crown Advocate has its origins in the Access to Justice Act 1999. They (barristers or solicitors with Higher Court rights of audience) have a structure mirroring the self-employed Bar. Respondents were a mix of Crown Advocates, Senior Crown Advocates and Principal Crown Advocates all of whom have experience in dealing with cases involving young witnesses at the Crown Court.

Responding barristers and solicitor advocates came from at least four of the six Bar circuits (those responding to the paper survey were not asked to identify their home circuit). Of the 15 responding online, three mostly prosecuted, 10 mostly defended and two did both.

The 31 Citizens Advice Witness Service team leaders came from Crown Courts in every region. All 48 intermediaries were registered with the Ministry of Justice between 2004 and 2016: in the previous year, 22 had worked with more than five police force areas and Crown Courts and 26 had accepted over 25 appointments each for young witnesses.
Table 7: Numbers of all criminal cases disposed of by year and level of court

<table>
<thead>
<tr>
<th></th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magistrates’ Court</td>
<td>1,556,261</td>
<td>1,570,660</td>
<td>1,594,051</td>
<td>1,566,303</td>
<td>1,503,623</td>
</tr>
<tr>
<td>Crown Court</td>
<td>130,382</td>
<td>132,327</td>
<td>134,359</td>
<td>126,284</td>
<td>119,077</td>
</tr>
<tr>
<td>Total</td>
<td>1,686,643</td>
<td>1,702,987</td>
<td>1,728,410</td>
<td>1,692,587</td>
<td>1,622,700</td>
</tr>
</tbody>
</table>

The figures show some reduction in the number of disposals in 2016 and 2017 compared with previous years: in 2017, the drop was four per cent in magistrates’ courts and six per cent in the Crown Court. The guilty plea rate in 2017 was unchanged from 2016 at 67%, after a fall from 70% in 2014, and was the lowest rate since 2006.

Annex 2  Timeliness of Crown Court cases

Table 8: Comparison of timeliness of Crown Court cases

<table>
<thead>
<tr>
<th>Year</th>
<th>Type of case</th>
<th>Mean days from charge to completion</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>All Crown Court cases</td>
<td>192</td>
</tr>
<tr>
<td></td>
<td>Crown Court cases other than CSA contact</td>
<td>190</td>
</tr>
<tr>
<td></td>
<td>All sexual offences</td>
<td>248</td>
</tr>
<tr>
<td></td>
<td>CSA contact</td>
<td>255</td>
</tr>
<tr>
<td>2012</td>
<td>All Crown Court cases</td>
<td>192</td>
</tr>
<tr>
<td></td>
<td>Crown Court cases other than CSA contact</td>
<td>189</td>
</tr>
<tr>
<td></td>
<td>All sexual offences</td>
<td>248</td>
</tr>
<tr>
<td></td>
<td>CSA contact</td>
<td>256</td>
</tr>
<tr>
<td>2013</td>
<td>All Crown Court cases</td>
<td>177</td>
</tr>
<tr>
<td></td>
<td>Crown Court cases other than CSA contact</td>
<td>175</td>
</tr>
<tr>
<td></td>
<td>All sexual offences</td>
<td>245</td>
</tr>
<tr>
<td></td>
<td>CSA contact</td>
<td>252</td>
</tr>
<tr>
<td>2014</td>
<td>All Crown Court cases</td>
<td>189</td>
</tr>
<tr>
<td></td>
<td>Crown Court cases other than CSA contact</td>
<td>186</td>
</tr>
<tr>
<td></td>
<td>All sexual offences</td>
<td>252</td>
</tr>
<tr>
<td></td>
<td>CSA contact</td>
<td>258</td>
</tr>
<tr>
<td>2015</td>
<td>All Crown Court cases</td>
<td>214</td>
</tr>
<tr>
<td></td>
<td>Crown Court cases other than CSA contact</td>
<td>211</td>
</tr>
<tr>
<td></td>
<td>All sexual offences</td>
<td>277</td>
</tr>
<tr>
<td></td>
<td>CSA contact</td>
<td>286</td>
</tr>
<tr>
<td>2016</td>
<td>All Crown Court cases</td>
<td>219</td>
</tr>
<tr>
<td></td>
<td>Crown Court cases other than CSA contact</td>
<td>215</td>
</tr>
<tr>
<td></td>
<td>All sexual offences</td>
<td>277</td>
</tr>
<tr>
<td></td>
<td>CSA contact</td>
<td>278</td>
</tr>
<tr>
<td>2017</td>
<td>All Crown Court cases</td>
<td>201</td>
</tr>
<tr>
<td></td>
<td>Crown Court cases other than CSA contact</td>
<td>195</td>
</tr>
<tr>
<td></td>
<td>All sexual offences</td>
<td>282</td>
</tr>
<tr>
<td></td>
<td>CSA contact</td>
<td>287</td>
</tr>
<tr>
<td>2018</td>
<td>All Crown Court cases</td>
<td>202</td>
</tr>
<tr>
<td></td>
<td>Crown Court cases other than CSA contact</td>
<td>198</td>
</tr>
<tr>
<td></td>
<td>All sexual offences</td>
<td>283</td>
</tr>
<tr>
<td></td>
<td>CSA contact</td>
<td>286</td>
</tr>
</tbody>
</table>

