

Mapping the Changing Face of Cross-Examination in Criminal Trials

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Dedication

In memory of
Professor Pete Duff
(1954-2022)

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Contents

Preface	1
About this Report	2
Acknowledgements	2
About the Nuffield Foundation	4
Executive Summary	5
Abbreviations	16
Glossary	17
1. Introduction	20
1.1 The importance of the research	20
1.2 Aims of the research project.....	21
1.3 The impact of Covid-19	22
1.4 Terminology	22
1.5 The report	24
2. Research Methods	25
2.1 Introduction	25
2.2 Research questions	25
2.3 Research design	25
2.4 Overall project management	27
2.5 International best practice.....	28
2.6 Courtroom observation	29
2.7 Interviews with stakeholders.....	31
2.8 Corpus linguistic analysis of transcripts	34
2.9 Data analysis	38
2.10 Dissemination and impact.....	38
3. Legal and Policy Context	40
3.1 Introduction	40
3.2 International norms and benchmarks	41
3.3 Effective participation and fair trial rights	42
3.4 The evolution of law, policy and practice across the research jurisdictions	43
3.4.1 England and Wales.....	43
3.4.2 Scotland.....	45

3.4.3 Northern Ireland	46
3.4.4 Ireland	47
3.5 Conclusions	48
4. Research Findings	50
4.1 Introduction	50
4.2 The changing cross-examination environment.....	50
4.2.1 Familiarisation and preparation for cross-examination	52
4.2.2 Special measures: remote testimony	53
4.2.3 ABE interviews	54
4.2.4 Live-link cross-examination.....	58
4.2.5 Delays.....	59
4.3 Ground rules hearings.....	59
4.3.1 Frequency and timing of GRHs	60
4.3.2 Value of GRHs	61
4.3.3 Written questions	62
4.3.4 Written questions for vulnerable defendants	64
4.4 Intermediaries.....	65
4.4.1 The use of intermediaries	65
4.4.2 Defence intermediaries.....	66
4.4.3 Added value of intermediaries.....	67
4.4.4 The intermediary role	69
4.5 Pre-recorded cross-examination.....	71
4.5.1 The dynamics of pre-recorded cross-examination	71
4.5.2 Added value of pre-recorded cross-examination	72
4.5.3 Logistical difficulties.....	73
4.6 Mapping the changing face of cross-examination.....	76
4.6.1 Adaptations seen by practitioners.....	76
4.6.1.1 Duration of questioning.....	77
4.6.1.2 The focus and organisation of cross-examination.....	77
4.6.1.3 Complexity and length of questions	77
4.6.1.4 Open and closed questions: tagged questions and comment	78
4.6.1.5 Tone and manner of questioning	79
4.6.1.6 Lack of direct challenge	79
4.6.2 The pace of change	80

4.6.3 Adaptations on the ground.....	80
4.6.3.1 Duration of questioning.....	81
4.6.3.3 Complexity and length of questions.....	85
4.6.3.4 Tagged questions.....	89
4.6.3.5 Statements as questions.....	94
4.6.3.6 Tone and manner of questioning.....	99
4.6.3.7 Direct Challenge.....	99
4.6.4 Children.....	103
4.6.5 Sexual offences complainants.....	105
4.6.6 Other vulnerable witnesses.....	106
4.6.7 Vulnerable defendants.....	107
4.6.8 Spillover.....	109
4.7 Changing legal culture.....	110
4.7.1 Acceptance of change.....	110
4.7.2 Resistance to change.....	111
4.7.3 The catalysts of change.....	112
4.7.4 Challenges.....	113
4.7.5 Critique: has best evidence become least evidence?.....	114
4.8 Outcomes and juries.....	116
5. Conclusions and Recommendations.....	119
5.1 Conclusions.....	119
5.1.1 Disposition towards change.....	119
5.1.2 Barriers to change.....	120
5.1.3 Inconsistency in practice.....	120
5.2 Recommendations.....	122
5.2.1 Improving technology.....	122
5.2.2 Special measures.....	122
5.2.3 Familiarisation.....	123
5.2.4 Intermediaries.....	124
5.2.5 Equality.....	124
5.2.6 Training.....	125
5.2.7 Innovation.....	126
5.3 Future research.....	127
5.4 List of recommendations.....	128

Appendix 1: References.....	131
Appendix 2: Project Outputs	138
Appendix 3: About the Authors	140

Preface

The criminal justice system has seen enormous changes over the past three decades in the way in which vulnerable witnesses are questioned in court. The need for such change was not always readily accepted in the early days and there was opposition in some quarters. However, as a result of a series of legislative and procedural reforms it is now generally accepted that adjustments to the trial process for some witnesses is necessary if the justice system is to be fair for all participants. Much progress has been made.

It is essential, however, that all involved in the criminal justice system continue to reflect upon the best means of ensuring a fair trial for all sides while enabling vulnerable witnesses, including defendants, to give their best evidence. This research is a crucial addition to the development of practice and procedure in the field of cross-examination, providing a clear and focused analysis of existing arrangements and suggesting practical, evidence-based reforms.

The research team has undertaken a thorough investigation across various jurisdictions, employing a combination of courtroom observation, interviews, and linguistic analysis to present a well-rounded view of the topic.

The findings highlight key areas where our current practices fall short, especially in maintaining the delicate balance between witness protection and the accused's right to a fair trial. Notably, the report brings to light the continued reliance on traditional cross-examination techniques and the distinct challenges faced by vulnerable defendants, areas which are often overlooked in mainstream legal discussions.

Additionally, this report pragmatically addresses the technological and procedural challenges faced in implementing reforms, and makes helpful recommendations. These include the need for improved technology in courtrooms, enhanced training for legal professionals, and updated legal protocols, all aimed at making the justice system more accessible and fairer for vulnerable participants.

I commend this comprehensive study to all involved in the trial process, whether criminal or civil. The report offers essential insights into our current processes and is an invaluable contribution to the continuing debate and development of best practice in cases involving vulnerable witnesses.

HHJ Sarah Whitehouse KC

About this Report

This report presents the findings from a Nuffield Foundation funded project which examines the nature and extent to which new approaches towards the cross-examination of vulnerable witnesses in criminal trials are producing change on the ground and develops evidence-based solutions that enhance the capacity of such witnesses to participate within the trial.

Acknowledgements

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We would like to express our gratitude to all members of our advisory group who played a key role throughout the project in advising the research team on many issues including access to data in the various jurisdictions examined in the research, providing feedback on the questionnaires that guided the research interviews and introducing us to stakeholders. The members were Prof Penny Cooper, barrister-at-law and former Chair of the Advocate's Gateway; Tim Jebb, solicitor and practising barrister at the Northern Ireland Bar; Prof Shane Kilcommins, Provost and Deputy President of the University of Limerick and an expert in Irish criminal law and procedure; Dr Alison May, lecturer in English Language at the University of Leeds and an expert on corpus linguistic analysis; Sarah Poppleton, HMCTS, Head of Crime Insight and Research; Her Honour Judge Catarina Sjölin Knight (Lincoln Crown Court), former Recorder; and Louise Taylor, lecturer in law at the Open University and an expert in Scots criminal law and victims' rights. We would also like to thank former members of the group, Rozanna Franklin, formerly of the HMCTS and the late Prof Pete Duff, an expert on Scots criminal law and procedure at the University of Aberdeen, who provided us with much advice and support at the outset of the project. The report is dedicated to Pete's memory. His intellectual curiosity and collegiality inspired a generation of criminal justice researchers and he is greatly missed.

Thanks are due to the Senior Presiding Judge for England Wales, the Lord Justice Clerk in Scotland, the Lady Chief Justice of Northern Ireland and the Legal Research and Library Services Committee of the Irish Courts Service for giving their approval in principle for the research. As mentioned above, the

research was conducted under the difficult circumstances of the Covid-19 pandemic. The research team is extremely grateful to the judges and members of the court staff across the jurisdictions who made strenuous efforts to facilitate our trial observations and provide us with transcripts of the observed trials despite the restrictions in place while conducting fieldwork.

It was vital for the success of the project that we obtained the goodwill and cooperation of those on the ground who have direct experience of court practice. We would like to thank all the judicial, legal and intermediary interviewees who gave so willingly of their time to participate in what were often lengthy interviews. We would also like to thank the resident judges in the court centres in England and Wales, Aliza Catlin (formerly of the Judicial Office England and Wales), Tom Sadler (formerly of the Scottish Judicial Office), Kim Elliott (Head of Reform, Lady Chief Justice's Office in Northern Ireland) and Laura Butler (Head of Legal Research and Library Services in the Irish Courts Service) for arranging interviews with judges. We would also like to thank the Ministry of Justice, the Intermediary Cooperative and Janet Smith for helping us to arrange interviews with intermediaries in England and Wales and various sets of chambers in England and Wales and the Criminal Bar Association of Northern Ireland for their assistance in arranging interviews with advocates. Special thanks are due to Miriam Delahunt for introducing us to barristers and judges on a visit to the Criminal Courts of Justice in Dublin in October 2022.

Another crucial aspect of the project was engagement with stakeholders in order to inform them of our research and our findings as they emerged. We would like to thank all those who participated in two stakeholder events we held in Nottingham in October 2021 and November 2022. Special thanks are due to Michael Forde for organising a meeting in Belfast with members of the Criminal Bar Association in December 2020, to Philip Campbell for organising a presentation on our preliminary findings to intermediaries in November 2022 and to Philip Plant for organising a presentation of our preliminary findings to members of the legal profession at the Galleries of Justice in Nottingham in March 2023. We would also like to thank the School of Law at the University of Limerick for co-hosting and providing funding for the project's international conference on *Adversarialism, Participation and Voice in the Criminal Process* which was held in Limerick on 22nd-23rd June 2023. Special thanks are due to Dr Alan Cusack, Associate Professor of Law at the University of Limerick for the considerable work he put into the organisation of the conference to ensure that it was a success.

Finally, we are grateful to all those who took the time to read earlier versions of this report and to give us their feedback. Members of the advisory group played a critical role in this respect. Special thanks are also due to members of the Northern Ireland judiciary, Lord Bennett, Alan Cusack, Miriam Delahunt, HHJ Greg Dickinson, Yvonne McDermott Rees, Rob Street and Matt Thomason for providing us with comments and insights. Needless to say, the research team take sole responsibility for any errors contained in the report.

About the Nuffield Foundation

The Nuffield Foundation is an independent charitable trust with a mission to advance social well-being. It funds research that informs social policy, primarily in Education, Welfare, and Justice. It also funds student programmes that provide opportunities for young people to develop skills in quantitative and scientific methods. The Nuffield Foundation is the founder and co-funder of the Nuffield Council on Bioethics, the Ada Lovelace Institute and the Nuffield Family Justice Observatory. The Foundation has funded this project, but the views expressed are those of the authors and not necessarily the Foundation.

Visit www.nuffieldfoundation.org.

Executive Summary

Research Context

Cross-examination - the questioning of a witness by an opposing party - has long been considered an 'iconic' feature of adversarial criminal proceedings used to test oral evidence. But over the course of the past 30 years, it has become apparent that many witnesses find the process distressing. Such distress is particularly acute among the most vulnerable witnesses: children, complainants in sexual offence cases, and witnesses with learning disabilities.

Increasingly, governments around the world have introduced a range of special or alternative measures as a tool to achieve 'best evidence' and to ease the burden of testifying. These have included (i) screens (ii) removal of wigs/gowns (iii) live video-link (iv) pre-recorded video evidence-in-chief (v) pre-recorded cross-examination (vi) supporters who accompany vulnerable witnesses while they give evidence and (vii) 'intermediaries' or communication experts who facilitate communication with a witness or a defendant.

Although these reforms have helped alleviate some of the stress and anxiety associated with giving evidence, they have not in themselves altered the fundamental nature of cross-examination in adversarial systems. However, in the course of the past decade, there has been a growing acknowledgement that there is a need for more fundamental changes to the nature of cross-examination itself. Spearheaded originally by the senior judiciary in England and Wales but increasingly with the support of senior judges in other jurisdictions, a new paradigm is developing which shifts cross-examination away from the traditional 'advocacy' model towards a 'best evidence' model. Whereas cross-examination has traditionally been used by advocates as a means of winning cases, it is now restricted, particularly when it comes to vulnerable witnesses, to producing the 'best evidence' for the court.

To supplement the guidance from the appellate courts, a variety of practices have been developed to achieve this new approach towards cross-examining witnesses. Intermediaries and pre-trial hearings known as 'ground rules hearings' (GRHs) are being used to improve the language advocates use to cross-examine the most vulnerable witnesses. Training is now provided to advocates on how to question vulnerable witnesses and 'toolkits' have been devised, setting out guidance for judges and advocates on the questioning of vulnerable witnesses. However, there has been no current research that has explored the extent to which these changes in practice have made an impact in influencing the conduct of cross-examination at court.

Research aims and methods

This report is the first systematic examination of the extent to which recent attempts to change the way in which vulnerable witnesses are cross-examined in England and Wales, Scotland, Northern Ireland and Ireland are being reflected in criminal practice. These jurisdictions were chosen because they share a strong adversarial tradition but have each been making changes to accommodate the cross-examination of vulnerable witnesses in recent years. For the purposes of the research, 'vulnerable' witnesses are defined as those eligible for the special measures referred to above,

including defendants who give evidence and meet the eligibility criteria for special measures that apply to other vulnerable witnesses.

Aims

The over-arching aim of the research was to map the precise nature of and extent to which the new approaches towards cross-examination are producing change on the ground and to develop evidence-based solutions that enhance the capacity of vulnerable people to participate within the trial. In order to identify best practice an international review of the law, policy and practice of cross-examination was published on the project website in November 2021 (see <https://irep.ntu.ac.uk/id/eprint/44924/>).

Methodology

The pioneering innovation of the project is the adoption of a mixed methodology which uses a variety of approaches to give a rounded picture of cross-examination practice across the chosen jurisdictions and gauges the impact of practitioners' changing approaches. The fieldwork was conducted at a time when all the jurisdictions were adapting their processes to deal with the Covid-19 emergency and its aftermath. This had a significant impact on how the research was designed and caused some delay to the project but it did not prevent the yield of a significant body of data.

The research centred on eight court centres in the UK and Ireland – five in England and Wales and one each in Scotland, Northern Ireland and Ireland – over a 27-month period and comprised observations of entire trials involving vulnerable and 'non-vulnerable' witnesses; interviews with judges, advocates and intermediaries; and corpus linguistic analysis of transcripts containing cross-examinations of vulnerable and non-vulnerable witnesses from the observed trials. The research centred on courts where the most serious (often sexual) offences are contested because this is where concerns about the impact of cross-examination on vulnerable witnesses have been concentrated and where many of the changes to practice have focused. The advantage of observing entire trials is that it enables researchers to understand the evidential case as a whole and to observe (defence and prosecution) advocates' approach to cross-examination vis-à-vis different witnesses (not just vulnerable witnesses), judicial interventions; and jurors' (apparent) reactions to the various parties and evidence.

Trial observations

Altogether 40 trials were observed, yielding well in excess of 2,500 pages of detailed contemporaneous notes of proceedings. A sizeable proportion (62.5%) of the trials involved rape and serious sexual offences (n=25). We observed 187 witnesses giving testimonial evidence, including adult and child, vulnerable and non-vulnerable, lay, professional, and expert witnesses, called by both the prosecution (n=148) and the defence (n=39). Of the defence witnesses observed, 33 were defendants, three of whom were observed in the same proceedings.

Semi-structured interviews

The trial observations were combined with 60 semi-structured interviews across six court centres with 21 judges, 24 advocates and 15 intermediaries, who had a wide range of experience working with vulnerable witnesses in contested trials. Participants were asked whether, in their experience, there has been a change of approach towards the cross-examination of vulnerable witnesses and whether

this has led to an improvement in the practice of cross-examining such witnesses. The interviews generated over 72 hours of recorded data.

Corpus linguistic analysis

Corpus linguistic analysis was applied to 56 cross-examinations involving 34 vulnerable witnesses and 22 'non-vulnerable' witnesses from 23 observed trials, comprising complainants (n=29), defendants (n=18), prosecution witnesses (n=8) and defence witnesses (n=1). It is a technique that combines quantitative identification of the frequency of particular linguistic phenomena, such as words, phrases or grammatical structures with a qualitative examination of how language is being used in context. Although the technique has been used previously in courtroom discourse, this is the first time it has been applied to contemporary cross-examinations of vulnerable witnesses in an interdisciplinary legal-linguistic triangulated research context.

Data analysis

A fully triangulated approach was adopted in the data analysis. Key themes were identified from the different sets of observational, interview and linguistic data such as: the support available to vulnerable witness including special measures; the use of GRHs to manage cross-examination; the role of intermediaries; the impact of pre-recorded cross-examination; and the various adaptations being made to the structure, tone and content of questions put to witnesses. These provided the framework for secondary analysis which was used to sub-divide the key themes and for making comparisons across the data sets so that a fully rounded picture emerged on practitioners' perceptions of change and changes that were observed on the ground.

Key research findings

(i) The cross-examination environment

There was general acceptance amongst interviewees across the jurisdictions that 'familiarisation' visits and special measures have improved the witness evidence giving experience and assisted in achieving best evidence, although there was no 'one size fits all' that works for all witnesses and it was important to give witnesses an informed choice as to which measures they prefer.

In the observed trials there was an inconsistency in the use of supporters who accompany vulnerable witnesses when giving evidence. A sizeable proportion of witnesses were cross-examined from behind a screen rather than remotely via live-link. Interviewees in England and Wales expressed concern that the recent roll-out of pre-recorded cross-examination was pushing witnesses into opting for this mode of cross-examination without being properly informed of the alternatives.

A persistent theme in interviews was the poor quality of video and audio in the Achieving Best Evidence (ABE) police interview, during the live-link and pre-recorded cross-examination. This was borne out in the trial observations where fieldnotes noted the observer's difficulty in hearing a particular witness's evidence, whether it was live in court or pre-recorded.

There was an apprehension among a number of legal practitioners that measures that promote remote testimony such as live-link and pre-recorded cross-examination impede the effectiveness of cross-examination and are not as impactful on the jury as when witnesses give live evidence in the courtroom. However, there is no evidence that giving evidence remotely affected the outcome in the

observed trials. Of the 12 trials where at least one significant (and vulnerable) witness was cross-examined via video-link, six resulted in acquittals, five resulted in convictions, and one resulted in a hung jury. The researchers judged that the acquittals were explained by evidential weaknesses in the prosecution's case.

(ii) Ground Rules Hearings

Across the UK jurisdictions, GRHs are increasingly common in cases involving vulnerable witnesses and have become accepted within the legal profession but they are rarely held for vulnerable defendants. Pre-trials hearings with the potential for the GRH model to evolve are gaining a foothold in Ireland but the use of pre-approved questions is exceedingly rare there and there was resistance amongst legal practitioners to the idea.

There are variations on when GRHs take place. Although it is best practice for GRHs to be held in advance of the trial to ensure its smooth running, GRHs were observed taking place just before trial and even before a witness gave their evidence - the norm for vulnerable defendants.

Inconsistencies were reported in the way GRHs are managed and on the issuing of formal directions after GRHs. Differences were also reported across the jurisdictions on the occasions when advocates are required to seek approval for written questions. The use of pre-approved questions appears to be much less common in the case of vulnerable defendant witnesses.

(iii) Intermediaries

The use of intermediaries has been growing across the two jurisdictions of England and Wales and Northern Ireland for some time, but they are not used at all in Scotland and they have only very recently been used in Ireland. They appeared relatively rarely in the trials observed (n=6 out of 40), all bar one to assist child or vulnerable adult complainants in sexual cases. When observed, they made significant interventions to assist communication. Interviewees in England and Wales drew attention to the limited use made of intermediaries for vulnerable defendants both in terms of the number of defendants who can access the support and in terms of the extent of the support that the courts will accept. When intermediaries are appointed for vulnerable defendants, it is reportedly rare for them to be appointed to support defendants throughout the whole trial, although in the one observed trial where the defendant was granted an intermediary, the intermediary was present to provide support for the duration of the trial.

There was a general consensus amongst judges and advocates that intermediaries add value in facilitating communication with the most vulnerable witnesses – in particular young children or where witnesses have specific communication difficulties – but there was a strong feeling in England and Wales where their use is more embedded that they are over-used in other cases. Intermediaries in England and Wales and Northern Ireland reported feeling much more accepted in the courts now than they had been in the past and they are increasingly accepted in Ireland. But a number considered that there is a lack of appreciation amongst some legal professionals as to the level of specialist skill required to facilitate good communication and simplistic assumptions are made about witnesses' or defendants' communication abilities.

Although there was a consensus that intermediaries carry out their duties impartially, there were a small number of concerns about the boundaries of their role when it comes to intervening in trials and on the extent to which they may influence the content of questions.

(iv) Pre-recorded cross-examination and evidence on commission

There were differences of view among judges and advocates in England and Wales about the benefits of pre-recorded cross-examination. Judges emphasised the evidential benefits and the benefit for vulnerable witnesses in hearing their evidence in advance of the trial without a jury and relieving them of the trauma of giving evidence at trial. Advocates and intermediaries acknowledged the benefits in the case of young child and elderly complainants whose evidence needs to be captured early but considered that the benefits for many adult complainants were more mixed as they continue to experience anxieties until the outcome of their trial is known.

There was considerable support amongst judges and advocates in Scotland for the practice there of taking the evidence of vulnerable witnesses on commission in advance of trial. This process involves a separate pre-recorded hearing presided over by a High Court judge ('Commissioner'), where vulnerable witnesses are questioned by advocates. In the longer term there was support for capturing all the evidence given by children early in the manner of the *Barnahus* (Children's House) system now widely used across Nordic countries.

Judges and counsel in England and Wales commented that pre-recorded cross-examination involving adult sexual offence complainants is being rolled out without properly resourcing technology to ensure the quality of recordings, the training of staff and the funding of advocates. Many suggested that insufficient thought had been given to the logistical problems of listing cases and the extra workloads for advocates.

In Scotland fewer logistical problems seem to have arisen with evidence on commission. Scotland has invested significantly in commission facilities which are bespoke suites rather than courtrooms with the result that there is no need to pre-book time slots in courtrooms with an external service provider.

(v) The Changing Face of Cross-Examination

There was a consensus amongst practitioners across the jurisdictions that there had been changes of approach towards the cross-examination of vulnerable witnesses since special measures were introduced over 20 years ago and these were most evident in the case of child witnesses and adults who had recognised communication needs. However, there were differences of view across the jurisdictions and within jurisdictions on the pace of change. Practitioners in England and Wales and Scotland said the most dramatic changes had taken place within the last five years as a result of judges becoming more involved in policing questions, a greater awareness of the toolkits in the Advocate's Gateway, greater use of intermediaries and the growing expectation that judges and advocates undertake vulnerable witness training. In the trials observed judges were proactive in managing the cross-examination of vulnerable witnesses and, for the most part, advocates appeared to accept this case management. There was a general consensus amongst interviewees, however, that vulnerable defendant witnesses are not accorded the same kind of modifications in cross-examination as are accorded to other kinds of vulnerable witnesses. Whilst a number of judges and advocates considered that there was much to be said for transferring the skills learned in questioning vulnerable witnesses to other witnesses, there would appear from the data to have been a limited spillover effect and there

were considerable differences between the way vulnerable and non-vulnerable witnesses are cross-examined.

Length of cross-examination

The trial observations data and linguistic analysis support legal professionals' perceptions that cross-examination is a shorter experience for vulnerable witnesses than for non-vulnerable witnesses. While it varied across the jurisdictions and offence-type, the former were on average asked fewer questions (115 questions) than the latter (157 questions).

Child witnesses were asked fewer questions on average during cross-examination than adult vulnerable witnesses. This was particularly the case with children under 12, who were asked on average 48 questions during cross-examination compared with 119.5 questions for children over 12.

Cross-examinations of complainants were shorter in the serious sexual offence trials than much mainstream narrative has suggested. The duration of cross-examination in such cases in trial observations was, on average, 47 minutes. Where complainants were accompanied and assisted by an intermediary, cross-examination lasted, on average, 36, minutes. Defendants who elected to give evidence in such trials were cross-examined on average for 59 minutes. The average time vulnerable witnesses were cross examined in non-sexual offences trials was 25 minutes and defendants 30 minutes.

Vulnerable defendants did not appear to be accommodated in terms of shorter cross-examinations. In one murder trial, an adult defendant with significant communication difficulties was asked 693 questions (the most of any witness, vulnerable and non-vulnerable, in the linguistic sample) and a child defendant with ADHD in a grievous bodily harm with intent trial was asked 265 questions which was far more than the average for other (i.e. non-defendant) vulnerable witnesses.

Structure of questions

Perceptions on the part of practitioners that some of the principles set out in the Advocate's Gateway and in the Inns of Court College of Advocacy's guidance are being followed, especially in the case of children, were borne out by the linguistic analysis. Tagged questions (which end in phrases such as 'isn't it?', 'didn't you?') were asked less frequently of vulnerable witnesses than non-vulnerable witnesses, although such questions were far from avoided completely. Child witnesses were asked tagged questions less frequently than adult vulnerable witnesses, although tagged questions still accounted for 10.58% of questions put to children under 12, for example. Adult complainants in sexual cases were asked more tagged questions than other adult vulnerable witnesses. The data suggest that cross-examiners are also signposting topics almost twice as often to vulnerable witnesses than non-vulnerable witnesses.

However, some of the principles are not being followed. Contrary to what we were told by interviewees, questions put to vulnerable witnesses were on average *as long as* those put to non-vulnerable witnesses, although child witnesses were asked shorter questions than adult vulnerable witnesses. Statements in the place of questions are still a feature of the cross-examination of vulnerable witnesses, as is the use of closed questions such as, 'Do you remember?' or, 'Do you agree?'. But, again, open questions were more common in the cross-examination of children than of adult vulnerable witnesses.

Tone and challenge

The perception of interviewees that vulnerable witnesses are no longer hectored or bullied was generally confirmed in the trial observations, at least in relation to lay prosecution witnesses (vulnerable or otherwise) where, with the exception of one case, the tone of cross-examination was respectful and courteous. However, aggressive, confrontational, and sarcastic cross-examination was observed in the case of defendants supporting the perception that vulnerable defendant witnesses are not accorded the same kind of modifications in cross-examination as other kinds of vulnerable witnesses.

Whilst some vulnerable witnesses in the observed trials were subject to rigorous, thorough and probing cross-examination, others were not subject to much, if any, probing, raising questions as to whether the evidence was genuinely tested. In the linguistic sample, there were fewer direct challenges to the truthfulness of vulnerable witnesses than non-vulnerable witnesses. However, there were examples where adult sexual offence complainants were accused of lying.

(vi) Changing Legal Culture

There was widespread acceptance amongst interviewees of the need to change the approach towards the cross-examination of vulnerable witnesses within the legal profession in order to achieve better evidence and to benefit vulnerable witnesses.

A contrast was drawn by a number of interviewees across the jurisdictions between ‘old school’ barristers and judges who could be quite resistant to change and younger barristers and judges who were more readily embracing the changes, although the pace of acceptance amongst barristers generally was considered to be somewhat slower in Northern Ireland and Ireland.

A number of interviewees said they were under no illusion that it was easy to change the habits of a lifetime. Although interviewees were positive about the need for training, there was a recognition on the part of some that it could become a ‘tick-box’ mechanism and there was a need for a more sophisticated understanding of how to communicate with different kinds of vulnerable witnesses.

(vii) Outcomes

There was no evidence in the sample of observed trials to support the view that vulnerable witnesses are disadvantaged by having trials determined by a jury. Although there were somewhat veiled and vague appeals by advocates to what might conceivably be construed as rape myths in a small number of trials, in the RASSO trials as a whole (n = 25) evidentially compelling cases resulted in convictions, and in the trials that resulted in either an acquittal or a hung jury, there were clear and obvious evidential weaknesses that gave rise to reasonable doubt regarding the guilt of the accused.

Conclusions

Three broad conclusions emerge from the research findings:

- Whilst it is too early to say that a ‘best evidence’ model of cross-examination has become the norm within the contemporary criminal trial, across all the jurisdictions we studied there was a willingness on the part of practitioners of all kinds – judges, counsel, solicitor advocates, prosecutors and intermediaries – to improve the cross-examination experience for vulnerable

witnesses and to help them achieve best evidence. There was an acceptance of many of the changes by advocates, although some considered an over-zealous approach towards case-management led to questions being curtailed in a manner that could adversely affect the outcome of cases, a detriment to the prosecution as much as to the defence. Few expressed objections to the changes in terms of them being incompatible with the right to a fair trial.

- Although there is a general disposition towards many of the changes, the effectiveness of the measures that have been introduced to achieve best evidence is being thwarted by poor technology, delays in bringing cases to trial and a lack of resources. This was borne out particularly in the observation of trials in England and Wales where trials were delayed because of the poor quality of ABE recordings and pre-recorded cross-examinations were postponed when the recording failed.
- While the data highlighted many differences in the way in which vulnerable witnesses are cross-examined as opposed to other kinds of witnesses, the changes have yet to metamorphosise on the ground into a coherent and consistent set of practices for achieving best evidence for all kinds of vulnerable witnesses. Instances of bad practice were encountered as well as good practice and a number of the adaptations that have been made for vulnerable witnesses have yet to be made for vulnerable defendant witnesses.

List of recommendations

Technology

1. Strategic priority should be given in all jurisdictions to the need to improve and standardise the quality of recordings and the environment where witnesses provide their evidence and to reduce the disruption and delays in trials caused by incompatible IT systems and poor-quality footage.

Special measures

2. Steps should be strengthened across the jurisdictions to ensure that witnesses are given an informed choice as to whether to avail of special measures and everything practicable should be done to enable each individual witness to give evidence in a manner that achieves the best evidence for them.
3. The eligibility requirements for vulnerable witnesses to qualify for special measures should be simplified so that all vulnerable witnesses are entitled to avail of any special measures that will assist them to achieve best evidence.
4. All of a vulnerable witness's evidence – evidence-in-chief, cross-examination and re-examination – should be able to be recorded in one hearing before trial if this is deemed necessary in order to achieve best evidence, as is the case with evidence on commission in Scotland, and should not depend on there being an admissible Achieving Best Evidence (ABE) interview.
5. Consideration should be given in England and Wales and Northern Ireland to adopting other features of the Scottish model of taking evidence on commission, including building more flexibility into the manner in which pre-recorded cross-examination is conducted (i.e. online

or face-to-face), the use of suites outside the courtroom for recording pre-recorded cross-examination and the use of in-house recording facilities.

6. Consideration should be given in Ireland to piloting the use of pre-recorded cross-examination.
7. Consideration should be given to whether vulnerable witnesses should be entitled to choose to have a supporter of their choice to sit alongside the witness when they are giving evidence whether at court or remotely, as is the case in Scotland and Ireland.
8. Consideration should also be given across the jurisdictions to entitling complainants in sexual offences to the presence of an Independent Sexual Violence Offence Adviser (ISVA) as a supporter.

Familiarisation

9. Steps should be strengthened across the jurisdictions to ensure that witnesses are properly prepared for giving evidence in advance of trial, including consistent use of familiarisation measures and advice on what giving evidence will entail.
10. Witness services should consider giving any vulnerable witness who wishes to take it an opportunity to practise speaking over a live-link or in the courtroom, as appropriate, at a familiarisation visit.

Intermediaries

11. Steps should be taken to ensure that intermediary services are made available consistently to all vulnerable witnesses who require them and that they continue to be integrated into the criminal justice system as a fully recognised and accepted professional service.
12. Consideration should be given to amalgamating the separate intermediary schemes for witnesses and defendants in England and Wales.
13. Consideration should be given to the formation of an international professional association for intermediaries across the jurisdictions with its own code of conduct to regulate their functions, take responsibility for their training and accreditation and promote best practice.
14. Scotland should consider piloting the use of intermediaries, given that it is the only jurisdiction in our study not to have adopted the role.

Equality

15. Protocols should be put in place for all professional groups who take evidence from witnesses to ensure that they are alert to the vulnerabilities of witnesses.
16. Vulnerable defendants should be given the same access to special measures as vulnerable witnesses.
17. Greater focus should be put on whether defence intermediaries should be appointed before trial and for the duration of the trial itself.

18. GRHs should be held in advance of the trial for both vulnerable witnesses and vulnerable defendants so that they can effectively participate in their trials.
19. In accordance with the *Advocate's Gateway: Ground Rules Hearing Checklist*, consideration should be given to holding a GRH for vulnerable defendants before the trial and then if the defendant later elects to give evidence, a second GRH specifically to discuss how questioning should be conducted. Where appropriate prosecutors should be required to submit written questions for judicial approval in the same manner as defence advocates.

Consistent practice

20. Consideration should be given to setting up local court user groups chaired by judges and comprising advocates, intermediaries, the police, prosecuting agencies, witness services and representatives from support groups to develop more consistent approaches towards familiarisation visits, the use of intermediaries, GRHs and pre-recorded cross-examination.
21. Full account should be taken at GRHs of intermediaries' views on how particular witnesses may best be challenged, if at all, about matters relating to putting the defence case.

Training

22. Vulnerable witness training should be an essential part of the judicial training syllabus.
23. The time has now come to consider whether it should be mandatory for advocates to undergo vulnerable witness training in order to work in cases involving vulnerable witnesses with continuing refresher courses.
24. There is a need to give greater emphasis in vulnerable witness training to defendant vulnerability and vulnerabilities around mental health and trauma to ensure that such vulnerabilities are properly identified and accommodated.
25. Consideration should be given to embedding linguistic analysis, perspectives and knowledge into the training of advocates in the cross-examination of vulnerable witnesses, and into the routine updating of professional guidance materials such as *the 20 Principles of Questioning* and the *Advocate's Gateway Toolkits*.
26. Real-life trial transcripts showing cross-examination of vulnerable witnesses collected for this project should be integrated into training and guidance materials as concrete examples of current practice, providing empirical support for the advice and recommendations made in training and guidance materials.
27. Consideration should be given to providing training to the judiciary and lawyers on the research evidence that is available on the impact on juries of remote testimony.
28. As research and education on best practice is constantly changing, there is a need to have continuing refresher courses.
29. Joint training events should be organised with barristers, solicitor-advocates, judges and intermediaries together so that they can share experiences and learn about the perspectives of other professional groups.

Innovation

30. Pilot schemes should be encouraged in particular court centres to promote best practice. Examples might include fast-tracking cases involving young children, adopting a *Barnahus* approach for such cases so that all the questioning of the child, including cross-examination, is completed at a special evidence and hearings suite, and extending GRHs to all witnesses who are deemed vulnerable including adult sexual offences complainants.

Abbreviations

ABE	Achieving Best Evidence
CHISVA	Children and Young People’s Sexual Violence Adviser
CPS	Crown Prosecution Service
CPD	Criminal Practice Directions
CVP	Cloud Video Platform
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GBH	Grievous bodily harm
HMCTS	His Majesty’s Courts and Tribunals Service
ISVA	Independent Sexual Violence Adviser
GRH	Ground Rules Hearing
JII	Joint Investigative Interview
RASSO	Rape and Serious Sexual Offences

Glossary

Accused or Defendant

An accused or defendant is a person who is on trial in criminal proceedings.

Achieving Best Evidence ('ABE') interview

An ABE interview is a video-recorded interview with a vulnerable witness, conducted by the police in England and Wales and Northern Ireland. The recording is played at trial as the witness's evidence-in-chief. This is known in Scotland as a 'Joint Investigative Interview' and in Ireland as a 'Special interview' or 'section 16' interview'.

Admissible evidence

Admissible evidence is evidence that may be used in court.

Adversarial

The mode of trial adopted across the UK and Ireland to conduct criminal proceedings whereby both the prosecution and defence each investigate and present their case, evidence and legal argument to the court and contest each other's case, with the judge overseeing the fairness of the proceedings and the jury deciding whether the defendant is guilty or not guilty on the evidence presented.

Advocate

An advocate is a lawyer who is professionally qualified to advise and represent another person in court.

Barrister

A barrister is a lawyer who specialise in advocacy and representing clients in court. Barristers are also called counsel.

Central Criminal Court

The court in Ireland which hears the most serious offences (e.g. murder, rape, aggravated sexual assault).

Children & Young People's Independent Sexual Violence Adviser

A CHISVA provides support and information to children and young people who have experienced rape, sexual abuse, or sexual exploitation at any time in their life.

Circuit Court

The court in Ireland which has criminal jurisdiction to hear all non-minor offences, except the most serious offences (e.g. murder, rape, aggravated sexual assault).

Complainant

A complainant is a person against, or in relation to whom, an offence was (or is alleged to have been) committed. In Scotland such a person is known as a 'complainee'.

Cross-examination

Cross-examination is the questioning of a witness by another party who has not called the witness which takes place after examination-in-chief.

Crown Court

The criminal court in England and Wales and Northern Ireland which hears all serious offences.

European Convention on Human Rights ('ECHR')

The ECHR is an international convention between the states of the Council of Europe to protect human rights and political freedoms.

European Court of Human Rights ('ECtHR')

The ECtHR is an international court which rules on individual or state applications alleging violations of the rights set out in the ECHR.

Evidence-in-chief

The evidence that a witness gives in response to questioning by the party who calls the witness.

Examination-in-chief

The questioning of a witness by the party that called the witness.

Ground Rules Hearing ('GRH')

A pre-trial hearing which takes place to enable a judge to make directions to facilitate the appropriate treatment and effective participation of witnesses and defendants who are considered vulnerable. They set ground rules on how advocates should question such witnesses.

High Court

The court in Scotland which has criminal jurisdiction to hear the most serious offences (such as murder and rape).

Inadmissible evidence

Inadmissible evidence is evidence that may not be used in court.

Independent Sexual Violence Adviser ('ISVA')

An ISVA provides support and information for anyone who has experienced sexual violence at any point in their lives.

Indictment

The formal document setting out all criminal charges against the defendant to be tried in serious cases.

Intermediary

An intermediary is an independent communications specialist appointed to facilitate communication with a witness or a defendant, including when they give their evidence to the police or the court.

Joint investigative interview

A Joint investigative interview is a video-recorded interview with a vulnerable witness conducted by a police officer and social worker in Scotland. The recording may be played at trial as the witness's evidence-in-chief.

Live-link

One of the special measures that may be ordered for vulnerable witnesses to give their evidence (both examination-in-chief and cross-examination) live (through a television link or other arrangement) while absent from the courtroom.

Putting the case

Putting the case means putting the defendant's version of the facts to the witness during cross-examination.

Re-examination

The further questioning of a witness by the party that called the witness to clarify any matters that have arisen in cross-examination.

Solicitor advocate

A solicitor advocate is a lawyer from the solicitor's branch of the legal profession who has rights of audience to represent clients in the higher courts.

Special measures

Special measures are procedural adjustments which may be ordered for vulnerable witnesses to enable them to give their best evidence. They include the use of screens; the removal of wigs and gowns; the giving of evidence by live-link; the showing of videorecorded evidence-in-chief; pre-recorded cross-examination; and the use of intermediaries.

Supporter

A person who accompanies a vulnerable witness while the witness is giving evidence.

Vulnerable witness

Vulnerable witnesses are those considered eligible for special measures.

1. Introduction

1.1 The importance of the research

Cross-examination - the questioning of a witness by an opposing party during a trial - has long been considered an 'iconic' feature of adversarial criminal proceedings used to test oral evidence (Roberts, 2022: 311). It has also been regarded as often crucial in determining the outcome of a contested trial because it is the point at which there is a 'direct confrontation of one point of view by the other' and the 'conflict becomes explicit' (Stone, 1984: 296). However, many now question the view that it is 'the greatest legal engine ever invented for the discovery of the truth' (Wigmore, 1940: §1367: see Roberts, 2019). Over the course of the past 30 years, it has also become apparent that many witnesses find the process distressing. Such distress is particularly acute among the most vulnerable witnesses: children, complainants in sexual offence cases, and witnesses with learning disabilities (Doak, 2008; Kirchengast, 2016).

Increasingly, governments around the world have introduced a range of special or alternative measures as a tool to achieve 'best evidence' and to ease the burden of giving evidence (Hayes & Bunting, 2013). Although these reforms have helped alleviate some of the stress and anxiety associated with giving evidence (Burton et al, 2006; Plotnikoff and Woolfson, 2009 and 2019), they have not in themselves altered the fundamental nature of cross-examination in adversarial systems. However, in the course of the past decade, there has been a growing acknowledgement that there is a need for more fundamental changes to the nature of cross-examination itself. Spearheaded originally by the senior judiciary in England and Wales but increasingly with the support of senior judges in other jurisdictions as well, a new paradigm is being developed which shifts cross-examination away from the traditional 'advocacy' model towards a 'best evidence' model. Whereas cross-examination has traditionally been used by advocates as a means of winning cases, it is now restricted, particularly when it comes to vulnerable witnesses, to producing the 'best evidence' for the court (Henderson, 2015b). In what has been described as a new 'revolution' in practice (Lord Judge, 2013), advocates are being required to adapt their forensic techniques to suit the needs of the witness.