* provisional

Annex 3  Comments about court waiting rooms and live link rooms

Comments from Witness Service team leaders included:

'Children’s facilities are nil, all witness rooms are just that, rooms with chairs in’

‘Children wait in the main room with other witnesses. We can take them into the live link room (our only other room) if necessary but this, of course, is likely to be in use’

‘This court has only one small waiting room despite requests that this is not adequate’

‘Witnesses have to leave the safety of the waiting room to use a public toilet which are in main public waiting areas’.

Intermediaries, who often have experience across different courts, were invited to describe those with the most and least child friendly waiting areas. They referred mostly to Crown Court centres but also to some magistrates’ courts and youth courts, identified below by the letters ‘MC’ or ‘YC’.

The best were considered to be very good. Several intermediaries rated the contribution of the Witness Service as important as the facilities:

‘Worcester (YC) has toys, is near a toilet, has natural light and is near the live link room, so a child is never far from a parent or carer which helps if there are attachment issues’

‘Caernarfon [is excellent], due the Witness Service manager who was amazing. A large room with a kitchen in it, plenty of chairs and spaces to move into. Warm and quiet. Books etc’.

‘Swansea has a separate waiting area for each live link room’

‘Shrewsbury. The court is due to move, but despite the building being unfit for purpose the waiting room has always been friendly. Games, books, TV and very private. The Witness Service takes the credit for maintaining this vital space’

‘Bradford and Teesside don’t have smaller rooms available ... however the attitude and welcome of the Witness Service in both these courts is very good and I think is probably more important than the physical surroundings’

‘Guildford is OK. The staff make up for any problems’

‘At Ipswich Crown Court the staff are excellent and the judges make a huge effort to put children at ease. The waiting rooms have very few toys or games and there was a water leak from the ceiling which took many months to fix. This was far from ideal as there was a bucket in the middle of the waiting area’.
On the other hand, Gloucester’s waiting area was considered ‘drab and stark’ and ‘not friendly for anyone’; Chelmsford’s was ‘grim’ and Aylesbury’s was ‘scruffy and messy with tatty furniture’. Hereford had ‘a huge room with huge table in the middle, uncomfortable chairs, right opposite the public toilets used by the suspects and their families’. (Another comment about this court was that it was ‘really awful. The Witness Service couldn’t wait around and we sat in a dire room for many hours’). Maidstone ‘rarely has a private area [available] so the young child is sitting among all the witnesses for other cases’. Ipswich (MC) is ‘terrible, very small and dingy, no windows. Have ended up playing with children in the corridor’. Luton has ‘no separate room for families or young children, just screens’. At Taunton, ‘the waiting room is the link room so everyone has to be turfed out for the child to give evidence’. Derby is ‘appalling – terrible rooms, no daylight, shoddy ripped colouring books and a few dry felt-tips. Poor access to toilets too’. Bury Crown Court ‘has very poor facilities for children and no separate area, when I was there with three witnesses we were given a jury room, a small room with a huge table, no games or colouring things and the children were very restricted and got bored despite bringing a few games with them’.

Some courts appeared in both good and bad lists, for instance:

‘Newcastle has attempted to make one of their rooms more child focused and has the advantage of a number of small rooms available’

‘Newcastle has a special child’s waiting room although I had to ask for women’s magazines to be removed when I noticed the headlines ‘Raped by my Dad’; ‘I slept with my Mum’s boyfriend’ on the cover page’.

Some waiting areas for witnesses going into the courtroom required them to share toilet facilities with members of the public; some were floors away from live link rooms, which was problematic for young witnesses who wanted reassurance that their supporter was near at hand, though sometimes arrangements were made for supporters to wait nearby:

‘In Maidstone, the live link rooms are on the top floor of the courthouse and the Witness Service is on the ground floor – it can be very scary for a young child to be so far away from their parents’.

A Witness Service team leader noted:

‘Our witness suite is located next to probation which means there is a constant risk that defendants can mistakenly enter the suite or witnesses bump into defendants in the corridor’.

None of the 29 Witness Service team leaders surveyed felt their live link rooms were child friendly:

‘They are very basic and, in my opinion, not very conducive to a relaxed atmosphere’

‘At present, we only have one very small live link room about the size of a large cupboard. We are trying to access a better room, waiting for HMCTS to make the necessary arrangements and this is taking a long time (over 12 months)’. 
Intermediaries praised some link rooms:

‘Newport Crown Court has enough space to get the witness, Witness Service and registered intermediary in comfortably. Natural light, new, comfy seating’

‘Leicester is perfectly acceptable, with plenty of space and good access, with toilets close by’

‘The Old Bailey is child friendly and the room is not distracting. There is very easy access to a play room if necessary’.

However, intermediaries thought poor link rooms far outnumbered the good ones. One described many link rooms as ‘dumping grounds for unused computers and furniture’. The size of the room was often unsatisfactory:

‘They are often small, dark rooms that don’t help the child to feel at ease. Hopeless for witnesses with claustrophobia. When there’s the witness, Witness Service and intermediary, we’re often squashed in. I’ve had to sit on a table as there were no spare chairs’

‘Worcester Crown has small room with no windows. It gets really hot. One witness had a panic attack in it during the pre-trial visit’

‘Exeter is tiny and cramped’

‘Lincoln is cramped and cluttered as it is shared with the volunteers. It has no natural light. Leeds is also very small and difficult to fit the furniture in if there are more than two people’

‘In Amersham the intermediary and child have to sit right next to each other and there is no room either side. For some young people with autism this very close proximity can be problematic’.

A specific concern was the lack of appropriately sized live link room furniture:

My biggest issue is the lack of seating appropriate for small children. They are often expected to sit on adult chairs where their legs can’t touch the floor, so they fidget more and can’t listen so well. In one case we had to use a cardboard box for a child to rest her little legs on. I always take cushions for children to sit on so they are high enough to be seen on the camera, or to put behind them if they are sitting in big adult chairs’

‘The chairs are too big for young children and when I have asked about using smaller chairs, I have been told the camera wouldn’t be able to focus on a smaller chair’

‘Luton has no child sized furniture. There is a broken table and nowhere to put communication aids etc’.

‘At Canterbury, the child sits at an adult height table like they’re at secondary school. Not ideal when the witness is four years old’.