We shall see that a variety of practices have been developed to achieve this new approach towards cross-examining witnesses. Communication experts, known as intermediaries, and pre-trial hearings, known as 'ground rules hearings' (GRHs), are being used to improve the language advocates use to cross-examine the most vulnerable witnesses and pre-recorded cross-examination has been introduced in certain countries to alleviate the need for such witnesses to be cross-examined at trial. Training is now provided to advocates on how to question vulnerable witnesses and 'toolkits' have been devised setting out guidance for judges and advocates on the questioning of vulnerable witnesses. In her interviews in 2013 with judges, advocates and intermediaries in England and Wales soon after the changes there began to take effect, Henderson (2015a; 2015b; 2016) detected an early shift in professional attitudes towards cross-examination. However, 10 years on from this research, there has been no current research that has explored the extent to which changes in practice in England and Wales have made an impact in influencing cross-examination on the ground at court. We do not know to what extent judges are managing cross-examination in trials or whether directions made at GRHs concerning the manner and content of questioning are subsequently being enforced at

trial. Above all, we do not know the extent to which the traditional ‘tools of the trade’ are still being used by advocates in cross-examining vulnerable people. The same is true of other jurisdictions which have followed in the path of the changes introduced in England and Wales. As changes are introduced, it is vital that there is an evidence base from which to evaluate how they are being received on the ground, to what extent they are assisting vulnerable witnesses to achieve best evidence and what further improvements might be made.

There has been valuable recent research, some of it funded by the Nuffield Foundation, which has focused on how children and other vulnerable witnesses are treated within the criminal justice system and across the different courts and tribunals and what can be done to improve provision for them (e.g. Plotnikoff and Woolfson, 2009 and 2018, Jacobson and Cooper, 2020). There has also been some research which has examined how advocacy could be improved in the courts through input by the judiciary or regulators (e.g. Hunter, Jacobson and Kirby, 2018). But these studies have not focused exclusively on cross-examination where witnesses face their gravest ordeal.

Previous studies on the cross-examination of vulnerable witnesses have tended to focus on questions of witness satisfaction (Burton et al 2006; Hamlyn et al, 2004; Wood et al, 2015). Such studies provide important insights but they do not give an indication as to how language is used as a tool of advocacy. There have been some sociolinguistic studies which have amassed a body of evidence on the types of questions which can prove problematic for witnesses, and the impact of responses on the fact-finder (Brennan and Brennan, 1988, Davies and Seymour, 1998; Kebbell et al, 2000; Hanna et al, 2012; Zajac et al, 2018). But many of these are outdated and there has been very little linguistic analysis carried out in England and Wales where the most innovative practices have been recently taking place (Doak et al, 2021).¹

1.2 Aims of the research project

This is the first research to ascertain the extent to which recent efforts to change the way in which vulnerable witnesses are cross-examined are being reflected in practice in the criminal courts. The over-arching aim of the research has been to map the precise nature and extent to which new approaches towards cross-examination are producing change on the ground and to identify specific issues and problems and develop evidence-based solutions that enhance the capacity of vulnerable people to participate within the trial.

The research is distinctive in that it has adopted a mixed methodology, described in more detail in Part 2, comprising (i) an international review of the law, policy and practice of cross-examination across common law jurisdictions that was completed and published on our website in November 2021²; and (ii) more focused research conducted at eight research sites in the UK and Ireland – five in England and Wales and one each in Scotland, Northern Ireland, and Ireland – comprising observations of entire trials involving vulnerable witnesses, interviews with judges, advocates and intermediaries, and corpus linguistic analysis of transcripts containing cross-examinations of vulnerable witnesses.

These jurisdictions were chosen because they share a strong adversarial tradition but have each been making changes to accommodate the cross-examination of vulnerable witnesses in recent years. At the same time they differ in size and in the manner in which they are implementing change. While

¹ Note though that Andrews and Lamb (2018) have carried out a linguistic study of the cross-examination of young complainers in the Scottish criminal courts.

² See <https://irep.ntu.ac.uk/id/eprint/44924/>

there is considerable legal and procedural overlap between these jurisdictions due to their shared history, each jurisdiction is also unique with differing procedural rules, special measures, and approaches towards judicial case management. It was considered that a cross-jurisdictional approach could serve as a useful comparison regarding the attitudes of professionals involved, how changes have been implemented in practice and how best practice is being developed.

1.3 The impact of Covid-19

Two introductory matters should be mentioned. The first is that the research was conducted during a time when all the jurisdictions studied were adapting their processes in order to deal with the Covid 19 emergency. As we shall see in Part 2, this had a significant impact on how we set about our research and caused some delay to the project but it did not prevent us obtaining a significant body of data. The pandemic had the initial effect of stopping jury trials altogether and then led to an increase in the use of remote evidence to help clear the backlog of cases. Many of the special measures that are used to question vulnerable witnesses involve the use of remote evidence whether this takes the form of live-link or video evidence. The effect of Covid 19 was to permit all manner of witnesses including defendants to testify outside the courtroom to enable trials to continue (Hoyano, 2021; Jackson, 2023).³

This raises the question whether during the period of our fieldwork a general and more fundamental shift in the nature of cross-examination took place which is reverting to the *status quo ante* now that the pandemic has subsided. During the two-year period of our fieldwork we observed vulnerable and non-vulnerable witnesses being questioned both outside and inside the courtroom (albeit during the Covid emergency in a socially distanced manner) thus enabling some comparison to be made between the way cross-examination is conducted under both these guises. The effect of remote technology on cross-examination is discussed later in further depth. However, the increase in its use looks set to continue in the post-pandemic world. Permanent new measures now empower courts in England and Wales to ‘require and permit’ any person to take part in criminal proceedings including summary and Crown Court trials by live-link.⁴ With a continuing lack of progress being made in reducing the backlog of cases, at least in England and Wales where a significant backlog of cases had been building up even before the pandemic,⁵ remote evidence will continue to be relied upon more than before the pandemic and would seem to be one of the longer-term implications of the ‘new normal’ that has changed the nature of criminal hearings for good.

1.4 Terminology

So far we have used the terms ‘vulnerable’ and ‘non-vulnerable’ witnesses without explaining these terms. Vulnerability is both a contested concept and an imprecise measure; individuals who experience or witness crime will inevitably respond differently (Green, 2007; Shapland & Hall, 2007; Cooper, 2018). It has also been argued that vulnerability is not a condition inherent only to – or found within – certain groups or individuals but is a condition to which we are all subject and is shaped by structures and institutions in society (Dehaghani, 2019; Fineman, 2008, 2013). Whilst recognising that

³ See for England and Wales Coronavirus Act 2020 s 53, sch 23.

⁴ Police, Crime, Sentencing and Courts Act 2022 s 200, sch. 20.

⁵ See Law Society, *Government set to miss target to reduce backlog of cases*, press release, 14 April 2023.

<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/government-set-to-miss-target-to-reduce-courts-backlog>.

some witnesses will be more ‘vulnerable’ than others irrespective of whether or how the law pigeonholes them, in the absence of consensus on what constitutes a ‘vulnerable’ witness, we found it convenient to operationalise ‘vulnerable’ to reflect the criteria for eligibility for special measures set out in the legislation governing special measures in the various jurisdictions studied.

‘Special measures’ is the term that has been given to procedural adjustments that are made to enable witnesses to give their ‘best evidence’. In England and Wales and Northern Ireland witnesses eligible for special measures are classified as ‘vulnerable’ if they satisfy the criteria relating to ‘age and capacity’ and are classified as ‘intimidated’ if they satisfy criteria relating to ‘fear or distress about testifying’ whereas in Scotland all witnesses who are eligible for special measures are classified simply as ‘vulnerable’.⁶ In our research, for the purposes of simplicity, we have opted to follow the Scottish approach; thus using the term ‘vulnerable’ to encapsulate all eligible witnesses. Over the years all jurisdictions have expanded the criteria of eligibility for special measures to reflect evolving societal attitudes towards vulnerability and there is now a presumption that certain kinds of witness such as children and sexual offences complainants are entitled to certain measures.⁷ It has been estimated that around 54% of witnesses in English Crown Court trials meet the criteria for special measures (Burton et al, 2006). We were confident that using these criteria as the basis for our definition of vulnerability would enable us to identify sufficient numbers of vulnerable witnesses in the trials we observed and indeed this proved to be the case.

Although much of the focus hitherto has been on the experiences of vulnerable witnesses who give evidence as victims or as witnesses for the prosecution, our research includes vulnerable defendants who give evidence. Evidence suggests that considerable numbers of defendants suffer from mental illness, a learning disability or communication difficulties (e.g. Jacobson and Talbot, 2009; Fairclough, 2018a). Vulnerable defendants were originally excluded from the special measure regimes across the four jurisdictions (see Fairclough, 2018a for England and Wales). The English legislation was later amended to permit defendants to avail of certain special measures, although only under stricter eligibility than other vulnerable witnesses: namely, in the case of child defendants, only where they have a compromised ability to participate effectively as a witness due to their level of intellectual ability or social functioning; and, in the case of adults, only where they suffer from mental disorder or otherwise have a ‘significant impairment of intelligence and social function’ and ‘are *unable* to participate effectively as a witness’.⁸

The asymmetry in the eligibility criteria for vulnerable defendants and other vulnerable witnesses gives the impression that ‘defendants whatever their age are somehow less deserving of assistance to give their best evidence than are other witnesses with the same communication difficulties’ (Hoyano, 2010: 366). By contrast, in Scotland accused children and adults are now afforded the same access to special measures (with the exception of screens) as other vulnerable witnesses.⁹ In Ireland there is no explicit legislation that enables defendants to avail of special measures. We shall see that differentiation in the treatment of vulnerable witnesses and vulnerable defendants emerged as a persistent theme throughout our research. For the purpose of our research we chose to classify

⁶ See Youth Justice and Criminal Evidence Act 1999 ss 16-17, Criminal Evidence (NI) Order 1999 arts 4-5, Criminal Procedure (Scotland) Act 1995 s 271(1).

⁷ See eg in Scotland Victims and Witnesses (Scotland) Act 2014 and in Ireland the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017. For a detailed analysis of these measures see Doak et al (2021), Cusack (2020), Keane and Davidson (2018: 38-42).

⁸ See Youth Justice and Criminal Evidence Act s 33A(4)(5) inserted by Police and Justice Act 2006 s 47.

⁹ See Vulnerable Witnesses (Scotland) Act 2004 s 271F.

defendants as ‘vulnerable’ witnesses when they gave evidence in circumstances where they appeared to meet the eligibility criteria for special measures of other vulnerable witnesses.

1.5 The report

The report is divided into five parts. Part 1 which comprises this introduction is followed by Part 2 which sets out the research methods employed in the study, detailing the research questions, the research design and the various work packages that comprised the study. Part 3 provides an overview of the legal and policy context that formed the backdrop to the research. It details the significance of cross-examination within the adversarial trial, the various drivers that have led to changes in the way in which vulnerable witnesses are cross-examined and the changes in practice that have been implemented across four jurisdictions both in relation to the cross-examination of vulnerable witnesses and witnesses more generally. Part 4 sets out our findings from the various work packages. This part begins by examining attempts to prepare witnesses for cross-examination before trial and to make the general court environment less intimidating. It then proceeds to consider how various initiatives designed to benefit vulnerable witnesses are operating in practice across the four jurisdictions, including the use of ground rules hearings, intermediaries and pre-recorded cross-examinations. It maps changes in the content and style of cross-examination in relation to different kinds of vulnerable witnesses combining the perspectives of professionals with our trial observations and the results of our corpus linguistic analysis of transcribed cross-examinations. It then examines how the changes have been received by legal practitioners and the degree to which they are changing legal culture. The part concludes with some brief comments on how the changes are affecting the outcome of trials and their effect on juries. Part 5 then draws together our conclusions and recommendations with some ideas for future research.

Part 2 dwells at some length on the research methods because the triangulated approach adopted is pioneering in this field of court research. However, readers who are primarily interested in the law and policy surrounding cross-examination and our research findings should turn directly to Parts 3 and 4.

2. Research Methods

2.1 Introduction

This part of the report details our research questions, research design and the research methods used in each of the work packages that comprised the study. The over-arching aim of the research was to map the precise nature and extent to which new approaches towards cross-examination are producing tangible change, to identify specific issues and problems and then develop evidence-based solutions that enhance the capacity of vulnerable people to participate within the trial. As we indicated in the Introduction, a better understanding of how the new approaches are being implemented in criminal proceedings will enable an assessment of how they are benefitting vulnerable witnesses and defendants and what further improvements might be made.

2.2 Research questions

The research questions we sought to explore were:

- To what extent is the new ‘best evidence’ model of cross-examination surrounding the aim and purpose of cross-examination displacing traditional theories concerning the role of cross-examination within the contemporary criminal trial?
- To what extent are judges managing the process of cross-examination in ground rules hearings and in the trial itself?
- How are advocates responding to the judicial management of cross-examination?
- Is there a material difference in the way in which vulnerable witnesses and defendants are being questioned, as opposed to other types of witnesses?
- What best practices can be learned about how to ensure that the practice of cross-examination produces best evidence?

2.3 Research design

The pioneering innovation of the project was the development of a mixed methodology to give a rounded picture of cross-examination in practice across a number of jurisdictions and allow the impact of changing approaches towards cross-examination to be measured in a variety of ways. Given that the changes are predicated on the concept of ‘best practice’, it was important to put the research in the context of international best practice. In order to give the best picture of what is happening on the ground, a mixed method approach was adopted consisting of observations of trials, corpus linguistic analysis of transcripts containing questions posed to witnesses, and interview data from professionals practising in the court centres where the trial observation and transcript data were generated.

Although the research team was based in England and Wales, it was considered that much could be learned in the way best practice is being developed by including other common law jurisdictions with the scope of the study. When the project was first devised, England and Wales stood out as a

jurisdiction that was well ahead of others in terms of changing cross-examination practices. In order to measure the scale of this change, it was considered that a good comparator would be the two neighbouring Irish jurisdictions which have traditionally adopted almost identical rules of procedure and evidence but had not yet implemented changes such as ground rules hearings and pre-recorded cross-examination. As our research design developed, however, it became apparent that both these jurisdictions were in fact beginning to embrace similar changes to that in England and Wales, such as ground rules hearings or preliminary hearings, as a result of reviews into the investigation and prosecution of sexual offences (Gillen, 2019 in Northern Ireland; O'Malley 2020 in Ireland). Scotland was also undergoing a period of change of practice which included the introduction of ground rules hearings. In the end it was decided to include England and Wales, the two Irish jurisdictions and Scotland within the compass of the study. While each has been making changes to accommodate the cross-examination of vulnerable witnesses in recent years, they differ in size and in the manner in which they are implementing change. While there is considerable legal and procedural overlap between these jurisdictions due to their shared history, each jurisdiction is also unique with differing procedural rules, special measures, and approaches towards judicial case management. It was considered that a cross-jurisdictional approach could serve as a useful comparison regarding the attitudes of professionals involved, how changes have been implemented in practice and how best practice is being developed.

The court centres within each of the jurisdictions were chosen on the basis that they would generate sufficient trials involving both vulnerable and non-vulnerable witnesses over the period that was planned for the fieldwork. Our research was limited to Crown Court trials in England and Wales and Northern Ireland, High Court trials in Scotland and trials in the Central Criminal Court and Circuit Court in Ireland as it is in these courts where the most serious contested trials involving vulnerable witnesses are held. This is not to deny that vulnerable witnesses face difficulties in contested cases in the lower courts. But the concerns about the impact of cross-examination on vulnerable witnesses have tended to concentrate mostly on serious (often sexual) offences where witnesses have had to endure many hours, if not days, of cross-examination before a jury and many of the changes to practice have focused on these trials.¹⁰

We originally planned to base our study in two busy Crown Court centres in England and Wales and one busy court centre in each of the other jurisdictions. However, our fieldwork began at a time when Covid social distancing rules meant only larger courtrooms could be used for trials. In practical terms, this drastically reduced the number of trials available to us for observation purposes. In order to increase the sampling pool, we decided to add three more Crown Court centres to the research sites in England and Wales. Two were busy Crown Court centres. The third was a much smaller and somewhat more rural centre, chosen because a member of the advisory group was able to facilitate our observations there during the Covid emergency. This not only had the advantage of increasing the number of trials available to us for observation, but also expanded the numbers of judges and advocates who were able to be observed and interviewed. While it is not suggested that the Crown Court centres chosen are fully generalisable across England and Wales, our research sites pulled in

¹⁰ One trial which received widespread publicity in both the Irish jurisdictions and which prompted reviews of practice was the so-called 'Belfast Rugby Trial' in 2018 where two elite rugby players were acquitted of rape and two other defendants were acquitted of other offences after a nine week trial in which the complainant was subjected to a lengthy cross-examination involving repeated intimate questioning by four different defence counsel over 9 days.

cases across diverse metropolitan, urban and rural areas serving large, ethnically and socially diverse populations. They are, at least, largely representative of England and Wales as a whole in terms of both the witnesses and defendants appearing in these courts and crime-mix in the cases dealt with. For practical purposes, including maximising the number of trials available for observation purposes and ease of travel and securing accommodation during the pandemic, the court centres chosen in the other jurisdictions were all in metropolitan areas. We acknowledge that the exclusion of rural areas here meant that we were not able to observe the full spread of cross-examination practice in these jurisdictions. Some interviewees in Ireland in particular commented that practice was likely to be different in remote rural areas. While this is a limitation of the study in these jurisdictions, we are confident that we made the best use of resources in concentrating on court centres with comparatively high numbers of operating courts and, as we shall see, sufficient data were collected to enable some, albeit limited, comparisons and contrasts to be drawn between practice in the various jurisdictions.

In order to best address our research questions, we organised our research around six different though inter-related work packages:

- Overall project management
- International best practice
- Courtroom observation
- Interviews with stakeholders
- Corpus linguistic analysis of transcripts
- Dissemination and impact

2.4 Overall project management

This work package was concerned with the overall management of the project, including access to the research sites, judicial permissions, research ethics, monitoring activities of the research team, data management, quality assurance, data analysis, synthesis and dissemination. The research team which consisted of a principal investigator, three co-investigators, one research assistant (employed full-time for 15 months) and one research associate (employed part-time for 27 months) met at regular intervals over the course of the project.¹¹ An advisory group which consisted of practitioners and academic representatives from each of the jurisdictions advised the research team throughout the project. Members of the group facilitated introductions to stakeholders across the four jurisdictions, assisted in the drafting of interview schedules with stakeholders and provided quality assurance.¹²

Ethical approval for the study was granted by the University of Nottingham School of Law Research Ethics Committee in the spring of 2020. The research was fully compliant with the Research Ethics policies and Codes of Practice of the University of Nottingham and Nottingham Trent University. All data were processed in compliance with the principles for processing personal data set out in Article 5 of the GDPR and in accordance with the Data Protection Act 2018, the University of Nottingham's

¹¹ 24 research team meetings were held over the course of the project which began in April 2020 and ended on 30 September 2023. Profiles of the research team are contained in Appendix 2.

¹² Over the course of the project 4 meetings were held with all members of the advisory group and there were numerous other occasions when individual members of the advisory group gave advice on specific jurisdictional and methodological matters.

Handling Restricted Data Policy, and the School of Law's Data Management Policy and Code of Research Conduct and Research Ethics. Data were fully anonymised through coding from the point of generation so that court users and interviewees could not be identified directly or indirectly. In order to protect the identity and personal data of all individuals affected by the research, anonymisation was extended not only to court users and interviewees but also to the court centres themselves. All anonymised data were stored electronically on a secure, password protected server.

The project was initially planned to last for three years, which included the time necessary to recruit research staff and obtain the necessary judicial permissions in each jurisdiction to interview members of the judiciary and, where necessary, observe closed trials. The project began in April 2020 which proved unfortunate timing given that all four jurisdictions covered in the research had gone into lockdown as a result of the Covid-19 crisis shortly beforehand. University recruitment and judicial approval for research were put on hold and jury trials were suspended for a brief period across all jurisdictions. Consideration was given to pausing the project altogether given the potential practical impact of the above on data collection. However, after this initial delay, recruitment for research assistance and judicial permissions were progressed and, once trials resumed nationally, resident judges and court staff went out of their way to ensure that researchers were accommodated within the court centres in accordance with Covid distancing restrictions. As explained below, resident judges in the court centres in England and Wales and Northern Ireland also gave us permission to observe trials via the CVP (Cloud Video Platform). Wherever possible, however, trials were observed live in the courtroom. The project was extended to enable us to observe trials up until the end of December 2022.

2.5 International best practice

An important aspect of the research was a desk-based survey of international best practice in order to inform the way cross-examination of vulnerable witnesses has developed across jurisdictions and in various human rights instruments. Although traditionally instruments such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) have focused more on defendants' rights, such as the accused's right to a fair trial, than the rights of victims and witnesses, a demonstrable shift has taken place clarifying the nature and scope of participatory rights of witnesses around the concept of 'effective participation' (Doak, 2008).

The survey focused primarily on common law jurisdictions such as those in Australasia where the best practices that have developed would be easier to adopt within the jurisdictions which were the primary focus of the research project. As policy transfer is now increasingly transcending traditional common law / civil law boundaries (Jackson, 2005, 2021; Misileglas et al, 2015), certain non-common law jurisdictions were also included in order to identify discernible trends and assesses the operation of new and innovative practices, such as the Nordic *Barnahus* (Children's House) system.

As our research questions included what can be learned about how best practice becomes embedded, the survey sought to examine how best practices have evolved across jurisdictions. Despite the proliferation of 'soft' international human rights instruments which recognise the right of victims and witnesses to participate effectively when giving evidence and to be protected during questioning from gross invasions of their dignity and privacy, there has sometimes been a reluctance to implement certain changes because they are perceived to clash with the fair trial rights of the accused. The survey

was therefore also designed to address how the changing face of cross-examination has accommodated the rights of witnesses, victims and the accused.

2.6 Courtroom observation

Courtroom observation is now a well-recognised socio-legal research method which has produced considerable dividends and has been adopted in recent studies of cross-examination (e.g. Durham et al, 2017; Smith 2018). As with all research methods, courtroom observation has its limitations. In particular, the method has provoked strong criticism on the ground that researchers have generally lacked an adequate understanding of the complex legal and procedural issues arising in the trials they observe (see Hoyano, 2019). We had originally planned to engage two legally qualified researchers full-time over the period of a year to observe trials. As the research design developed, however, we decided to engage one of the co-investigators, Dr Candida Saunders, directly in trial observations and to employ only one (similarly legally qualified) researcher to assist. This decision proved vital to the success of the project. It not only enabled a senior member of the research team to observe firsthand how trials were conducted, but also enabled us to observe trials beyond the originally planned 12-month period. In all, trial observations were conducted over 16 months. This, as explained below, proved necessary because of the delays in processing trials due to the Covid emergency, albeit that the co-investigator had other university commitments to fulfil during this extended period.

From the outset we considered it vitally important to observe trials in their entirety. This would enable us to understand the evidential case as a whole and to observe (defence and prosecution) advocates' approach to cross-examination vis-à-vis different witnesses; compliance (or otherwise) with ground rules hearings or other pre-trial directions regarding cross-examination of particular witnesses; the tone, pace, and content of questioning; judicial interventions; and jurors' (apparent) reactions to the various parties and evidence. Key variables were uniformly recorded across the cases: the charges on the indictment; the number of witnesses; the specific nature of a witness's vulnerability (or indeed vulnerabilities); the use of special measures; whether a GRH was conducted prior to trial, etc. However, the bulk of the observational data, amounting to well in excess of 2,500 pages, comprised detailed contemporaneous notes of trial proceedings. These extensive field-notes are separate and in addition to any official transcripts of (selected parts of) proceedings obtained for the corpus linguistics analysis discussed further below.

On the basis of a preliminary scoping exercise examining the cases listed for trial in one Crown Court centre in England and Wales in 2018, it appeared that over 50% of contested cases were sexual offences cases. This did not appear out of line with other Crown Court centres given that court statistics in England and Wales showed that the not guilty plea rate for sexual offences and in particular rape is higher than for most other offences.¹³ We decided to prioritise sexual offences cases when selecting trials in order to maximise the number of vulnerable witnesses observed. And, of course, the treatment of complainants in serious sexual offences cases is an issue that has prompted significant and ongoing critique. However, for comparative purposes, we also sought to include a spread of non-sexual offences trials involving vulnerable and non-vulnerable witnesses in order to examine the conduct of cross-examination of different types of witnesses in different types of cases. Allowing for the delays, adjournments and cracked trials that routinely impede the efficiency of the

¹³ See eg Ministry of Justice (2019). For figures comparing rape not guilty plea rates with rates for other offences from 2007 to 2021 see Thomas (2023).

courts, we estimated that with two observers able to devote a full year each to trial observation, we would be able to observe 48 trials across the jurisdictions over the course of the legal calendar year.

As explained above, however, our observation of trials coincided with the Covid emergency and social distancing restrictions which significantly reduced the number of trials running and thus available to be observed. We increased the number of trials available to us by extending our observations to three additional court centres in England and Wales. With the cooperation of resident judges and court staff who facilitated our access to courtrooms, we were able to observe eight trials across four court centres between October and December 2020.

In January 2021, *courtroom*-based observations came to an abrupt (albeit temporary) halt as England and Wales followed other jurisdictions in going (back) into full lockdown. Travel restrictions, and the fact that most judges were no longer comfortable with us being physically present in court, meant that it was no longer possible to observe trials in situ. We were, however, quickly permitted by the resident judges in four of the English court centres and by the Recorder of the court centre in Northern Ireland to observe trials 'live' via the CVP (Cloud Video Platform). This meant observations were able to continue into 2021 and beyond. At the same time, the establishment of so-called 'Nightingale' courts in the English centres meant there was an increase in the number of cases proceeding.¹⁴

Observing trials remotely was not without its difficulties. Depending on the platform used by a particular court, and, we suspect, sometimes the technical prowess of the court clerk, it was not always possible to observe proceedings while video evidence was being played or when a witness was giving evidence via live video-link. We were also heavily dependent on court clerks giving us access. While in some cases remote entry was immediate, unproblematic and consistent throughout the trial, some clerks were somewhat over-zealous in policing entry to a case via the CVP while others forgot to check the CVP 'lobby' to give timely access, if at all. Sometimes we were given access to proceedings prior to the jury coming into court, which meant we could observe counsels' submissions, legal arguments and other matters arising; other times, we were given access as the jurors took their seats. Mostly we had audio; occasionally, we did not. We rarely had a good view of the court.

Having extended trial observations beyond the one-year period originally planned, we were able to resume courtroom-based observations as the Covid restrictions eased, and, eventually, to travel and observe trials in person in court centres in Scotland, Northern Ireland and Ireland.

An additional complication in these jurisdictions was that, unlike England and Wales, there are restrictions on members of the public being present in certain trials involving vulnerable witnesses.¹⁵ In Scotland, members of the public are invariably excluded from the trial when vulnerable witnesses are giving evidence.¹⁶ In Northern Ireland, there is a protocol in place which recommends that in cases where there is a child victim of a sexual crime, their evidence should be heard in a closed court.¹⁷ In Ireland, members of the public are excluded from the trial altogether in rape and aggravated sexual assault cases.¹⁸ We received support in principle for observing witnesses in a closed court in Scotland

¹⁴ These were courts set up on a temporary basis in venues that are not courthouses in order to hear as many trials as possible as the court systems recovered from the pandemic.

¹⁵ In England and Wales there is provision under the Youth Justice and Criminal Evidence Act 1999 s 25 for witnesses to give their evidence in private in proceedings related to sexual, human trafficking or slavery offences but it is not widely used: HMICFRS and HMCPSI (2022).

¹⁶ Criminal Procedure (Scotland) Act 1995 s 271HB as amended by the Victims and Witnesses (Scotland) Act 2014.

¹⁷ Practice Direction No 2/2019, Annex A6.7, permitted under Criminal Evidence (NI) Order 1999 art 13.

¹⁸ Criminal Law (Amendment) Act 1990 s 3.

from the Lord Justice Clerk. Similarly, support for the observation of closed trials in Northern Ireland was received from the Lady Chief Justice and in Ireland from the Court Service Library and Research Committee. When it came to obtaining consent of the parties and witnesses to observe evidence in closed court in particular cases, we were heavily dependent on obtaining the permission of the sitting judge who made the parties and witnesses aware of the presence of the researcher in court.

Altogether we were able to observe 40 trials across the five centres in England and Wales and the court centres in Scotland, Northern Ireland, and Ireland. The trials involved 43 defendants charged, between them, with 190 offences ranging from thefts and burglaries, to driving offences (dangerous driving and death(s) by dangerous driving), from neglect to administering a noxious substance to GBH, and, at the furthest end of the spectrum, rape and serious sexual offences, and murder. Unsurprisingly, given the nature of the research and the focus on cross-examination of ‘vulnerable’ witnesses—and, indeed, the caseload in the relevant courts at the time of the study—a sizeable proportion (62.5%) of observed trials involved rape and serious sexual offences (known as ‘RASSO’) cases (n=25).

Across the trials, we observed 187 witnesses giving testimonial evidence. These included lay, professional, and expert witnesses, called by both the prosecution (n=148) and the defence (n=39). Of the defence witnesses observed, 33 were defendants, three of whom were observed in the same proceedings [A006]. While their evidence was noted, witnesses who did not attend trial but whose statements were read into evidence are not included in these counts.

In terms of special measures, these were observed in 32 of the 40 trials observed. A special measures order was in place for two prosecution witnesses in a further case [A022]. However, both witnesses refused any measures, preferring to give evidence in court and without a screen. In yet another case [A005] involving two child witnesses, an intermediary was involved in the investigative stage for one child. Neither child’s evidence was adduced at trial, and no special measures were in place for any of the other witnesses. In total, 47 witnesses gave evidence with the assistance of special measures at trial. The vast majority of these were prosecution witnesses (n=45). Across the trial sample, one defendant [A004] was in receipt of special measures. In addition to the detailed observational data pertaining to the trial itself, other pre-trial proceedings, including, for example, legal applications, Ground Rules Hearings, and a section 28 hearing involving the pre-recording of cross-examination, were also observed.

2.7 Interviews with stakeholders

Although there has been a previous qualitative study in which judges, advocates and registered intermediaries were interviewed in 2013 about the initiative taken in England and Wales to reform conventional cross-examination practices (Henderson, 2015a, 2015b, 2016), little research has been conducted since on practitioners’ perceptions of changes in practice. The research study was designed to carry out interviews with the three types of practitioners who were the subject of Henderson’s study in the court centres where observational data and transcript data were obtained in order to gauge the extent to which there were any gaps between perception and reality. Just as the court centres chosen cannot claim to be fully generalisable of practice across the various jurisdictions, so the interview datasets cannot claim to be representative of the entire population of judges, advocates and intermediaries in these jurisdictions. At the same time the court centres chosen drew in large numbers of legal practitioners with a wide range of experience in cross-examining vulnerable and non-

vulnerable witnesses and sufficient numbers of intermediaries with experience of dealing with vulnerable witnesses.

We wanted to ensure there was a mix of advocate interviewees who specialised either in prosecution or defence work or both. In England and Wales, Northern Ireland and Ireland, independent counsel or solicitor advocates can be instructed in either prosecution or defence work. In Scotland advocates from the Faculty of Advocates and solicitor advocates may conduct either prosecution or defence work but in the High Court most prosecutions are conducted by advocate deputes who are appointed by the Lord Advocate from the Faculty of Advocates and solicitor advocates mostly for a term, typically three years, during which the only criminal work they will undertake is for the prosecution. We also wanted to ensure that there was a mix of intermediaries which included those who assisted vulnerable defendants as well vulnerable witnesses. In England and Wales, Ministry of Justice registered intermediaries are appointed to assist vulnerable witnesses and intermediaries who assist defendants are now appointed under the HMCTS intermediary scheme. In Northern Ireland the registered intermediary scheme covers vulnerable witnesses as well as vulnerable defendants. Intermediaries are used in Ireland to assist witnesses and defendants but Scotland does not provide for intermediaries to assist vulnerable witnesses or defendants.

The original plan was to confine our interviews to judges and practitioners who had appeared in the actual trials we observed but this proved difficult to accomplish for a variety of reasons. First of all, it was a condition of conducting judicial interviews across the jurisdictions that judges could only be approached by the research team after names of judges who agreed to be interviewed were given to us. In England and Wales the names were provided by the resident judges in the respective court centres; in Northern Ireland it was the Recorder who sat in the relevant court centre; in Scotland it was the Judicial Office for Scotland and in the case of Ireland it was staff from the Criminal Courts of Justice. Secondly, it proved impossible to obtain a sufficient mix of legal practitioners and intermediary interviewees by limiting our approaches to those who appeared in the observed trials. During the Covid emergency it was difficult for observers to approach potential interviewees face to face, although this did happen in certain cases. When we resorted to writing to advocates and intermediaries who appeared in the observed trials, again we did not get a sufficient response. In order to obtain sufficient numbers of advocates and intermediary interviewees we developed a number of strategies. We wrote to sets of chambers in the court centres which engaged counsel in criminal work and we elicited the assistance of resident and other judges who made recommendations accordingly. Intermediaries are organised centrally and we elicited the assistance of the Ministry of Justice and a defence intermediary organisation which publicised our research and asked for volunteers who worked in the relevant court centres. In the event we obtained volunteers from intermediaries who worked in two of our centres and in other court centres across the country. We acknowledge that this did not result in a representative group of practitioners across the various court centres but it did yield a broad cross-section of practitioners with experience of dealing with vulnerable witnesses and defendants.

In the end we gathered interview data from 60 interviewees across the six court centres, 21 with judges, 24 with advocates and 15 with intermediaries, generating over 72 hours of recorded data. 22 of the interviews were conducted face-to-face and 38 were conducted via MS Teams. Altogether, six judicial interviewees and five advocate interviewees appeared in trials we observed. Table 2.1 below shows how the interviewees were distributed across the various jurisdictions and court centres and the codes are used when referring to extracts from the interviewee transcripts. Of the advocates 11

were senior counsel and 13 were junior counsel; all the advocates in England and Wales had been instructed in both prosecution and defence work; in Northern Ireland two counsel had been instructed in both prosecution and defence work, one in prosecution work and one in defence work; and in Ireland two had been instructed in both prosecution and defence work and two in defence work. In Scotland three advocates were advocate deputes and three were solicitor advocates. In England and Wales all 9 of the intermediaries interviewed were registered intermediaries who assisted vulnerable witnesses and 3 of those also assisted vulnerable defendants. In Northern Ireland and Ireland all the intermediaries had assisted vulnerable witnesses and vulnerable defendants. In order to preserve their anonymity, we have used the female pronoun when referring to judicial and intermediary interviewees and the masculine pronoun when referring to advocate interviewees.

Table 2.1: Interviewees by Jurisdiction and Court Centre

	Judges	Advocates	Intermediaries
England & Wales: Court Centre A			
	AAJ1	AAC2	AAR1
	AAJ2	AAC3	AAR2
	AAJ3	AAC4	AAR3
		AAC5	
England & Wales: Court Centre B			
	ABJ1	ABC1	ABR1
	ABJ1	ABC2	ABR2
	ABJ3	ABC3	ABR3
	ABJ4		
England & Wales: Court Centre C			
	ACJ1	ACC1	
	ACJ2	ACC3	
	ACJ3	ACC4	
England & Wales: Other Court Centres			
			AXR1
			AXR3
			AXR4
Scotland: Court Centre A			
	BAJ1	BAC1	
	BAJ2	BAC2	
	BAJ3	BAC3	
	BAJ4	BAC4	
		BAC5	
		BAC6	
Northern Ireland: Court Centre A			
	CAJ1	CAC1	CAR1
	CAJ2	CAC2	CAR2
	CAJ3	CAC3	CAR3
	CAJ4	CAC4	

Republic of Ireland: Court Centre A			
	DAJ1	DAC1	DAR1
	DAJ2	DAC2	DAR2
	DAJ3	DAC3	DAR3
		DAC4	

File Name: Country Code: Court Centre: Professional Group

Note: Court Centre X comprises intermediaries who practice nationwide.

All interviewees signed consent forms to say that they could stop the interview at any stage and have their data withdrawn from the research at any time prior to data analysis. All interviews were digitally recorded and the contents of the recordings kept under password protection by members of the research team. Interviewees were offered the opportunity to review the transcripts of their interviews for accuracy purposes. Draft interview schedules for the various types of participants were scrutinised by members of the advisory group and piloted in one court centre.

2.8 Corpus linguistic analysis of transcripts

For the linguistic analysis, the data comprised official trial transcripts from a sample of the observed trials. Due to the cost and administrative challenges involved in obtaining transcripts, we did not attempt to secure transcripts for all the observed trials. Instead, a sub-sample was constructed with the input of Dr Candida Saunders who identified and recommended trials, and particular sections of trials, for which transcripts should be secured based on the courtroom observations. In short, then, the sub-sample of official transcripts for the linguistic analysis is not random and makes no claims to be representative of all trials. The aim was to construct a sample of transcripts that included a range of different types of offence, different categories of witness(es) and defendant(s), different outcomes, and to incorporate and reflect the full gamut of different methods, styles, and types of cross-examination encountered on the ground. In the absence of video/audio-recorded trials, transcripts represent the ‘gold standard’ data-type for linguistic analysis of courtroom discourse. The transcripts are contextualised and their analysis is underpinned by the observation notes for each trial. This triangulation of data informs the linguistic analysis and represents a major methodological innovation in terms of courtroom discourse analysis.

The complete dataset (or ‘corpus’) contains transcripts from 23 trials out of the 40 trials observed across six Crown Court Centres in England and Wales, Northern Ireland and Ireland. It includes transcripts of 56 cross-examinations, and includes complainants (n=29), defendants (18), prosecution witnesses (8) and defence witnesses (1). There are 37 cross-examinations from defence counsel and 19 from prosecution counsel. Crucially, there are cross-examinations of 34 vulnerable witnesses and 22 ‘non-vulnerable’ witnesses. Although this study focuses primarily on vulnerable witnesses, our research questions required us to observe any differences in the nature of cross-examination for vulnerable and non-vulnerable witnesses and so the transcripts for the latter provide an invaluable comparison set against which the questioning of vulnerable witnesses can be contrasted. The non-vulnerable witness sub-corpus contains the cross-examination of 16 defendants, five prosecution witnesses (including one police officer) and one defence witness. In total, 40 advocates are represented in the data, with most appearing only once in the data, cross-examining one witness in a

single trial. However, some advocates appear more than once, for example in trials with multiple defendants or multiple complainants and a small number of advocates appear in transcripts for more than one trial.

The set of transcripts runs to 364,906 words (tokens) in total. Several steps had to be followed in order to properly prepare it corpus for linguistic analysis:

1. Identifying different witnesses
2. Separating vulnerable and non-vulnerable witnesses
3. Extracting cross-examinations
4. Isolating counsel questions

Trial transcripts often included a full day’s proceedings, sometimes over several documents. Therefore, the first step in preparing the data was to identify and separate the evidence of different witnesses. Second, it was necessary to determine if the witnesses in the transcripts were vulnerable. In identifying witnesses as vulnerable or non-vulnerable, we followed the legislative designations outlined in the Introduction to this report. Represented in our data are: child witnesses (under 18), witnesses with significant impairment of intelligence and social functioning, complainants in sexual offences trials, intimidated witnesses, victims of serious crime and relatives of victims of serious crime. Such witnesses are categorised in this analysis as ‘vulnerable’. All other witnesses are referred to here as ‘non-vulnerable’. The format of transcripts provided to us varied by court centre and often included elements of the trial that are not cross-examination, such as evidence-in-chief, ABE interviews and conversations between counsel and judge in the absence of the jury. Therefore, for our purposes, the third step of data preparation was to extract *only* the cross-examinations from the transcripts. Even then, during cross-examinations, there are many elements that are not questions put to the witness: judges’ interventions, interruptions from opposing counsel, intermediary interjections, to name a few. The final stage in the preparation of the data for analysis saw only counsel’s full and complete questions extracted for analysis (though full transcripts were retained and returned to throughout analysis). Table 2.2 shows the composition of the final dataset following these steps.

Table 2.2: Breakdown of the corpus used for the linguistic analysis

	Vulnerable witnesses	Non-vulnerable witnesses	Total
Cross-examination questions	5774	4979	10,553
Words (tokens)	100,379	89,378	189,757
Shortest cross-examination	20 questions	29 questions	-
Longest cross-examination	693 questions	544 questions	-
Median length of cross-examination	115 questions	157 questions	-

The methodological approach used in the linguistic analysis of the transcripts is *corpus-assisted discourse analysis* (sometimes called *corpus-assisted discourse study*, or ‘CADS’). *Corpus* (plural *corpora*), from Latin, means ‘body’ – and corpus linguistics is a set of procedures or methods for studying bodies of language, often very large bodies of electronically stored texts (Baker, 2018: 168).