307 The Court and Tribunal Design Guide includes design data sheets for a waiting room that can also be used for video link or Section 28. The optimum size is 15m², and the guide sets out design considerations such as wall colours, acoustics, microphones, distance from screen to individual and technology recommendations: email from Ministry of Justice Customer Directorate (29 June 2018).
Seating could be a problem in link rooms that were otherwise child friendly. Liverpool was described by one intermediary as having ‘a very friendly live link suite with posters and lots of games in the waiting area outside’. Another agreed: ‘there are more toys and bright, appealing posters directly outside’. But a third pointed out that its link rooms ‘have big chairs and no one has ever offered a smaller chair, just cushions to raise the child up’.
Annex 4 Numbers of registered intermediaries

The numbers of intermediaries joining and leaving the register each year are as follows:

Table 9: Annual change in number of registered intermediaries

<table>
<thead>
<tr>
<th>Year</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number on register at start of year</td>
<td>150</td>
<td>141</td>
<td>110</td>
<td>103</td>
<td>124</td>
<td>177</td>
<td>201</td>
<td>183</td>
</tr>
<tr>
<td>Number joining register during year</td>
<td>10</td>
<td>6</td>
<td>0</td>
<td>37</td>
<td>63</td>
<td>30</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Number leaving register during year</td>
<td>19</td>
<td>37</td>
<td>7</td>
<td>16</td>
<td>10</td>
<td>6</td>
<td>6307</td>
<td></td>
</tr>
<tr>
<td>Net change during year</td>
<td>-9</td>
<td>-31</td>
<td>-7</td>
<td>21</td>
<td>53</td>
<td>24</td>
<td>-18</td>
<td></td>
</tr>
</tbody>
</table>

Between 2012 and 2017, there was a seven-fold increase in demand for intermediaries for children, from 634 to 4,527.309 However, the year-on-year pattern has fluctuated, with large increases up until 2015 then falling back significantly:

Table 10: Intermediary requests for a child

<table>
<thead>
<tr>
<th>Year</th>
<th>No of requests for an RI for a child</th>
<th>% increase over previous year</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>634</td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>907</td>
<td>43%</td>
</tr>
<tr>
<td>2014</td>
<td>1952</td>
<td>115%</td>
</tr>
<tr>
<td>2015</td>
<td>3679</td>
<td>88%</td>
</tr>
<tr>
<td>2016</td>
<td>4286</td>
<td>16%</td>
</tr>
<tr>
<td>2017</td>
<td>4527</td>
<td>6%</td>
</tr>
</tbody>
</table>

There has been a 398 per cent increase in the number of intermediary requests for children aged four and under: from 123 in 2012 to 612 in 2017.

308 The figure here of six refers to intermediaries who left the register during 2017. However, the total number removed from the register that year was 18, as indicated in the net change figure. This was because a further 12 intermediaries had actually left or retired from the scheme in the preceding years and were on the database as not active and pending removal. The work to remove these intermediaries was carried out in May as a result of information provided by the Ministry of Justice. Arrangements have since been put into place to ensure intermediaries leaving the scheme are removed from the register expeditiously (information from the NCA received 5 December 2018).

309 Figures provided by the National Crime Agency, April 2018.
The proportion of requests for a young witness each year that were not cancelled but where no match could be made peaked in 2015 but fell in 2016 and 2017:

Table 11: Unmatched requests

<table>
<thead>
<tr>
<th>Year</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of unmatched requests</td>
<td>0%</td>
<td>1%</td>
<td>5%</td>
<td>15%</td>
<td>7%</td>
<td>4%</td>
</tr>
</tbody>
</table>

Most requests for intermediaries for young witnesses concern sexual offences. The proportion has remained fairly steady:

Table 12: Intermediary requests in sexual offences

<table>
<thead>
<tr>
<th>Year</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of requests for young witnesses that relate to sexual offences</td>
<td>68%</td>
<td>77%</td>
<td>73%</td>
<td>66%</td>
<td>69%</td>
<td>68%</td>
</tr>
</tbody>
</table>
Annex 5  Registered intermediaries and vicarious trauma

In the absence of information from recently-instituted exit interviews for registered intermediaries, it is impossible to know to what extent vicarious trauma contributes to high turnover in the position. It is, however, an aspect of the work discussed by intermediaries themselves. An experienced intermediary recently described on RIO (Registered Intermediaries Online, the confidential website) her need to access private clinical supervision ‘to process the horror I have been exposed to’ in a specific case. The psychiatrist ‘really helped me, framing and normalizing the symptoms of secondary trauma I was experiencing and named my symptoms as Acute Stress/ Trauma Reaction’. The intermediary concluded:

‘I strongly believe it is especially crucial for us registered intermediaries, who very much work in isolation, to be aware of the risks of vicarious trauma. We need to actively learn to recognize the slow impact crime cases have on us and allow some time to process them fully’.310

The potential for criminal justice professionals to experience secondary trauma is recognised: the risk increases for those whose caseloads consist largely of child abuse cases.311 The Criminal Bar Association has appointed a Wellbeing Director and has ‘invested in an employee assistance programme’.312 However, the Ministry of Justice offers no comparable provision for its self-employed registered intermediaries. In Australia, pilot intermediary programmes in New South Wales and Victoria address vicarious trauma. In Victoria, the scheme includes self-employed and a few employed (‘internal’) intermediaries. The Department of Justice and Regulation considers a wellbeing strategy for them all as a ‘common-sense occupational health and safety issue’.313

Intermediaries are encouraged to find ‘a good professional supervisor’ but in addition, the Department recognises the potential for:

‘exposure to graphic material and explicit information, as well as managing a highly traumatised witness, to be extremely traumatic. It may be a single incident that triggers vicarious trauma or the cumulative impact of the work’.

The Department’s strategy is multi-pronged, with immediate debriefing offered by the pilot programme manager and by a small group of internal (i.e. employed) intermediaries; regular group debriefing sessions with an external facilitator; access to the Department’s employment assistance programme; and a quarterly survey of intermediaries asking about stress and how they are managing the role.

310 Reproduced with the kind permission of the registered intermediary.
312 Criminal Bar Association Monday Message (2 July 2018).
313 Email from the manager of the intermediary pilot, Department of Justice and Regulation, State of Victoria, Australia (7 June 2018).
In New South Wales, self-employed intermediaries have access to psychologists and support staff from the Department of Justice Victims Services. They can also participate in monthly clinical debriefing sessions run by a psychologist. Group sessions are described as covering de-briefing on specific matters/cases; ‘compassion fatigue’; awareness building; self-regulation/self-care; work and system barriers; safety; support networks; professional learning opportunities; and feedback. One-to-one clinical debriefing is also available by phone or face-to-face. The Annual Training and Development Conference for witness intermediaries provides a forum for group discussion about welfare, vicarious trauma and case conferencing.

314 Email from Victims Services, NSW Department of Justice (18 July 2018).
Figure 6: Views of intermediaries on advocates’ compliance with ground rules

<table>
<thead>
<tr>
<th>Compliance with ground rules on questioning (n=47)</th>
<th>Stayed the same</th>
<th>Decreased</th>
<th>Increased</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compliance with other adjustments to child’s needs (n=47)</td>
<td>23%</td>
<td>4%</td>
<td>64%</td>
</tr>
<tr>
<td>Compliance with other adjustments to child’s needs (n=47)</td>
<td>26%</td>
<td>4%</td>
<td>57%</td>
</tr>
</tbody>
</table>

The remaining respondents felt unable to express a view.

Figure 7: Judicial practice on holding the GRH before the day of trial in non-s 28 cases

<table>
<thead>
<tr>
<th>Cases with an intermediary (n=38)</th>
<th>Almost always</th>
<th>Rarely</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases without an intermediary (n=35)</td>
<td>66%</td>
<td>1%</td>
</tr>
<tr>
<td>Cases without an intermediary (n=35)</td>
<td>51%</td>
<td>17%</td>
</tr>
</tbody>
</table>

Figure 8: Judicial practice in accepting a defence submission that they could not ‘put the case’ to a young witness

<table>
<thead>
<tr>
<th>According to judges (n=39)</th>
<th>Almost always</th>
<th>Rarely</th>
</tr>
</thead>
<tbody>
<tr>
<td>According to crown advocates, barristers and solicitor advocates (n=47)</td>
<td>3%</td>
<td>76%</td>
</tr>
<tr>
<td>According to crown advocates, barristers and solicitor advocates (n=47)</td>
<td>11%</td>
<td>36%</td>
</tr>
</tbody>
</table>
Figure 9: Judicial practice on placing restrictions on ‘putting the case’ to a young witness