The 'essential characteristics' of a corpus-based approach to language analysis relevant to its application here are outlined by Biber, Conrad and Reppen (1998: 4):

- it is empirical, analysing the actual patterns of use in natural texts;
- it utilises a large and principled collection of natural texts, known as a 'corpus', as the basis for analysis;
- it makes extensive use of computers for analysis, using both automatic and interactive techniques;
- it depends on both quantitative and qualitative analytical techniques.

Corpus methods have established themselves across a wide range of areas in applied linguistics, including language teaching and language learning, contrastive linguistics, translation, sociolinguistics, psycholinguistics, clinical linguistics and forensic linguistics (see Hunston, 2022). One of the areas of linguistics where corpora have made arguably their largest methodological contribution is in discourse analysis. *Discourse*, in this context, refers to communicative discourse, put simply – language in use. In sum, corpus-assisted discourse analysis 'explores discourse (i.e., language as social practice) through examining corpora (i.e., large computerised sets of textual data)' (Gillings, Mautner and Baker, 2023: 1). There are many well-cited benefits of the corpus approach to analysing discourse. Corpus-assisted discourse analysis allows for the combination of quantitative and qualitative analyses of language use. Its quantitative basis allows the analyst to identify the frequency of particular linguistic phenomena, such as words, phrases or grammatical structures. This way, it can identify recurring patterns which are not immediately visible to the 'naked eye', but which reveal prevalent and even dominant ways of speaking or writing in a given context (Jaworska, 2016). These frequently occurring patterns may require a closer analysis, thus serving as a way into or as 'points of entry' (Baker, 2010: 133) into very large datasets of language. In other words, the method allows the analyst to quantitatively observe the 'big picture' of their data and then 'zoom in' on particular feature(s), extracts or sections of the discourse to qualitatively examine how language is being used in context. Corpus-assisted discourse analysis can therefore be said to exploit 'the fuzzy boundaries between "quantitative" and "qualitative" approaches [...] that "qualitative" findings can be quantified, and that "quantitative" findings need to be interpreted in the light of existing theories, and lead to their adaptation, or the formulation of new ones' (Baker et al., 2008: 296). The use of computer software also permits the analysis of far larger datasets than would be possible if only manual or qualitative methods were used (Mautner, 2007: 55) and, in any case, it can help reduce cognitive biases such as the primacy effect or confirmation bias (Baker, 2006: 10-12). Corpus assistance can therefore add a degree of objectivity to discourse analysis because it offers a set of predictable analytical techniques (two such techniques applied in this analysis are discussed below) and is based on a spirit of methodological transparency underpinned by two guiding principles: (i) no systematic bias in the selection of texts included in the corpus (i.e. do not exclude a text because it does not fit a pre-existing argument or theory) and (ii) total accountability (all data gathered must be accounted for) (Wright and Brookes, 2019: 63). Proponents of corpus-assisted discourse studies are united in their stance that quantitative analyses are there to support, inform and supplement qualitative discourse analysis, not replace it.

The two corpus techniques that are utilised in this analysis are *concordance analysis* and *word n-gram analysis*. Although the set of techniques available to corpus discourse analysts are fairly well-established, there is still some flux as some gain popularity while others wane. Concordance analysis,

however, is ‘the single most important tool available to the corpus linguist’ (McEnery and Hardie, 2012: 35). A ‘concordance analysis’ involves the analyst querying the corpus (i.e. performing searching for) a particular word or phrase and retrieving every instance of it in their data. The instances themselves are presented in their immediate context, usually a few words to the left and right of the search word/phrase. So-called ‘concordance lines’ can then be subjected to manual qualitative analysis to identify patterns in the way in which a particular word or phrase is used in the data (see Figure 1.1 for an illustrative example). The concordance feature allows the analysis to directly search the corpus for any word, phrase or set of words/phrases which may be identified as potentially interesting before (top-down) or during (bottom-up) the analysis.

Figure 2.1: A sample of concordance lines for ‘told the police’ in our corpus

4	you about; and I'm asking you about what you told the police you saw, which was much closer to
5	good relationship. Just in the same way when you told the police you did not just stick to the truth, did
6	himself. And then I reminded you that what you told the police was that it was an assault by
7	your car was well over the verge on that road. You told the police that the weather was fine, and the
8	off, she was fine, was she? So why was it that you told the police that, "She was not behaving
9	time, didn't they, because the divorce. Now you told the police that sexual intercourse had
10	talking about him being there on 15 January, you told the police that he started knocking on other
11	I don't do in any way out of disrespect to what you told the police officers, he called you over, you lay
12	to the police you had plans to scrap the car. You told the police in your statement that you didn't
13	set out. You say I think you told us and I believe you told the police in your statement that when he
14	fact that you say she consented. And that what you told the police in your first interview about her
15	next? When you did tell the account that you told the police in October, were you aware that
16	help me with this. In relation to the incident that you told the police about, was the walking you to
17	all check in summary form some of the things you told the police about on that video. You maintain,
18	this memory, don't you? So, in this memory that you told the police about in your interview, it seems
19	But you were bothered about the car. But you've told the police. You've admitted, "I had cannabis
20	, jeans up. I hear the belt again." That's what you've told the police; all right? you mention at one stage

Word n-grams refer to strings or clusters of words of a fixed length, or *n* words in length. They include all word strings of that length, regardless of whether that string represents a complete or incomplete phrase. For example, word 3-grams are three-word strings, such as *told the police*, *do you accept*, and *where was the*. Any length of n-gram can be identified. They effectively split the data into ‘clusters’ of words, which is a very effective means by which to identify recurrent phrases, word sequences and formulations across texts. The multi-word sequences captured by an n-gram analysis are indicative of those constructions which ‘help language users carry out particular discourse functions’ in a given context (Gray, 2016: 33) and which are ‘associated with the typical communicative purposes of that register’ (Biber and Barbieri (2007: 265). Word strings tend to become rarer the longer that they get (Wright 2017), and for that reason 3-word grams have been chosen for the analysis here. The concordance and n-gram analyses presented in this report are conducted using two corpus linguistic software packages: *Wordsmith Tools* (Scott 2020) and *SketchEngine* (Kilgariff 2014).

A benefit of corpus techniques is that they can be utilised in two ways. They can be used to test hypotheses by querying the corpus for certain pre-determined features that emerge as being potentially interesting in ways external to the data (i.e. *top-down* analysis). For example, here, they can be used to test a claim made in an interview by a practitioner or member of the judiciary. At the same time, they can be used in a more iterative, explorative way to identify what emerges from the data itself, without any preconceived ideas or expectations from the analyst (i.e. *bottom-up* analysis). Both top-down and bottom-up approaches are used in the analysis in this report.

There is a growing body of literature that uses corpus approaches to analyse different courtroom genres. Given the availability of court transcripts (compared to UK jurisdictions, at least) much of this work is from outside of the UK – namely the United States – and often focuses on a single or a very small number of trials. Examples are corpus analyses of opening statements (Chaemsaitong, 2018), witness examinations (Szczyrbak, 2020), closing arguments (Felton Rosulek, 2015), victim impact statements (Abrams and Potts, 2021), US Supreme Court opinions (Goźdź-Roszkowski, 2018) and Cotterill’s (2003) book-length treatment of language in the O.J. Simpson trial. In a UK context, studies have used a corpus approach in the analysis of the *David Irving vs Deborah Lipstadt/Penguin Books Ltd* libel case (Johnson and Clifford, 2011; Szczyrbak, 2021), the Harold Shipman trial (Johnson, 2014) and the Brexit Article 50 hearings in the High Court and Supreme Court (Wright et al., 2022). By far the largest corpus-assisted analysis of courtroom discourse is Heffer’s (2005) seminal work on the language of trials in England and Wales. Heffer’s data comprised 100 complete witness examinations (containing both examination-in-chief and cross-examination), 100 judges’ summing ups and 100 judicial sentences as well as 16 opening addresses and 10 closing speeches. Heffer’s work ‘mapped out the terrain’ (Heffer, 2005: 211) of the various sub-genres of the trial, bringing new insights to the understanding of courtroom discourse to the field of forensic and legal linguistics. However, Heffer’s work – now almost twenty years old – did not include the analysis of vulnerable witnesses. The analysis of contemporary cross-examination, a focus on vulnerable witnesses and the interdisciplinary legal-linguistic triangulation in this project represents ground-breaking and methodologically innovative research in the field.

2.9 Data analysis

A fully triangulated approach was adopted in the data analysis. Key themes were identified from the different sets of observational, interview and linguistic data such as the support available to vulnerable witness including special measures, the use of GRHs to manage cross-examination, the role of intermediaries, the impact of pre-recorded cross-examination and the various adaptations being made to the structure, tone and content of questions put to witnesses. These provided the framework for secondary analysis which was used to sub-divide the key themes and for making comparisons across the data sets so that a fully rounded picture emerged on practitioners’ perceptions of change and changes that were actually happening on the ground.

2.10 Dissemination and impact

A crucial aspect of the research project was to engage with stakeholders to ensure that they were fully informed of our research as it developed and communicate our findings and recommendations as they emerged through our website, practice-facing outlets and social media. A full list of presentations and publications to date can be found in Appendix 2. As well as benefiting from the engagement of the advisory group which consisted of practitioners and academics across the jurisdictions studied, we held two face-to-face stakeholder conferences in Nottingham, one on 1st October 2021 and the other on 28th November 2022 where local practitioners and members of the advisory group were able to share their thoughts on best cross examination practice and the use of intermediaries to improve communication with vulnerable witnesses and defendants in the courts. In addition to these stakeholder events, a major international conference was held in Limerick on 22-23 June 2023 on *Adversarialism, Participation and Voice in the Criminal Process*. which began with a presentation from the research team on our emerging findings. The conference consisted of 14 papers showcasing best

practice achievements that have taken place in recent years at the frontier of courtroom advocacy and academic scholarship and a series of keynote addresses from senior judges across the jurisdictions examined in our research who brought a wealth of policy, research and practice knowledge on the topic.

3. Legal and Policy Context

3.1 Introduction

Within the last 20-30 years a large body of research has exposed the difficulties that vulnerable witnesses and victims in particular face in the witness box and a more ‘witness/victim’ centred approach has led to the concept of promoting ‘best evidence’ for vulnerable witnesses.¹⁹ A consensus largely shared by legislators, the public at large and the various professional stakeholders emerged on the need for a number of ‘special’ or ‘alternative’ measures to assist such witnesses in giving their evidence which have tended to take on a very similar character across a number of jurisdictions. While these began as fairly limited and carefully circumscribed exceptions to normal trial procedure (the use of screens or the removal of wigs and gowns, for example), they have increasingly led to more pronounced departures from traditional procedure such as the use of video-platforms enabling witnesses to give either live or recorded evidence out of the courtroom.

Within the last decade the drive to assist vulnerable witnesses to give their best evidence has permeated into the very nature of cross-examination itself. Given the rising prominence that has been given to victims’ rights in political, criminological, legal and human rights discourse (Doak, 2008), it is not surprising that the manner in which they are questioned in the witness box has come under particular scrutiny. Although cross-examination has been defended in most legal discourse primarily on epistemic grounds, lawyers who conduct cross-examination within the adversarial system are not charged with discovery of the truth but with advocating on behalf of their client’s case. The history of cross-examination is linked to the rise of adversarialism whereby the trial came to resemble a ‘gladitorial’ contest conducted by lawyers who advocated on behalf of their clients’ case by examining and cross-examining witnesses who gave evidence on oath. Advocates were given a broad discretion to question witnesses on any relevant issues or on any matter affecting a witness’s credibility. They could decide not to cross-examine opposing witnesses but in many adversarial systems advocates are required to put their case to witnesses and a failure to cross-examine them can amount to a tacit acceptance of their evidence in chief.²⁰ When we asked counsel what they sought to achieve by cross-examination, the answer we invariably received was not the discovery of the truth, but it was either to undermine testimony that challenges their client’s case or to elicit testimony that is favourable to their client. As one counsel put it, ‘you adopt a twofold approach, either challenging or eliciting’ (AAC2).

¹⁹ Full details of this research can be found in Doak et al (2021) Ch 1.

²⁰ See eg *Brown v Dunn* (1894) 6 R 67). Note however, we were informed that in Scots criminal procedure it is not necessary to ‘put the defence case’ to any witness. It does not prevent evidence being led and it is not a professional requirement: see Lord Bennett (2023), citing *McPherson v Copeland* 1961 HC 74; *Mailley v HM Advocate* 1993 JC 138. For more on the history and contemporary practice of cross-examination, see Doak et al (2021) ss 2.2-2.3.

When cross-examination is seen as a means of advocating a case, it is not hard to see how it can require advocates to closely control what witnesses say and coax them to accept statements put to them. Although judges can in theory intervene to curb aggressive, repetitive or oppressive questioning, descending into the arena has been considered an intrusion on the need for an 'unbroken sequence of question and answer'.²¹ The lack of any meaningful control on counsel's questioning led them in turn to infuse comment and advocacy into their questioning as they used witnesses to promote their case in the adversarial system.

As we shall see, steps are now being taken to move away from this 'advocacy' model of cross-examination towards a 'best evidence' model which restricts cross-examination purely to testing the veracity of witnesses' evidence. In this part of the report we explore the various policies and practices that have been put in place to promote this new approach across the four jurisdictions at the centre of our research. But first it is important to be aware that the witness/victim centred approach that has driven these reforms has been supported by a series of international norms and benchmarks centring on the need for effective witness and defendant participation and what impact these have had on fair trial rights.

3.2 International norms and benchmarks

Recent decades have seen a proliferation of soft law international standards and norms which broadly reflect a consensus on best practice in terms of how vulnerable parties ought to be treated within the criminal process (Doak, 2008). Although the standards fall short of prescribing how exactly testimony should be given, they have focused on the need to ensure their effective participation. A demonstrable shift has occurred clarifying the nature and scope of participatory rights of both defendant and non-defendant witnesses.

The European Court of Human Rights (ECtHR) has acknowledged that the notion of effective participation for defendants is effectively a *sine qua non* of the accused's fair trial rights under Article 6 of the European Convention on Human Rights (ECHR).²² The concept of effective participation is also reflected in the European Union's Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.²³ In various instruments, the United Nations and Council of Europe have indicated that all child witnesses, irrespective of their status as defendant or non-defendant witnesses, have a right to participate effectively in criminal justice processes.²⁴ One particular exemplar of child participatory justice which draws heavily from the international standards and which the Council of Europe has encouraged states to adopt is the Nordic *Barnahus* (Children's House) system now widely used across the Nordic countries to handle the testimony of child witnesses and, increasingly, that of complainants in cases of sexual violence (Myklebust, 2012). It involves live cross-examination being substituted by an investigative interview, conducted during the pre-trial investigation, at a remote location, with an intermediary receiving questions from advocates via an earpiece. Recent years have also witnessed the emergence of new international standards requiring states to adopt measures to protect the privacy of victims of sexual violence in criminal proceedings

²¹ *Jones v National Coal Board* [1957] 2 QB 55, 65.

²² *Colozza v Italy* (1985) 7 EHRR 516; *Stanford v UK* (1994) App. No. 16757/90.

²³ Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings 2013/C 378.

²⁴ See eg UN Convention on the Rights of the Child (1989), Art 40 Art 40(2)(b)(iv), Council of Europe's *Guidelines on Child-Friendly Justice* (2010).

and guard against the use of gender stereotypes and misconceptions around rape and sexuality.²⁵ There are also standards requiring states to adapt their justice systems to ensure effective access for disabled people on an equal basis.²⁶ Within Europe, the Victims' Directive 2012/29/EU represents a 'high water mark' in victim' rights protection, requiring member states to take due account of children's age and maturity when they are giving evidence and to protect victims and their family members from secondary and repeat victimisation. These instruments, particularly the EU Directive, acted as a significant catalyst for reform across European jurisdictions, including the four examined in this report.

Apart from the requirement on states to ensure that witnesses are able to participate effectively in criminal proceedings, international criminal tribunals are also required to protect victims and witnesses in international criminal trials, and the International Criminal Court has been an exemplar of effective victim participation.²⁷ Its rules and procedures provide for a number of protective measures to be taken including giving live or recorded testimony by means of audio or video-link and for support persons to be present during their testimony.²⁸ Trial Chambers are also required to be vigilant in preventing any harassment or intimidation of witnesses during questioning, especially victims of crimes of sexual violence. The Chambers are also given considerable scope within the parameters of the rules to develop practice, for example in relation to whether lawyers should be able to prepare witnesses for examination and cross-examination by means of what is known as 'witness proofing' and in how witness evidence should be presented at trial (Jackson and Brunger, 2015).

3.3 Effective participation and fair trial rights

This new normative stance towards encompassing the rights of victims and witnesses to effective protection and participation has given rise to concerns that measures giving effect to such rights risk interfering with the fair trial rights of the accused. Three well embedded common law principles have at various times been cited in common law jurisdictions as grounds for impeding reform: the principle of open justice, the right to confrontation and the principle of orality, whereby the accepted norm is for live testimony to be given under oath in open court in the presence of the accused and in the presence of the trier of fact. But international bodies consider such principles can be accommodated without prejudicing the accused's right to a fair trial (Jackson, 2023). The ECtHR has ruled that Article 6(3)(d) which guarantees a criminal defendant the 'right to examine or have examined witnesses against him' before an accused can be convicted enshrines the principle that all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument.²⁹ But in common with other Convention rights, it has adopted a proportionality approach towards limitations on this principle and, crucially, has recognised that 'in appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests coming

²⁵ See eg Council of Europe's Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011).

²⁶ UN Convention on the Rights of Persons with Disabilities (2006) Art 13.

²⁷ ICC Statute (2002) Art 68.

²⁸ ICC RPE 87, 88.

²⁹ *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23 [118].

generally within the ambit of Article 8 of the Convention'.³⁰ Recognition of these interests has led the Court to embrace a fair trial model of 'participatory proof' which encourages member states to develop less adversarial practices to enable all witnesses (including victims and defendants) to give their best evidence (Jackson and Summers, 2012).

It is noteworthy that certain appellate decisions in the jurisdictions that are the focus of this research have endorsed the proportionality approach adopted by the ECtHR and permitted measures to be taken for the benefit of vulnerable witnesses which have placed limitations on the way that cross-examination has been traditionally carried out. In *R v Camberwell Green Youth Court ex p D (a minor)* [2005] 1 WLR 393 the House of Lords could not see anything in the relevant special measure provisions which was incompatible with the ECHR. According to Lady Hale:

The evidence is produced in the presence of the accused, some of it pre-recorded and some of it by contemporaneous television transmission. The accused can see and hear it all and has every opportunity to challenge and question the witnesses against him at the trial itself. The only thing missing is face-to-face confrontation, but the appellant accepted that the Convention does not guarantee a right to face-to-face confrontation. [49]

In this case the House of Lords was considering a challenge to child witnesses being examined-in-chief by pre-recorded video and cross-examined by live-link but there is no reason to believe that when the cross-examination is carried out by pre-recorded video before the trial (so-called 'pre-recorded cross-examination') that this procedure would be any less compliant with Article 6. Nor is there any reason to believe that when an intermediary who has been appointed to facilitate the communication of a vulnerable witness interjects in the course of cross-examination that this would not be considered compatible with the Convention.

Recent decisions of the Irish Court of Appeal have also endorsed the constitutionality of certain special measures. In *DPP v VE* [2021] IECA 122 Ms Justice Ní Raifeartaigh considered that fairness of the trial may require some accommodations to be made for vulnerable complainants and in *DPP v O'Driscoll* [2022] IECA 4 the Court upheld a ruling that the principal prosecution witness be permitted to give evidence by video-link and to be supported by an intermediary. However, a recent decision concluded that 'if matters have reached a point where a child witness no longer remembers the events which gave rise to the prosecution by reason of the delay between the video-recording and the trial, matters may have reached a point where cross-examination would be in effect meaningless, and the accused person may be said to have been deprived of his right to cross-examine' (*People (DPP) v MT* [2023] IECA 65 [86] but cf. the English Court of Appeal decision in *R v DL* [2019] EWCA Crim 1249).

3.4 The evolution of law, policy and practice across the research jurisdictions

3.4.1 England and Wales

In response to a mounting critique of traditional court procedure, including especially cross-examination, 'special measures' first began to be introduced for child witnesses in the 1980s including

³⁰ *Doorson v The Netherlands* (1996) 22 EHRR 330 [70]. For analysis of the relationship between the right to a fair trial and the protection of complainants of sexual offences during criminal proceedings, see Law Commission (2023: App 2).

screens, live TV link, and in 1991 pre-recorded video-taped evidence-in-chief. The far-reaching recommendation of the Pigot Committee (Home Office, 1989) that all questioning of child witnesses in serious crimes of sex and violence (including cross-examination) should take place in advance of trials met with stiff opposition. But the idea resurfaced a decade later as part of a series of recommendations made in a government inter-departmental review of the treatment of vulnerable or intimidated witnesses in the criminal justice system, *Speaking up for Justice* (Home Office, 1998). This led to an enhanced range of special measures being enacted under the Youth Justice and Criminal Evidence Act 1999 for broader categories of vulnerable and intimidated witnesses which, however, as mentioned in the Introduction, originally excluded defendants. The introduction of special measures was also accompanied by Home Office guidance for those responsible for conducting interviews with witnesses who may be eligible for special measures, and for preparing witnesses for attending court.³¹

Two measures in particular – pre-recorded cross-examination and the use of intermediaries – impacted considerably upon traditional cross-examination, although it took a considerable period of time before they were implemented. Pre-recorded cross-examination along Pigot lines allowing children and other witnesses classified as vulnerable under section 16 of the 1999 Act to give all of their evidence in advance of the trial (known as ‘section 28 hearings’ after the provision in the 1999 Act which provided for this procedure) was not piloted until 2013 and was only made available for certain categories of witnesses in all Crown Court centres in November 2020 (see Doak, Jackson and Cooper, 2022). The use of intermediaries with a power to intervene in advocates’ questioning of certain kinds of witnesses which had already been happening on an *ad hoc* basis was formally phased in in 2007 and rolled out nationally in 2008. The intermediary may not only communicate questions and answers to and from a witness, but may also explain the questions and answers in such a way as to enable them to be understood, although their substance or meaning may not be changed.

More radical changes to the nature of cross-examination itself occurred in the aftermath of a series of rulings by the Court of Appeal from 2010 which sought to put much greater restrictions on the manner in which vulnerable witnesses were cross-examined by urging that age-appropriate language and short ‘untagged’ questions be used and that a cautious approach be adopted when challenging or seeking to undermine the testimony of a vulnerable witness.³² Best practice guidelines were issued urging judges and magistrates to control questioning of vulnerable witnesses and in some circumstances breaking from the rule (known as ‘putting the case’) that a failure to cross-examine should be taken as tacit acceptance of the witness’s evidence since such evidence could be challenged after (rather than during) the witness’s testimony.³³ All this has had the effect, as the Court of Appeal put it in *R v Lubemba: JP* [2015] 1 WLR 1579, of requiring a radical departure from the traditional style of advocacy. If justice was to be done to the vulnerable witness and accused, ‘[a]dvocates must adapt to the witness, not the other way round’ ([45]).

The main mechanism for giving effect to this expanding judicial role is the ‘Ground Rules Hearing’ (GRH) which has its origins in intermediary training in 2004 when intermediaries were taught to articulate ‘ground rules’ for advocates to improve their communication with vulnerable witnesses.³⁴ When it transpired that, despite meetings with advocates, these rules were not being adhered to in

³¹ For the latest version, see Ministry of Justice and National Police Chiefs’ Council (2022).

³² See *R v Barker* [2010] EWCA Crim 4; *R v E* [2011] EWCA Crim 3028; *R v W and M* [2010] EWCA Crim 1926; and *R v Wills* [2012] 1 Cr App R 2.

³³ See CPD 2015 I General Matters 3E. See now CPD 2023 Ch 6.

³⁴ See Backen, Cooper and Marchant (2015).

the trial, intermediaries called for a 'ground rules hearing' with the trial judge and advocates present where the judge could issue directions on how the advocate should question the vulnerable witness. GRHs came of age in 2013 when there were recognised in Criminal Practice Directions as a key step in planning the proper questioning of a vulnerable witness or defendant.³⁵ According to *Lubemba*, the GRH should discuss, amongst other things, 'the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked' ([43]). The most innovative aspect of the GRH is the requirement that for particularly vulnerable witnesses with communication needs advocates prepare and furnish a draft list of proposed cross-examination questions for consideration by the judge, who will in turn invite representations from prosecuting counsel and the intermediary and make any directions accordingly. Criminal Practice Directions state that where there is a vulnerable witness or accused, consideration must be given to holding a GRH and one is required in all trials involving an intermediary.³⁶

Significant steps have been taken to train advocates in the questioning of vulnerable witnesses. The Inns of Courts College of Advocacy (2022) has developed a national programme of *Advocacy and the Vulnerable Training*, in conjunction with the Bar, based around 20 principles of questioning vulnerable people and children which is designed to become mandatory for any advocate wishing to undertake publicly funded work for serious sexual offences cases involving vulnerable witnesses. An independent body known as The Advocate's Gateway (2019) has also published 19 toolkits to assist judges, lawyers and other criminal justice professionals with dealing with vulnerable court-users, covering subjects such as questioning witnesses with a range of disabilities, young children, and ensuring the effective participation of young defendants.

3.4.2 Scotland

Calls for reform of the way in which the evidence of vulnerable witnesses was elicited at trial in the late 20th century, paralleling similar calls in England and Wales, led the Scottish Law Commission to examine the issue and on the back of its recommendations, the Criminal Procedure (Scotland) Act 1995 introduced screens and live televised links for child witnesses under 16 giving evidence-in-chief and under cross-examination. Further reforms to the 1995 legislation have since followed; the Vulnerable Witnesses (Scotland) Act 2004 extended the categories of vulnerability to include complainants in sexual offences cases and adults whose live testimony in court might be diminished by reason of mental disorder or fear or distress, while the range of alternative measures was broadened to include the taking of evidence by a commissioner, use of a supporter and giving evidence-in-chief in the form of a prior statement. Further amendments to the 1995 Act were introduced by the Victims and Witnesses (Scotland) Act 2014 (extending categories of vulnerability) and by the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 (enabling courts to take children's evidence in full in advance of the trial in 'solemn' cases via a commissioner). Witnesses who fall under one of the other vulnerable categories may also apply to the court to give evidence in this way, and since the Dorrian Review (2021) on the management of sexual offences cases it has become the norm for complainers in serious sexual offences cases to give evidence in this way. A Practice Note

³⁵ Backen, Cooper and Marchant (2015: 420). See CPD 2013 3E: Ground Rules Hearings to Plan the Questioning of a Vulnerable Witness or Defendant.

³⁶ CPD 2023 6.1.4.

was introduced in 2017 to implement good practice for making and deciding evidence on commission applications which commended both the Advocate’s Gateway Toolkits and the reasoning of the Court of Appeal in *R v Lubemba*.³⁷ A further Practice Note was introduced in 2019 which created a general presumption that for children under 12 written questions will be prepared as they may be for other children and adults with particular issues.³⁸

While many of these alternative measures bear some similarity with those which have been introduced in England and Wales, one difference lies in the fact that there is no conceptual equivalent of an intermediary. The role of a ‘supporter’ is markedly different from that of an intermediary; supporters may not intervene or rephrase questions or answers; their sole purpose is to provide moral support by being present alongside the witness while s/he is giving evidence.

The introduction of GRHs creates new obligations for commissioners to manage proactively the questioning of vulnerable witnesses and significant appellate rulings have introduced a ‘sea change’ in the court’s readiness to control cross-examination in sexual offences cases (Lord Beckett, 2023).³⁹ In March 2021 the Dorrian Review (2021) recommended that GRHs should be introduced for any occasion when a complainant is to give evidence on commission or at trial and the creation of a specialist court for sexual offences, where trauma-informed practices would be embedded and a presumption of early pre-recorded cross-examination would apply in all cases. Those recommendations which require legislation have been introduced in the recent Victims, Witnesses and Justice Reform (Scotland) Bill 2023. As in England and Wales, professional bodies and regulators have taken separate steps to influence how witnesses are questioned and the Judicial Institute of Scotland has developed a training programme (known as ‘Project Echo’) in line with the phased implementation of the 2019 Act.

3.4.3 Northern Ireland

Northern Ireland mirrored England and Wales in making provision for special measures for vulnerable witnesses. Evidence by live-link and pre-recorded evidence was made available to child witnesses during the 1990s and the Criminal Evidence (NI) Order 1999 then provided for the same range of special measures as those contained in the Youth Justice and Criminal Evidence Act 1999. As in England and Wales, defendants were originally excluded from the statutory special measures framework, though the legislation was subsequently amended to allow certain vulnerable defendants (children under 18 and certain disabled defendants) access to the live-link and to an intermediary. The roll-out of intermediaries and pre-recorded cross-examination experienced significant delays. After initial pilots based on a similar scheme to that in England and Wales intermediaries were rolled out across Northern Ireland in 2016 and pre-recorded cross-examination was partially introduced in 2017 to allow for the scheme to be piloted.

There is no equivalent to the line of recent appellate case law in England and Wales regarding the proper judicial role in controlling cross-examination and requiring advocates to adapt cross-examination to the needs of vulnerable witnesses. However, the need for closer judicial control of

³⁷ Practice Note 1 of 2017; https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts---practice-note---number-1-of-2017.pdf?sfvrsn=7a1447d2_4

³⁸ Practice Note 1 of 2019; https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts--practice-note-p--number-1-of-2019.pdf?sfvrsn=f0e0bd2_4

³⁹ See e.g. *Begg v HM Advocate* 2015 SLT 602 (Lord Justice Clerk Carloway) and *Donegan v HM Advocate* 2019 JC 81 (Lord Justice Clerk Dorrian).

cross-examination and the potential utility of GRHs was given impetus with the publication of the Gillen Review (2019) which was commissioned to review the law and procedures in serious sexual offences in Northern Ireland following a highly publicised nine-week trial in 2018 in which two professional rugby players were acquitted of rape and two other defendants were acquitted of other offences. The review set out a plan for transformative change, entailing a new culture of cross-examination which identified a need to redefine conventional rules for cross-examining children and vulnerable people in criminal trial. The review recommended that GRHs should be piloted in all cases involving pre-recorded cross-examination, with a view to eventually rolling them out for hearings involving child complainants and vulnerable adult witnesses (including the accused). Training was identified as a key priority. The first major changes to take effect were contained in *Case management protocols for vulnerable witnesses and defendants* published in 2019.⁴⁰

3.4.4 Ireland

Following a report from the Law Reform Commission in 1990, the first significant statutory protections for vulnerable witnesses were introduced in the Criminal Evidence Act 1992 which aimed to make it easier for children and persons with ‘mental handicap’ to give evidence in cases of physical or sexual abuse. This legislation was largely unchanged for a quarter of a century. As with many other jurisdictions, heightened awareness of the issues facing vulnerable witnesses and, in particular, the advent of the ‘Victims’ Directive’ (Directive 2012/29/EU) acted as catalysts for a major overhaul of the law. The 1992 Act was significantly revised by two new pieces of legislation: the Criminal Law (Sexual Offences) Act 2017 and the Criminal Justice (Victims of Crime) Act 2017, both of which extended the range of measures available and extended eligibility requirements to cover a wider pool of witnesses including complainants in sexual assault cases. Irish law thus recognises a full range of special measures including: (i) tv link; (ii) pre-recorded evidence-in-chief; (iii) removal of wigs/gowns; and (iv) screens. Currently, there is no statutory provision that facilitates the admission of pre-recorded cross-examination but provision has been made for the support of an intermediary since 1992. Specifically, under the Criminal Evidence Act 1992 (as amended), this measure is available to all witnesses under the age of 18, as well as to adults with a ‘mental disorder’, who are delivering, or about to deliver, testimony through a live television link in respect of a sexual and violent offence (i.e. a ‘relevant offence’). The relevant offence gateway, it should be noted, does not apply where the witness in respect of whom the special measures application is being made, is the victim of the alleged offence and is a child or an adult with a ‘mental disorder’. In each case the court has jurisdiction to grant an application for an intermediary if it is satisfied that such an accommodation is in the ‘interests of justice’.⁴¹ In addition, pursuant to section 19(2)(c) of the Criminal Justice (Victims of Crime) Act 2017, the intermediary facility is open, at the discretion of the court, to all victims who are adjudged to have a ‘specific protection need’ regardless of the nature of the offence that has allegedly been committed against them. Following the recommendation of the O’Malley Review (2020) on the need for a cohort of appropriately qualified intermediaries a Professional Diploma in Intermediary Studies was launched at the University of Limerick in September 2022.

Cross-examination in Ireland has remained largely unregulated and has been subject to relatively little judicial comment. However, a new statutory power introduced under the Criminal Justice (Victims of Crime) Act 2017 enables the court to restrict questions asked in cross-examination at the trial which

⁴⁰ Practice Direction no. 2/2019.

⁴¹ Criminal Evidence Act 1992 s 14(1A) inserted by Criminal Justice (Victims of Crime) Act 2017 s 30(c)(ii).

relate to the private lives of victims and are unrelated to the offence in addition to provisions already in force under the Criminal Law (Rape) Act 1981 (as amended) restricting questions on sexual history evidence. In addition, in recent years the Irish judiciary has become more proactive in arranging pre-trial hearings on an ad hoc basis to discuss how vulnerable witnesses are questioned using inherent common law powers. Following the O'Malley Review (2021) into the protection of victims of sexual violence during the investigation and prosecution of sexual offences, a legislative scheme for pre-trial hearings was provided by the Criminal Procedure Act 2021 which came into force on 28 February 2022.⁴² Under this legislative framework, a trial court enjoys a structured discretion to hold one or more preliminary hearings in all cases sent forward for trial which involve an indictable offence, provided that the court is satisfied that such a hearing 'would be conducive to the expeditious and efficient conduct of the proceedings' and 'it is not contrary to the interests of justice'.⁴³ Significantly, this formality is mandated for certain particularly serious offences.⁴⁴

Both the O'Malley Review and the Oireachtas Joint Committee on Justice (2021) have recognised the importance of specialist training and guidelines to improving the quality of questioning vulnerable witnesses.

3.5 Conclusions

Special' or 'alternative' measures and procedures are entrenched in legislation across all four of the surveyed jurisdictions. Table 3.1 below shows the range of measures and procedures that are now adopted across the jurisdictions and the legislative basis for them.

Table 3.1: Summary of special measures and procedures across the surveyed jurisdictions

	England & Wales	Scotland	Northern Ireland	Ireland
Screens	Yes	Yes	Yes	Yes
Pre-recorded evidence-in-chief	Yes	'on commission'	Yes	Yes
Live-link cross-examination	Yes	Yes	Yes	Yes
Pre-recorded cross-examination	Yes	'on commission'	Yes (but not yet operational)	No
Intermediaries	Yes	No- 'supporter' only	Yes	Yes

⁴² For a detailed discussion of this scheme, see Cusack (2022).

⁴³ Criminal Procedure Act 2021 s 6(1).

⁴⁴ Criminal Procedure Act 2021 s 6(2). A serious offence is one which, upon first conviction, may result in a competent person being sentenced to life imprisonment or to a maximum term of imprisonment of 10 years or more; or aiding, abetting, counselling or procuring the commission of such an offence; or conspiring to commit, or inciting the commission of, such an offence. It also includes any offence designated as such by the Minister for Justice.

Ground Rules Hearings	Yes	Yes	Yes	No – pre-trial hearings only
Key sources	Youth Justice and Criminal Evidence Act 1999 Criminal Practice Direction 2023, ch 6. <i>R v Lubemba: JP</i> [2015] 1 WLR 1579	Criminal Procedure (Scotland) Act 1995 Victims, Witnesses and Justice Reform (Scotland) Bill 2023 Practice Note 1/2017 Practice Note 1/2019.	Criminal Evidence (NI) Order 1999 Practice Direction 2/2019	Criminal Evidence Act 1992 Criminal Justice (Victims of Crime) Act 2017 Criminal Procedure Act 2021

While reforms across each jurisdiction have evolved at varying degrees of pace and scale, the overall direction is clear; there is a general consensus that the traditional ‘gladiatorial’ approach to cross-examining vulnerable witnesses is now essentially redundant. In this respect, on paper at least, England and Wales would seem to have the most extensive range of measures in place, with the pace and success of innovation being partly attributable to recent judicial muscularity from the Court of Appeal. Scotland has followed suit to a large degree, with evidence on commission being pre-recorded, although there is no provision for intermediaries. Likewise, Northern Ireland has the same mechanisms in place as England and Wales, although pre-recorded cross examination is still not operational. Ireland appears to lag behind in some respects, with no provision currently in place for pre-recorded cross- examination or ground rules hearings, although efforts towards further reform have gathered momentum over the past decade.

In broad terms, the reforms outlined above have not only made legislative inroads into the orality principle but, with the active participation of the judiciary, have also begun to change the fundamental nature of cross-examination itself. The introduction of GRHs, where directions are given on how witnesses should be questioned, and the increasing use of intermediaries to mediate on the way questions are put, represent significant changes to the traditional ‘advocacy’ model of cross-examination. In this respect, it now appears that the ‘best evidence’ approach now prevails in informing the development of law, policy and practice in this area.

4. Research Findings

4.1 Introduction

In this part of the report we move on to explore the extent to which the various legal and policy initiatives discussed in Part 3 are changing cross-examination practice on the ground across the four jurisdictions of the study. We will begin by exploring the changing environment in which the cross-examination of vulnerable witnesses is taking place which includes the use of special measures deployed to assist vulnerable witnesses in giving their evidence. We then consider the way in which three specific initiatives - ground rules hearings, intermediaries and pre-recorded cross-examination - are being deployed in those jurisdictions that have adopted these measures. Finally, we make an assessment from the research findings in the various work packages of the extent to which the duration, content and style of cross-examination are changing to accommodate vulnerable witnesses and whether these changes are enabling them to achieve best evidence.

4.2 The changing cross-examination environment

There was a general view amongst interviewees across the jurisdictions that the court system had embraced a much more witness and victim-centred approach. Often, this was attributed to the practice of senior judges who demonstrated a much more sensitive approach to the needs of witnesses and victims than in the past. One judge in Ireland commented that judges were no longer afraid of communicating directly with victims in court, taking a more human approach to their interactions and using very ordinary language – ‘thanking them for participating in the process and acknowledging what had happened to them and wishing them well in the future’ (DAJ1). According to interviewees, this witness/victim-centred approach has extended towards meeting witnesses and victims before the trials start. One intermediary in Northern Ireland referred to a case involving a 16-year-old with complex mental and physical needs who had been raped as a 12-year-old by a family member and was very nervous about giving evidence. The judge brought the prosecution and defence barristers into her room and with her wig off in her normal clothes and she and the barrister adopted a very friendly manner in their discussion with the witness which had put her very much at ease (CAR1).

Interviewees also highlighted the role that victim and witness services play in providing support to complainants at court. Statutory provision is made in Scotland for a ‘supporter’ to sit alongside vulnerable witnesses and in Ireland for complainants in sexual offences to be accompanied by a ‘support worker’ described as a volunteer or someone employed in an organisation which provides support to victims of crime.⁴⁵ One interviewee in Scotland said that sometimes complainants were supported by counsellors from organisations such as the Rape Crisis Centre but, in contrast to intermediaries for whom there is no provision in Scotland, supporters as a whole do not intervene in trials (BAC1). In England and Wales and Northern Ireland there is statutory provision for supporters to

⁴⁵ Criminal Procedure (Scotland) Act 1995, ss 271H and 271L, Criminal Law (Rape) Act 1981 s 6(3)(5), Criminal Justice (Victims of Crime) Act 2017 s 20.

accompany vulnerable witnesses who give evidence by live-link.⁴⁶ Beyond this the court may, through its inherent jurisdiction, permit supporters to accompany witnesses in the court room and sit next to them when they give evidence.⁴⁷

Excluding those trials in which a witness was accompanied by an intermediary while giving evidence (n=6), witness supporters were observed in 11 trials; nine in England & Wales and two in Northern Ireland. While the jury was generally told in these cases that the witness had a supporter, it was not always clear whether that supporter was a family member or friend, a volunteer from Witness Support or other organisation, or an Independent Sexual Violence Adviser (ISVA) or a Children & Young People's Sexual Violence Adviser (CHISVA). We know for certain that an ISVA or CHISVA was supporting the witness in three cases: one witness was accompanied by an ISVA in the witness box in [A039]; an ISVA was present in court, but not in the witness box, in [A033]; and a CHISVA accompanied the complainant during cross-examination via video-link in [A020].

In the observed trials, we noted that, in contrast to 'professional' witness support, accompanying family and friends might be more of a hindrance to proceedings than a help. In [A034], for example, the witness (C)—the complainant in a rape case—was accompanied by her sister during the trial. This supporter was seated in the public gallery while C was cross-examined behind a screen in the courtroom. According to court personnel seated in the dock with the defendant (D), C's sister was mouthing 'rapist' and 'you are a rapist' to D throughout C's cross-examination. This was brought to the attention of the judge by an usher later in the day, when C's evidence had finished. In the absence of the jury, the judge warned those in the public gallery:

I'm just going to stress this, I'm not suggesting for one moment there's any truth in the suggestion; I am entirely neutral on the topic. But it is important that any personal feelings or attitudes are kept private in order to see that justice is done fairly and to both sides. In the event that inappropriate conduct is witnessed again by anybody and reported to me, I will have no choice but to clear the public gallery and the person responsible, whomsoever that might be, would find themselves, potentially, in a contempt of court direction.

The following day, C was not at court. Her sister, however, was. During the lunch break, it was brought to the Officer in the Case's (OIC) attention, again by an usher, that the sister appeared to have been recording the morning's proceedings on her mobile telephone. The OIC immediately sought out and confronted C's sister in a corridor of the court building, demanding that any such recording was prohibited and must be deleted. C's sister immediately left the court building. The OIC was subsequently admonished by the judge for not having retained the material and let the court exercise its powers in dealing with it.

In a slightly different vein, concerns regarding the potentially disruptive and distractive impact of family and friends supporting the complainant in another rape case [A038] were discussed by the judge (J), prosecution counsel (PC), and the intermediary (IM) while finalising special measures during the Ground Rules Hearing held on the morning the complainant (C) was due to be cross-examined. PC and IM had discussed the use of some special measures with C immediately prior to the GRH:

⁴⁶ Youth Justice and Criminal Evidence Act 1999 s 24(1A); Criminal Evidence (NI) Order 1999 art 14 (1A).

⁴⁷ For commentary see Law Commission (2023: 7.199).

J: So, wigs and gowns off. Meeting?

IM: We hadn't got that far, we were discussing coming into court versus live-link. There was lots of people there and it was getting difficult to discuss. The officer in the case has checked and she has said her preference is to come into court and just wants to get it done.

PC: One of the issues that is troubling us is the 'entourage', so to speak. I don't want to be unkind, but there is a risk that they may become a distraction rather than a support. The intermediary and I were discussing whether they might be in the public gallery upstairs [behind Perspex] where they can't be heard. I think that there is a risk they may interject.

J: Well, it won't happen more than once.

PC: Yes. If they are upstairs then they will be in her line of sight.

J: Exactly. I think it would be best for them to be downstairs.

4.2.1 Familiarisation and preparation for cross-examination

We were told that victim and witness services can also provide support to vulnerable witnesses before the trial at court familiarisation visits which help to familiarise witnesses with the procedure for giving evidence. It appears that intermediaries can also attend such visits. One intermediary in England and Wales told us that she would often request to carry out a live-link practice at the court visit which would show up any problems with using live-link. She would arrange for someone to ask the child some questions unrelated to the case, copied in advance to the CPS, while she was in the live-link room with the child so that they experience looking at and answering questions to the screen (AAR1). But one counsel in England and Wales was sceptical about whether the familiarisation visits that take place before trial always help children:

It's very difficult for those people because they've never been through it before, those parents, so, they are doing what they are told to do by well-intentioned police officers and Witness Support and court staff all doing their best. But I've gone to meet a child who's say, eight, at court, and I go into the room and there can be six adults in there with the child. Six adults in court. So, you've got like mum, you've got like the officer who's given them a lift, you've got an intermediary, you've got witness support staff, you've got an usher who works at the court whose job is to administer the oath, and you've got — who else? Anyway, I think that's overwhelming, and I think it's too much. (ACC4)

Apart from general court familiarisation procedures, interviewees across the jurisdictions reported that there had been a shift towards preparing witnesses more for cross-examination, although there are strict prohibitions on any coaching of witnesses. One judge in Ireland referred to Victim Support giving witnesses advice on asking counsel to repeat questions they do not understand (DAJ2). A Scottish judge, however, doubted whether witnesses get as much information given to them in a sensible way that they understand as they should. She said that people must be realistic and not unduly raise expectations: 'I mean, if anybody tells a witness that going to a commission will be a walk in the park, then they shouldn't' (BAJ4).

An advocate in England and Wales referred to two types of meetings that prosecution counsel should arrange with certain vulnerable witnesses. In rape and serious sexual offences (RASSO) cases counsel

are now expected to attend 'special measures meetings' with the police, CPS case worker and the ISVA where, as the advocate put it, the lawyers' roles are explained, there is some relationship building and a discussion of appropriate special measures (AAC3). This meeting should take place early on in the proceedings so as to provide the witness with some reassurance and continuity of contact. But with the huge pressures on courts, the barrister who attends this meeting may not be the same barrister who appears at the trial which rather defeats the purpose of any relationship building. The second meeting which takes place later is the 'speaking to witnesses at court' (STWAC) meeting, where, according to the Crown Prosecution Service (CPS) protocol,⁴⁸ counsel are expected to tell witnesses what issues may come up in cross-examination and, if they are old enough, to understand whether any third-party material has been disclosed about them, for example, counselling notes or medical records, so that they are forewarned that any such material might be referred to (AAC3). A Northern Irish prosecution counsel also said that he would meet with the witness beforehand and explain that the defence have access to third party material and this is an area of cross-examination which they are going to inevitably be asked questions about (CAC3). A Scottish prosecutor referred to the fact that where there had been a successful application to have sexual history evidence admitted in Scotland complainers would be given advance notice of what the lines of cross-examination will be (BAC2), something which, according to another advocate, is 'not wholly satisfactory from the point of view of the accused person while it may well avoid the sort of traumatic surprise that cross-examination can otherwise have' (BAC4). In England and Wales the CPS protocol states that witnesses are entitled to be told that leave has been given for them to be cross-examined about sexual history evidence or bad character evidence and in Northern Ireland we were told that witnesses are made aware of successful applications to admit sexual history evidence and the topics that are likely to be explored.

4.2.2 Special measures: remote testimony

Perhaps the most significant change in cross-examination has been the move away from vulnerable witnesses giving their evidence in the courtroom. Across the jurisdictions vulnerable witnesses are now able to give their evidence remotely without having to be present in the courtroom through special measures directing that vulnerable witnesses give their evidence-in-chief by way of a police-recorded interview and are cross-examined by a live-link video with them usually located somewhere else in the court building. A number of interviewees also referred to the increase in the numbers of all kinds of witnesses giving evidence remotely since the outbreak of the Covid 19 pandemic. As one judge put it, 'there's been far more people on video-link than I think historically we've ever seen' (AAJ2).

A persistent theme raised by interviewees, however, was the poor quality of video and audio in the police-recorded interview, during the live-link and in pre-recorded cross-examination which did nothing to help witnesses when they were responding to questions:

What is of concern and it's a practical issue is the quality of the equipment, either the police equipment so you don't necessarily get a clear picture of the witness or the sound quality is poor or the court equipment so the screen is miles away from the jury. (AAJ1)

⁴⁸ See <https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court>

I still find that in the room in which the recording is taking place, which tends to be at a police station... the microphones always seem to be in the wrong place... So, you know, the acoustics then play a part. (ABJ4)

The video-links in court for live-link are quite poor quality. So I had one today where the defence barrister was cross-examining the complainant and asked whether she had discussed the defendant with another complainant. In other words, whether they put their heads together. But when he said 'discussed' she thought he had said 'disgust' as in whether he made her sick and she was like, 'Yes, I'm disgusted by all paedophiles'. (ACC3)

Another concern was that the camera did not pick up on what the witness was demonstrating:

I've had a very young complainant with an intermediary on a video-link being cross-examined where she was demonstrating things but... the camera just had her head and shoulders, so when she's demonstrating things, the things that she was demonstrating [were] off camera which I thought was extraordinarily problematic because it potentially makes the intermediary and the usher or whoever is in the video room, a witness to fact as to what the child was showing. Now, if the child had a doll with a pair of pants and was demonstrating whether the fingers went inside or outside the pants for example and you can't see that, a huge problem. (AAC3)

These reported deficiencies in the quality of audio and video equipment were borne out in the trial observations. Fieldnotes frequently noted the observer's difficulty in hearing a particular witness's evidence, whether it be over the live TV link or pre-recorded, and it was not uncommon for proceedings to stop while the police-recorded video interview was playing so that the jury could be provided with a transcript because the sound quality was so poor. These sound issues also extended to the live video-links. In [A013], for example, the witness—the complainant in a rape case — was all set up for cross-examination via live-link from a video suite in another court centre, some 20 miles away from the trial court. Having spoken to the complainant via the link, however, prosecution counsel (PC) immediately informed the judge that proceedings would be delayed while the complainant and interpreter were transported to the trial court:

PC: As required, I've had a discussion with [the complainant] over the CVP platform. It did not go well re the quality of the sound; there's a time delay between questions and answers. It's simply not good enough for giving evidence. It's not fair on the prosecution or defence to conduct his cross-examination this way. And her English is very good. In the circumstances, we're going to have her here. We may do cross-examination over the court link here or behind court screens.

4.2.3 ABE interviews

The evidence-in-chief of most vulnerable witnesses who were observed in trials was given by means of a police-recorded interview, which is called an 'Achieving Best Evidence' (ABE) interview in England and Wales and Northern Ireland, a 'Joint Investigative Interview' (JII) in Scotland and a 'Special Interview' or 'section 16' interview in Ireland (after the provision in the Criminal Evidence Act 1992 which provides for the admissibility of video-recordings). Interviewees in Scotland referred to the fact that the police do not yet generally record interviews with adult complainants and their evidence is usually now given on commission with a recording made of it for the trial. Nevertheless, a police interview of an adult can be recorded and used as evidence-in-chief per section 271M of the Criminal Procedure (Scotland) Act 1995. A pilot project implementing this measure in Dumfries, Edinburgh and

Inverness is still being evaluated. One interviewee considered that police-recorded ABE interviews were a major step forward in terms of locking the evidence down early and giving vulnerable witnesses the opportunity of giving evidence in a more relaxed setting than court and with the luxury of time to take as long as is necessary to provide their account (AAJ2). But interviewees did not think that such interviews always benefited witnesses. Poor quality ABE interviews could ‘make a huge difference in the jury’s understanding of what they’re saying, and the jury’s ability to actually engage and empathise’ (AAC3). Apart from the quality of the audio and video itself, the content of interviews also varied enormously. One counsel said that ‘the police don’t ask the simple questions that we are being told that we’ve got to use in cross-examination’ (AAC3). Another common complaint was that the interviews were often too long with the result, according to one judge, that ‘the chances of the child saying something which is wrong or mistaken just increase with the volume of questions’ (AAJ3), although another judge acknowledged that it was in the nature of the ABE interview that it is not going to be as focused as live evidence because of the stage at which it was held before the issues in the case have become clear (ABJ3). Interviews were edited but the editing could not always achieve a focused interview.

These issues reported by interview respondents were borne out in the trial observations where the playing of a vulnerable witness’s ABE video as evidence-in-chief was par for the course in England and Wales. Of the 17 rape and serious sexual offences (RASSO) complainants whose evidence was adduced at trial in this jurisdiction, all but one’s evidence-in-chief was in the form of the ABE. While the number of cases in other jurisdictions was far lower, the Special Interview was played in the one RASSO trial observed in Ireland, and the three RASSO trials observed in Northern Ireland. In Scotland, three RASSO trials were observed, at least in part. Of the nine (adult) complainants across these three trials, the evidence-in-chief of three was pre-recorded. Of the remaining six complainants, two testified in court behind a screen, two testified via live-link, and two received no special measures.

What very quickly became clear during trial observations was that the quality of ABEs—and their equivalents in other jurisdictions—was inconsistent, in terms of both the audio and visual quality of a recording, and its content. While the audio equipment and acoustics in many courts were, themselves, variable, difficulties hearing a complainant were not infrequently explained by how the police officer conducting an interview had placed the microphones, as the judge’s interruption of the ABE eight minutes into a 112 minute (edited) recording in [A007] illustrates: ‘Can everyone hear her? No? We have the usual thing of the adults [the interviewing officers] being clear and the child not’. Proceedings were halted for half an hour while transcripts were produced for the jury. This was not an isolated case.

Notwithstanding that struggling to hear a complainant’s evidence was a recurring issue, there was a marked, albeit principled, reluctance among some judges regarding the provision of transcripts to jurors. The fieldnote from pre-trial discussions on the morning of trial in [A034], for example, reports:

PC raised concerns that the audio on the ABE was on the cusp of being inaudible and may require a transcript. J responded that it is for the jury to raise if they have trouble hearing and then it would be for him to grant the provision of a transcript. J listened to a portion of the ABE and decided he would rather run the ABE with the usual warning.

The warning given to the jury was noted as follows:

J: The sound quality of recordings can vary. If you find you cannot hear or understand what is being said, then please let us know. Please bear in mind that you cannot see the video again. You will not be given a transcript. That is so this evidence is as similar as possible to live evidence...

In terms of the quality of the content, the stark reality is that some officers are plainly more adept at conducting these interviews than others. The defendant in [A027], for example, was charged with two counts of sexual assaulting a child under 13. The 11-year-old complainant presented as somewhat more focused, articulate, and coherent in her (edited) half-hour ABE than the Detective Constable who interviewed her. As the interview progressed, she appeared to become increasingly perplexed by the interviewing officer's (IO) vague, confusing, and repetitive questions while he appeared to become increasingly frustrated by her failure to answer the questions he (thought he had) asked her:

IO: Okay, so let's start from you were in bed. Tell me what happened.

C: I was in bed, sleeping, and he came in the room and woke me up and asked me to help him look for his keys. I helped him look. We went downstairs. We looked everywhere... and then I went, 'I'm going to bed now', and he grabbed my arm, put me on his lap, so I said 'I'm going to bed now' and then I went to bed.

IO: So, where were you?

C: We were downstairs in the living room.

IO: I mean whose *house* were you in?

C: My Aunty [name]'s house.

...

IO: Tell me about the first time it happened.

C: What? Like, when he was kissing me?

IO: Yes.

C: He was kissing me like a thousand times.

IO: Where were you?

C: He was sitting at the dining table, eating his food—

IO: Okay. No. *Where* were you? Whose house were in you in?

C: [Looks surprised and pauses] Aunty [name]'s house.

The editing of ABEs was also inconsistent. At one end of the spectrum, there were sharply edited ABE videos that were comprehensive and focused. At the other end of the spectrum, however, there were protracted, rambling, and repetitive interviews containing irrelevant details. In introducing the ABE to the jury in [A020], the judge commented:

You can take notes but, if this turns into a note taking exercise, you risk taking your eyes off the witness. It is not just what she says; it is how she said it. It is unfortunate that the police let this interview go on for so long. I have already looked at this and what she has to say can be summarised on to one page of A4.

The same judge subsequently interrupted the playing of the second disk of the complainant's two-disk ABE, addressing the prosecutor directly:

J: We have already been through this.

PC: During lunch, we could not agree on how much of the video that we would agree to take out.

J: You could start from 17:55 [of a 28-minute video] where she starts talking about a new topic where she is asked if he has ever said anything sexual to her.

The prosecutor proceeded to start the video at the judge's suggested timestamp.

In short, watching an ABE can be an arduous task, and not simply because of the nature of the allegations. In [C018], for example, the jury spent several minutes watching a quietly crying complainant blow her nose and wipe her eyes as she sat alone in the video interviewing suite while the interviewing officer had gone to check with colleagues if there was anything else he needed to ask before ending the interview. Yet the ABE is typically crucial, if not pivotal, evidence in the trial.

The quality of the ABE matters not just in terms of the evidence-in-chief of the witness but also in terms of the opportunities it gives the defence for cross-examination because, according to one counsel, 'often the questions that are asked in cross-examination flow from the ABE' (ACC3). According to one interviewee, the ABE will traditionally start with an open narrative in which the witness will tell the police in their own words what has happened to them. But the police will often go over it again:

And it will be you know, 'What was the colour of curtains? Was it a 2-seater settee? Did he have, was it a Ford Escort or a Ford?' And these are hostages to fortune because the child will get tons of things wrong. 'Was it a 3 bedroom house? Had you moved to this other house by then?' The child will get all sorts of things wrong. (AAJ3).

But interviewees also pointed to the difficulties the defence face because of the time gap between the ABE interviews and the cross-examination in court. One Scottish advocate-depute gave the example of a nine-year-old who was around eight years old when her statements were recorded by the police. She gave three different statements, which together lasted about three and a half hours, of incidents involving her father:

So, what the defence were then presented with was a wee girl a year and a bit later who by that point has boxed off quite a bit of that, hasn't been reminded of it. She's too wee to be asking her to read her statement or playing statements to her. So they're left with the situation where if they had the opportunity the day that she gave her statement to the police, to ask her and to probe her a bit more about things. But with that time delay and you then just start to say, 'Hold on a minute... that day that you said that happened, is it not right that your grandma was in the house and she was making soup?' You know, those types of lines of cross are quite difficult to achieve when somebody's sitting under a blank canvas. (BAC2)

This interviewee said one way of remedying the delay between the police interview and cross-examination in court would be to pre-record the cross-examination. As noted below, at present the cross-examination of vulnerable witnesses in Scotland is pre-recorded on commission and, according to this interviewee, although it is now possible for commissions to take place earlier at the pre-indictment stage that does not usually happen because the defence are not fully instructed at that

point. In his view, and that of a defence advocate, the best way forward in child cases would be to capture all the evidence given by the child in one go early on and they considered that the Barnahus approach is the way forward in the longer term (see Section 3.2 above).

4.2.4 Live-link cross-examination

In a number of the trials observed there had been special measures directions for cross-examination to be conducted via live-link but a sizeable proportion of witnesses were actually cross-examined in court from behind a screen. Mostly this was because the witness would seem to have specifically asked or been advised to give evidence in the courtroom. While interviewees acknowledged that live-link testimony had the benefit of not exposing vulnerable witnesses to the ordeal of giving evidence in the courtroom, a number took the view that it did not help witnesses achieve their best evidence.

It's easier seeing the person in the flesh who's asking the questions. I mean the video-link for all its advantages... it doesn't feel natural to a lot of people, and I think from the witness's point of view as well, regardless of what the jury might make of it, ultimately, I think dealing with things in this way for some people just makes them feel uncomfortable. They would actually far rather, providing they can't see the defendant, can't see the public gallery, they would far rather actually be in court and see the person who's asking questions. (AAJ2)

We didn't make any accommodations for [adult victims of historic sexual abuse] at all because all of them said that they wanted to give evidence in open court in front of their grandfather because they wanted to, and I quote, 'We want him to know what he did to us and we want him to know how his behaviour affected our lives for decades'. (ABJ2)

Some advocates also considered that online testimony made it much more difficult to make their cross-examinations effective. According to one, the remote live-link procedures affected cross-examination 'massively' because it made it more stilted and 'you just don't have that immediacy of cross-examination where you can kind of put someone on the spot and correspondingly, when a witness comes back at you with an answer, that just completely bowls you over... It loses the power of the cross-examination in both directions' (ACC3).

He went on to say that the 'lightbulb' moment that comes when the jury become convinced of a defendant's guilt because the complainant comes back and says, 'It absolutely did happen, I was not consenting, he did it to me' is lost on live-link.

While this perception is one that was regularly encountered from professionals throughout this research project, it is not supported by the trial observations data. Across the sample, at least one significant (and vulnerable) witness was cross-examined via video-link in 12 trials. Of those trials, six resulted in acquittals, five resulted in convictions, and one resulted in a hung jury. All things being equal, and bracketing questions of size and representativeness of the trial sample, it might be tempting to infer that, with a 50% acquittal rate (58% if we include the hung jury), video-links do, in practice, impact negatively on juries. All things, however, were not equal. There were evidential weaknesses in the prosecution's case in each and every one of the video-link cases that did not result in convictions. It is not easy to see how those difficulties might have been resolved by a 'lightbulb' moment.

Moreover, if securing a conviction is the measure of the impact of remote versus courtroom testimony, then we might expect the 'hit rate' to be higher in cases involving screens. It was not.

Across the sample, 23 significant witnesses gave evidence from behind a screen in 16 trials. Of those trials, eight resulted in acquittals, seven resulted in convictions, and one resulted in a hung jury.

4.2.5 Delays

Although accommodations are made in the court environment to try to facilitate the way vulnerable witnesses give evidence, there were regular delays in many of the trials we observed which meant that vulnerable witnesses were subject to the disruption of having their cases adjourned and having their cross-examination postponed. Delays arose for a variety of reasons. Adjournments might result from late applications to the court, disclosure issues, last-minute changes in counsel and/or a need to take (further) instructions from a defendant. There were also diary clashes, with half and sometimes full-day adjournments so that judges or counsel could ‘attend to other matters’. More frequently, delays stemmed from issues with the courtroom technology. As discussed above, it was not uncommon for proceedings to pause while transcripts of ABE videos were produced and handed out to juries because the sound quality was so poor; this tended to take at least half an hour and usually longer. In other cases, however, problems with the audio could not be dealt with by means of a transcript. In [A013] and [A038], to give just two examples, the audio on the complainants’ ABE videos simply would not play. When it became clear that the sound issues could not be resolved reasonably quickly or by ‘switching it off and on again’—in one case, the system required a software update and reboot, and, in the other, it required an IT technician—the judges in each case reluctantly sent the jury home for the remainder of the day. This, of course, meant that the complainants in both trials, whose cross-examinations were expected to take place immediately following their ABEs, also had to go home and return to court the next day.

Even a short adjournment, moving a cross-examination from a morning to an afternoon can cause considerable upset for a witness. One counsel in Ireland gave an example of a sexual assault involving two children where the trial was transferred to a neighbouring county court because the local court did not have a video-link facility (DAC1). On the day the children were to give evidence, the trial was delayed due to audio difficulties while playing the section 16 (Special Interview) recording. The second child witness’s cross examination only began at 6pm by which time the child became too distressed to carry on. The court reconvened the following day and cross examination was completed without incident. Although the defendant was ultimately found guilty, this example highlights the potentially negative impacts of delay on a child or other vulnerable witness.

4.3 Ground rules hearings

As mentioned in Part 3, one innovation that has been introduced across the jurisdictions is to hold a ground rules hearing (GRH) in advance of the trial to plan for facilitating the evidence of vulnerable witnesses and defendants. One judge described it as an ‘elaborate directions hearing’ where ‘you should be discussing the issues in the case, the length of time witnesses are going to have to give evidence, the nature of the way in which they will give evidence, whether special measures are required and so on’ (AAJ3). But it is a radical break from tradition as advocates are required to reveal in advance their line of questioning and, in the case of young children and witnesses with learning difficulties, to have the questions pre-approved by a judge beforehand. Interviewees considered that intermediaries who are appointed to facilitate communication with vulnerable witnesses play a crucial role in these hearings in advising on the appropriate language to be used, what breaks will be required

for the witness and what time of day the cross-examination should take place, while judges played a significant role in ruling on the relevance and scope of the questions to be asked.

4.3.1 Frequency and timing of GRHs

As noted in Part 3, ground rules hearings (GRHs) have been in existence for some time in England and Wales. Criminal Practice Directions in England and Wales state that where there is a vulnerable witness or accused, consideration must be given to holding a GRH and a GRH must be held where the court directs that questioning will be conducted through an intermediary.⁴⁹ We were told that there were also GRHs where there is going to be pre-recorded cross-examination in order to ensure the correct dates and time slots for the witnesses, deal with any applications to cross-examine on previous sexual history or bad character and flesh out what steps are required to deal with the vulnerabilities of the witness (ABJ1). Whilst GRHs are increasingly commonplace for many non-defendant vulnerable witnesses, especially young child witnesses, our research suggests that they are rarely held for vulnerable defendants.⁵⁰ This is largely because the driver for a GRH is often (though not exclusively) the appointment of an intermediary, which, as we shall see, is rare for a vulnerable defendant, or the use of section 28 (pre-recorded cross-examination), which is not available for vulnerable defendants or evidence on commission in Scotland which is available to vulnerable defendants but is exercised very rarely by them.⁵¹

From the trial observations, GRHs were observed taking place just before trial or, more often, just before a witness gave their evidence. An intermediary said that GRHs were sometimes held on the morning of the trial, sometimes two weeks before and latterly they could be ‘all over the place’, scheduled for two weeks before, then moved to one week, and then moved to the day before the trial. Often this had to do with the availability of counsel and the judge. But she also said that ground rules can be set quite a long time before the trial which was not ideal because the judge conducting the GRH may not be the presiding judge at the trial (AAR1). The lack of continuity of judges and counsel across GRHs, section 28 hearings and the trial is discussed in more detail at Section 4.5.3 below. Another intermediary said the ideal timing of a GRH would be one or two weeks before the trial, after the court familiarisation visit, because the intermediary can then feedback issues such as how the witness coped with being asked questions over the video-link (AAR3). Intermediaries disliked it when GRHs were listed for the day of the trial itself as everything was then rushed, especially when they had not been given the questions from counsel to review beforehand. That was, however, the norm for vulnerable defendants because it is unclear before trial whether the vulnerable defendant will give evidence. One judge told us that occasionally, a ‘welfare and ground rules hearing’ before the trial would take place for very vulnerable defendants, as in one instance where she had a defendant with an acquired brain injury (ACJ1).

In Northern Ireland the protocols for vulnerable witnesses and defendants state that GRHs must be arranged where the vulnerable witness or defendant is a child or where a registered intermediary has been appointed to aid communication.⁵² In Scotland legislation now requires GRHs in cases where there has been a successful application for evidence on commission and we were told they usually

⁴⁹ CPD 2023 6.1.4, 6.2.10.

⁵⁰ This echoes earlier findings by Cooper (2014).

⁵¹ See the combined effect of Criminal Procedure (Scotland) Act 1995, s 271F and I.

⁵² Practice Direction no. 2/2019 A5.1 and B5.1.

form part of a preliminary hearing.⁵³ The practice of having any kind of preliminary hearing before the trial is very new in Ireland but we were told by one judge that instead of issues such as intermediaries and ground rules relating to the questions in cross-examination being dealt with 'in the teeth of the trial' after the jury was empanelled, the idea now was to have these issues dealt with in a hearing before the trial (DAJ2).

4.3.2 Value of GRHs

There was a general consensus that the advantage of GRHs for witnesses was that with everything approved in advance they can be put in a much better place to give their best evidence. GRHs help to ensure that the questions asked are at a linguistic level that witnesses can understand and respond to and also provide an opportunity to discuss how the court environment can best be adapted to assist the witness to give evidence. The latter may include the arrangements for entering the court building and for counsel and the judge to meet the witness before they give evidence, the use of first names, the time of day of the cross-examination, the breaks required, whether legal professionals should stand or sit in the presence of the witness, the use of special measures and how the intermediary may intervene during questioning. Intermediaries gave examples where they considered that the GRH made the difference between the witness giving evidence or not such as agreeing on the basis of their recommendation that a witness gives evidence first thing in the morning and not having to wait all day (AXR1) or deciding in one case to screen the defendant's view of the plasma screens where the witness indicated that she would not provide evidence if she thought the defendant could see her (AAR3).

Judges and intermediaries in particular saw judicial management during GRH as a significant tool in the armoury of improving witness experience at trial. As one judge put it:

If you've had a ground rules hearing, the judge has ticked and crossed everybody's homework before you've even gone into court which I think is a massive advantage to the witnesses themselves. (ABJ2)

One intermediary contrasted the difference between facilitating a victim in a section 28 hearing where there will have been a GRH, it will 'all be nice and calm, all the questions will be agreed, the sequence of the questions, the topics... my visual aids, whether I've got a body map board or a timetable, and it's all in order' with a case where she had been in the dock with a 15 year old defendant facing a murder charge where there had been no GRH and it was like 'the wild west' (AAR2). In this case she had no idea what questions were going to be asked or even what pages to turn to in a jury bundle of 200 or 300 pages on which the defendant was asked questions. The trial was held in an antiquated court where there was not enough room for the defendant to open the jury bundle and turn the pages. If there had been a GRH there could have been a discussion on how the intermediary would manage the jury bundle with the defendant in the witness box but that had not happened.

From what we were told, however, GRHs 'vary enormously' in the way they are run and in what is covered in them (AAR3). Intermediaries considered that the complexity of the case and pressure on court time played a role in how long they would last but much also depended on the particular judge concerned. The best ones were where there was a very open discussion between the judge, the intermediary and counsel of all the practicalities surrounding how the witness could give their best

⁵³ Vulnerable Witnesses (Criminal Evidence) Act 2019 s 5(2).

evidence and there was genuine collaboration amongst judges, counsel and intermediaries. According to one intermediary:

The best ground rules hearing I ever went to was where a judge said let's move into chambers and we sat round the table, a big table in her office, and everybody was on the same level, and we had a real discussion. (AXR1)

But intermediaries also reported that GRHs could be quite perfunctory with the judge wanting them to be very short which meant that issues would come up at trial that could have been ironed out in the GRH. One gave an example where:

I turn up, I sit in the court and nobody even speaks to me, other than the judge saying, 'Has everyone read the intermediary's report?' and the barristers say, 'Yes', and they'll say, 'Is there anything that anyone wishes to disagree with the report?' and then they'll go, 'No'. And I'm like 'no, is no-one gonna ask me anything?'. (ABR1)

Another intermediary said that when the GRH became a tick-box exercise, she would find that the legal professionals had not really understood the underlying premise of the recommendations that were made by her. It was much better in her view if she is cross-examined on the report and the recommendations and questions can be asked by defence and by prosecution as to why those recommendations are made. Another intermediary said:

I'd love to think that there was a policy that enabled all ground rules hearings to be fantastic, but it isn't the case at the moment for sure. It's I think a sort of postcode lottery really, depending on your judge. (ABR2)

By contrast, some counsel considered that judges could be excessively intrusive at GRHs in their case management of the cross-examination in advance of the trial. One accepted that there needed to be an opportunity in advance of the trial for defence and prosecution counsel and the intermediary, or sometimes even just defence counsel and the intermediary, to sit down and to work through the questions but 'you don't need the judge, then, to look at that list of questions and say, "Oh, I think there's a tag here"' (ACC1). Another counsel said that judges sometimes used the opportunity of GRHs to case manage cross-examinations down to excessive time limits:

Overall, I think that there is sometimes too much intrusion and too many limits. This sort of cross-examination must last no more than 20 minutes. It's what I get told. I think, well, why? I mean, who said 20 minutes? That's just a figure you've plucked. There's no basis for that, except that you just think that you need to set a limit, and that this child will sit in classes at school that lasts 45 minutes. That's not a concentration thing. That's just because you want to be seen to be managing the case... (ACC4)

4.3.3 Written questions

One of the most innovative aspects of the GRHs is the requirement that counsel seek approval in advance for the questions they are going to ask. Again, there would seem to be a wide variety in the way this is done, before, after or even during the GRHs. From the intermediaries' point of view, it was best to get the questions in advance of the GRHs, so that they could go through them beforehand with counsel and then present a final version at the GRH of what had been agreed and what questions were left for the judge to rule on. But according to one intermediary, this only happens in 30-40% of cases,

and in the other cases the judge will tell the barrister at the GRH to send through the questions (ABR2). Another said she had to do 'quite a bit of badgering' to get the questions in advance (AAR1) and a third said sometimes 'as you're walking into court to have the ground rules hearing you're handed a list of questions which could be 10 pages long and they say, "Can you review these?" which made it difficult to do an effective job' (ABR1). One intermediary considered that the reason she got the questions late was due to the workload of the barristers concerned and not because of any reluctance on their part to do so, but another said that she sensed there was a reluctance sometimes to send questions unless the judge had ordered them in advance.

According to a number of interviewees, the requirement that counsel submit written questions in advance to the judge for pre-approval prompted considerable resistance at first in England and Wales and there is still resistance to it in Ireland. But although there was still a 'natural reluctance', as one counsel put it, to have 'your homework marked by somebody else' (ACC1), interviewees in England and Wales considered that there was now a general acceptance of the need to write questions down. As one put it, 'That cri de cœur, "Why should I do this? It's outrageous that I should put my questions down", I haven't heard that for a long time' (AAC2).

The practice of written questions appears to be still evolving in Scotland. One advocate depute referred to the recent Practice Note in Scotland stating that written questions should be the norm for children under 12 or witnesses with a significant communication problem and said that there was now more acceptance of written questions (BAC2).⁵⁴ But a defence advocate told us that while he had no objections to writing down themes and topics in advance he had reservations about writing questions 'word for word' because 'the whole point of advocacy is you have to react to the answer you're given and therefore, setting out the questions in such a precise and rigid way might make no sense whatsoever because when you create these questions, you're assuming certain answers or types of answers which you may not get and you may have to probe a bit more' (BAC1).

A judge in Northern Ireland said that written questions would be the norm for children up to secondary school age and for very vulnerable adults. She said that counsel had been a bit resistant, 'They say, "Cross-examination's dynamic" and I'll say, "Well, yes, I'll allow for that but there is no reason why you cannot put down the areas and the primary questions that you want to ask"' (CAJ3).

In Ireland the practice still seems to be uncommon. One counsel said he did not object to it in certain cases involving very vulnerable witnesses (in one case he had been required to write down questions for a witness who was both deaf and mute) but he was sceptical about an approach which required a list of questions routinely for vulnerable witnesses which he saw as 'the thin edge of the wedge' because you have to be guided by the answers that you get and this will inform any further probing (DAC4).

Advocates across the jurisdictions (with the exception perhaps of Ireland) appear now to accept that written questions are necessary in cases of very vulnerable witnesses provided judges are willing to permit further questions in response to how the written questions are answered. But counsel had two lingering concerns about written questions. One was that in cases of older children without learning difficulties you were giving away questions that would get back to the witness. Criminal Practice Directions in England and Wales require that where questions are to be committed to writing and subject to judicial editing, with or without input from an intermediary, then, as a general rule, the

⁵⁴ High Court Practice Note No 1 of 2019.

proposed questions must be shared with the other parties to the trial.⁵⁵ A Scottish advocate depute said that 'the idea of keeping everything, and not forewarning anybody about your lines of question' had 'kind of dissipated over the years and people were a bit more accepting of all of this', partly because Scotland's 'rape shield' legislation now required complainers to be told what lines of questioning are going to be asked (BAC2). But according to a judge in England and Wales:

If you're dealing with a 16-year-old streetwise girl who says she's been raped outside a nightclub, you will have a lot of resistance from certain advocates who do not want to give you advance notice of the questions that they want to ask her... Say, for example, there is something they want to challenge her about, about some CCTV where she's seen in the bar area doing something which she denied doing and it would affect her credibility. (ABJ2)

Another judge said that in a recent case counsel had told her he didn't like 'cross examination by committee' (ACJ3). But the truth was that 'You can't have a hearing at which there's a conversation between the judge and the defence about a document that the prosecution haven't seen'.

The other concern on the part of counsel was judges could be too prescriptive about cutting down questions at GRHs especially where they did not know the advocate. A particular example was when 'you're asking a question because there is information that you have that the judge is not privy to because it's in your defendant's proof of evidence and you need to ask that witness because you know the defendant is going to say something else later down the line' (ACC1). The judge will say, 'Well, you don't need to ask this' but 'actually, I do but I don't really want to tell you too much about it'. A Scottish advocate depute also said the judge could interfere too much in how they wish to conduct their questioning of the witness. He gave the example of asking a witness about where a town clock was as this could be a useful reference point when he wished the witness to describe where various incidents took place, but the judge had said there was no need to ask about the town clock as it was something that could be agreed in evidence.

4.3.4 Written questions for vulnerable defendants

It would seem to be much less common for written questions to be submitted in the case of vulnerable defendants. One intermediary said that most of the times when she asked in her report for questions in advance with a vulnerable witness, the judge grants it but with a defendant her request was often rejected and '[you're] just [told] that the judge feels that the barristers are suitably skilled to question somebody and that's it' (ABR1). Another intermediary said that prosecution barristers are 'a breed apart' when it comes to giving them their written questions and that they are still getting their head around intermediaries for defendants (ABR2). There would also seem to be mixed approaches taken by judges. One judge said that when an intermediary is appointed for a defendant, the same approach would apply as when an intermediary is appointed for a vulnerable complainant, the prosecution would have to draft the questions in advance, they would have to avoid tagged questions and there would be a ground rules hearing to make sure that that happened (AAJ1). But a judge in another court centre queried whether written questions should ever be required for vulnerable defendants because there would be potentially quite a significant problem with the defence barrister having the prosecution questions in advance but not being able to share those with his client (ABJ3). To avoid the problem of any coaching, one intermediary said she would recommend that after the defendant has given their evidence-in-chief, there would be a break when she could talk to the prosecution in

⁵⁵ CPD 2023 6.1.5.

confidence so she would have no opportunity to go running to tell the defendant what the questions were going to be (AAR2). Sometimes this was agreed and it could be very helpful especially where the defendant was struggling to understand complex questions, but mostly even this was not agreed to.

4.4 Intermediaries

4.4.1 The use of intermediaries

The use of intermediaries has been growing across the two jurisdictions of England and Wales and Northern Ireland for some time but they are not used at all in Scotland and they have only very recently been used in Ireland. Although, as noted above (in Section 3.4.4), provision has been made for intermediaries in Ireland since 1992,⁵⁶ we were told that they were first appointed in two rape cases in 2015 and 2016.⁵⁷ Criminal Practice Directions in England and Wales now state that 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.⁵⁸ Intermediaries made a contrast between their use for younger child witnesses which they said was now well established and their use for other vulnerable witnesses. Whilst their use for adults with communication difficulties or with particular vulnerabilities was becoming more frequent, criminal justice professionals did not always identify or appreciate the need in an individual case. According to one intermediary, referrals for people with acquired communication difficulties, traumatic brain injuries, strokes, Parkinson's or MND 'were still few and far between' (ABR1). Another said that sometimes the CPS will make a referral after the ABE when they realise it is one thing 'talking to a nice little female police officer in this nice, cosy room' but it is quite another scenario when they are going to be cross-examined by maybe three counsel in a multi-defendant case (AAR2). According to another intermediary even when there has been a referral by the CPS, there is still a need to persuade the prosecution barrister that one is needed. She gave the example of a 14-year-old who had mental health difficulties where the prosecution barrister had said that the child did not seem to have any communication difficulties in the ABE interview but had failed to realise that giving evidence in a court environment posed a completely different communicative challenge than speaking to a police officer in an interview suite (AXR1).

In the trial observations, intermediaries appeared relatively rarely. We observed intermediaries in attendance in only six out of the 40 observed trials: one in Ireland, the other five in England and Wales. In three of those cases, the intermediaries were with child complainants in sexual offences cases during cross-examination—be that in a section 28 pre-recorded hearing (n=1), via live-link (n=1), or behind a screen (n=1). In the fourth and fifth cases, the intermediaries accompanied adult complainants, again, in sexual offences cases, with significant vulnerabilities, both of whom were cross-examined via video-link with the intermediary sitting alongside them. In the sixth trial, the intermediary was granted to the defendant, a minor (16 at the time of trial, 15 at the time of the offence) with ADHD, charged with GBH with intent.

⁵⁶ Criminal Evidence Act 1992 s 14.

⁵⁷ See *DPP v FE [2015] unreported, (Hunt J) (Bill No. 84/2013 Central Criminal Cour)* and *DPP vs NR & RN [2016] IECCC 2 (Central Criminal Court)*. See Rape Crisis Network Ireland (2010: 11). Thanks are owed to Penny Cooper, Alan Cusack and Miriam Delahunt for alerting us to these cases. The intermediary in the 2016 case was Ruth Marchant who was a leading pioneer in the first generation of intermediaries.

⁵⁸ CPD 2023 6.2.9.

An intermediary was involved in the investigative stages in a seventh case involving two child complainants in, again, a sexual offences case. The eldest child, aged 9 years, had ‘significant learning difficulties’ and was assisted by an intermediary during their police interview. In the absence of any learning difficulties, the second child, aged 7 years, was not assisted by an intermediary. Both ‘complainants’ had denied being sexually touched or assaulted in their ABE videos. Their evidence was not, therefore, adduced by the prosecution, they were not subject to cross-examination, and there was no call for an intermediary at trial. Instead, the case was proved by other independent evidence, including messages and photos taken from the defendant’s mobile phone.

While the data on the use of intermediaries from the trial observations are limited, they do raise questions surrounding the consistency in approaches as to whose ability to communicate and engage with the criminal process might and might not be assisted by the use of an intermediary.

4.4.2 Defence intermediaries

During the period of our research, Criminal Practice Directions in England and Wales stated that directions to appoint an intermediary for a defendant's evidence will be rare, but for the entire trial extremely rare, although it should be noted that new Directions handed down in 2023 no longer refer to their exceptional use.⁵⁹ Interviewees in England and Wales drew attention to the limited use made of intermediaries for vulnerable defendants both in terms of the number of defendants who can access the support and in terms of the extent of the support that the courts will accept. According to one intermediary, from their initial involvement in the criminal justice process defendants did not get the same treatment as complainants, regardless of their need, so a ‘defendant would get an appropriate adult, even if they've got complex learning and mental health needs, ... who is no more qualified than, you know, my mother to assist someone’s vulnerabilities’ (ABR1). When it came to the trial, interviewees confirmed that it is rare for intermediaries to be appointed for vulnerable defendants and rarer still for them to be appointed to support defendants throughout the whole trial. It is notable, then, that in the one observed trial where the defendant had been granted an intermediary [A004], the intermediary was present to provide support for the duration of the trial.