- Cases with an intermediary (n=38): 34% almost always, 29% rarely
- Cases without an intermediary (n=37): 24% almost always, 30% rarely

Figure 10: Judicial practice on limiting length of cross examination

- Cases with an intermediary (n=39): 44% almost always, 28% rarely
- Cases without an intermediary (n=38): 29% almost always, 26% rarely

Figure 11: Intermediaries and modifying questions

- Intermediaries who almost always offered to review questions (n=47): 91%
- Intermediaries who said judges almost always directed the defence to submit questions for review (n=47): 45%
- Intermediaries who almost always had the opportunity to discuss questions with lawyers out of court (n=47): 17%

Figure 12: How intermediaries’ need to intervene in questioning has changed in past year

- Increased (n=47): 9%
- Stayed the same (n=47): 51%
- Decreased (n=47): 40%
Figure 13: Those who thought young witness evidence almost always had a clean start

- Judges (n=39): 77%
- Crown advocates, barristers and solicitor advocates (n=35): 40%
- Intermediaries (n=46): 15%

Figure 14: How often do judges introduce themselves to a child witness?

- Judges (n=39): 3% Rarely, 77% Almost always
- Intermediaries (n=47): 0% Rarely, 79% Almost always
- WS team leaders (n=29): 7% Rarely, 41% Almost always


Bar Council (1 July 2013) ‘Bar Council encourages creation of a required training programme for cross-examination of vulnerable witnesses’ press release.


Chief Inspectors’ Report on Arrangements to Safeguard Children’.
[http://dera.ioe.ac.uk/5425/1/safeguards_fullprint.pdf].

Conservative and Unionist Party Manifesto 2017 ‘Forward, Together: Our plan for a Stronger
Britain and a Prosperous Future’.

Criminal Bar Association (2 July 2018) ‘Monday Message’.
[https://www.criminalbar.com/resources/news/cba-monday-message-02-07-18/].

justice partnerships by HMIC, HMCSPI and HMI Probation’.
[https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/local-criminal-justice-
partnerships.pdf].

joint inspection’.
[https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2014/12/CJJI
ABE_Dec14_rpt.pdf].

and Witnesses in the Criminal Justice System’.
YVV_Jan12_rpt.pdf].

report on arrangements to safeguard children’.
[https://www.justiceinspectorates.gov.uk/hmicfrs/media/joint-inspection-safeguarding-
children-20090629.pdf].

Report on Arrangements to Safeguard Children’.
safeguards_fullprint.pdf].

[https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court].

Child Sexual Abuse’.
[https://www.cps.gov.uk/legal-guidance/child-sexual-abuse-guidelines-prosecuting-cases-
child-sexual-abuse].


pdf].

[https://www.cps.gov.uk/sites/default/files/documents/publications/cps_whistleblowing_
procedure_may_2016.pdf].

[https://www.cps.gov.uk/sites/default/files/documents/publications/cps_whistleblowing_
policy_may_2015.pdf].


Hanmer, O. (February 2016) ‘Youth advocacy, standards and specialisation’ Counsel. [https://www.counselmagazine.co.uk/articles/youth-advocacy-standards-and-specialism].


Home Office (18 February 1988) press release ‘Child abuse cases are to get greater priority’.


Hoyano, L. (November 2018) ‘Putting the Case in Every Case’ Counsel.


Inns of Court College of Advocacy ‘The Advocate’s Gateway’. [http://www.theadvocatesgateway.org/].


Law Society Gazette (16 May 2018) ‘Question mark remains over cross-examination support for vulnerable witnesses’. [https://www.lawgazette.co.uk/law/question-mark-remains-over-cross-examination-support-for-vulnerable-witnesses/5061633.article].