According to one counsel, there was a view amongst some judges that there was no need for defence intermediaries because there are experienced counsel on both sides who have been trained in how to adapt cross-examination appropriately (AAC3). This fed into a view that vulnerable defendants were in a different category from vulnerable witnesses because they have a defence team who can explain things to them and attend to their communication needs. One judge admitted that most defendants have in many cases got some sort of cognitive issue that would ordinarily be considered as vulnerable in some regard, but nevertheless do not get the assistance of an intermediary (AAJ3).

Intermediaries who had been appointed to assist vulnerable defendants pointed out how important it was for them to be appointed throughout the whole trial as opposed to just when they are giving evidence so that they can make informed decisions throughout the trial. As one put it, ‘How [is the defendant] going to answer questions about a case where he hasn’t understood what the prosecution evidence is?’ (AXR1). Another intermediary described to us how better understanding of the evidence against the defendant results in better instructions which intermediaries note and communicate to counsel while the trial is going on (DAR3).

⁵⁹ CPD | General matters (October 2020), 3F.13.

Although intermediaries considered they had a crucial role in facilitating defendant participation throughout the whole trial, there was a reluctance to appoint them for this purpose. According to one, some judges are very open-minded and would say if someone is a vulnerable defendant, they need to have assistance all the way through the trial proceedings so they understand each stage, understand the evidence against them and are fully prepared when they make their decision whether to give evidence or not. But others who were more prosecution-minded think that 'intermediaries are bloody expensive... and will take the attitude that... little Johnny in the dock, he was clever enough to commit the crime, he should be clever enough to listen to a trial' (AAR2). Apart from the problems that their absence throughout the trial presented for defendants, there was also the difficulty that when intermediaries were 'helicoptered' in at the last minute as defendants are about to give evidence, they will have a very limited time to understand what the evidence is about and to consider how the defendant might be supported to give their best evidence.

It would seem that there is a different attitude towards the appointment of defence intermediaries in Northern Ireland and Ireland. One intermediary explained that when intermediaries were first introduced in Northern Ireland there was a strong sense from a human rights perspective that vulnerable defendants had to have access to intermediaries as well as vulnerable witnesses (CAR2). The result is that the registered scheme in Northern Ireland applies to both vulnerable witnesses and defendants. In Ireland there is not yet a statutory framework for the appointment of intermediaries for defendants but according to one counsel, there was an openness on the part of judges to have an intermediary appointed in cases where there is a relevant report to say that the defendant has difficulty understanding issues (DAC1).

4.4.3 Added value of intermediaries

The use of intermediaries to support the communication needs of vulnerable witnesses is a radical break from tradition in that it is the first time anyone other than the judge or opposing counsel has had the power to interrupt and query counsel's examination in a criminal trial (Henderson, 2015c). Yet there was a general consensus amongst most judges and counsel that intermediaries added value to the process in facilitating communication and providing reassurance to witnesses that there is somebody there to help with communication. Some interviewees also commented on the wider educational role intermediaries had played over the years in raising awareness on how vulnerable witnesses should be questioned for the betterment of best evidence. A judge referred to a case she had once prosecuted where a very vulnerable young woman with learning difficulties was asked by defence counsel: 'Well, X didn't take you into the woods, did he?' to which the witness answered 'no' and 'all we got was "no", "no"' (AAJ1). A couple of years later an intermediary in another case explained that that might have meant 'No, I don't agree with you' and the judge then understood what the problem was with a tagged question.

Judges commented on how intermediary reports could be very helpful in alerting judges to the vulnerabilities of certain individuals although there was criticism from some judges and advocates of the quality of some intermediary reports. They considered that intermediaries really came into their own at the GRHs where they shaped the cross-examination in advance of the trial and without whom, as one put it, arriving at a set of acceptable questions would be a 'much more arduous business' (ACJ3).

Intermediaries gave numerous examples of cases where they were able to inform advocates' questioning of certain witnesses who, for example, may have no concept of time or distance so there is no point asking them straight out when something happened or how far away something was (AXR1). Others commented on how they would pick up on the suggestibility of certain witnesses or the need to simplify the language used. Apart from advising on the structure and language of questions, they also raised a variety of issues at the GRH as to how the witness can be supported to give their best evidence. There was a general view that when a GRH has worked well, there was often not much need for intermediaries to intervene at trial at all. A key theme in all our interviews with intermediaries was that playing a passive role at trial is frequently a measure of success, not failure, even though the result is that 'Nobody sees all the hours of work that you do before you get to that point' (AXR3). One intermediary considered that if she could get to trial having had the questions agreed and all the points made at the ground rules answered, then 'barring disaster, the child's got the best chance then. Our work's virtually done at that point really' (AAR1).

This is not to say that intermediaries could not make an important contribution during the questioning of witnesses at trial. One intermediary said that they may have to intervene when counsel go 'off piste' from the agreed questions (AAR3).

Apart from intervening in questions at trial, judges considered that intermediaries played an important role in monitoring witness reaction to questions and spotting things the judge has not been able to, for example picking up 'non-verbal cues' (CAJ3): 'another pair of eyes and ears having them in the video-link room' (ACJ2). One judge said that they were far better placed during the hearing to spot if a witness is not understanding what is going on, or 'if they're just agreeing with things when they shouldn't be because they don't agree with them' (AAJ2). Counsel also commented on how valuable intermediaries could be in facilitating witness communication needs and in giving support to witnesses at trial. One said that a case he was involved in had 20 different child witnesses, some of whom were very damaged, and the intermediary helped the damaged children make clear what they were saying (ABC1). Another said that they enable witnesses to feel as 'though there's a professional ally in the room, not a friend, but somebody who's got their back and who will assist in making sure that things are done fairly' (ACC1).

Intermediaries in England and Wales and Northern Ireland said that they felt much more accepted now in the courts than when the role was first introduced. One said that she had been in courts with defendants where judges have said without the intermediary here, 'we wouldn't have got through this trial' (AXR1). Another said that she had had 'some fantastic conversations with barristers who have been really resistant to having an intermediary and then afterwards they say, "I get it now"' (ABR2). In Ireland where the use of intermediaries is very much in its infancy, an intermediary said that they had been given a very warm reception by the judiciary, by counsel and the courts in general, even though it is a very new thing and 'everybody is learning on the hoof' (DAR1).

But in England and Wales and to some extent in Northern Ireland there remained a lingering sense on the part of some intermediaries that they still needed to prove themselves to *some* counsel and judges (e.g. AXR3). In broad terms, this seemed to stem from a lack of appreciation amongst some legal professionals as to the level of specialist skill required to facilitate good communication with the result that 'they think they know the same as us' (AXR1). According to one, 'There are still some defence counsel who will almost do a, you know, "get your red pen out then miss"', so they're going along with

it but they're perhaps not totally comfortable with it' (AAR3). Another said that some senior prosecution counsel 'hate it' if you intervene to correct questions put to defendants (ABR2).

Although judges and advocates were for the most part positive about the intermediary role in cases involving the most vulnerable witnesses – in particular young children under 9 or where witnesses had specific communication difficulties - there was a strong feeling that they were becoming over-used in other cases. According to one judge, in cases involving a 13- or 14-year-old child with absolutely no difficulties or issues whatsoever, there was no reason really for having them (AAJ1). Another commented:

[An intermediary] is just another ingredient to the trial. It's another unnecessary complexity and it can be dead wood. There's a degree of fashionability about these things, I think. And it's very difficult to argue against having an intermediary, because of course who's going to say or argue that it's a bad thing or a wrong thing to have somebody helping a vulnerable witness? (AAJ3)

Another comment was that when 'you've got a deaf blind mute or severely autistic child, or even older witness, you can completely understand why you would need a specialism' but when 'you've got someone who is a witness, who is 22, says they've got ADHD... and has limited educational skills, are not very good at reading and writing, or they don't know how to use long words and they wouldn't understand certain words, they don't need an intermediary on the whole... They need a good advocate and a good judge [who] will make sure that the questions are broken down' (ABJ1).

According to one intermediary, scepticism about the need for their role often came down to a lack of appreciation of how an intermediary could facilitate the communication of e.g. 14 year old children who may have no specific language problems but who were vulnerable nevertheless because of their mental health, although this intermediary acknowledged that there was a tendency for some colleagues with a therapeutic background to think that everybody needs an intermediary (AXR1).

4.4.4 The intermediary role

Although there was a real sense that intermediaries are now a vital piece of the jigsaw in enabling certain witnesses to give their best evidence, there were also some misunderstandings around the boundaries of their role. It has become apparent that the intermediary role in England and Wales has moved away from the 'interpreter' role defined in section 29 of the Youth Justice and Criminal Evidence Act 1999 as intermediaries were trained to facilitate communication rather than act 'as the conduit for questions and answers'; this is now the purpose of the intermediary in all the common law jurisdictions that have utilised the role (Cooper and Mattison, 2017: 354). Intermediaries across the jurisdictions were at pains to tell us that as officers of the court they played a neutral role in facilitating communication. There was little criticism of intermediaries venturing beyond their professional role (one judge in England and Wales saying that 'I've never known them to cross the line' (ACJ1)), although one counsel in Northern Ireland claimed that there had been a number of cases where the registered intermediary had interjected with comments that were beyond the remit of their role, or occasionally, where they would answer for the witness. He gave an example of a witness who had been saying 'I don't know' in answer to questions put by video-link and then suddenly said, 'I saw it with my own two eyes' and started looking at the registered intermediary (CAC2).

Certain advocates had difficulties in accepting that intermediaries were truly impartial, one saying that 'fundamentally, intermediaries see themselves as the guardian of the witness, a bit like a guardian in

family proceedings' where they consider that they are there to protect the witness, usually a child, 'from this nasty defence barrister' (ACC4). Against this, intermediaries told us that they really tried hard to convince counsel that they had no interest in influencing the content of questions or ruling out the substance of what could be put to witnesses. One said that counsel 'had a preconceived idea of what [intermediaries] do... that we're there to stop tricky questions being asked and to stop you putting your case' and it was therefore 'really important to say no, put your case, I'll help you put your case' (AXR4).

There was also some concern on the part of judges and advocates that intermediaries could be too interventionist at trial, although one counsel gave an example of a case where, out of a lack of confidence, the intermediary had failed to stop defence counsel completely abandoning the approved questions and asking different questions instead (ACC1). While some intermediaries recognised the need for flexibility, it was felt that others could be too dogmatic or formulaic in prohibiting the use of tagged questions and requiring open questions as opposed to closed questions. Using a rugby analogy, one judge said she would be 'playing the advantage when the [intermediary] hand goes up' and let questions go, even when they were tagged and the intermediary objects, if the witness seemed able to cope with the questions (ACJ2). The same approach seemed to be taken sometimes with closed questions. One judge said that asking purely open questions may not get to the heart of the matter. She gave the example of a case where the child said her hands got burnt because they were put in the flame of the cooker and the defence case was, 'No, in fact the child took hold of a pan that was used for cooking a stew and D said he took her hands and thrust them under the cold tap' (AAJ1) The questioning went along the lines of, 'Does Daddy cook a stew called X?', 'Did Daddy cook that stew that day?' 'Yes.' 'Does Daddy cook it in a pan with two handles?' At this point the intermediary objected, 'That's too many closed questions. You need an open question there: Where did Daddy cook it?' But then you get the answer, in the kitchen and you can go round in circles. According to the judge, you need a combination of open and closed questions and sometimes being too prescriptive about how many open questions may not help (AAJ1).

This points to a tension between the role of intermediaries who wish to ensure the structure of questions are right and that of judges and counsel who wish to obtain answers that are pertinent to the case. One counsel thought that the 'more skilful intermediaries and the ones with a deeper experience' were better at judging what they're just going to let run, and where they're going to say to counsel, 'Actually, if you ask the question like that, she will not understand it, let me help' (AAC1). An intermediary in Northern Ireland considered that for intermediaries who had no court background 'the most difficult thing... is learning how the court operates' (CAR2). There would seem to be a need for advocates and intermediaries to have a deeper understanding of each other's role but also for greater clarity surrounding the intermediary role. Some intermediaries said they were often asked to rephrase questions in their own words which they felt was outside their role. There also seems to be some confusion as to whether intermediaries are expert witnesses. Intermediaries were adamant that they were there simply to assist the court, yet certain intermediaries told us that at GRHs they would be put in the witness box and made to take the oath before explaining the recommendations they were making to facilitate a witness's evidence.

4.5 Pre-recorded cross-examination

4.5.1 The dynamics of pre-recorded cross-examination

One of the most recent innovations in England and Wales and Scotland has been the use of pre-recorded cross-examination in England and Wales and evidence on commission in Scotland to capture the evidence of vulnerable witnesses in advance of the trial. The environment in which this is done, however, varies between the two jurisdictions. In England and Wales pre-recorded cross-examination is a special measure, known as a section 28 hearing, that is conditioned upon a police ABE interview having already been recorded which will constitute the witness's evidence-in-chief at trial. While ABE videos were observed to be par for the course in the observed trials involving vulnerable witnesses, this inter-dependency inevitably means that the use of section 28 depends on police recognition of a particular witness's vulnerability. During the section 28 hearing, the witness sits in a room adjoining the courtroom and gives evidence by way of video-link rather than in an open courtroom. The hearing is recorded and played at trial in place of a live cross-examination. An intermediary considered that the requirement that pre-recorded cross-examination be conducted in the court building was a good example of how technology drives procedures to the detriment of getting the witnesses' best evidence (AXR1). According to her, some witnesses hugely value giving evidence remotely but would much prefer to do so from a location remote from the court building which the technology does not allow for. Conversely, other witnesses perform much better when the questioner is in the room, but the technology does not allow section 28 hearings to be conducted in this way.

In Scotland, pre-recorded cross-examination will be taken on commission by a judicial commissioner (a High Court judge) and although the witness's evidence-in-chief may already have been recorded in a joint investigative interview which is now the norm for child witnesses, *both* evidence-in-chief *and* cross-examination will be commonly recorded on commission. The evidence will be taken in a commission suite described by one interviewee as 'an average sized living room with a desk' or in the well of a small courtroom, and in either case the witness will usually sit alongside five other persons including the judge, the judge's clerk, the advocates and the witness's supporter, with the proceedings being beamed to the accused and his solicitor in another building (BAC2). This interviewee acknowledged that some witnesses may prefer to give evidence in this manner but it was quite different from the way the joint investigative interview would be conducted and it could be quite intimidating for a teenage girl to sit in a room with five other men who are strangers and have to recount intimate details to them. Another interviewee said that a witness's evidence could be beamed in remotely from another location but this did not normally happen (BAJ1).

Witnesses were given the choice whether to give pre-recorded cross-examination or not but interviewees in both jurisdictions said that there had recently been a drive to roll it out for adult sexual offences complainants as well as children. Even before the recommendation of the Dorrian report that it be introduced for complainers in sexual offences cases in Scotland, one of the key drivers had been the pressure to capture evidence as soon as possible during the pandemic when there was a backlog of trials building up. Interviewees in England and Wales said that the push had come from senior judges and it was now 'creeping into the psyche of the CPS and the police' that if the witness qualifies for a section 28 hearing then it will be applied for (ABJ1).

In terms of the cross-examination itself, interviewees in both jurisdictions said it took exactly the same form as if it were given before a jury in the actual trial. On one view, the experience of cross-

examination was much the same for the vulnerable witness irrespective of whether it was pre-recorded or not, and it was 'just as traumatic for them whether there's a jury there or not' (ABJ2). But there was a general consensus that when the jury is not there 'there's less showboating from the advocates because you're not playing to an audience' (ABC1) and the questioning is 'much shorter, more focused and less confrontational' (ABJ4). According to a Scottish judge, there is something very powerful about the presence of a jury, which is like an audience that inflames 'the theatrical gene' within advocates and when you take the jury away, they behave very differently (BAJ1). She also thought the presence of the camera makes them behave very differently, because 'it's one thing to grandstand in front of a jury when nothing's being recorded' but it is very different when an advocate knows that their behaviour is recorded for ever and could be revisited in a disciplinary process.

4.5.2 Added value of pre-recorded cross-examination

Judges were mainly positive in their support of pre-recorded cross-examination (one judge said she was a 'massive fan' - AAJ3) pointing to how particularly at the present time when there were so many delays to trials it enabled witnesses' evidence to be recorded 'in the bag' ahead of trial. A vivid example was given by one judge:

I'm about to do [a section 28 hearing] with about 9 victims and they're all going to be pre-recorded Section 28 cross examinations... I think they can work very well indeed. And spare these little... boys who have been raped, the allegation is multiple times by a local man... he's basically groomed them and there are multiple victims from very dysfunctional families, limited IQ, just very vulnerable, on the street really, these boys. And all of them are being cross examined ahead of the trial, which is next year. Because there's a real danger that you will lose them, that they will just disappear, and that's why it's important to get their evidence recorded as soon as you can. (ABJ1)

Judges also considered that pre-recorded cross-examination led to more reliable evidence:

There are massive advantages to [section 28]. It's the fact that the witness is able to give their version of events closer to the incidents themselves. At the moment I'm listing cases 18 months to 2 years down the line. It's just not fair. And everybody forgets that with time, memory fades. And you're going to be a much better witness nearer the time. (ABJ2)

Another evidential advantage of pre-recorded cross-examination is that it would be edited for trial so, as one judge put it, she would not need to decide whether to discharge a jury because a witness has disclosed inadmissible evidence such as, 'He did it to my sister and he served two years' (ABJ1). According to a Scottish advocate, the fact that the recording could be edited also meant that unless the cross-examination was upsetting a witness, any objections as to the relevance or admissibility of questions could be raised with the judge after the witness had given evidence so that the witness did not have to 'hang around' while the point was being argued (BAC3). A further advantage was that recordings could be preserved for any future re-trial if the jury could not agree on the verdict.

Apart from these evidential advantages, there was the advantage, according to one judge, that vulnerable witnesses 'are able to walk away from court thinking, it's over, it's finished' (ABJ2). They were given a time slot to give evidence and they were spared the inconvenience and stress of having to wait around in the court building to give their evidence (BAC3). There were also cost benefits when trials can collapse after pre-recorded cross-examination because complainants are either seen to

perform so well that defendants consider plea options or so badly that the prosecution decide to bring proceedings to an end (AAC3).

In contrast to judges, however, most counsel took the view that section 28 hearings were far from an ideal solution to the problems of delay. There was general acceptance that the pre-recorded cross-examination could be beneficial to young child complainants so that they can get over the trauma of giving evidence but the benefits for adult complainants were more mixed. As one counsel put it:

I think Section 28 is being seen as a panacea to the court backlog because it's like, oh, well, we'll get the witnesses heard earlier, and it doesn't matter when the trial goes on. Well, that witness has still got to wait for months for the outcome, it's still hanging over their heads. (ABC1)

Intermediaries also considered that section 28 was not a panacea for all witnesses. There was an acceptance that it could work well for very young witnesses or elderly witnesses whose evidence needed to be captured early. According to one intermediary, some older witnesses wanted to get their evidence over with and forget about the trial but others did not want the 'double trauma' of a section 28 hearing and the trial itself where they may not be giving evidence but there would all the anxiety of waiting for the verdict (AAR3). This intermediary also made the point that section 28 hearings forced the witness to undergo cross-examination early whereas if there has not been a section 28 hearing there was always the prospect that the defendant might plead guilty on the morning of the trial with the result that the witness might escape the trauma of cross-examination altogether. She acknowledged that there had also been a number of pleas after section 28 hearings which advantaged the court because it saved the court time but it had not saved the complainant from having to undergo cross-examination at the hearing.

Generally counsel were uncomfortable about pre-recorded cross-examination as this meant isolating the main witness from the rest of the trial. As one counsel put it, 'you are isolating a part of the evidence. Whereas when you're doing a trial, it has to be looked at holistically. And you still have to know to weave the threads together, and I don't think you can do that when you cross-examine one witness' (ABC1). Rather than fast-tracking cross-examination, there was a view that a much better way to deal with the problems of delay was to fast-track vulnerable witness trials altogether. As one counsel put it:

Section 28s... are only necessary because the whole system is so badly funded that we can't get a trial with a vulnerable witness on quickly enough. If the system worked properly, we wouldn't be saying to that person, 'We're going to separate your evidence off from the trial'. We'd be saying to that person, 'Well, because you're vulnerable, we can hold the trial in four months' time, that's not too long to wait'. So we'll have the trial and it's all sorted, the whole thing is dealt with. But because we can't do that, we've come up with this halfway house which is just turning the whole thing into a sort of... an adjunct to the trial. (AAC1)

4.5.3 Logistical difficulties

A general concern on the part of judges and counsel in England and Wales was that section 28 hearings were being rolled out and used excessively without enough thought being given to the very significant logistical problems which could lead to adverse consequences. A common perception was that section 28 had been rolled out to adult sexual offences complainants for political reasons to show that something was being done about the attrition rate in rape cases without thinking about the practical

ramifications, the fairness, and whether section 28 hearings were always necessary for more mature teenagers or for victims of historic sexual abuse. One judge, who was a supporter of section 28 hearings when they work well, said that the problem was that the resources have not been put in place to enable them to run smoothly. There had been a distinct lack of investment in the quality of the recordings, computer equipment, the training of staff, and the funding of advocates so that they get paid for time spent drafting the questions in advance (ABJ1).

In a section 28 hearing attended as part of the trial observations fieldwork, the witness—an adult complainant in a rape trial—was so nervous and stressed about the hearing that she had contacted the Officer in the Case (OIC) an hour before the scheduled hearing to explain that she was ill and would not be attending. This turned out to be somewhat fortuitous as the ‘link’ was down; a reportedly common technical problem with Vodafone, the service provider. The hearing was rescheduled, but not without some difficulty given the need to coordinate the availability of the court, the judge, prosecuting and defence counsel, the OIC, the complainant and any supporter she may have, and, of course, the link itself.

The use of an outsourced service provider introduces complications for both the recording and the playing at trial of a witness’s pre-recorded cross-examination if issues arise which interfere with the original schedule. One judge (ACJ2) gave the example of a case where the cross-examination could not be played as scheduled on the first day of the trial as anticipated. The need to give 24 hours’ notice to the service provider for the new ‘slot’ meant that the playing of the pre-recorded evidence had to be delayed to day three of trial. This has obvious consequences for the efficient use of valuable court time.

A number of practitioners considered that the strict timetables that are imposed for section 28 hearings are not always suitable for more complex cases involving older witnesses where, unlike cases involving younger witnesses, there may be a lot of work around disclosure of third-party material such as social services and medical records. The consequence, according to a judge, is that the police may then delay charging until they finish their disclosure so ‘we still end up further down the line from when the child should be giving evidence’ (AAJ1).

Another issue mentioned was that where full disclosure is not made in time for the section 28 hearing there was an obvious reluctance to schedule a second pre-recorded cross-examination with the result that any later disclosure may be admitted as an agreed fact which may be problematic for the complainant who then will not get an opportunity to respond to the disclosed matters.

A further difficulty that was commonly mentioned was the original requirement that the same judges and counsel appear in ground rules hearings, section 28 hearings and trials. This led to significant difficulties in listings and schedules, a problem that was likely to be compounded because of the expansion of section 28 to adult sexual offences complainants. One counsel said the whole system would ‘implode’ if section 28 were to be extended in this way because something like 70% of the Crown Court work at the moment is adult sexual offences cases (ACC3). Even where it was possible to get cases listed with the same counsel and judge, problems arose when trials had to be taken out of the list because of other trials were running on and they had to be relisted again.

Steps have been taken to obviate this difficulty by not requiring the same judge to appear in both section 28 hearings and trials. We were told that most court centres now have designated section 28 judges and the case then gets released to another judge for trial (ABC1). In March 2022 the Criminal

Practice Directions were amended so that it is no longer mandatory for the same judge to conduct the GRHs and the section 28 hearing or for the same advocate to appear at the GRH, the section 28 hearing and the trial.⁶⁰ But interviewees said this was far from ideal. From a judicial perspective:

I sit as a recorder as well and I just dealt with a section 28 hearing. The ground rules hearing had been done by a different judge a couple of weeks earlier who'd made rulings, some of which had been recorded, some of which hadn't. Some other judge again is going to deal with a trial... [T]hat's not the way to do it.... I mean, it is bizarre, you would not get a judge saying, 'Well, I'll start the trial on Monday morning, but a different judge is going to rock up on Tuesday'. And yet that's what we're doing with section 28. (ACC1)

From counsel's point of view also, it was also ethically problematic, because 'I would never be allowed to step into a trial where a witness has already been cross-examined, it would have to be a re-trial, so I don't see why you should be doing that as an advocate for a section 28' (ABC1).

Practitioners also referred to the extra workload involved for counsel and judges in preparing for section 28 hearings and to the difficulties in appearing in GRHs and section 28 hearings alongside other ongoing trials. One of the problems was that when doing a section 28 hearing in particular, the whole case has to be prepared and then when the trial comes on later, the case has to be prepared all over again 'doubling the work that we have to do' (AAC1). Section 28 hearings also meant preparing for two cases at the same time, so that, as a judge put it, 'if you're part heard in a guns' case, but you've got a section 28 and you've got to go and cross-examine a vulnerable 9 year old, you need to spend the evening before reminding yourself of the questions, the tone, the way that you want to ask them, but at the same time you're also meant to be preparing the cross-examination of the principal witness in the guns' case':

When a surgeon goes in to perform an operation... he isn't going to leave another operation halfway down the corridor... and pop in and do this one because it's a child and then go back to the other one. (ABJ1)

One counsel said he had stopped doing section 28 hearings along with other senior members of the Bar because of the workload involved. He said that the system would grind to a halt if they were rolled out further for all vulnerable witnesses including every complainant in a sexual offences case because 'people like me will say, I can't do those cases because I have such a heavy workload, I can't work in those time frames' (ACC4).

In Scotland fewer logistical problems seem to have arisen with evidence on commission. A judge stressed how hugely resource intensive taking evidence on commission is because it means defence lawyers, prosecutors and judges 'are all putting almost double time into the same event that would just have been a witness in the trial in the past' (BAJ1). But she also considered there were savings in terms of the cross-examination being shorter than they would be if they were conducted in front of a jury. We were also told that Scotland had invested significantly in commission facilities which were bespoke suites rather than courtrooms as in England and Wales. The result was that unlike England and Wales, there was no need to pre-book time slots in courtrooms which prevented other court business being undertaken. The recording and editing of the evidence on commission was also done

⁶⁰ CPD V Evidence 18 E 61, 63.

by an in-house team rather than by an external service provider which seemed to result in greater efficiency with fewer technical problems and postponements.

One problem that was identified by judges and advocates was that there was sometimes late disclosure by the Crown Office after evidence had been given on commission. As in England and Wales, there was a reluctance to organise a second pre-recorded cross-examination but the result was that complainers did not get an opportunity to deal with the material that had arisen which was unfair on them as the defence could use it to 'powerful effect' (BAJ1).

Practitioners seemed less concerned than in England and Wales about the same personnel not being used for GRHs, evidence on commission and the trial. One judge said that the lack of continuity of judges was not a problem so long as there is the clarity about what the decisions reached are at each stage (BAJ1). An advocate referred to the problem that he may not be able to cross-examine a witness on commission if he were involved in another trial which meant that the cross-examination would be done by someone without a full grasp of the case (BAC5). But he accepted that there was a 'huge advantage' for witnesses in getting their evidence heard early and there seemed to be more acceptance on the part of advocates that evidence on commission was the best way forward for vulnerable witnesses.

4.6 Mapping the changing face of cross-examination

4.6.1 Adaptations seen by practitioners

There was a consensus amongst practitioners across the jurisdictions that there had been a change of approach towards the cross-examination of vulnerable witnesses over the last 20 years. According to one judge, special measures such as the use of screens and video-links did much to make witnesses feel more comfortable about giving their evidence but the real change had come more recently with a greater emphasis on the content of the questioning (AAJ2). While counsel have the same objectives in the cross-examination of both vulnerable and non-vulnerable witnesses - to reveal weakness in their evidence or to lay a foundation for their client's case - as one counsel put it, there are 'massive differences in the way that they would go about it' (ACC1).

Judges and advocates described the linguistic changes that they had seen during the cross-examination of vulnerable witnesses and, potentially, vulnerable defendants. One judge neatly characterised the changes that advocates have been required to confront as follows:

So, the interminable long question, the question with the tag on the end of it, the question that was three questions in one, the questions that jumped about, the questions that were too confrontational, the questions that made statements... all of that had to change. (ACJ3)

However, as a group, judges and advocates described additional modifications that counsel are expected to adopt, with varying assessments as to the success of the project to date. These modifications are largely based on general principles of questioning vulnerable witnesses set out in the Advocates' Gateway (2019) and on the 20 principles of questioning set out in the Inns of Court College of Advocacy's (2022) guidance. They can be categorised as follows:

- Duration of Questioning
- The Focus and Organisation of Cross-Examination

- Complexity and Length of Questions
- Open and Closed Questions
- The Tone and Manner of Questioning
- The Lack of Direct Challenge: Putting the Case

4.6.1.1 Duration of questioning

There was a consensus among professionals in England and Wales and Scotland that the cross-examination of vulnerable witnesses was generally now much more time limited than in the past, with one judge saying that in the case of young children cross-examination is now in most cases 5 to 15 minutes and 'it's a list of questions which are contained on one side of A4' (AAJ3). One Scottish solicitor advocate said that the cross-examinations he had seen of vulnerable witnesses in commissions and live proceedings were now 'a lot briefer than they used to be' (BAC3). Advocates further said that they themselves would try to limit their questioning of vulnerable witnesses, sometimes to the point of not cross-examining at all. One defence advocate in Scotland said that he took a 'reductionist' approach and that he had been involved in several sexual cases where he had chosen not to cross-examine and where he had sought to challenge the evidence in other ways (BAC4).

4.6.1.2 The focus and organisation of cross-examination

Linked to the shorter duration of cross-examination is the tendency to focus much more than in the past on the essential elements of cross-examination and the elimination of unnecessary questions. One judge commented that 'some old school advocates would like to recite and then have fillers and then eventually, scamper up to a question' but the better approach is to go 'straight in, getting on with the question you're trying to ask' (BAJ2). One counsel said that 'for the most part, my cross-examinations are far more forensic and they are far more direct, tailored to specific questions that need asking' (ABC3).

There was also a greater tendency to organise questions around topics and to signpost to the witness what is going to be asked:

The first principle for all of my questions is signposting which is one of the main 20 principles. I tell the witness the topic that I'm going to be asking them about in a very, very clear way. I then do a signpost to each and every individual topic. (ABC1)

The counsel will say, 'We're now going to deal with the incident at mummy's house', or words to that effect, then they will say, 'I'm now going to deal with the day in the park'. I'm seeing that, and I'm seeing it in other cases... it's more frequent that people are signposting cross-examination. (CAJ3)

4.6.1.3 Complexity and length of questions

Turning to the specific content of the questions posed, interviewees reflected on the complexity of language and the structure and length of question. They commented on the need for lawyers to 'rid ourselves of the feeling that you have to use formal language... simple English, words of one syllable... Trainers will say "What's your job?" not "What's your occupation?" Nobody says what's your occupation down the pub' (ACC4).

Practitioners also commented on the need to avoid long questions and on making questions shorter and more concise: ‘no more I think than seven, eight words, and possibly even five or six’ (ABC2).

The general standard of questioning has improved vastly, who, what, where, when, how and did? And these very simple techniques create a great, great dividend and carry through into more simple cross-examination, a more understandable cross-examination across the board in my experience. (ACJ1)

One of the most prominent issues raised by both judges and counsel was the need to avoid the multi-part question, or, as ACJ3 pointed out above, ‘the question that was three questions in one’ as it is not clear to the witness, vulnerable or not, which part of the question they are expected to answer. Other judges commented:

The style of cross-examination now is much more uniform... Your linguist, if she or he looked at historical transcripts, would probably see a very significant difference in the length of a question, the number of clauses in the question, the complexity of a question. (AAJ3)

The position now is the old, what will be regarded as the razz-matazz of the multi-part question and the comment dressed up in question has now fallen away and judges universally insist upon a genuine question which is put in simple terms. (ACJ1)

4.6.1.4 Open and closed questions: tagged questions and comment

An archetypal feature of traditional cross-examination has been the use of leading or closed questions in order to give counsel a degree of control over the answer the witness provides and to assist in the advocacy of the case. But intermediaries referred to the risk that children and other vulnerable witnesses who are particularly susceptible may answer such questions incorrectly. Although as we have seen it can be difficult to avoid closed questions, most agreed that an effort has been made to do so.

I would say to a witness now, ‘I now want to ask you about when you played football in the park, what was the weather like, who was there, what were you wearing?... Do you see? Whereas with an ordinary witness I’d say, ‘You used to go to the park, didn’t you, and you used to wear this, and you used to say this or you used to do that’... With a vulnerable witness, I’ve got to be open all the time and not suggest any answers. (ABC2)

There was also a recognition that whilst tagged questions (a statement followed by a short question) have been an ingrained part of the cross-examiner’s lexicon, they are problematic because they are highly suggestive, linguistically complex and, as we have seen, ambiguous. Children, in particular, are not only more likely than non-vulnerable witnesses to agree with a statement from an authority figure but they also struggle to understand precisely what is being asked.

Closely allied with the need to avoid closed and tagged questions are questions that are, strictly speaking, not questions at all but rather statements dressed up as questions or outright comment. A judge said that witnesses ‘look at you blankly’ when instead of asking straightforwardly “‘Did he hit you?”, counsel say, “He didn't hit you” even if you inflect it’ (ACJ2).

4.6.1.5 Tone and manner of questioning

Many interviewees focused as much on changes to the tone and manner of cross-examination as on the structure and complexity of the formulated questions. Aggression and confrontation towards vulnerable witnesses, which are typical characteristics of the traditional cross-examination, are now regarded as unacceptable as is any form of sarcasm, unpleasantness, attempts to diminish or demean or accusing a witness of lying:

When you have an adult, it's what I would call good old-fashioned advocacy where the barrister will, through the tone of their voice and the choice of their language, themselves display their incredulity of the evidence that's being given, whereas with a child, it's a whole different ballgame. If an advocate starts being emotive, emotional during their cross-examination, jury out, stop this, that's not the way you do it. (ABJ2)

Certainly the sort of hectoring and bullying which would be the archetype of the poor question, or one of the archetypes of poor questioning of a vulnerable witness, I don't think one sees that. (ABJ3)

4.6.1.6 Lack of direct challenge

One difficulty that arises for counsel in avoiding confrontation is when they need to challenge what the witness is saying, such as when they wish to put inconsistencies to the witness or are required to 'put their [client's] case' to the witness, i.e. putting the defendant's version of the facts to the witness during cross-examination. Of course, much depends on the purpose of the cross-examination. In one GBH with intent trial observed, it was noted that nobody had a particularly hard time in cross-examination as there was no suggestion by the defence that the independent witnesses called by prosecution were anything other than honest and helpful. The argument instead was, basically, 'this incident was over before you knew it, was highly emotive and distressing, and you were quite a distance away. You're honest but mistaken about what you saw, and understandably so.' But when the defence case requires a challenge on the ground that the witness is not being honest, it can be more difficult. As one judge put it:

Judges expect you to put your case. It is actually quite difficult and requires quite a lot of thought as to how you're going to do that in the way that we are, we now expect counsel to do it, because if the case is... this is all lies and you are not permitted to say to a child, 'Well you're telling lies aren't you?' or 'Have you told lies?', then it's difficult to put the case. So the two things don't sit well together, if you see what I mean. (AAJ1)

But there was a sense that 'putting the case' can and is being done without any form of direct challenge in terms of effectively calling the witness a liar. One counsel contrasted the way he would challenge 'normal witnesses' sometimes putting it baldly to them that they are lying in contrast to child witnesses where he does not put the emphasis on the child lying (ABC1). A judge said that she could not remember the last time a sexual offences complainant was accused of outright lying:

That kind of language just isn't used anymore... And it's unnecessary, so... what's more likely to be put is, 'The defendant says that he didn't do any of these things to you. Is he telling the truth or is he telling lies?' (ABJ4)

Another judge stated:

[The case] doesn't have to be put in full but a challenge... for example, 'Did the defendant have sex with you?' is sufficient. It shows, it's a genuine question. There must be some form of challenge but a gently worded question in those terms, an open question, 'Did he do that or did she do that' is sufficient... Even as simple as saying, 'There wasn't any sex' or, 'He didn't hit you'. (ACJ1)

4.6.2 The pace of change

Although there was consensus that much had changed, there was a difference of emphasis between interviewees on how much change there had been on the ground. Interviewees in England and Wales were more inclined to refer to a 'wholesale change' of approach (AAJ1, AAJ2), with one counsel saying that when he started out, 'the phrase vulnerable witnesses didn't exist' but now the position had changed beyond recognition. He said that when he has conferences with vulnerable witnesses, it was important to explain to them that the kind of hectoring or bullying or effectively trying to trip up and trick witnesses which they may have seen in a television drama 'is not what you would experience in court and will just not be tolerated any longer' (AAC2).

Interviewees in other jurisdictions were more muted about the pace of change. One judge in Scotland noted that while there had been a change in advocates' approaches, it had not been voluntary and had been brought about by the senior judiciary taking a bold and firm line over the last 6-7 years, stamping out as unacceptable 'the bullying, belittling of witnesses, endless cross examinations, you know, going for days' (BAJ1). A judge in Northern Ireland said that there had been a marked difference since 1999 but it had been a 'slow improvement ... with still pockets of bad practice' (CAJ2). There were other more critical views in the Irish jurisdictions. Another judge in Northern Ireland commented:

As far as the treatment of vulnerable witness is concerned, it's an uphill battle, right? It's how I would see it. I think the representatives... intellectually they know how these things should be done. But, on the ground, there's relatively little change. (CAJ4)

A judge in Ireland said that the pace of change had been incredibly slow. Although there had been an acceptance on the part of the legal profession on the need to modify very entrenched habits in order to elicit reliable evidence from vulnerable witnesses, 'on a day-to-day basis the emphasis on the part of defence counsel... is more inclined towards confusing the witness, and endeavouring to get the answer that suits the case they're making rather than getting a more reliable and factually accurate answer' (DAJ1). She considered that the pace of change was slow even in children's cases, where there had most definitely been a shift in terms of court style, but there was still quite a confrontational approach involving 'a lot of the pitfalls of... overly complicated questions... leading questions, tagged questions... closed questions' (DAJ1).

4.6.3 Adaptations on the ground

This section reports on the observational data and the main results of the corpus linguistic analysis conducted on the trial transcripts. The primary focus here is to align the analysis with the themes emerging from the interviews with practitioners, discussed in the section above. Throughout most of this analysis, vulnerable witnesses are analysed together as a whole, with differences between different kinds of vulnerable witnesses discussed in relevant sections below from Section 4.6.4 onwards. For the most part, the results for vulnerable witnesses are compared to those for non-vulnerable witnesses. Several extracts are presented from the transcripts to show the features under discussion in use 'on the ground' in trials.

4.6.3.1 Duration of questioning

Our interviewees indicated that the cross-examination of vulnerable witnesses is much shorter and briefer than has previously been the case, with the number of questions being limited when compared with other witnesses. Turning first to the trial observation data, if we look first at all complainants in RASSO (rape and serious sexual offences) trials - i.e., adults and children - across all four jurisdictions, we have 33 complainants in total. One of them, the complainant in [A036], did not give evidence as the defendant changed his plea following a particularly compelling opening speech by the prosecutor. We also have two trials ([A005] and [A006]), involving three complainants, all children, who were not called as witnesses at trial with the prosecution relying on other evidence to prove the relevant charges.

We are left, then, with 29 complainants- adults and children - who did give evidence at trial, generally in the form of an ABE video (or its equivalent), followed by cross-examination. We do not have an accurate record of the duration of cross-examination for three of these witnesses. Of those RASSO complainants we do have accurate timings for (n=26), the duration of cross-examination ranged between 4 and 188 minutes. On average, across the trial sample, RASSO complainants spent 47 minutes undergoing cross-examination.

The number of trials observed in other jurisdictions was limited and we must be wary of over-generalising from such a limited sample. We can note, however, that within our sample, duration varied across the jurisdictions. The average duration of cross-examination of complainants in RASSO trials was 22 minutes in Scotland, 48 minutes in England and Wales, and 116 minutes in Northern Ireland. With only a single RASSO trial observed in Ireland, it is not included in the calculation here.

An interesting, and perhaps counterintuitive, finding from the trial observations relates to the impact of an intermediary on the duration of cross-examination. Given their role, and the interventions that interrupt the flow of questions and answers, it might be anticipated that cross-examination involving an intermediary would last longer. This was not the case. Across the trial sample, cross-examination of a RASSO complainant accompanied and assisted by an intermediary lasted for, on average, 36 minutes. Although there is a danger of extrapolating too much from this, given the limited number of intermediaries in the trial sample, this suggests that the input of the intermediary in the preparatory stages pays dividends at trial in terms of the time complainants are subject to cross-examination.

Given that cross-examination in RASSO cases is subject to particularly scathing criticism and is high on the reform agenda, some comparative findings and insights from the trial observations data are worth noting here. The first is in relation to the duration of cross-examination of defendants in RASSO trials in the sample. In total, 19 defendants in RASSO trials in three jurisdictions chose to testify in their own defence and thus subject themselves to cross-examination. Accurate timings were recorded for 17. Across the sample, cross-examination of defendants in RASSO trials lasted, on average, 59 minutes. In England and Wales, the average was 61 minutes. The second relates to witnesses subject to special measures directions in non-RASSO trials, all of which were observed in England and Wales. On average, these vulnerable witnesses were subject to cross-examination for 25 minutes. The defendants in these same trials (none of whom were deemed vulnerable or subject to special measures), who elected to testify in their own defence, were cross-examined for, on average, 30 minutes. Finally, the vulnerable defendant in [A004] who was under a special measures order, including an intermediary, was cross-examined for 54 minutes.

In summary, the trial observations data support what legal professionals were telling us in research interviews: while it varies across the jurisdictions and offence-type, cross-examination is perhaps a shorter experience for vulnerable complainants than the mainstream narrative and critical reformist discourse surrounding this topic might lead us to expect.

The linguistic analysis of the sub-sample of official court transcripts supports the perception of interviewees that the cross-examination of vulnerable witnesses was shorter than for non-vulnerable witnesses. On average across this sample, vulnerable witnesses were asked 115 questions, some 42 (or 31%) fewer than non-vulnerable witnesses, who are asked on average 157 questions (Table 4.1).

Table 4.1: Number of questions put to witnesses

	Vulnerable witnesses	Non-vulnerable witnesses
Shortest cross-examination	20 questions	29 questions
Longest cross-examination	693 questions	544 questions
Median length of cross-examination	115 questions	157 questions

While the occasional cross-examination lasting less than a minute and comprised of a single question was observed in the trial observations, the shortest cross-examination in the official transcript sample put together for linguistic analysis was of a twelve-year old complainant in a rape and sexual abuse case in Ireland (though it should be added that this particular child was cross-examined by five different defence counsel). The longest cross-examination in terms of number of questions asked was also of a vulnerable witness, more specifically a vulnerable adult defendant (for whom no special measures were in place) in a murder trial in England and Wales, who was asked 693 questions. The length of this particular cross-examination is such that defence counsel objects to how long the cross-examination is taking, though the judge disagrees (Extract 1).

Extract 1

Defence counsel: My Lord, it does trouble me, what has happened.-- I've stayed mercifully silent --because my learned friend knows how vulnerable this young lady is. She (DC): knows that I didn't ask for a ground rules hearing, although I was going to, because of the medical reports as to the nature of cross-examination and whether it could be dealt with succinctly and pointedly rather than, I'm afraid -- I don't like to criticise, but this has been one of the slowest cross-examinations I've seen.

Judge: Well, I think you are now into criticism.

DC: I am now, and I don't apologise for it. In the circumstances of how vulnerable this lady is -- and the medical situation, which my learned friend knows well about -- one would have expected things to have gone a little bit more apace. I was assured yesterday that my learned friend would get her speech in today. Yes, my Lord may raise an eyebrow. I'm raising --

Judge: I don't think I did, actually; I was just looking at the computer. Thank you.

DC: Forgive me, but this has gone on long enough. For my learned friend to say, in answer to my Lord's question, 'Well, I think I have actually got a little bit more,' or whatever the expression was, didn't sound from this side of the bench to be much of a speeding

up. So I am putting down a marker that there has to be care taken when someone is vulnerable and unwell, and none has been.

Judge: Well, [DC name], I disagree with that. I think there has been a tremendous amount of care taken so far, which is why I asked whether there was very much left. I'm sure there has now been covered most, if not all, of the matters, and I suspect there's going to be very little left tomorrow.

DC: One can only hope, my Lord.

There were six witnesses who were asked more than 500 questions in cross-examination in the official transcripts sample and four of them were vulnerable. Notably, they were all adults; in addition to the defendant at the centre of the discussion in Extract 1, there were three rape complainants who were asked over 500 questions. When it comes to child witnesses, it appears that for the most part they were spared very lengthy cross-examinations (see Section 4.6.4 for more on child witnesses).

4.6.3.2 Organisation of cross-examination

Judges and advocates told us that there was an increasing emphasis on organising cross-examination questions around topics for vulnerable witnesses and explicitly signposting introductions of (new) topics to the witness. This relates to two of the Inns of Court College of Advocacy's 20 principles of questioning: 'signpost a new topic and tell the vulnerable person or child that you are going to ask them questions'.

Table 4.2 presents the most frequently occurring three-word strings (*n-grams*) in the questions put to vulnerable witnesses in our sample. The table includes a number of word strings that are important in this analysis and will be revisited, but for now attention is directed to three of the *n-grams* in particular, *to ask you* (ranked 4th most frequent, occurring 162 times), *going to ask* (ranked 19th, *n*=82) and *ask you about* (ranked 25th, *n*=76). Each of these word strings indicate instances of counsel organising their cross-examination. Counsel exercised turn-openers such as *I am going to ask you*, *I want to ask you*, *I'd like to ask you* to introduce topics and shifts in topic. Questions that include 'to ask you' featured 117 times in the cross-examination of vulnerable witnesses (2.03% of all questions). This is more often than they featured in the questioning of non-vulnerable witnesses, for which they were only used 59 times (1.18%). Therefore, these sorts of explicit signposts were almost twice as common in the cross-examination of vulnerable witnesses than they were of non-vulnerable witnesses, providing some support for the claims of our interviewees. Moreover, they appeared in 28 of the 34 cross-examinations of vulnerable witnesses that we have in our data, showing that this was a common practice across different advocates, rather than something that was only adopted by a few individuals.

Table 4.2: The 60 most frequent 3-word n-grams in the questions of vulnerable witnesses (those in bold are involved in the analysis below)

	n-gram	freq.	n-gram	freq.	n-gram	freq.
1	is that right	328	21 don't know	80	41 you said that	63
2	do you remember	296	22 at the time	79	42 do you see	62
3	you did n't	247	23 you were n't	78	43 that she was	62
4	when you were	202	24 and you were	77	44 when you say	62
5	is n't it	171	25 ask you about	76	45 out of the	60
6	did n't you	167	26 told the police	76	46 you say you	60
7	to ask you	162	27 you can't	76	47 can you see	59
8	that you were	160	28 i think you	73	48 do you recall	58
9	you don't	147	29 what did you	73	49 suggest to you	58
10	i don't	123	30 and do you	72	50 you accept that	58
11	to the police	118	31 in the car	70	51 did you ever	56
12	do you know	113	32 do you think	69	52 do you understand	56
13	i want to	92	33 at that stage	68	53 that what you	56
14	that you had	92	34 you say that	67	54 that you did	56
15	why did you	92	35 did you say	66	55 the police that	55
16	you remember that	92	36 what you said	66	56 what do you	55
17	in relation to	89	37 do you agree	65	57 would have been	55
18	to you that	84	38 did you tell	64	58 you went to	54
19	going to ask	82	39 is n't that	64	59 n't want to	53
20	you told the	82	40 you were in	64	60 you said to	52

This is an important strategy in signposting a topic shift or particular topic focus, to help the witness know which particular knowledge or memories they need to be accessing. Given that counsel knows the trajectory of his or her questions and has an advantage here, this is a useful means by which they make explicit to the witness the changing direction of their questioning: i.e. 'I've finished with X; now on to Y'. Extract 2 is an example from one cross-examination in which the advocate employed this technique consistently with a 10-year-old rape complainant.

Extract 2

- Q: **[Complainant], now I'm going to ask you** about when you were living with your grandparents with mummy and [defendant], okay?
- A: Okay.
- Q: [Defendant] says that, when you all lived at your grandparents' house, he was never alone with you. Is that true?
- A: Yes, that's true, but grandma would always be downstairs.
- Q: **[Complainant], I'm going to move on now to ask you** about your father, okay?
- A: All right.
- Q: When you were living in Brazil, did you spend time with your father?
- A: Yes, I would spend one or two days with him.
- Q: Did you like spending time with him?
- A: Yes, I did.
- Q: Did you do nice things when you were with your father?
- A: Yes, my dad would take me to the club and play with me in the park.
- Q: Was your father less strict than [defendant]?
- A: Yes, but he was still strict with me but less than [defendant].
- Q: Did you want your mummy and father to get back together?
- A: Yes.
- Q: After you moved away from Brazil, did mummy get you a phone so you could stay in touch with your father?
- A: Well, only when we were here in England. When I was in Italy, I had one but it was stolen.
- Q: **I'm going to ask you now, [complainant]**, about when you moved to Italy. [Defendant] said that he did not look after you without mummy when you were in Italy. Is that true?
- A: No, when my mum went out, he used to look after me.
- Q: **[Complainant], I'm now going to ask you** about when you moved to [road name] in the UK, all right?
- A: Okay.
-

4.6.3.3 Complexity and length of questions

Practitioners told us that there is a need to avoid long questions when cross-examining vulnerable witnesses, with one advocate commenting that questions should be as concise as five to eight words (ABC2). Table 4.3 provides evidence from our sample that suggests that this is not the reality on the ground. The average length of question (measured by words per question) was actually longer in the cross-examination of vulnerable witnesses than it was for non-vulnerable witnesses, albeit by about one word. The difference was small, but at best the questions put to vulnerable witnesses were *as long as* those put to non-vulnerable witnesses. In this section of the analysis, counsels' full speaking turn is considered a 'question'. This might include a long information-giving/preamble/comment section and then a shorter question. At the longest end of the spectrum, one cross-examination of a non-vulnerable witness saw counsel having very long 'turns', or questions, at an average of 34.49

words per question, much longer than anything that we saw in the questioning of vulnerable witnesses. However, the shortest average question length for vulnerable *and* non-vulnerable witnesses was 10 words.

Table 4.3: Average question length in cross-examinations

Witness type	Median question length (words per question)	Cross-examination with the longest average question length	Cross-examination with the shortest average question length
Vulnerable	18.47	28.17	10.49
non-vulnerable	17.22	34.49	10.29

So, even the cross-examination of a vulnerable witness that has the shortest questions still had an average question length longer than the 5-8 words suggested by our interviewees. As examples, some of the shortest questions in that particular cross-examination of a child defendant, which ranged between 3 and 8 words in length were:

- Was [name] there?*
- Was that true?*
- Did you punch him?*
- Were the stamps hard?*
- Whose head was it?*
- Did something change your mind?*
- Did you fracture his skull?*
- That's what you thought happened?*
- Were you proud of it?*
- Did you mean to hurt him?*
- How did the second argument start?*
- Were you being horrible as well?*
- Why were you wearing the balaclava?*
- Are you sorry that you were caught?*
- The second argument, did it get worse?*
- Was she shouting at you to stop?*
- Were you running to avoid being arrested?*
- Are you trying to make him look bad?*
- Did you know you'd committed a serious crime?*
- Is it true that he threatened your mum?*
- Was he falling about all over the place?*
- You called it talking shit to each other.*

However, in general, any attempts to make questions shorter and more concise for vulnerable witnesses were not observed in our sample. Some examples of particular long and complex questions are in Extracts 3-5. In Extract 3, we see a rape complainant, who had a first language other than English, asked a question that is 80 words long.

Extract 3

Q: So, at the beginning of my question today, you said no you didn't speak to him via any other communication. When I suggested Snapchat, you said you couldn't think and you couldn't remember and you weren't sure. So, I want to be fair to you; because we're coming up to lunch, maybe over lunch you can check. But so no one is in any doubt, what I suggest is that you did communicate with [name] via Snapchat yesterday. Didn't you?

A: I can't remember.

In Extract 4, a child complainant was asked a question by defence counsel which was 99 words long and which prompted the intermediary in the case to request that the question be made more specific. However, we see that after counsel attempted to reformulate the question, the intermediary was still of the opinion that the question was too complex for the 14-year-old witness.

Extract 4:

Q: Now, one thing I should say, [complainant], and people have said it to you already, but I'm going to repeat it. You're not under any pressure. You're under no -- there's no trouble. No one's saying anything about you. This is simply questions we're obliged to ask, we have to ask. And I'm going to ask you a question, and I'm not asking you to name anybody, so you can keep names out of it, but I'm going to ask you. You said [name] said something to you. Do you remember that? At the soccer field? Sorry, [intermediary's] hand.

Int: I'm just asking, just wondering, if it's possible, could that be made more specific.

Q: Very well. You said yesterday, [complainant], that at that soccer field [name] said something to you. Do you remember saying that?

A: Yes.

Q: And I'm saying to you, I'm asking you, was it not somebody else? Never mind -- sorry, the hand is up again. Sorry, [intermediary].

Int: I'm afraid that's a very complex formulation. I wonder if you could break it down for [complainant], please.

As a last example, Extract 5 shows a rape complainant being asked a question that is 85 words long, followed shortly after by a 59-word question, which prosecution objected to as being a comment (more on comments-as-questions in Section 4.6.3.5):

Extract 5:

Defence I'm going to suggest he drove up [road name] with you in the car, he dropped you
counsel at your home, and then he went on in the direction he was facing down towards
(DC): [city name]. He went down the road a little bit, as far as [road name], and then he
was coming back again because he was going back into [city]. So, then we've got, at
3.09, he's at the [road name] junction with [road name]. Do you see where the
[road name] is?

A: Yeah.

[...]

DC: Then the [road name] is that street that runs parallel with [road name]. It's one way and it's heading back down towards [place name], isn't it? Then, finally, he's entering [road name] at [road name] roundabout, okay. So, looking at his movements, he's driven up [road name]. He's turned left onto [road name]. That fits with him taking you home.

Prosecution That's a comment, come on.
counsel:

One of our interviewees commented that the general standard of questioning had 'improved vastly' when it comes to vulnerable witnesses, and specified that *who*, *what*, *where*, *when*, *how* and *did* questions are 'simple techniques' that result in a more understandable cross-examination. A direct query of our corpus for these 'question words' shows that, in fact, these sorts of questions were more common in the cross-examination of non-vulnerable witnesses than they were of vulnerable witnesses in our sample (Table 4.4).

Table 4.4: Frequency of WH- and did questions in cross-examination

Type	Examples	Vulnerable		Non-vulnerable	
		Freq	(%)	Frequency	(%)
Who	<i>Who did you receive the phone call from?</i> <i>Who was your girlfriend at the time?</i> <i>Who did you go there with?</i>	47	(0.81%)	33	(0.66%)
What	<i>What did you do with the bucket?</i> <i>What did you think he'd put in the drink?</i> <i>What colour are the walls in your room?</i>	204	(3.53%)	368	(7.39%)
Where	<i>Now, where did this meeting take place?</i> <i>Where was he when you saw him?</i> <i>Where were you when that was happening?</i>	53	(0.92%)	51	(1.02%)
When	<i>When did that happen?</i> <i>When did you ask that question?</i> <i>Well, when did you change your mind?</i>	27	(0.47%)	39	(0.78%)
How	<i>How could you tell you'd hurt him?</i> <i>How did you get on with her?</i> <i>And how do you know him?</i>	156	(2.70%)	203	(4.08%)
Did	<i>Did he make that clear to you?</i> <i>Did you like living with them from the start?</i> <i>Did you have any injuries on that occasion?</i>	636	(11.01%)	390	(7.83%)
Total		1123	(19.45%)	1084	(21.77%)

Despite being grouped together by our interviewee, *WH-* and *did* questions are quite different in the type of response for which they allow. Whereas *WH-* questions are typically 'open' questions, inviting a longer response from a witness, *did* questions usually restrict possible answers to 'yes' or 'no'. When separated, however, the picture remains largely the same. Taking just open *WH-* questions, these

account for 8.43% of all questions asked to vulnerable witnesses but 13.94% of all questions asked to non-vulnerable witnesses. By contrast, closed *did* questions were more common in the cross-examination of vulnerable witnesses making up 11.01% of all questions, compared with 7.83% for non-vulnerable witnesses. Therefore, it seems that a different approach was being taken with these open and closed question types. Non-vulnerable witnesses were given the opportunity to provide longer responses, while vulnerable witnesses were more commonly restricted to yes/no 'did' questions.

4.6.3.4 Tagged questions

Most of our judge and advocate interviewees agreed that an effort is being made to avoid the use of tagged questions when examining vulnerable witnesses, due to their highly complex, suggestive and ambiguous nature. The 20 Principles of Questioning for the cross-examination of vulnerable people and The Advocates Gateway recommend that counsel be cautious about using tagged questions or avoid them altogether. Linguistically, tagged questions are considered to be challenging, complex and powerfully suggestive to vulnerable witnesses. The list of the most common three-word strings in Table 4.2 above shows several question tags in the corpus (*is that right, isn't it, didn't you*). In order to identify the type and frequency of tagged questions in our sample, the corpus was batch-queried for 193 question tag formations to compare their use in the cross-examination of vulnerable and non-vulnerable witnesses, and 87 of them were found across all transcripts (Table 4.5).

Table 4.5: Question tags found in our cross-examination corpus

<i>are they?</i>	<i>did they?</i>	<i>have they?</i>	<i>should you?</i>	<i>would you?</i>
<i>are you?</i>	<i>did you?</i>	<i>have you?</i>	<i>was he?</i>	<i>would you not?</i>
<i>are you not?</i>	<i>did you not?</i>	<i>haven't you?</i>	<i>was it?</i>	<i>wouldn't it?</i>
<i>aren't they?</i>	<i>do they?</i>	<i>is he?</i>	<i>was it not?</i>	<i>wouldn't she?</i>
<i>aren't you?</i>	<i>do you?</i>	<i>is it?</i>	<i>was she?</i>	<i>wouldn't they?</i>
<i>can he?</i>	<i>do you not?</i>	<i>is it not?</i>	<i>wasn't he?</i>	<i>wouldn't you?</i>
<i>can you?</i>	<i>does he?</i>	<i>is she?</i>	<i>wasn't it?</i>	<i>yes?</i>
<i>can't you?</i>	<i>does it?</i>	<i>is that correct?</i>	<i>wasn't she?</i>	
<i>could he?</i>	<i>does it not?</i>	<i>is that fair?</i>	<i>were there?</i>	
<i>could they?</i>	<i>does she?</i>	<i>is that not correct?</i>	<i>were they?</i>	
<i>could you?</i>	<i>don't they?</i>	<i>is that not right?</i>	<i>were they not?</i>	
<i>could you not?</i>	<i>don't you?</i>	<i>is that right?</i>	<i>were you?</i>	
<i>couldn't he?</i>	<i>had you?</i>	<i>isn't he?</i>	<i>weren't they?</i>	
<i>couldn't she?</i>	<i>hadn't it?</i>	<i>isn't it?</i>	<i>weren't you?</i>	
<i>couldn't they?</i>	<i>hadn't she?</i>	<i>isn't she?</i>	<i>will you?</i>	
<i>couldn't you?</i>	<i>hadn't they?</i>	<i>isn't that correct?</i>	<i>won't it?</i>	
<i>did he?</i>	<i>has he?</i>	<i>isn't that right?</i>	<i>would it?</i>	
<i>did he not?</i>	<i>has it not?</i>	<i>mustn't it?</i>	<i>would it not?</i>	
<i>did it?</i>	<i>has she?</i>	<i>mustn't you?</i>	<i>would she?</i>	
<i>did she?</i>	<i>hasn't it?</i>	<i>Okay?</i>	<i>would they?</i>	

In our sample, tagged questions were asked to vulnerable witnesses less frequently than they were to non-vulnerable witnesses. Tagged questions accounted for 12.35% of all questions asked of vulnerable witnesses in our data, while they accounted for 15.46% of all questions asked of non-vulnerable

witnesses (Table 4.6). The median proportion of tagged questions for vulnerable witnesses was 11.17%, which means that, on average, 11.17% of the questions asked to vulnerable witnesses in cross-examination were tagged questions. In contrast, for non-vulnerable witnesses, on average, 14.33% of the questions asked were tagged. These numbers provide some evidence to suggest that the move away from tagged questions in the cross-examination of vulnerable witnesses is at least underway. However, they were far from being avoided completely; only one vulnerable witness was asked no tagged questions at all, while in the cross-examination of another vulnerable witness, a 12-year-old rape complainant, almost a third (31.67%) of the questions asked were tagged questions; this was a greater proportion than in all but one of the non-vulnerable witnesses (see Section 4.6.4 for the distribution for tagged questions in child and adult witnesses).

Table 4.6: Frequency of tagged questions in cross-examination

Witness type	Total number of tagged questions	Total number of questions asked	Tags as a % of all questions	Median proportion of questions as tagged questions
Vulnerable	713	5774	12.35%	11.17%
non-vulnerable	770	4979	15.46%	14.33%

There was a similar patterning in the precise types of tagged questions asked to both sets of witnesses. Six tags were common to the top ten most frequent for both sets of witnesses (Table 4.7). While it seems as though the frequency of tagged questions was being reduced to accommodate vulnerable witnesses, it does not appear to be the case that the *types* of tags being used were being adapted to vulnerable witnesses. There are two possible exceptions to this: the frequency of *okay?* which was markedly more frequent in the cross-examination of vulnerable witnesses when compared with non-vulnerable witnesses (n=83 vs 12) and the higher frequency of *you*-oriented tags to non-vulnerable witnesses (*did you, weren't you, wouldn't you?*) which did not appear to be as characteristic of the examination of vulnerable witnesses.

Table 4.7: Most common question tags in cross-examination

Vulnerable witnesses		non-vulnerable witnesses	
Tag	Freq. (%)	Tag	Freq. (%)
<i>is that right?</i>	134 (18.79)	<i>is that right?</i>	179 (23.25%)
<i>yes?</i>	101 (14.17%)	<i>yes?</i>	93 (12.08%)
<i>okay?</i>	83 (11.64%)	<i>isn't it?</i>	69 (9.96%)
<i>isn't it?</i>	45 (6.31%)	<i>is it?</i>	41 (5.32%)
<i>is that correct?</i>	31 (4.35%)	<i>did you?</i>	28 (3.64%)
<i>isn't that right?</i>	29 (4.07%)	<i>wasn't it?</i>	22 (2.86%)
<i>is it?</i>	24 (3.37%)	<i>weren't you?</i>	20 (2.60%)
<i>wasn't it?</i>	22 (3.09%)	<i>wouldn't you?</i>	20 (2.60%)
<i>was it?</i>	21 (2.95%)	<i>do you?</i>	19 (2.47%)
<i>do you?</i>	21 (2.95%)	<i>is that fair?</i>	18 (2.34%)

Extract 6 shows the use of a number of different tagged questions in the cross-examination of an adult complainant in a historical child rape case:

Extract 6

Q: At that point you were angry with, from your version of events and to some degree on ours, you were angry with [defendant], upset with [defendant], what better way to get at your mum and say by the way the man in the leisure centre has been sexually abusing me since the age of 13. Why didn't you say that to her then?

A: No.

Q: Would have been the best way to get back at your mum, **wouldn't it?**

A: No.

Q: The reason you didn't say that is because you were having a relationship with him when you were 16?

A: No.

Q: That's the truth there, **isn't it?** If you were angry and upset with him, that would have been the best thing to do, **isn't it?**

A: No, definitely not.

Q: What did you do is you lied repeatedly to that social worker about your history, **didn't you?**

A: No.

There are a number of examples in our data of judges intervening in instances where counsel asked tagged questions to children, for example Extract 7 taken from the cross-examination of a 13-year-old child rape complainant and Extract 8 from the cross-examination of a 16-year-old defendant.

Extract 7

Q: Do you recall telling the police that you gave [defendant] a hug --

A: Yes

Q: -- in the second incident?

A: Yes

Q: What I'm going to suggest to you is this: neither of the incidents which you've described happened. That's correct, **isn't it?**

A: (No audible response).

Q: If I were to suggest to you that this did not happen, what would you say to that?

Judge: That's not an appropriate way of questioning a 13-year-old.

Extract 8

Q: Did [police officer] chase after you and drag you to the ground in the stop and search?

A: No.

Q: That's not how they do it, **is it?** Do you agree?
A: I don't know.
Q: They have to follow rules, **don't they?**
Judge: That's more of a comment, [defence counsel name]
Q: It is.

In the cross-examination of a 12-year-old sexual abuse complainant, which saw 31.67% of the questions asked being tagged questions, there were also repeated interventions by the intermediary for the witness, asking counsel to avoid tagged questions. However, as can be seen in Extract 9, these appeals were not successful.

Extract 9

Q: All right. So, in terms of your own brothers and sisters, you have an older brother, [brother name1]; **isn't that right?**
A: Yes.
Q: Yes. I think he's 14 or thereabouts now, about 14; **is that right?**
A: I'm not quite sure.
Q: That's okay. And then obviously [brother name2], who's living with you with [name2] and [name3]; **isn't that right?**
A: Yes.
Q: And he'll be -- I think he'll 12 soon. Sorry, too fast?
Int: May I intervene? I wonder if we could avoid tag questions and questions posed as statements when it's evidential matters.
Q: So, if I start again, [intermediary name] stop me, okay, I don't mean to --
Int: I will, I know.
Q: So, [brother name2] is -- I want to get just a sense of the family. Okay, so [brother name2] is living with the [family name] with you?
A: Yes.
Q: He will be 12 later, I think in July; **is that right?**
A: Yes.
Q: And then you have two younger brothers as well, [brother name3] and [brother name4]; **isn't that right?**
A: Yes.
Q: ... question, sorry, [intermediary name]... and [brother name3] I think is aged nine now; **is that right?**
A: I'm not quite sure.
Q: Around that age I think?
A: Yes.
Q: So, he's a bit younger, he's the youngest of the boys and he's eight I think?

- A: I think so.
- Q: Great. Now, I don't want to be upsetting you, but I know that about five years ago now, in April 2016, you won't remember the date, but five years ago you went to live with the [family name]; **isn't that right?**
- A: Yes.
- Q: In that house, living with you on a regular basis is Mum, which is [name 3]; **is that right?**
- A: Yes.
- Q: And -- yes, sorry, sorry.
- Int: I wonder if we can avoid the tag questions if at all possible. They can be quite – ‘when you say Mum was living at home, isn't that right.’
- Q: Okay.
- Int: Can you pose it as a question rather than as a statement, please?
-

The cross-examination of a vulnerable witness that had the highest raw frequency of tagged questions was of an adult rape complainant, which contained 93 tagged questions, the most common of which are *isn't it* (n=23) and *weren't you* (n=10). An extract from the cross-examination is in Extract 10.

Extract 10:

- Q: Okay, you accept that what you have in your head about somebody forcing their penis into your mouth that night might not be true.
- A: Yeah, I accept that.
- Q: What I'm not suggesting to you is that you're telling a deliberate lie about that. Do you understand?
- A: Yeah.
- Q: I'm not saying you're a liar.
- A: I -- I'm aware that might not be the truth. I've stated that from the beginning.
- Q: If it isn't a deliberate lie on your part but it's not true, then it's something else, **isn't it?**
- A: Yeah.
- Q: And what I'm saying is it's some sort of nightmarish fantasy. It's a bad trip, **isn't it?**
- A: Potentially, but I remembered that when I wasn't high.
- Q: Sure, but you don't know if it's true or not.
- A: No, I don't.
- Q: So, if it isn't true, then it's some sort of imagined horror story, **isn't it?**
- A: Yes.
-

On the basis of the transcript alone, the use of tagged questions would seem problematic. However, the notes from the observation of this trial give an account of a good cross-examination:

It (cross-examination) was challenging in that the gaps and issues with C's evidence were highlighted, and the defendant's case was put to her, as it must be. At the same time, however, counsel's tone and pace, the judge's interjections, were sensitive and measured. When C got

distressed, counsel paused, the judge asked if she wanted a break, etc. DC was almost apologetic prior to putting D's case to her, forewarning her that there were some distressing questions coming and that he (DC) would be as quick as possible. This did not fit with the image of cross examination in rape cases that the prevailing research literature paints.

It might be the case that tagged questions, when used with care, can be facilitative and supportive in some contexts and with some witnesses, rather than being primarily or exclusively coercive or suggestable. That means that for some witnesses who are vulnerable, tagged questions may be an appropriate means of navigating difficult testimony.

4.6.3.5 Statements as questions

In the same way as with tagged questions, interviewees told us about the need to avoid questions that are actually statements dressed up as questions, or outright comments (albeit perhaps with rising intonation to indicate their questioning function). Our transcript data can be used to test whether statements-as-questions or outright statements are being avoided in the cross-examination of vulnerable witnesses. For the purposes of this analysis, a binary distinction was drawn with regard to the 'form' that advocates' utterances take: they were either grammatically interrogatives (which *usually* perform the functions of questions) or grammatically declaratives (which usually perform the functions of statements). What we were looking for here are those turns by cross-examiners which are declaratives – statements – rather than interrogatives. Even with a rising intonation (which is not determinable by transcripts in any case), and even if they are intended to serve an eliciting function, a declarative is still a declarative in form and may cause confusion for vulnerable witnesses. In this section of the analysis, those questions where statements were followed by a tag were counted as questions.

Of the 5,774 'questions' that were asked of vulnerable witnesses across 34 cross-examinations, 3,584 (62.07%) were grammatical interrogatives and 2,132 (36.92%) were grammatical declaratives. On average (median), grammatical interrogatives accounted for 66.96% of 'questions' that were put to vulnerable witnesses and 32.48% were declaratives. Within that range, there were some cross-examinations where almost everything that counsel says to the witnesses was an interrogative – a straightforward question. For example, in one cross-examination of a child complainant in an assault case, counsel took 48 turns, and 47 of those turns were interrogatives. Extract 11 shows part of the examination:

Extract 11

Q: Yes. How do you know that he was your mummy's old boyfriend?

A: Mummy told me.

Q: Mummy told you. When did mummy tell you that?

A: I can't remember.

Q: Okay. Was it on the day when the ambulance and the police came to your house?

A: Hu?

Q: Do you remember the day when the ambulance came and the police came?

A: Yea.

Q: Do you remember that day?

A: Yea.
Q: Was it on that day that mummy told you that [defendant] used to be her old boyfriend?
A: No.
Q: No. Do you know if it was before then, or after then?
A: Before then.
Q: All right. I want to ask you about the day that your mummy's car was damaged. Was that a school day?
A: Yes.

Similarly, in one longer cross-examination of a child complainant, 111 'questions' were put to the witness, and 105 of them were interrogatives. For example:

Extract 12

Q: Okay. Well, thinking about the text messages, were they rude, or were they aggressive, or were they friendly, or were they something else?
A: They was nice messages.
Q: Thank you.
Judge: Nice messages?
Q: Nice messages. In that first police interview, you told the police that you didn't want [defendant] to contact you at that time. Did you want [defendant] to contact you at that time?
A: No.
Q: No. Okay, [witness], last topic now, last group of questions. You haven't got these in front of you, but we, the lawyers, know from the phone records that, in January/February 2019 -- so just after Christmas -- you would ring [defendant] and you would put 141 in front of your number. Why do you think you put 141 in front of your number when you called [defendant]?
A: I never put 141 at the end -- at the beginning of his number.
Q: All right, is that something you've ever done?
A: No.
Q: No? Is that something you've heard of people doing?
A: I've heard of it.
Q: And why would people do that, do you think, put 141 in front of their numbers?
A: So, they don't have the number.
Q: Yes, so the person that you're ringing doesn't have the number. Do you agree?
A: I've never rang (Several inaudible words).
Q: Okay.

At the other end of the spectrum, some cross-examinations saw counsel making far more comments than questions. For example, in a cross-examination of a vulnerable complainant in a robbery case, 76 (70.37%) of counsel's turns were grammatical declaratives – statements rather than questions.

For example (note: the transcripts with which we were provided often included question marks at the end of the turns, even though the utterance was not a question. Original transcripts are reproduced here):

Extract 13

- Q: So is that when you're on the floor you put your foot on the dressing table?
- A: The dressing table was on the floor. Me foot was on the floor and put me foot on it and try to wiggle out.
- Q: **Trying to wiggle away.**
- A: Yes.
- Q: **So he's behind you on top of you with his arms around your neck?**
- A: His two arms around me neck.
- Q: **Restraining you?**
- A: Yes.
- Q: **I believe you said five to ten minutes. You think eight?**
- A: Yes.
- Q: **I think is what you said?**
- A: Yes. I didn't time everything.
- Q: No, of course not -- of course not. **Now, you then describe how you went from -- to that position in that part of the room, over to where you say the money was kept?**
- A: Yes.
- Q: And you did that by crawling on your --
- A: On me knees, like walking like this (Indicated.)
- Q: **And he still had his -something- around your neck?**
- A: Exactly. He wouldn't let go.
- Q: **And that was obviously quite an awkward thing to do, difficult thing to do?**
- A: Awkward. It was terrifying.
-

Therefore comments-disguised-as-questions were still very frequently found in the cross-examination of vulnerable witnesses in our sample. The next step in the analysis, which is currently being conducted, is to unpick patterns in the types of comments that were made by counsel, in place of questions (e.g. 'I am going to suggest' questions).

Although straightforward interrogative forms being used to perform a question function are considered preferable to comments, there are two types of interrogative that deserve some attention here. Both are indicated by the frequent three-word strings presented in Table 4.2 above: *do you remember* and *do you agree*. *Do you remember* (n=296) and *do you recall* (n=58) accounted for 6.13% of all of the questions asked to vulnerable witnesses in our sample, far more frequently than they appeared in the cross-examination of non-vulnerable witnesses in our data (n=36, 0.72%). Despite both the 20 Principles of Questioning (The Inns of the Court College of Advocacy, 2022) and The Advocate's Gateway (2015) recommending that *do you remember* questions are to be avoided with vulnerable witnesses because they require complex processing and are likely to confuse the witness,

our data finds that they were used routinely with vulnerable witnesses. This included child witnesses, such as in Extract 14, where the move from *do you remember* questions, to *why* questions caused a problem for the witness.

Extract 14

- Q: **Do you remember** that the gentleman who you spoke to, the police officer, when you did your video interview, was called [officer name]?
- A: (indicates agreement)
- Q: **Do you remember** telling [officer name] that [defendant] asked you into his bedroom to help tidy up?
- A: (indicates agreement)
- Q: And was showing you his clothes?
- A: Yeah.
- (section of extract removed for space)
- Q: **Do you remember** telling [officer name] that [defendant] wanted to give you a massage?
- A: Yeah.
- Q: Did you want to have one, a massage?
- A: No.
- Q: What did you think would happen if he gave you a massage?
- A: Something would happen that I wouldn't necessarily want to happen.
- Q: Do you mean something sexual?
- A: Yeah.
- Q: Why couldn't you be arsed to say anything? That was the expression you used to [officer name]?
- A: Sorry?
- Q: **Do you remember** saying to [officer name] that you couldn't be arsed to say anything?
- A: I was scared.
- Q: Why did you pull up your top so [defendant] could rub oil on your back?
- A: I didn't.
- Q: **You don't remember** telling [officer name] that you did that?
- A: No.
-

Similarly, *do you agree* questions were far more commonly found in our data in the cross-examination of vulnerable (47, 0.81%) than non-vulnerable witnesses (18, 0.36%). Extract 15 is an example of defence counsel asking a 13-year-old rape complainant a *do you agree* question, before being asked by the intermediary and the judge to reformulate it as an open question. After some difficulty, the problem with this question is demonstrated – the child gave a different answer to that which she gave when it was elicited through an open question.

Extract 15

- Q: **Do you agree** that you only had sexual intercourse with [defendant] once?

A: Yeah.

Int: Your Honour, can we just pause there? Could counsel please repeat the question? I just thought --

Judge: Yes, all right.

Int: I think [complainant] needed a bit of time to think about that.

Judge: [Defence counsel] will repeat the question and, when he's done so, just take a moment to think of the question before answering, OK?

Q: **Do you agree** you only had sexual intercourse with [defendant] once?

A: On the day or just in general?

Q: I'm not sure the difference but on the day we're talking about.

A: No.

Q: Why do you say no?

A: It happened twice. I'm so confused.

Int: Your Honour, could we just pause a minute, [complainant] just said she's confused.

Judge: Yes.

Int: Would it be possible to ask that as a direct question?

Judge: I think so.

Q: I'm open to suggestion.

Judge: Open question and rather than sexual intercourse, perhaps spell out exactly what that means and just ask how many times. You can formulate it yourself along those lines. OK, can you do that?

Q: Do you understand what sexual intercourse means?

A: (indicates agreement)

Q: Would a shorter way of putting it just be called sex?

A: (indicates agreement)

Q: Well, what I'm asking you is, **do you agree** that you only had sex with him once on that evening?

Judge: Can you ask an open question? How many times?

Q: Well, how many, how many times did you have sex with him that evening?

A: Twice.

These two types of questions show that, although they are not statements or comments and they are not tagged questions, they can still be confusing, complex and, in the case of *do you agree*, highly suggestive.

4.6.3.6 Tone and manner of questioning

The tone and manner of questioning is not something that is easy to evaluate in linguistic analysis of official transcripts given that much can depend on non-verbal cues. But the perception of interviewees that vulnerable witnesses were no longer hectored or bullied was generally confirmed, at least in relation to lay prosecution witnesses, vulnerable or otherwise, in the trial observations where, with the exception of one case, the tone of cross-examination was respectful and courteous, and the delivery of questions typically described as ‘gentle’, ‘slow and deliberate’, ‘considered’ and, sometimes, ‘almost apologetic’ in fieldnotes. The exception was [A011], a case involving a historic allegation of indecent assault on a child. While the questions posed to the complainant in cross-examination in this trial were unobjectionable on paper, the observer made the following comment in the fieldnotes:

I was struck by the apparent disdain on [defence counsel’s] face while he questioned [the complainant]: he constantly looked like he had a bad smell under his nose, but then, he looked like that throughout the prosecution’s case. And he turned away from C after every question, like he was refusing to look at him, which appeared very dismissive. Then again, the court wants witnesses to talk to the jury, not to counsel... it is difficult to draw any firm conclusions but, impressionistically, this ‘tone’ stands out in comparison to other trials observed so far.

This is not to say that aggressive, confrontational, and sarcastic cross-examination was not observed at trial. It was. The recipients of that type of cross-examination, however, were defendants and police officers.

4.6.3.7 Direct Challenge

Judges and advocates told us in interviews that difficulties can arise in ‘putting the case’ to vulnerable witnesses, such as probing apparent inconsistencies in their evidence or questioning whether they are telling the truth. In particular, our interviewees noted that vulnerable witnesses, particularly children, are now no longer accused of lying during cross-examination. One (albeit perhaps crude) way of probing the data directly to test this is by isolating explicit mentions of lying and truthfulness in counsel’s questions in which they suggested that the witness may be lying, or may have lied at some earlier point (e.g. in evidence-in-chief or police interview). Our analysis finds that there were more direct challenges to the truthfulness of non-vulnerable witnesses’ evidence than to that of vulnerable witnesses (Table 4.8).

Table 4.8: Frequency of words related to truth and lies in cross-examination

	Vulnerable (frequency and per thousand words)	non-vulnerable (frequency and per thousand words)
<i>Lie</i>	34 (0.34)	68 (0.76)
<i>Lied</i>	7 (0.07)	12 (0.13)
<i>Lies</i>	12 (0.12)	24 (0.27)
<i>Lying</i>	3 (0.03)	11 (0.12)
<i>True</i>	36 (0.36)	41 (0.46)
<i>truth</i>	37 (0.37)	47 (0.53)
Total	129 (1.29)	203 (2.27)

However, there were still several examples of vulnerable witnesses explicitly being accused of lying. In Extract 16, for example, counsel accused a rape complainant of lying about being sexually assaulted and raped. What compounds this particular example is that counsel not only accused the complainant of lying in this case, but also invoked allegations that the complainant had made in a previous case. This double-accusation of untruthfulness is seen to cause confusion for the complainant, whose first language is not English.

Extract 16

- Q: That is what the police wanted to interview you about, and that is ultimately what [defendant] has admitted doing, is it not?
- A: Yes.
- Q: And just like with [name1], when you were making your complaint, because you said that [name1] physically abused you as well, yes? [name1]?
- A: Yes.
- Q: (Question interpreted) Just in the same way when you told the police **you did not just stick to the truth, did you? You exaggerated it and made up allegations** of sexual assault and oral rape.
- A: (Interpreted) Sorry, are we talking about the late, last case or the previous one, [name1]?
- Q: (Question interpreted) We are talking about this case, but my point is you did the same thing to [defendant] as you did to [name1].
- A: (Interpreted) Can you please repeat your question because I don't understand?
- Q: (Question interpreted) Yes. We agree that [defendant] was despicable towards you. And he beat you to the point where you could not be beaten anymore.
- A: Yes.
- Q: (Question interpreted) Because who knows where it would have ended and what he would have done to you.
- A: Yes.
- Q: (Question interpreted) And you had the courage, and it really is courage to tell the police about this. And when the police were talking to you and you were telling them about the way he had been beating you up, during the course of that otherwise truthful account, **you made up things that were not true** about sexual assault, about oral rape. Those things which did not happen.
- A: No. No.
-

In one historical sexual offences trial, a major argument for the defence was that the complainant was lying about how old she was when she started a sexual relationship with the defendant (Extract 17 and 18).