References


[https://www.counselmagazine.co.uk/articles/secondary-traumatic-stress].


[https://www.england.nhs.uk/ourwork/safeguarding/safeguarding-updates/].

Nuffield Foundation ‘Juries, the Digital Courtroom and Special Measures’.


[https://www.nuffieldfoundation.org/sites/default/files/files/Young%20witnesses%20in%20criminal%20proceedings_a%20progress%20report%20on%20Measuring%20up_v_FINAL.pdf].
[https://www.nspcc.org.uk/globalassets/documents/research-reports/measuring-up-report.pdf?_t_id=1B2M2Y8AsgTpgAmY7PhCf%3D%3D&t_q=young+witnesses&_t_tags=language:en,siteid:7f1b9313-bf5e-4415-abf6-aaf87298c667&_t_ip=10.97.160.97&_t_hit.id=Nspcc_Web_Models_Media_GenericMedia/_7b7207d7-4697-476b-a430-b3c2f20ca21e&_t_hit.pos=9].


Rose N. (29 November 2017) ‘Six years after it was due to begin, BSB pulls the plug on QASA’ Legal Futures.
[https://www.legalfutures.co.uk/latest-news/six-years-due-begin-bsb-pulls-plug-qasa].


[http://dx.doi.org/10.1080/13218719.2013.839930].

[https://www.sra.org.uk/solicitors/accreditation/higher-rights/competence-standards.page].


The Guardian (2 April 2018) ‘The UK justice system is in meltdown. When will the government act?’
[https://www.theguardian.com/commentisfree/2018/apr/02/uk-criminal-justice-system-meltdown-violence-rising-government].

The Guardian (30 November 2016) ‘Police will need licence to practice for child sex abuse cases, says Rudd’.
[https://www.theguardian.com/uk-news/2016/nov/30/police-need-licence-to-practise-child-sex-abuse-cases-says-rudd].

The Guardian (10 October 2016) ‘Sexting between children not automatically a crime, says CPS’.


The Times (5 December 2018) ‘Prosecution cannot take more cuts, says DPP’. [https://www.thetimes.co.uk/article/prosecution-cannot-take-more-cuts-says-dpp-6cn8phs5m].

The Times (26 March 2018) ‘New barristers to face police record checks’. [https://www.thetimes.co.uk/article/new-barristers-to-face-police-recordchecks-3qkzl0psx].


Cases

England and Wales (Criminal)

[https://www.bailii.org/ew/cases/EWCA/Crim/2018/1081.html].

R v RK [2018] EWCA Crim 603

[https://www.bailii.org/ew/cases/EWCA/Crim/2018/2606.html].

R v Rashid (Yahya) [2017] EWCA Crim 2.
[http://www.bailii.org/ew/cases/EWCA/Crim/2017/2.html].

R v Grant-Murray & Anor [2017] EWCA Crim 1228.


Re E (a child) (Evidence) 2016 EWCA Civ 473.

H v R [2014] EWCA Crim 1555.


R v Farooqi [2013] EWCA Crim. 1649.
[http://www.bailii.org/ew/cases/EWCA/Crim/2013/1649.html].

[http://www.bailii.org/ew/cases/EWCA/Crim/2012/549.html].


England and Wales (Family)

A Local Authority and CM, CM and U, V, W and X (through their Guardian) and Y [2016] EWFC B96).

New Zealand

Banks v R [2018] NZCA 120
M v R [2017] NZCA 333
DH v R [2015] NZSC 35.
Everyone who comes into contact with children and young people has a responsibility to keep them safe. At the NSPCC, we help individuals and organisations to do this.

We provide a range of online and face-to-face training courses. We keep you up-to-date with the latest child protection policy, practice and research and help you to understand and respond to your safeguarding challenges. And we share our knowledge of what works to help you deliver services for children and families.

It means together we can help children who’ve been abused to rebuild their lives. Together we can protect children at risk. And, together, we can find the best ways of preventing child abuse from ever happening.

But it’s only with your support, working together, that we can be there to make children safer right across the UK.

nspcc.org.uk