Extract 17

- Q: At that point you were angry with,-- from your version of events and to some degree on ours, you were angry with [defendant], upset with [defendant], what better way to get at your mum and say by the way the man in the leisure centre has been sexually abusing me since the age of 13. Why didn't you say that to her then?

A: No.

Q: Would have been the best way to get back at your mum, wouldn't it?

A: No.

Q: The reason you didn't say that is because you were having a relationship with him when you were 16?

A: No.

Q: That's the truth there, isn't it? If you were angry and upset with him, that would have been the best thing to do, isn't it?

A: No, definitely not.

Q: What did you do is **you lied repeatedly** to that social worker about your history, didn't you?

A: No.

Q: Are you saying you didn't?

A: Not always.

Q: What do you mean 'not always'?

A: It depended if my mum was in the sessions or not.

Q: I've only got one, that one in?

A: Hm.

Q: So that one session **you lied repeatedly**?

A: Yes.

Extract 18

Q: But on these occasions that you describe as happening in the squash court nobody saw anything?

A: No.

Q: And again this is a busy public bath, isn't it?

A: It wasn't very busy at the back where the squash courts were. It's very quiet.

Q: It was quiet there, was it?

A: Hm.

Q: I'm going to suggest that sadly **this is an invention**, isn't it?

A: No.

Q: Three years after you have gave your statement to the police?

A: No, absolutely not.

Q: And **it's an invention** purely because you're desperately trying to assert this must have been when you were below 16?

A: No.

Q: When the truth is this was when you were in the sixth form and you were 16 years and some?

A: No.

Both of these extracts also show a common strategy used in this cross-examination, and which is also present in others, in which counsel offered a less 'direct' challenge and accusation of lying by saying something along the lines of 'that's the truth' or 'the truth is' implying that the witnesses' version of events is *not* the truth. So apparently indirect was this approach to accusing the witness of lying, that counsel said it while simultaneously emphasising that they were *not* accusing the witness of lying:

Extract 19

Q: So you used to as - because- your case is this is between the ages of 13 and 15. As a 13 and 15 year- old you were going into a chemist to buy condoms?

A: Hm, that's correct.

Q: You've never said this before, do you agree?

A: No.

Q: That just occurred to you?

A: I just remember that. She used to put them in a brown paper bag.

Q: She used to put them in a brown paper bag. She never asked you how old you were?

A: One time she said 'Bless you dear' as I walked out.

Q: Bless you dear. So she never said to you -she- never formed the view or asked you that looks like a 13 year- old person --

A: No.

Q: -- buying condoms. **Is that really true?**

A: Yes, it is true.

Q: Are you sure you're not -- you're casting your mind back a long way and **I don't want to accuse you of being deliberately dishonest**, but do you think you might have inflated your memory to this effect?

A: No.

Q: I'm going to submit to you, again disagree as you see fit, **the truth is** you only really met [defendant] towards the end of 1989, around November December time 1989?

A: No.

Q: When you were in the sixth form?

A: No.

Q: Because your birthday is [date], isn't it, [date] --

A: Hm.

Q: -- when you turned 16 and you were in the sixth form at this point?

A: I definitely met him before that.

Q: And your relationship didn't become intimate for want of a better phrase until March of 1990, **isn't that really the truth?**

4.6.4 Children

There was a consensus amongst interviewees that the most dramatic changes that had taken place were in relation to young children. Interviewees told us that the length of cross-examination had declined considerably. One judge said:

I had a 6-year-old a couple of months ago who was asked four questions in cross-examination. It was a section 28 pre-recorded cross examination, and it was literally four questions. It was over in less than 10 minutes. (AAJ2)

One counsel said that judges will usually not allow cross-examination of a child to be any longer than maybe an hour, an hour and a half and broken into maybe 20-25 minute sections: 'so maybe like 3 short sessions and that's it'. (CAC3)

Interviewees also reported that restrictions were often placed on putting inconsistencies and putting the case to child witnesses. As regards inconsistencies, one judge said that what children may have told other people on other occasions will largely be lost on a child:

They won't grasp that as a concept usually, so the emphasis has shifted to not asking those questions of the witness themselves, but to introduce that evidence about what they've said on earlier occasions, either by agreed facts or by other witnesses. (AAJ2)

In terms of putting the case, some judgments of the Court of Appeal in England and Wales appeared initially to deter judges from allowing counsel to put the case at all, and some interviewees suggested this remains the current position, but the prevailing view appears to be that it can be done, provided the case is put sensitively and in an appropriate manner for the particular child witness. According to one judge, when the toolkits were first introduced, judges were effectively encouraged to say 'Don't put your case at all' and 'the pendulum swung too far that way' but 'we've centred it again and if it's an appropriate challenge and if it can be dealt with sensitively and appropriately, and in a very limited way, judges allow it, and I think the process is far better for it' (AAJ2). According to another judge:

The circumstances in which the case shouldn't be put are quite limited... [A common case is] you're lying, you're making it up. And that can be put as, 'This didn't happen, did it?' Sorry, that's a bad question, it's a tag question! (ABJ3)

Counsel across the jurisdictions reported that they would seek to agree in advance on what aspects of the case, if any, needed to be put to children and the approach taken depended very much on the vulnerabilities of each individual child.

Up to this point in the linguistic analysis, all vulnerable witnesses have been analysed together, as one group. However, when adult and child vulnerable witnesses were separated and compared, some important differences in their cross-examination emerged (Table 4.9).

Table 4.9: Comparing the cross-examination of adult and child vulnerable witnesses

	Adult VWs	Child VWs (over 12)	Child VWs (under 12)
Median length of cross-examination	127.5 questions	119.5 questions	48 questions
Median question length (words per question)	18.94 words	17.37 words	13.74 words

Median WH- / did 'open' questions	13.26%	25.66%	38.94%
Median proportion of questions as tagged questions	11.61%	10.94%	10.58%
Median proportion of statements-as-questions	48.51%	22.02%	6.68%

In terms of the areas in which our linguistic analysis has focused, it appears that, overall, adaptations to cross-examination were more evident in the questioning of child witnesses than adults. Child witnesses, both over 12 and under 12, were asked fewer questions on average during cross-examination than adult vulnerable witnesses. This was particularly clear with children under 12, who were asked on average 48 questions during cross-examination in our sample, compared with 119.5 questions for children over 12. Similarly, child witnesses were asked shorter questions on average than adult vulnerable witnesses, with children under 12 being asked questions that are up to five words shorter than those asked to adult witnesses. Furthermore, open questions (i.e. *WH-* questions and 'did' questions) were more common in the cross-examination of children than of adult vulnerable witnesses; they accounted for almost 40% of the questions asked to children under 12. If 'did' questions are removed, these percentages dropped dramatically. But still, 4.67% of the questions asked to adult vulnerable witnesses were open *WH-* questions, while they accounted for 7.92% and 6.01% of those asked to over and under 12-year-olds respectively. Child witnesses were asked fewer tagged questions than adult vulnerable witnesses, though the differences were not as large as we might expect; tagged questions still accounted for 10.58% of questions put to children under 12, for example. One very noticeable difference in the cross-examination of adult and child vulnerable witnesses was the use of statements-as-questions, or 'comments disguised as questions'. On average, 48.51% of the questions asked to vulnerable adult witness were declaratives in form. However, this proportion dropped to 22.02% for children over 12 and again to 6.68% for children under 12. This type of question, therefore, was almost avoided entirely in the cross-examination of the youngest children. One aspect that deserves some more detailed attention is direct accusations of lying. One child witness, over 12, was repeatedly and directly accused of lying by counsel (see Extract 20, for example). A compounding factor here might be that this was the only child *defendant* in our data (see Section 4.6.7 below for more on vulnerable defendants).

Extract 20

Q: The first thing is the topic of lies. Do you understand? **I suggest that you've told a lot of lies in your interview and, also, today.** What do you say about that?

Judge: There's a difficulty with that.

Int: Sorry, [counsel name], could you just ask the question in simple terms?

Q: I've put tag on the end, haven't I?

Int: Yes.

Q: Thank you.

Judge: And again. All right.

Q: **You lied in your interview.**

Judge: **[Defendant], do you agree that you lied in your interview or not?**

A: I don't agree that I lied but, as I said, my head wasn't in the right state. I got told I'm being arrested for murder. What else am I supposed to think?

Q: **Did you lie in the things you've said today?**

A: No

4.6.5 Sexual offences complainants

Interviewees across the jurisdictions reported that there had been adaptations in the way in which complainants in sexual offences cases were cross-examined. Advocates reported that they were totally aware of the bruising experience giving evidence can entail and they took this account when cross-examining sexual offences complainants. Certain counsel said that there was always a sense in which you treat vulnerable witnesses and complainants in sexual offences cases more gently because you did not want to look bad in front of a jury and 'it does you no favours when you defend in those circumstances to have the witness breaking down all the time... the jury just thinks you're bullying' (CAC4). But cross-examination was much more regulated now. According to one judge, when she started practising at the Bar there were very few rules and protocols in place, and there was 'unfettered freedom to cross-examine pretty much as you felt', without any advance notice of the topics and asking questions about complainants' previous sexual history without any application 'so the Crown and the witnesses were distinctly disadvantaged' (ABJ1).

A number of interviewees referred to the effect that rape shield legislation had had not only in restricting the questions that could be asked but also in making advocates think about asking questions which previously they would have asked, so that 'questions such as, "You were wearing a short skirt?" were asked at one time and are not asked now' (BAJ4). There was also a broad consensus that there was a greater awareness of the sort of rape myths that permeate sexual offences cases. As one counsel put it:

We've moved a long, well we should have moved a long way, [from] the attitude that the female's clothes weren't ripped and she wasn't injured and she wasn't crying or distressed immediately after what had happened. (CAC1)

Interviewees also referred to efforts being made to limit the time taken to cross-examine sexual offences complainants. One counsel in Northern Ireland said that in a historic sexual offences case where the offences allegedly occurred in three different locations, the judge called counsel in afterwards and said, 'Mr X examination-in-chief 14 minutes, Mr Y cross-examination for 47 minutes, I commend you both' (CAC1), although another counsel in the same jurisdiction considered that in sexual offences cases where the complainant had no obvious vulnerable issues, judges would give 'a lot more leeway' (CAC3). One notable change referred to across the jurisdictions was that in multi-defendant cases one counsel would be nominated to ask the questions instead of there being repeated cross-examinations. According to one counsel, one of the big differences is that if you're defending now, there are not supposed to be 'two or three or four or 10 counsel having a pop at the same kind of thing, and that does involve cooperation between counsel ... but it involves preparation ahead of time' (AAC1).

The general picture given by interviewees then was that the cross-examination experience of sexual offences complainants had improved across the jurisdictions. At the same time, there appeared to be a certain difference in perception in the amount of progress that had been made. One judge in England

and Wales commented that in the sexual offences cases she had done in the last few years the lawyers had stuck very much to the new approach 'because we're used to it' (ABJ2). Another judge, however, contrasted the experience of vulnerable witnesses with what she called 'ordinary' complainants in sexual offences cases who still felt bruised and feel 'as though they've been through the ringer a bit and the mangle a bit' (ACJ3).

According to a solicitor advocate in Scotland:

There's no such thing as just a vulnerable witness, there's all categories and people can lie in a big broad spectrum and if somebody's at the more capable end as a deemed vulnerable witness, for example a complainer in a rape case, then... still relatively robust cross-examination takes places, but that's policed pretty well by the judiciary here.

Interviewees in the Irish jurisdictions reported that cross-examination could still be very unnerving and there was room for improvement in the questioning of adult sexual offences complainants:

I will do a very high percentage of cases with vulnerable complainants in sex cases. And I see them on both sides. I see my other defence colleagues and I see what they do... and some do it very well and some also have a long way to go, yeah. A long way to go. (CAC1)

[Adult] complainants still do say to me afterwards, you know, 'Oh, that was terrible' or 'I didn't know he could do this'... Has there been a softening generally with adults with no vulnerabilities? I don't really think so... taking maybe extra breaks and things like that... but that's as much for the benefit of the jury as it is for the witness. (CAC3)

Above, we compared the findings of the linguistic analysis for child and adult vulnerable witnesses. The same can be done here, separating adult sexual offences complainants from adult non-sexual offences complainants and, again, differences in cross-examination practice emerges (Table 4.10).

Table 4.10: Comparing cross-examinations of adult sexual offences complainants and adult non-sexual offences complainants as vulnerable witnesses

	Non-sex complainants	Sex complainants
Median length of cross-examination	74.5 questions	275.5 questions
Median question length (words per question)	17.63 words	19.29 words
Median WH- / did 'open' questions	12.37%	14.58%
Median proportion of questions as tagged questions	8.75%	13.52%
Median proportion of statements-as-questions	49.75%	42.32%

The picture here is somewhat mixed. In the sample of official trial transcripts analysed here, sexual offences complainants were asked far more questions in cross-examination than non-sexual offences complainants, and those questions tended to be longer. Meanwhile, although they were asked more open WH-/did questions and fewer statements-as-questions than other adult vulnerable witnesses, they were also asked more tagged questions.

4.6.6 Other vulnerable witnesses

There was a consensus amongst interviewees that changes had also been made to accommodate the particular vulnerabilities of adult witnesses. There was an acceptance of the need to make

accommodations for people who have difficulties with communication and as one intermediary put it, 'changing how a person is questioned and cross-examined can impact on how they tell their story' (CAR3). So, for example, according to one advocate, 'for an elderly witness it's not about what they can understand more conceptually but... your tone has to be far more measured and gentle. Whereas with autism, you have to think about the structure of the questions and make sure that it makes sense' (ABC1).

There was also a view, however, that there was a considerable difference of approach towards different kinds of vulnerability, for example between the treatment of children and people with special needs on the one hand, and young people or adults who don't have any special needs but who may be vulnerable because of the backgrounds they come from or because they have been damaged by trauma (AAJ1).

In one counsel's view, certain types of vulnerability are advantaged over others:

I think there are some people in relation to whom it's easier to accept that they've got a vulnerability or one has a more ready sympathy. So, I don't see anybody dealing with children other than in a gentle and a sympathetic fashion. But I do see differences... So I think we do treat people with different vulnerabilities in different ways, yes. (ACC1).

One of the examples he gave was the way that advocates deal with teenage boys and teenage girls. A teenage girl might be regarded more readily as being vulnerable than a teenage boy with the same difficult background because of the way their behaviour manifests itself, the girl for instance bursting into tears, whereas the boy might get angry, prompting the reaction, 'Well, actually, you know, him being a bit of an angry so and so, that doesn't do me any harm, I'm perfectly prepared for the jury to see that'.

Some of the differences of treatment seemed to be explained in terms of whether the vulnerabilities are recognised and the degree of understanding there is about them. According to one advocate, accommodations are usually made for people with learning difficulties and there is now greater recognition of autism, and elderly people with disabilities. But witnesses with mental health difficulties get less accommodation because unless somebody specifically notices the mental health difficulty it is not something that is generally picked up in witness statements (ABC1). Even when mental health was recognised as vulnerability, there was also a view that such persons could be the subject of unfair stereotypes:

I think that when prosecuting cases, it is sometimes still possible that a jury would accept that, for example, an untrue stereotype about mental health problems correlating with violent behaviour would mean that a defendant who had mental health problems was more likely to be guilty of a violent offence than if they did not have mental health problems." (ACC3)

4.6.7 Vulnerable defendants

Although judges and advocates were alive to the fact that many defendants had vulnerabilities, there was a general consensus amongst interviewees that vulnerable defendant witnesses are not accorded the same kind of modifications in cross-examination as are accorded to other kinds of vulnerable witnesses. Certain judges said that they would not treat vulnerable defendants differently (ABJ2) and insisted on the same approach being taken to asking questions (ABJ2, ACJ1, ACJ2), while others considered that vulnerable defendants are given a tougher time by prosecution counsel (ACJ3, ACJ4).

For their part, some counsel commented on the harsher approach that judges took towards vulnerable defendants. According to one, judges allow 'more latitude' in relation to tagged questions etc. because 'a victim is always treated more favourably than somebody who is accused of stabbing someone, hurting someone, sexual abusing them for example' (ABC1).

Prosecution advocates said there were limits to what could be put to defendants because 'there's such an obvious power imbalance between you and the defendant that ... if you're seen to bully a defendant that's... self-defeating' (ACC1). But one Scottish solicitor advocate said that a lot of advocate deposes could be 'reasonably brutal' in cross-examination of a vulnerable defendant in a way that they would never be with a vulnerable witness (BAJ4). One prosecuting counsel in England and Wales admitted that 'the way that I cross-examine a defendant is just worlds apart from the way in which the defence barrister is allowed to cross-examine a vulnerable witness' (AAC3) Another counsel said that it could be difficult to 'row back' from the traditional way defendants are cross-examined, admitting that he has used sarcasm in cross-examination and, 'I'll be looking at the jury, almost drawing them in ... and you have people nodding along or they're pulling those faces when the defendant says something ridiculous, you know, that's completely in the face of other evidence' (AAC5). A counsel in an Irish case described how a 17-year-old accused of raping a young child was given no concessions for his cross-examination: 'nothing in terms of breaks, there was nothing in terms of repetition, there was nothing in terms of going all over the place, all of the things that you would do for any child witness, A to B to C to D, that didn't happen. There was an aggressive tone, there was a snide kind of tone' (CAC1).

One of the problems that advocates face is that although 'a huge percentage of defendants have mental health problems' (ACC4), there is often an absence of information on just what defendants' vulnerabilities are and so accommodations are not made. If there was something in somebody's educational record or their psychiatric background, then most counsel would be quite careful to take on board those vulnerabilities. But we have seen intermediaries are rarely appointed for vulnerable defendants. One counsel said that when you're prosecuting, you meet the vulnerable witness, and 'get to know them as a person' but 'the one person as a prosecutor you never ever get to know is the defendant'. Very often then 'you're dealing with somebody you realise halfway through is a bit vulnerable for one reason or another, but you're sort of left to suss that out a bit for yourself'. (AAC1)

It is, of course, the responsibility of the defence legal team to highlight defendants' vulnerabilities. But a solicitor advocate in Scotland admitted that the accused person is very much an afterthought in most of the thinking and planning, admitting that while 'we're trying to do the right thing in relation to vulnerable witnesses in particular, or complainers... we're not really where we should be for the accused people' (BAC4). One of the problems was that the majority of accused persons have some sort of vulnerability and 'you see it so often that you stop seeing it', almost assuming that 'they're going to be vulnerable in some way, but that, because it's so common, you don't then think, "Well, actually, I should be taking steps here to ensure that this person's properly able to take part in the proceedings"'.

In terms of the linguistic analysis, there were some notable aspects of the cross-examination of the two vulnerable defendants who were included in our sample of transcripts. One of our defendants was an adult with significant communication difficulties in a murder trial (VW3) and the other, mentioned above, is a child with ADHD in a GBH with intent trial (VW34). VW3 was asked 693 questions, which was the most of any witness in our sample (vulnerable and non-vulnerable). This was

the witness for whom we saw defence counsel object to the length of cross-examination in Extract 1 (Section 4.6.3.1). Meanwhile, VW34 was asked 265 questions, which was far more than the average for other (i.e. non-defendant) vulnerable witnesses (n=109) and non-vulnerable witnesses (n=157). It seems then, that when it comes to length of cross-examination, the vulnerable defendants in our data were not afforded a particularly short experience. That said, both vulnerable defendants were asked relatively short questions. The questions put to VW3 were 13.21 words on average, with the average for other vulnerable witnesses generally being 18.82. The questions put to VW34 were an average length of 10.49 words, which was the shortest average question length for all vulnerable witnesses (though this may be explained by the fact he was a child, and we have seen children tend to be asked shorter questions in general). Therefore, although they do not seem to be accommodated for in terms of a short cross-examination, the questions vulnerable defendants were asked were on the shorter, and therefore less complex, end of the scale for our sample.

When it comes to the types of questions asked, on average, open questions (*wh-* and *did* questions) accounted for 16.01% of the questions asked to non-defendant vulnerable witnesses. VW34 was asked a higher proportion of open questions than that with 25.66% of the questions they were asked being open, again possibly due to their being a child. On the other hand, only 11.69% of questions asked to VW3 were open. Interestingly, both vulnerable defendants were asked about the same proportion of tagged questions, with 6.64% of all of the questions asked to VW3 being tagged and 6.42% of those asked to VW34. Both of these proportions were much lower than the average for other types of vulnerable witnesses, which is 11.61%. Therefore, the two vulnerable defendants in our sample were asked relatively few tagged questions. As shown above, despite interviewees suggesting that vulnerable witnesses are no longer directly used of lying in cross-examination, VW34 was repeatedly accused of lying by prosecution counsel (Extract 20).

4.6.8 Spillover

One question that interviewees were asked was whether the change of approach towards questioning vulnerable witnesses has in turn had an effect more generally on the cross-examination of other witnesses. Some advocates referred to the fact that there had been a change in the training towards encouraging a more focused approach in all cross-examination away from out-and-out advocacy where there were no-holds barred. An advocate who had considerable experience of training on advocacy courses said that there had been a shift in the direction of what he called the 'Hampel method' of cross-examination which he described as 'a more focused, forensic' approach towards cross-examination which meant asking only what you needed to ask (ABC3). A Scottish solicitor advocate drew a contrast between the approach of older practitioners or practitioners steeped in older ways, who think they have to challenge every witness on absolutely everything and his approach:

So, you're trying to do, I suppose, kind of like the doctor, first do no harm. You certainly don't want to make the case any worse for your client. And that can happen if you blunder into it without having prepared properly. You want to lay the groundwork for the defence case that is to come, and then to highlight the areas where there are problems with the credibility or the reliability of the witness. (BAC4)

While the approach towards cross-examining vulnerable witnesses has to be seen in the context of changes to cross-examination more broadly, there was also a view that the cross-examination of vulnerable witnesses has had an effect on the cross-examination of non-vulnerable witnesses. One

counsel considered that there was no conscious cross-over but because of the approach that was now taken with vulnerable witnesses there was a realisation that there were better ways of cross-examining witnesses in general and judges were more impatient of the old-style 'battering ram' kind of cross-examination than they used to be (ACC1). A judge considered there were transferable skills - breaking things down into topics and putting thought into a logical sequence of cross examination, giving rather more thought to precise language and concentration on getting as much information as possible in as few questions as possible - so that 'if you do several cases with vulnerable witnesses, where you submit specific questions in advance, and then you go and do a case where you cross-examine an adult, I think some of that bleeds over' (AAJ2).

A number of judges and advocates considered that there was much to be said for transferring these skills to non-vulnerable witnesses as cross-examination can be more effective ultimately. As one judge put it:

Good questioning is good questioning. You know, you identify the issues, you plan your cross examination, you tailor it to the issues, you tailor it to the witness, and you go through it. Nothing is ever gained by repetition. Often things are lost in repetition. Nothing's ever gained by sloppy, ill thought-out questions. So, I cannot see a downside to this. (AAJ3)

But there was a feeling that there was still quite a difference between the way vulnerable and non-vulnerable witnesses were cross-examined. Interviewees contrasted the 'good old-fashioned advocacy' techniques that were still used with 'normal' adult witnesses - using 'the tone of their voice and the choice of their language to display their incredulity of the evidence that's being given, jumping around sometimes to discombobulate... wanting them to forget' or accusing them of lying – with the 'completely different skill set' required for child witnesses where a much less emotive approach is taken and 'you have to do things far more chronologically' (e.g. ABJ2, ABC1). An advocate in Ireland said that the discipline of having to ask focused witnesses to vulnerable witnesses had helped him in cross-examining other witnesses (DAC3). But there was a difference in that you would sometimes use a non-vulnerable witness to bring out a broader story so that you've 'spread the seeds' of what will be your theme in the closing speech whereas 'in a child sex case, you're not going to be doing that with a child'.

4.7 Changing legal culture

4.7.1 Acceptance of change

There was widespread acceptance amongst interviewees of the need to change the approach towards the cross-examination of vulnerable witnesses within the legal profession in order to achieve better evidence and to benefit vulnerable witnesses. Some counsel spoke highly about the benefits that a more witness-centred approach had achieved:

Asking a defendant who doesn't understand it, what's the point? But if he quite clearly understands what you're driving at, and you can see that he understands it, then his answers are worthwhile then. (AAC1)

Without any shadow of a doubt, [the changes have] made it easier for vulnerable witnesses to give their account. (AAC3)

It's the right thing to offer the most vulnerable in society, whether they're witnesses who are the victims of serious crime or they're defendants who have their own issues, it's the right thing to do to offer them the support to give them the best chance of giving their evidence the best way. So it's a proper change. (CAC4)

Judges were also whole-heartedly in favour of the new approaches to questioning vulnerable witnesses as they increased the chance of best evidence being taken from a witness and therefore the chance of justice being done and, very importantly, they reduced the chance of re-traumatization of the witness: 'A win, win, win for the interests of justice and the interests of witnesses', according to one judge (BAJ1). The new approaches were contrasted favourably with some poorer habits that had crept in in past years, such as, according to one judge, asking a question which is in fact 'a closing speech to the jury with the words "isn't that right?" tied on at the end' (CAJ2).

4.7.2 Resistance to change

A number of interviewees referred to the fact that there had been some resistance at first to the changes and it has taken some time for them to bed down. According to one judge in England and Wales, it had been 'very slapdash' at first as many older members of the Bar took the view, 'Well, it doesn't affect me' but the judges took a strong stance and said 'Sorry, mate, but you are going to comply with the advocates' toolkits' (ABJ2). But in her view generally advocates now are really good at just sticking to the 'simple issues and all the fluff of cross-examination has just gone'. Another judge said that people had railed against the changes at the beginning and said that they would be impossible to implement but then they realised that the changes do not fundamentally prevent you from putting your case or from asking the things you want to ask and 'actually, you are probably getting better evidence as a result of it' (AAJ1).

A contrast was drawn by a number of interviewees across the jurisdictions between 'old school' barristers who were still quite resistant to change and younger barristers who were embracing the changes more:

I've had two examples in the past year where I've had to stop [counsel's] cross-examination, get the jury out and say, 'Look, these days... are long gone. You just cannot do this'. And both of them were barristers who were in their 70s. (ABJ2)

You used to get a lot of, 'I think you know me and I think you can trust me to ask proper questions' or 'I've been doing this for 30 years, I think I know how to ask a question of a child'. And invariably, that was a preamble to not a clue how to ask a question of a child. (ACJ3)

Although there was a general feeling that changes were more accepted by younger counsel, the pace of acceptance was considered to be somewhat slower in Northern Ireland and Ireland. A judge in Ireland gave an example of a case she was doing at the present where a very junior counsel was 'committing all of the cross-examination offences' that older counsel are accused of (DAJ1).

There was also a view that there were differences of approach between 'old school' judges and judges who were more newly appointed, although there was more consistency now than there used to be because guidance such as the Crown Court Compendium in England and Wales and the Crown Court Bench Book in Northern Ireland were imposing more uniformity. One counsel referred to an 'old-school' judge who dealt with a sensitive vulnerable witness case completely differently from a newly appointed judge who had been doing this sort of work recently and had done all the recent training

(AAC3). Another contrasted the ‘new breed... who know how to do this and do it properly’ with ‘some of the old dinosaurs who are just like, “Well, why haven’t you put the inconsistency in? Oh, come on, do it properly”’ (ABC1). The worst, he said, were ‘the older male recorders [part-time judges], particularly the Silks [senior counsel], who generally don’t deal with this kind of thing as much, and they are less receptive to it’.

4.7.3 The catalysts of change

A number of factors were mentioned by interviewees as affecting the changes to the way in which vulnerable witnesses were cross-examined: the toolkits in the Advocates Gateway, judgments of the appellate courts endorsing the toolkits, greater judicial management, ground rules hearings, intermediaries and training. In England and Wales and Scotland the rulings of the Court of Appeal were considered critical in building momentum towards change. A number of interviewees in Scotland and Ireland also referred to the various reviews on sexual offences that have been carried out (such as the Dorrian Review (2021) in Scotland, the Gillen Review (2019) in Northern Ireland and the O’Malley Review (2020) in Ireland) as important catalysts of change.

The toolkits in the Advocate’s Gateway were considered particularly important in England and Wales, Scotland and Northern Ireland in raising awareness of the changes needed (e.g. ABJ1, BAJ1). One counsel in Northern Ireland reported that in one case the defence were not happy that they were not allowed to ask all the questions they wanted but when they appealed the Court of Appeal said, ‘Look, the Advocate’s Toolkit applies, it lawfully applies, and really counsel can tell the jury about all the inconsistencies without you having to elicit them all from the child witness’ (CAC4).

Certain judges said that every so often they would tell counsel to go away and read the Advocates’ Toolkits. One judge reported that in one case she had stopped a senior counsel cross-examining, sent the jury home, told him she was not permitting him to resume the cross-examination until he had read and understood the Advocate’s Gateway. The counsel came back the next morning and there were 11 minutes of questions for an 11-year-old boy and in that 11 minutes, he had established all he had wanted in terms of the boy having been allegedly coached by his mother to say things against the father. So, ‘You can do it in a different way, you just have to want to’ (CAJ2).

Some intermediaries also said that they used the toolkits to reinforce what they were saying. According to one experienced intermediary:

It's like a backbone... it's like a bit of strength I suppose, as opposed to... just me standing in court saying you should do this - you know this is The Advocate’s Gateway. (CAR3)

The willingness of judges either before or at trial to become involved in policing questions, often with the assistance of intermediaries, was considered to be a crucial catalyst. There was a consensus that judges had descended into the arena in this respect much more than they used to. In England and Wales the Court of Appeal was perceived to have assumed an important role in making judges much more confident now ‘about setting time limits, about scrutinising the proposed questions and about challenging them’ (AAJ3). Without appellate guidance judges would otherwise be in a difficult position when counsel are flagrantly breaking the rules of the toolkits because ‘the greatest fear for any judge is that there is a conviction and that is overturned because you have intervened too much, or you’re accused of this, that or the other, because then the complainant has to go through the whole thing again’ (CAJ4).

While appellate rulings were thought to play an important role in setting the boundaries, it also seemed that resident judges in England and Wales in particular court centres – recorders in Northern Ireland – played an important role in setting an example. One judge said she did not have to tell counsel to go and look at the Advocate’s Gateway because ‘[t]he good ones are all getting the message’ (CAJ3).

There was a general consensus in England and Wales and Scotland that change had been particularly rapid within the last five years. Various reasons were attributed to this. According to one counsel in England and Wales, it is only in this time frame that intermediaries were being used on a much more regular basis and training on questioning vulnerable witnesses had been rolled out by the Bar Council. When this training was rolled out in 2017:

In the space of a few months, awareness of the modern way that you’re supposed to cross-examine a vulnerable witness just increased kind of infinite fold across the legal profession it seemed to me, and all of a sudden, judges across the piece were talking about, knowledgably about, the dos and the don’ts of cross-examination and expecting advocates to know. So that, for me, that was where the sea change occurred. (AAC3)

Across the range of legal interviewees, a persistent theme was that the new changes could be accommodated provided there was flexibility in the way they were applied. This applied particularly to the questions that intermediaries and judges scrutinised either in written form before the trial or at the trial itself. According to one judge, the Advocate’s Gateway had been instrumental in forcing changes and getting counsel to think about questions more carefully and they were very good as a guide, but she thought they could be applied too inflexibly. Her approach was to apply what she called a ‘Ways and Means’ test:

I would look at them as the structure and say... we shall do this, but I don't need to have my hand held as I work my way through the appropriate questions... I think it's forced people to think about what they're asking and why they're asking it and to focus. And that is a good thing so long as there is some residual discretion in using those gateways, particularly for the judge, but for other practitioners. (ABJ1)

Another theme that emerged from some of our interviews was that in terms of changing legal culture it was more productive to pursue a collaborative approach where everyone is working together towards a common goal to do justice to the case rather than a disciplinary approach. This was summed up by one counsel in Ireland who said that ‘[e]verybody in truth is looking for solutions as opposed to problems’ (DAC4). He said that even though there are different perspectives hoping for different outcomes in the case, it had been his experience that ‘nobody is being obstructionist, nobody is seeking to create trouble, everybody recognises that the system must work, and the best way to achieve it is through collaboration, working together, as opposed to simply being difficult’.

4.7.4 Challenges

A number of interviewees said they were under no illusion that it was easy to change the habits of a lifetime. One barrister in England and Wales who had a lot of experience of delivering advocacy courses said that ‘[t]here can be comfort in routine and repetition which means if you are making mistakes, you continue to make the same mistakes’ (ABC3). There was a view that it can be particularly difficult for the more experienced to shed old habits:

We've had this adversarial system. We're all used to it, and we're all trained in it, and it's very difficult for, I would speak for I think both my colleagues on the defence side and my fellow prosecutors, to suddenly have this soft soap approach because we're not used to it. Probably certainly my vintage, I'll never, we'll never get used to it. Obviously the new ones, the new intake will probably have a different approach. (CAC3)

Even when counsel had undergone the training as a number of interviewees had in England and Wales there was feeling that there was a lot left to learn. One counsel considered that it was easy for the training to become a mere 'checkbox' mechanism:

The worst problem that lawyers have is thinking they know something. Whereas it's the unknown unknowns. And it's very easy to characterise yourself as having done the training but then having a disconnect between having done it and putting it into action. (ABC3)

One counsel considered that the training had given barristers 'a toolkit, a basic toolkit, to be able to say no... that question is too complicated or that question is irrelevant or we can deal with that material in a different way' but what it hadn't done was to produce a 'a more sophisticated understanding of the way in which we should be communicating with people' (ACC1). In his words, 'the language skills of a child of six or seven who's vulnerable by virtue of being six or seven but is perfectly intellectually able would be completely different from a woman of 25 who's got intellectual difficulties but who's got a lot more life experience'. Yet they tend to be dealt with in exactly the same way and, equally, if somebody has got no intellectual difficulty but they have got massive trauma problems then again 'we tend to say, "Well, no tag questions and they'll need breaks every 20 minutes", as though that solves the problem'.

4.7.5 Critique: has best evidence become least evidence?

So far, we have dwelt on the benefits that practitioners considered the new changes had brought and the challenges presented. Although interviewees considered there is still some resistance displayed from the 'old school', most judges and advocates had accepted the new changes, with the possible exception of Ireland where there was still some resistance, so long as some flexibility was shown in the way they were applied. But a number of advocates and judges drew attention to a particular tension in the drive to improve the cross-examination of vulnerable witnesses between, on the one hand, protecting victims and witnesses from questions that may re-traumatise them and, on the other hand, making the system robust enough for obtaining the best evidence. There are two aspects to this tension – how it impacts on the fairness of the process and how it impacts on the fairness of the outcome. One counsel said that his clients in cases involving vulnerable witnesses felt cheated a bit sometimes because they think, 'why hasn't my barrister gone after this person and really cross-examined them?'. But in his view, public confidence required that vulnerable witnesses were not disenfranchised and were protected, adding that 'it's gone a bit too far the other way now but there needed to be that reining in of cross-examination' (ABC1).

Judges on the whole were inclined to think there was now a much more balanced approach taken towards cross-examination that had shifted away from looking at the fairness of the trial primarily from the defendant's point of view without any consideration of the fairness of the trial for the witnesses. One judge considered a lot of defendants, and defence counsel, would feel that they don't really get a chance to challenge as vigorously as they would like and there was perhaps something in this but she thought that with judicial directions to guide them, juries 'by and large understand why it

is that you don't get Rumpole-style cross-examination of small children and they make allowance for it' (ACJ3). In other words, it did not affect the fairness of the outcome.

A number of advocates did indeed consider that the pendulum had swung too far in the direction of restricting questions in the interests of vulnerable witnesses and that as a result best evidence was being compromised. This was particularly so when it came to putting the defendant's version of the facts to the witness during cross-examination known as 'putting the case'. We have seen that the practice here is still evolving and a view expressed by certain counsel was that there was now an unpredictability as to whether they will be required to put the case or not, with some judges saying they want the case put and others saying 'you can't put your case at all'. One counsel gave an example of a 15-year-old whom he thought could cope with it being suggested to her that she had talked to her sister and this had affected her testimony but some judges would say, 'No, you can't say that' (AAC5). Yet the counsel who had met the witness before the trial considered the girl was bright enough to know that the defendant was denying what she was saying (AAC5).

Although not 'putting the case' could be unfair to the defence, there was a view that the defence could adapt to this in a manner that could actually advance the defence case (AAC2). As one judge put it, 'not putting the case from a defence perspective that's fantastic. You don't get a contradiction and you get, "This is a defendant in a difficult situation. The child's vulnerable. These are the questions we would like to have asked but we haven't been..." The defendant becomes at a disadvantage in the eyes of everybody' (AAJ3).

From the prosecution point of view, it was considered that not putting the case in a direct enough way to a vulnerable complainant could disadvantage the prosecution case as 'you can lose some of that... indignation or... shock or confusion... because if you ask a child, "Well did X really happen?" and the child says "Yeah", then that's it... So, it doesn't always have the same impact, I don't think' (AAJ1). A judge explained:

The unfairness is that [the complainant] doesn't have the opportunity to address the central plank of the defence which is either she's lying or she's mistaken or it wasn't Bob it was Jimmy who did it... or whatever the central plank of the defence is... Later the defence are going to sort of say to the jury, well you know, she was a bit uncertain about the colour of the bed clothes and the wallpaper and all that sort of stuff. And her mum said that she didn't always trust her to tell the truth, or whatever other bits of stuff they've got in the case to disparage her. And yet she... hasn't had the opportunity to deal with a central plank of the defence case. (ACJ3)

An advocate said that in one case he wanted a 14-year-old to be able to stand up for her own position and have a voice rather than fobbing it off to the jury and saying, 'Oh, well, we don't want to upset her' because that would give the defendant a tactical advantage and potentially lose the sympathy of the jury (AAC5).

There was also a view that witnesses could be over-protected in a manner which not only damaged the prosecution case but also was not in their own best interests. One counsel said that 'very often now you deal with witnesses and their experience of the process is that it's so anodyne that they [think], "Well, when am I actually going to be asked a difficult question?"' His view was that 'sometimes we are better to support a witness well through a difficult process than to make the process so easy that they don't get a chance to tell their story properly' (ACC1).

Some advocates took the view that not putting the case directly enough could affect the outcome of the case especially in cases involving very young witnesses where there was a real tension between exposing witnesses and victims to challenge in order to make them more believable or watering down cross-examination to protect complainants and witnesses at the risk of offenders avoiding justice. Defendants may be acquitted in these cases on the basis of ‘a handful of really namby-pamby questions’, as the complainant’s evidence ‘lacks the bite’ to convict the defendant (ACC3). One counsel described a case where there was extremely limited cross-examination of a very young child of seven or eight, involving three or four questions and when the defendant was acquitted, he remembered thinking, ‘I’m not really sure that that was right... He really had the benefit of not having had his case put to a witness’ (AAC2).

Some went so far as to question whether cross-examination should continue at all for very vulnerable witnesses:

Because there is no point, really, in saying to a child, ‘Uncle Joe says he didn't touch you. Is he right? Or is he wrong?’ And the child says, ‘He's wrong’, and then we will go home. I think that, because quite often now, we find ourselves so restricted in what we can ask, I think, too restricted. And I think it's swung too far as to be almost pointless, sometimes cross-examining in those circumstances. We're just emasculated really from asking any questions. And then I think, why are we putting this witness through this, the upset of coming to court, and sitting here and being asked these questions, which, in my experience, most of the time, they sort of sit there and go, ‘Is that it?’ (ACC4)

Another counsel wondered whether a section 28 hearing was ‘anything more than the appearance of cross-examination rather than anything of real value’ and if someone is too vulnerable, the questions could be put by an intermediary as a sort of follow up ABE rather than cross-examination in a courtroom (ACC3). This points towards a Barnahus approach adopted in Scandinavian countries which we have seen certain Scottish advocates considered was the best way of achieving best evidence in these kind of cases (e.g. BAC2, BAC4).

4.8 Outcomes and juries

We have seen that there was a general consensus amongst interviewees that the changes to cross-examination have improved the experience of vulnerable witnesses, albeit for some categories more than others. There was also a view that the linguistic accommodations made to the content of cross-examination had improved the accuracy of such witnesses’ testimony. But there were concerns about the impact of evidence elicited through live-link or pre-recorded cross-examination on effective cross-examination and about the value of severely truncated cross-examination.

The question whether these changes are affecting the outcome of trials is not something we can test in this research. Much would seem to depend on the way in which juries react to the testimony that is given and any claims regarding how that testimony *might* have been received, and what the outcome of a trial *might* have been, had the evidence been presented by alternative means would be pure speculation. However, a number of interviewees considered that online testimony creates a ‘distancing’ effect on juries which diminishes its impact. One judge who used to prosecute sexual offences cases involving adult witnesses considered that there was a ‘marked difference in outcomes’ when the witness felt comfortable coming into court and giving evidence from behind a screen so they were physically in the room as opposed to being examined over a live-link (AAJ2). But whether this

extended to children giving evidence in this manner when everyone understands the reason for doing it was something she did not know (AAJ2).

Another judge said that although instinctively one worries about the sort of ‘moral distance’ that there is when you don't see somebody face to face, she had not noticed that ‘where a witness gives evidence by an ABE and then by some sort of TV link so he's not in court, there are more acquittals’ (AAJ3). This judge’s experience-based perceptions correspond with our own tentative findings from the trial observations discussed at Section 4.2.4 above. Some judges and advocates called for jury research to test what impact live-link testimony and pre-recorded cross-examination has on juries, a call with which we would very much agree.

We have seen that there was a view that the absence of the jury in pre-recorded cross-examination took the theatricality out of cross-examination which raises the question whether the jury itself may be an obstacle to achieving best evidence in cross-examination. An intermediary who had experience of working in the family courts said that the atmosphere was completely different there because it was about finding out the truth. Criminal trials, by contrast, are adversarial and barristers do ‘a lot of performing for the jury in terms of their body, their language, how they look at a jury after a defendant’s given their answer’ which is absent in the family courts because ‘there is no jury and it’s the judge’ (AAR2). In our interviews, we found that advocates were acutely aware of the need to gear their questioning to how they think it will be received by the jury. But this would seem to have a positive effect in deterring the worst kinds of cross-examination. As mentioned above, advocates reported being sensitive towards how the jury will view any bullying of vulnerable witnesses and defendants. As one counsel put it:

Simply being a posh barrister who tells... the witness that they’re lying or made it up or they’re unreliable. That just doesn’t really work anymore. If at any point you appear to be bullying a witness or just using your position as a formal member of the courts to just attack someone in their evidence without any foundation to that attack then you just look appalling. I think the jury take against barristers or other advocates who behave in that way very quickly, and that impression is disastrous and very difficult to reverse. (ACC3)

A recent issue that has caused controversy is the extent to which juries still harbour rape myths and misconceptions when determining sexual offences cases. Some Scottish interviewees referred to the pilot proposed in the Dorrian Report to replace the jury with a single judge in rape trials which is now included in the Victims, Witnesses, and Justice Reform (Scotland) Bill.⁶¹ In its recent consultation paper on evidence in sexual offences prosecutions, the England and Wales Law Commission has asked consultees for their views on mandatory removal of juries from sexual offences trials currently heard in the Crown Court.⁶²

Interviewees across the jurisdictions, however, considered that juries were now much more educated about rape myths. Some referred to the directions that judges are obliged now to give juries on myths and stereotypes and considered that these had made a significant difference as to how juries approach their task. But there was also a view that juries themselves are much less susceptible to rape myths than 15 or 20 years ago. A barrister in England and Wales remembered a case in his early career at the Bar where a barrister had held up the complainant’s underwear and had overtly made the point that

⁶¹ Dorrian Review (2021) recommendation no. 5.

⁶² Law Commission (2023) consultation question 116.

she had gone out dressed to have sex, which made it not just more likely but overwhelmingly clear that she would have consented to sex with the defendant. At that time, the counsel said, there would have been a healthy number of jurors who might have nodded along with that but if you said that to a jury now, 'one: the judge even in your speech would interrupt you, and two: you could expect an audible response really, some of the jurors telling you where to get off' (ACC3). This counsel's prediction that juries can be very sympathetic to complainants was seen in the trial observations. In [A035], a case involving multiple counts of robbery, one of rape, and one firearms offence, a juror's visual and audible reactions to complainants' distress prompted direction from the judge on the need for 'robust' cross-examination: 'This is a typical case in that it was two diametrically opposed accounts and it is entirely normal that they be challenged - a challenge that is robust but done compassionately. There is no other way'. The judge went on to comment that each witness will react differently during cross-examination and that a witness crying or not crying is not an indication of whether they are telling the truth.

In relation to broader criticisms concerning the negative impact of rape myths, misconceptions, and stereotypes on jury decision-making in RASSO cases, some key findings from the trial observations problematise, or at the very least, complicate, such claims. The first is that juries *do* convict in RASSO trials and, moreover, they convict more than they acquit. In line with findings reported elsewhere (see e.g. Thomas, 2023), across all RASSO cases in our trial observations sample where a verdict was returned and recorded, 64% of juries convicted, and 36% acquitted.

A second complicating factor is that, during trial observations, blatant and overt appeals to rape myths and stereotypes, of the 'but look at what you were wearing!' variety discussed by counsel above, simply were not observed. Again, this is not to say that rape myths did not subsequently impact on juries' deliberations and ultimate decision-making once they retired to consider their verdicts - something we could not possibly examine, given our research methodology. Nor is it to say that rape myths did not feature at all in RASSO trials. There were somewhat veiled and vague appeals to what might conceivably be construed as rape myths in a small number of trials. Such references were generally contained in closing speeches, rather than in cross-examination, and they tended to arise - where they arose at all - in cases where the evidence against a defendant was particularly strong. In other words, relying on rape myths appeared to be something of a last-ditch, 'Hail Mary' defence. Crucially, it was not a defence that appeared to work. Evidentially compelling cases resulted in convictions, regardless of defence counsels' potential attempts to harness rape myths in closing speeches. Similarly, in the RASSO trials that resulted in either an acquittal or a hung jury, there were clear and obvious evidential weaknesses that gave rise to reasonable doubt regarding the guilt of the accused. These bona fides evidential difficulties provide a more persuasive explanation for the failure to secure a conviction than appeals to the routine operation of rape myths on jurors.

5. Conclusions and Recommendations

5.1 Conclusions

We have seen that all the jurisdictions in our study have introduced a number of practices to support a 'best evidence' approach for vulnerable witnesses. There has been more communication with witnesses before the trial by witness services and by prosecutors and supporters are able to sit alongside witnesses in the courtroom. Special measures have enabled vulnerable witnesses to give their evidence-in-chief by means of what is known as an Achieving Best Evidence (ABE) interview in England and Wales, as a Joint Investigative Interview in Scotland and as a 'section 16' interview in Ireland and to be able to avail of screen or live-link when cross-examined in court. Vulnerable witnesses can now also be relieved from attending trial altogether by the provision that is made for pre-recorded cross-examination in England and Wales and Northern Ireland (although it has yet to be rolled out in Northern Ireland) or for taking evidence by commission in Scotland. There is no statutory provision as yet for pre-recorded cross-examination in Ireland, despite calls for it to be introduced (see Cusack, 2020; Rape Crisis Network Ireland, 2018). In all jurisdictions, judges are now expected to exercise greater control over cross-examination and the rules relating to putting the case have been relaxed in the case of young children. The main mechanism for giving effect to this expanding judicial role has been the 'ground rules hearing' (GRH) where the boundaries are set as to how the cross-examination of vulnerable witnesses should be conducted. This procedure is now well established in all jurisdictions except Ireland where recent statutory provision for a pre-trial hearing is expected to permit GRHs to evolve there. This process is greatly assisted by the appointment of intermediaries who may now be appointed across all the jurisdictions except Scotland to advise the court on how communication with vulnerable witnesses can be facilitated and to monitor the way in which questions are put and answered at trial.

5.1.1 Disposition towards change

In mapping the extent to which these practices have become embedded in practice, three powerful conclusions emerge from our research. First of all, whilst it is too early to say that a 'best evidence' model of cross-examination has become the norm within the contemporary criminal trial, across all the jurisdictions there was a willingness on the part of practitioners of all kinds - judges counsel, solicitor advocates, prosecutors and intermediaries - to improve the cross-examination experience for vulnerable witnesses and to help them achieve best evidence. Judges were observed to intervene, some quite regularly, and advocates - prosecution and defence - did so too, pointing out when questions were too complex, poorly worded or rolled into each other, when facts were mis-stated, and when questions went beyond the limits of what had been agreed at GRHs. Intermediaries in England and Wales and Northern Ireland reported feeling much more accepted now in the courts than when the role was first introduced, although they considered that there was a lack of appreciation amongst some legal professionals as to the level of specialist skill required to facilitate good communication and a tendency for some judges and counsel to make simplistic assumptions about witnesses' or defendants' communication abilities. There was resistance on the part of advocates to certain aspects of the new changes (such as in Ireland the idea that questions should be pre-approved by judges). Some practitioners complained about the over-use of certain changes (e.g. use of

intermediaries, pre-recorded cross-examination) and some considered that an over-zealous approach was taken towards case-management which led to questions being cut short and the defence case not being put robustly enough. Tellingly, it was considered that this could adversely affect the outcome of cases to the detriment of the prosecution as much as to the defence. But few legal practitioners expressed outright objections in terms of them being incompatible with the right to a fair trial. There was a general consensus that the best way of changing legal culture towards accepting the new changes was to adopt a collaborative approach whereby all professionals are encouraged to work together to resolve the difficult challenges of cross-examining vulnerable witnesses and defendants.

5.1.2 Barriers to change

The second conclusion, however, is that although there is a general disposition towards many of the changes, the effectiveness of the measures that have been introduced to achieve best evidence is being thwarted by poor technology, delays in bringing cases to trial, and a lack of resources. This was borne out in our observations of trials. In England and Wales we observed trials being delayed because of the poor quality of ABE recordings and pre-recorded cross-examinations having to be postponed when the recording failed. Poor quality recording and bad camera angles during ABEs were also observed to diminish best evidence presentation. Legal practitioner interviewees had particular misgivings about the way in which the roll out of pre-recorded cross-examination in England and Wales had been poorly resourced. They cited unease about the effect on the listing of cases, disclosure, the quality of recording and playback (complicating the editing process) and the heavy workloads which, according to some counsel, had become unmanageable. Many of these concerns were also cited by practitioners in the recent evaluation of section 28 hearings (see Ward et al, 2023). Although steps have been taken recently to obviate concerns about listing by not requiring the same judge or counsel to operate in both the section 28 hearing and the trial, some practitioners considered that this leads to ethical and practical difficulties in terms of quality assurance. Interviewees in Scotland did not express the same misgivings about the increase in the use of evidence on commission, although it was acknowledged that it was resource intensive and needed to be properly funded.

5.1.3 Inconsistency in practice

Thirdly, while the data highlighted many differences in the way in which vulnerable witnesses are cross-examined as opposed to other kinds of witnesses, the changes have yet to metamorphosise on the ground into a coherent and consistent set of practices. Supporters and intermediaries were present in few of the trials that we observed, and there was no apparent reason for their lack of use in certain trials. Interviewees in England and Wales commented in particular on the under-use of intermediaries and GRHs in cases involving vulnerable defendants which suggests there is a discrepancy of treatment between vulnerable defendant and vulnerable non-defendant witnesses. This appeared to be less of a concern in Northern Ireland where there is a unitary scheme for the appointment of intermediaries. Where defence intermediaries were appointed in both jurisdictions they were rarely appointed to facilitate defendants' communication needs throughout the trial. The cost of appointing intermediaries appeared to be a factor in this discrepancy but there was also a view that vulnerable defendants were in a different category from vulnerable witnesses because they have a defence team who can explain things to them and attend to their communication needs.

We were also told that there were inconsistencies in the way GRHs are managed. Some were conducted in a manner that attended fully to intermediaries' advice on how the witness might be

facilitated to give their best evidence, whilst others were conducted in a much more perfunctory fashion.⁶³ There were also inconsistencies reported on the extent to which judges issued formal directions, the absence of which could lead to difficulties when a different judge presided over the conduct of the trial. Differences were also reported across the jurisdictions on the occasions when advocates would be required to seek approval for written questions. This procedure is well established in England and Wales but has only recently been evolving in Scotland and Northern Ireland and is not yet accepted in Ireland. Across the jurisdictions, the procedure appears to be less common in respect of questions to be put to vulnerable defendant witnesses and prosecutors were reported to be resistant to sharing their questions with the defence.

Turning to the cross-examinations themselves, practitioners told us that the more witness-victim centred approach that their systems had embraced within the last 20 years had led to significant changes in the way vulnerable witnesses were cross-examined, although there were differences of view across the jurisdictions and within jurisdictions on the pace of change. There was a consensus that the differences had been most marked in the case of young children and some older children to the extent that some advocates questioned whether there was any longer any meaningful cross-examination at all and there was a concern that some cross-examinations were not sufficiently robust. Adjustments had also been made for adults with recognised communication needs. But there were differences in perception in England and Wales and Scotland on the extent of the improvement in the cross-examination experience of sexual offences complainants and interviewees in the Irish jurisdictions reported that cross-examination could still be very unnerving. There was a consensus that vulnerable defendant witnesses are not accorded the same kind of modifications in cross-examination as are accorded to other kinds of vulnerable witnesses.

These perceptions were largely borne out in our trial observations and linguistic analysis. Although cross-examinations were on average shorter for vulnerable witnesses than for non-vulnerable witnesses (particularly so for children which averaged 12 minutes), there were wide variations across jurisdictions, offence-type and types of vulnerable witnesses. Complainants in serious sexual offences cases were cross-examined for longer periods than vulnerable witnesses in non-sexual offence trials. However, they were shorter (an average of 47 minutes) than much mainstream narrative has suggested, although there were significant differences between jurisdictions. Vulnerable defendants did not appear to be accommodated in terms of shorter cross-examinations.

From the sample of transcripts, it appears that some of the principles set out in the Advocate's Gateway and in the Inns of Court Advocacy's guidance are being followed, with fewer tagged questions ('isn't it?', 'didn't you?') and greater signposting of topics in the cross-examinations of vulnerable witnesses (especially children) than non-vulnerable witnesses. But questions put to vulnerable witnesses are *as long as* those put to non-vulnerable witnesses and statements in the place of questions are still a feature of the cross-examination of vulnerable witnesses, as is the use of closed questions such as, 'Do you remember?' or 'Do you agree?'.

While, generally speaking, advocates did not adopt an aggressive tone towards vulnerable witnesses, aggressive, confrontational, and sarcastic cross-examination was observed in the case of vulnerable defendants. Some vulnerable witnesses were subject to rigorous, thorough and probing cross-examination while others were not subject to much, if any, probing at all, raising questions as to whether the evidence was genuinely tested. In the linguistic sample there were fewer direct

⁶³ This echoes earlier findings by Cooper (2014).

challenges to the truthfulness of vulnerable witnesses than non-vulnerable witnesses. However, there were examples where adult sexual offences complainants were accused of lying.

Whilst we observed then many differences in the way in which vulnerable witnesses are cross-examined as opposed to other kinds of witnesses, we encountered instances of bad practice as well as good practice. The changes that are being developed to achieve 'best evidence' for vulnerable witnesses and defendants are still very much in their infancy. Witnesses and defendants have very different vulnerabilities ranging from different learning difficulties, mental health problems and victims of trauma. There is much work still to be done in learning about the specific and varied communication needs of witnesses and defendants, and how guidelines and training can be most effectively tailored to meet them. Our findings demonstrate that there is considerable variation in the implementation of the measures that have been developed to date to improve practice and there is inconsistency in the way vulnerable witnesses are currently cross-examined. In turn, the question arises as to what should be done to instil greater coherence and consistency in practice. The following recommendations address this question.

5.2 Recommendations

5.2.1 Improving technology

Government clearly has a responsibility to ensure that measures designed to achieve best practice are properly resourced and run smoothly. In 2016 in England and Wales the HMCTS launched an ambitious programme to modernise the courts and tribunals system and improve access to justice for users of its services, including vulnerable groups. Across the jurisdictions delays caused by a backlog of cases exacerbated by in recent years by the Covid pandemic have had a detrimental effect on the ability of vulnerable witnesses to achieve their best evidence. We found that special measures designed to improve the witness experience and achieve best evidence have been particularly blighted by poor technology. **The Gillen Review Implementation Plan in Northern Ireland identified as a strategic priority a need to improve and standardise the quality of recordings and the environment where witnesses provide their evidence and to reduce the disruption and delays in trials caused by incompatible IT systems and poor-quality footage (Department of Justice, 2020). This should be a strategic priority in all jurisdictions.**

5.2.2 Special measures

Although there was a consensus amongst interviewees that special measures have improved the witness experience of giving evidence and assisted in achieving best evidence, there was no 'one size fits all' that works for all witnesses and it was important to give witnesses an informed choice as to which measures they prefer. **Steps should be strengthened across the jurisdictions to ensure that witnesses are given an informed choice as to whether to avail of special measures and everything practicable should be done to enable each individual witness to give evidence in a manner that achieves the best evidence for them.**

The eligibility requirements in England and Wales and Northern Ireland for vulnerable witnesses to qualify for special measures are particularly complicated with some automatically entitled to certain measures and others not. **We consider that the provisions should be simplified so that all vulnerable witnesses are entitled to avail of any special measures that will assist them to achieve best**

evidence.⁶⁴ We also consider that legislation should enable them to be used as flexibly as possible. As Hoyano and Riley (2021) have pointed out, there appears to be no justification for the requirement in the legislation in England and Wales and Northern Ireland that pre-recorded cross-examination is dependent on there being an admissible Achieving Best Evidence (ABE) interview.⁶⁵ There may not be an ABE interview because the vulnerabilities of a particular witness have not been identified at the police interview (intermediaries informed us that they are often brought in at a stage after the police interview) or where the ABE is of such poor quality that prosecutors do not wish to admit it as a witness's evidence-in-chief. It is sometimes forgotten that the original Pigot Committee proposal in England and Wales was predicated upon the entirety of a child's evidence being taken at a pre-trial hearing (Home Office, 1989; see Cooper, 2005). **All of a vulnerable witness's evidence – evidence-in-chief, cross-examination and re-examination – should be able to be recorded in one hearing before trial if this is deemed necessary in order to achieve best evidence, as is the case with evidence on commission in Scotland, and should not depend on there being an admissible Achieving Best Evidence (ABE) interview** (cf. Law Commission (2023: 7.140)). In view of the concerns raised by legal practitioners about the implementation of pre-recorded cross-examination in England and Wales and the more positive reception given by practitioners in Scotland to taking evidence on commission in advance of the trial there, **consideration should be given in England and Wales and Northern Ireland to adopting other features of the Scottish model, including building in more flexibility into the manner in which pre-recorded cross-examination is conducted (i.e. online or face-to-face), the use of suites outside the courtroom for recording pre-recorded cross-examination, and the use of in-house recording facilities. Consideration should also be given in Ireland to piloting the use of pre-recorded cross-examination.**

Given the inconsistent use of supporters that was observed, **consideration should be given to whether vulnerable witnesses should be entitled to choose to have a supporter of their choice to sit alongside the witness when they are giving evidence whether at court or remotely, as is the case in Scotland and Ireland. Consideration should also be given across the jurisdictions to entitling complainants in sexual offences to the presence of an Independent Sexual Violence Adviser as a supporter** (cf. Law Commission (2023: 14.95, 14.96)).

5.2.3 Familiarisation

Although there is a prohibition on any coaching, more emphasis is being given across the jurisdictions towards preparing witnesses for the experience of giving evidence. But there would appear to be inconsistency in practice in this respect. **Steps should be strengthened across the jurisdictions to ensure that witnesses are properly prepared for giving evidence in advance of trial, including consistent use of familiarisation measures and consistent advice on what giving evidence will entail.** An exemplar in this respect is the practice that certain intermediaries told us they adopt of enabling witnesses to experience what it is like to answer questions unrelated to the case via a live-link and approved by the CPS during a court familiarisation visit. **Witness services should consider giving any vulnerable witness who wishes an opportunity to practise speaking over a live-link or in the courtroom as appropriate at a familiarisation visit.**

⁶⁴ Cf the Law Commission's (2023: 14.75) provisional proposal that complainants in sexual offence prosecutions should be automatically entitled to what it calls 'standard measures' to assist them give evidence.

⁶⁵ Youth Justice and Criminal Evidence Act 1999 s 28(1); Criminal Evidence (NI) Order 1999 art 16(1).

5.2.4 Intermediaries

In view of our finding that intermediaries play a very significant role in facilitating communication with vulnerable witnesses who have communication needs, **steps should be taken to ensure that their services are made available consistently to all vulnerable witnesses who require them and that they continue to be integrated into the criminal justice system as a fully recognised and accepted professional service.** In order to reinforce their neutral role as officers of the court in facilitating the communication of all vulnerable witnesses and defendants, their services should be organised through one central funding source. The unitary scheme for registered intermediaries in Northern Ireland is an exemplar in this respect and **consideration should be given to amalgamating the separate intermediary schemes for witnesses and defendants in England and Wales** (see also Fairclough, Taggart and Backen, 2023). As, in Plotnikoff and Woolfson's (2020) terms, intermediaries constitute a 'new profession', **consideration should be given to the formation of an international professional association for intermediaries across the jurisdictions with its own code of conduct to regulate their functions, take responsibility for their training and accreditation and promote best practice.** A code of conduct could also address the misunderstandings and lack of clarity surrounding the boundaries of their role that our research identified. **Scotland should consider piloting the use of intermediaries, given that it is the only jurisdiction in our study not to have adopted the role.**

5.2.5 Equality

In Part 3 we referred to the internationally established right of all witnesses and defendants to participate effectively in the criminal process. In the light of interviewees' concerns that certain kinds of vulnerability are not recognised and that some witnesses would appear to be advantaged over others, **protocols should be put in place for all professional groups who take evidence from witnesses to ensure that they are alert to the vulnerabilities of witnesses.** A good exemplar in this respect is the England and Wales' Equal Treatment Bench Book (Judicial College, 2023). **A particular concern identified in our research that defendant witnesses are not accorded the same treatment as other vulnerable witnesses should be addressed by adopting the principle that vulnerable defendants are given the same access to special measures as vulnerable witnesses** (see also Fairclough, 2018a). Given the barriers that vulnerable defendants have traditionally faced in accessing intermediary services to facilitate their communication needs before and during the trial, in contrast to the access that vulnerable witnesses have to intermediaries before trial, **greater focus should also be put on whether defence intermediaries should be appointed before trial and for the duration of the trial itself. GRHs should be held in advance of the trial for both vulnerable witnesses and vulnerable defendants so that they can effectively participate in their trials. In accordance with the Advocate's Gateway: Ground Rules Hearing Checklist, consideration should be given to holding a GRH for vulnerable defendants before the trial and, if the defendant later elects to give evidence, a second GRH should be arranged specifically to discuss how questioning should be conducted.**⁶⁶ **Where appropriate, prosecutors should be required to submit written questions for judicial approval in the same manner as defence advocates.** Although there is scope for greater guidance in the Practice Directions of certain jurisdictions as to when certain procedures such as GRHs should be required and how they should be run, we consider that consistent approaches are best achieved by adopting a collaborative approach where issues are discussed and worked out between court users

⁶⁶ The Advocate's Gateway: Ground rules hearing checklist (2019). See: https://www.theadvocatesgateway.org/files/ugd/1074f0_395da62674464adbabfccc9e2fa43827.pdf

on the ground. **Consideration should be given to setting up court user groups comprising judges, advocates, intermediaries, the police, prosecuting agencies, witness services and representatives from support groups to develop more consistent approaches towards familiarisation visits, the use of intermediaries, GRHs and pre-recorded cross-examination.** An exemplar in this respect is the court user group that was established in Scotland chaired by a judge with representatives including prosecution and defence lawyers to identify problems, solve them and develop shared understandings and good practice for making and deciding evidence on commission applications (Lord Beckett, 2023). In view of the tension highlighted by a number of legal practitioners between on the one hand, protecting victims and witnesses from questions that may be traumatic for them and, on the other hand, making the system robust enough for obtaining the best evidence, we consider that **full account should be taken at GRHs of intermediaries' views on how particular witnesses may best be challenged, if at all, about matters relating to putting the defence case.**

5.2.6 Training

A number of vulnerable witness training courses have been developed across the jurisdictions for judges and advocates and there was a general consensus amongst them that these have had a positive impact in developing best practice. **Vulnerable witness training should be an essential part of the judicial training syllabus. The time has now come to consider whether it should be mandatory for advocates to undergo vulnerable witness training in order to work in cases involving vulnerable witnesses.**⁶⁷ In view of the concerns we heard over the way vulnerable defendants are questioned (supported by our observations that defendants generally appear to have the hardest time in cross-examination along with police officers), it would appear that **there is a need to give greater emphasis in vulnerable witness training to defendant vulnerability training.**

Given the unease raised about whether vulnerabilities around mental health are properly identified and accommodated when witnesses with such vulnerabilities give evidence, greater emphasis should be given in training on these vulnerabilities. An exemplar in this respect is the provision made in Scotland for judges and sheriffs to have access to a 'Trauma-Informed Judging Resource Kit' online which examines the issue from the perspective of accused persons, witnesses, and even judges who could suffer vicarious trauma (Lord Beckett, 2023). It includes videos about the impact of trauma on the brain and how that bears on recollection and giving evidence. The kit contains a question and answer section in which a psychologist and judge explain how court processes might create a risk of re-traumatisation for witnesses and offer suggestions for practical steps which can be taken to mitigate that risk when evidence is being adduced.⁶⁸

The linguistic analysis adopted in our research is based on real-world cross-examinations that are currently happening in criminal trials involving vulnerable witnesses. The analysis has shown how

⁶⁷ cf Gillen Review (2018) which considered that in respect of sex offence prosecutions only barristers who have undergone approved specialist training in serious sex offences should be publicly funded and permitted to participate in the trial of such offences: para 15.66. The Law Commission (2023) in England and Wales has invited views on whether it should be mandatory for practitioners to undergo training on myths and misconceptions in order to work on sexual offences cases.

⁶⁸ A pilot was also launched in Scotland in 2019 for video-recorded interviewing, which uses specially trained police officers known as sexual offences liaison officers ('SOLOs') who are trained in cognitive interview methods, trauma-informed interviewing, forensic awareness, and how to obtain, present and test best evidence. (See Law Commission, 2023: 13.61).

perspectives from linguistics can bring new understanding to important features of cross-examination, such as the need for a more nuanced approach to tag questions, the precise difficulties associated with ‘do you agree’ and ‘do you remember’ questions and the interactional problems caused by comments-as-questions, amongst others. At the same time, it has presented elements of good practice, such as in the clear signposting of topic shifts in cross-examination and how this can be successfully achieved by counsel. **Our analyses and results provide a strong case for the benefits of embedding of linguistic analysis, perspectives and knowledge into the training of advocates in the cross-examination of vulnerable witnesses, and into the routine updating of professional guidance materials such as the *20 Principles of Questioning* and the *Advocate's Gateway Toolkits*.** Expertise from linguistics can provide additional support in helping advocates navigate cross-examination by revealing or emphasising precise challenges that certain features of cross-examination pose for vulnerable witnesses, which may have previously been overlooked or not fully appreciated. By extension, **the trial transcripts collected and analysed for this project are a valuable resource. They can, with the support of linguistics expertise, be integrated into training and guidance materials as real-life, concrete examples of cross-examination and therefore provide empirical support for the advice and recommendations made in such training and materials with regard to elements of good practice in cross-examining vulnerable witnesses.** Although a number of interviewees spoke highly of the training they had received, in view of the fact that research and education on best practice is constantly changing **there is a need to have continuing refresher courses.** In view of the importance attached to adopting a collaborative approach, **joint training events should be organised with barristers, solicitor-advocates, judges and intermediaries together so that they can share experiences and learn about the perspectives of other professional groups.**⁶⁹

Although a common perception among legal practitioners was that remote testimony has a ‘distancing’ effect on juries, there is no evidence to support this in the observational trial data. **Consideration should be given to providing training to the judiciary and lawyers on the research evidence that is available on the impact on juries of remote testimony.**⁷⁰

5.2.7 Innovation

We are conscious that a number of recent reports and reviews have considered more radical reform in order to improve the cross-examination experience of vulnerable witnesses and assist them to give best evidence, particularly in the case of sexual offence complainants. Among the proposals considered have been the provision of separate legal advice and assistance for sexual offences complainants in certain circumstances (Law Commission, 2023), the exclusion of the public from such trials (as in the case in Ireland, Scotland and in Northern Ireland as recommended by the Gillen Review, 2018),⁷¹ the use of juryless courts in sexual offences cases (Dorrian Review, 2020) and the introduction of ‘specialist examiners’ to replace counsel in exceptional cases (see Dorrian Review, 2020; O’Malley Review, 2020; and Law Commission 2023). Some of these proposals would require extra funding at time when finances are tight across all court systems and we consider that in such an environment

⁶⁹ cf Fairclough et al (2023) who recommend that intermediaries and the legal profession are brought together in a training environment to iron out misperceptions and form a strong and respectful relationship.

⁷⁰ A brief summary of the research is contained in Law Commission (2023: 7.123-125). The Commission made a similar provisional proposal in respect of the impact on juries of measures to assist complainants in sexual offence prosecutions (see 14.106).

⁷¹ See Justice (Sexual Offences and Trafficking Victims) Act (NI) 2022 s 19.

the focus should be on optimising the effectiveness of the changes that have already been implemented. The proposals would require a strong evidence base if they were to be acted upon and there was little appetite amongst interviewees for them. However, **there would seem to be scope for more radical innovation in the form of pilot schemes in particular court centres**. One example is the recent pilot in Belfast Crown Court where cases involving complainants under 13 in sexual offences cases are fast-tracked so that there were only 13 weeks between arraignment and trial. Innovations like this could be extended to include a *Barnahus* approach for such cases so that all the questioning of the child, including cross-examination, is completed at a special evidence and hearings suite for children (Cf Dorrian Review, 2020). There may also be scope for a pilot scheme that would examine the benefits of extending GRHs to all witnesses who are deemed vulnerable including adult sexual offences complainants where lines of questioning, if not specific questions, would be discussed and approved by the judge (see e.g. Victims Commissioner 2021: recommendation 7; see Law Commission 2023: 9.93-98).

5.3 Future research

At the outset, we noted that there has been little research on the impact that changes to cross-examination practice affecting vulnerable witnesses have made on the ground. Our research has been an attempt to remedy that situation but as our project evolved we became aware of further research that needs to be done in order to inform an evidence-based approach to practice and reform. GRHs have been a core innovation in the drive to improve cross-examination practice but they were not a central focus in our research where the focus was on cross-examination in trials. We heard much from intermediaries about the inconsistent manner in which GRHs operate. We believe there is scope for an inter-disciplinary, mixed methods project to examine the effectiveness of GRHs. Such a project would not only include observations of GRHs but also follow-up up through courtroom observation and linguistic analysis of transcripts on the extent to which written questions approved by judges are adhered to when witnesses are cross-examined in court or in pre-recorded cross-examination.

Given the difficulties that legal practitioners said that they have encountered, there is also scope for further research on the effectiveness of pre-recorded cross-examination which might build on the Ministry of Justice evaluations to date by including observations and linguistic analysis. Such research could also explore the relative merits of the English and Scottish models.

Although they did not feature so prominently in our observed trials, intermediaries featured as central figures in our research. Legal practitioners were mostly positive about the role they now play in the justice system. But there is scope for further empirical work on the impact that they have in enhancing communication at trial and facilitating best evidence. Cooper and Mattison (2017: 367) have commented that '[i]t is striking how little research has been conducted into the completeness, accuracy and coherence of the evidence that intermediaries facilitate'.

The perception that remote testimony has a 'distancing' effect on juries has been noted in other research (e.g. Fairclough, 2018b; and Ward et al 2023). A meta-analysis of research using mock jurors watching pre-recorded evidence and live-link testimony concluded that this medium does not have a negative effect on trial outcomes (Munro, 2018). However, the Law Commission (2023: 7.283) has described the evidence as a whole to date as 'mixed and not yet comprehensive' and there is scope

for more research on this issue.⁷² Proposals that juries should be dispensed with altogether in sexual offence trials also need to be informed by more research on jury decision making in these trials and in other trials involving vulnerable witnesses.

Finally, although our research did not focus centrally on police-recorded interviews that are used as evidence-in-chief, interviewees considered that, apart from the poor audio and video quality of such recordings, the quality of their content varied enormously and this was borne out in our trial observations. A number of interviewees considered that their dual purpose as an investigative tool and as means of presenting evidence-in-chief was not conducive to achieving best evidence. We consider that there is scope for further research to examine in a more systematic manner the quality of police-recorded interviews, with the aid of linguistic analysis, and to suggest linguistically-based solutions as to how the quality of such interviews might be improved.

5.4 List of recommendations

Technology

1. Strategic priority should be given in all jurisdictions to the need to improve and standardise the quality of recordings and the environment where witnesses provide their evidence and to reduce the disruption and delays in trials caused by incompatible IT systems and poor-quality footage.

Special measures

1. Steps should be strengthened across the jurisdictions to ensure that witnesses are given an informed choice as to whether to avail of special measures and everything practicable should be done to enable each individual witness to give evidence in a manner that achieves the best evidence for them.
2. The eligibility requirements for vulnerable witnesses to qualify for special measures should be simplified so that all vulnerable witnesses are entitled to avail of any special measures that will assist them to achieve best evidence.
3. All of a vulnerable witness's evidence – evidence-in-chief, cross-examination and re-examination – should be able to be recorded in one hearing before trial if this is deemed necessary in order to achieve best evidence, as is the case with evidence on commission in Scotland, and should not depend on there being an admissible Achieving Best Evidence (ABE) interview.
4. Consideration should be given in England and Wales and Northern Ireland to adopting other features of the Scottish model of taking evidence on commission, including building in more flexibility into the manner in which pre-recorded cross-examination is conducted (i.e. online or face-to-face), the use of suites outside the courtroom for recording pre-recorded cross-examination and the use of in-house recording facilities.
5. Consideration should be given in Ireland to piloting the use of pre-recorded cross-examination.

⁷² Cheryl Thomas's Nuffield Foundation project on Juries, the digital courtroom and special measure should shine light on this question. See <https://www.nuffieldfoundation.org/project/juries-the-digital-courtroom-and-special-measures>

6. Consideration should be given to whether vulnerable witnesses should be entitled to choose to have a supporter of their choice to sit alongside the witness when they are giving evidence whether at court or remotely, as is the case in Scotland and Ireland.
7. Consideration should also be given across the jurisdictions to entitling complainants in sexual offences to the presence of an Independent Sexual Violence Offence Adviser (ISVA) as a supporter.

Familiarisation

8. Steps should be strengthened across the jurisdictions to ensure that witnesses are properly prepared for giving evidence in advance of trial, including consistent use of familiarisation measures and advice on what giving evidence will entail.
9. Witness services should consider giving any vulnerable witness who wishes an opportunity to practise speaking over a live-link or in the courtroom as appropriate at a familiarisation visit.

Intermediaries

10. Steps should be taken to ensure that intermediary services are made available consistently to all vulnerable witnesses who require them and that they continue to be integrated into the criminal justice system as a fully recognised and accepted professional service.
11. Consideration should be given to amalgamating the separate intermediary schemes for witnesses and defendants in England and Wales.
12. Consideration should be given to the formation of an international professional association for intermediaries across the jurisdictions with its own code of conduct to regulate their functions, take responsibility for their training and accreditation and promote best practice.
13. Scotland should consider piloting the use of intermediaries, given that it is the only jurisdiction in our study not to have adopted the role.

Equality

14. Protocols should be put in place for all professional groups who take evidence from witnesses to ensure that they are alert to the vulnerabilities of witnesses.
15. Vulnerable defendants should be given the same access to special measures as vulnerable witnesses.
16. Greater focus should be put on whether defence intermediaries should be appointed before trial and for the duration of the trial itself.
17. GRHs should be held in advance of the trial for both vulnerable witnesses and vulnerable defendants so that they can effectively participate in their trials.
18. In accordance with the *Advocate's Gateway: Ground Rules Hearing Checklist*, consideration should be given to holding a GRH for vulnerable defendants before the trial and then if the defendant later elects to give evidence, a second GRH specifically to discuss how questioning should be conducted. Where appropriate prosecutors should be required to submit written questions for judicial approval in the same manner as defence advocates.

Consistent practice

19. Consideration should be given to setting up local court user groups chaired by judges comprising advocates, intermediaries, the police, prosecuting agencies, witness services and representatives from support groups to develop more consistent approaches towards familiarisation visits, the use of intermediaries, GRHs and pre-recorded cross-examination.
20. Full account should be taken at GRHs of intermediaries' views on how particular witnesses may best be challenged, if at all, about matters relating to putting the defence case.

Training

21. Vulnerable witness training should be an essential part of the judicial training syllabus.
22. The time has now come to consider whether it should be mandatory for advocates to undergo vulnerable witness training in order to work in cases involving vulnerable witnesses with continuing refresher courses.
23. There is a need to give greater emphasis in vulnerable witness training to defendant vulnerability and vulnerabilities around mental health and trauma to ensure that such vulnerabilities are properly identified and accommodated.
24. Consideration should be given to embedding linguistic analysis, perspectives and knowledge into the training of advocates in the cross-examination of vulnerable witnesses, and into the routine updating of professional guidance materials such as *the 20 Principles of Questioning* and the *Advocate's Gateway Toolkits*.
25. Real-life trial transcripts showing cross-examination of vulnerable witnesses collected for this project should be integrated into training and guidance materials as concrete examples of current practice, providing empirical support for the advice and recommendations made in training and guidance materials.
26. Consideration should be given to providing training to the judiciary and lawyers on the research evidence that is available on the impact on juries of remote testimony.
27. As research and education on best practice is constantly changing, there is a need to have continuing refresher courses.
28. Joint training events should be organised with barristers, solicitor-advocates, judges and intermediaries together so that they can share experiences and learn about the perspectives of other professional groups.

Innovation

29. Pilot schemes should be encouraged in particular court centres to promote best practice. Examples might include fast-tracking cases involving young children, adopting a *Barnahus* approach for such cases so that all the questioning of the child, including cross-examination, is completed at a special evidence and hearings suite, and extending GRHs to all witnesses who are deemed vulnerable including adult sexual offences complainants.

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Appendix 2: Project Outputs

- Cooper, D. and Jackson, J. (2022). Outsider Perspectives on the Role of the Intermediary in Cross-Examination. Paper presented at the Ministry of Justice annual conference for the Witness Intermediary Scheme on 22 March 2022.
- Doak, J. (2022). Mapping the Changing Face of Cross-Examination. Paper presented at *Forensic Linguistics: scoping for synergies in language, law, crime and evidence at NTU*. Inter-disciplinary conference. Nottingham Trent University. 20 June 2022.
- Doak, J. and Jackson, J. (2021). Cross-Examination: In Search of a New Normal. *The Barrister Magazine*: <https://www.barristermagazine.com/cross-examination-in-search-of-a-new-normal/>
- Doak, J., Jackson, J., Saunders, C., Wright, D., Gómez Fariñas, B. and Durdiyeva, S. (2021). *Cross-Examination in Criminal Trials: Towards a Revolution in Best Practice? A Report for the Nuffield Foundation* (2021): <https://www.ntu.ac.uk/research/groups-and-centres/projects/mapping-the-changing-face-of-cross-examination>
- Doak, J. and Jackson, J. (2021) Cross-Examination on Trial: Practitioners' Perspectives and Debates" 24 November 2021 Blog. See: <http://www.nlscl.org.uk/cross-examination-on-trial-practitioners-perspectives-and-debates/>
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- Doak, J., Cooper, D. and Jackson, J. (2022). Outsider Perspectives on the Role of the Intermediary in Cross-Examination. Paper presented at stakeholder event, *Participation, Vulnerability and the Legal Process: International Perspectives*. Crowne Plaza Hotel Nottingham. 28 September 2022.
- Doak, J., Cooper, D. and Jackson, J. (2022). Outsider Perspectives on the Role of the Intermediary in Cross-Examination. Paper presented at Ministry of Justice event for Intermediaries. 4 November 2022.
- Doak, J., Cooper, D. and Jackson J. (2023). Adversarialism, Participation and Voice in the Criminal Trial: The Changing Face of Cross-Examination. *Annual Intermediary Scheme Conference*. 24 March 2023.
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- Jackson, J. (2021). The Impact of Covid-19 and the rise in video-technology on criminal trial procedures. Sao Paulo University, Brazil. 20 October 2021
- Jackson, J. (2022). Re-thinking the Orality/Confrontation Paradigm in a Virtual Justice World. Conference on the *McDonaldization of Justice*. University of Warwick. 19-21 May 2022.
- Jackson, J. (2022). Cross-Examination in Criminal Trials: Towards a Revolution in Best Practice? Lecture presented to the 23rd Annual National Prosecutors' Conference. Dublin. 19 November 2022
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- Jackson, J., Cooper, D., Saunders, C. and Wright, D. (2023). Mapping the Changing Face of Cross-Examination in Criminal Trials: Preliminary Findings. Nottingham High Pavement Chambers Lecture. Galleries of Justice, Nottingham. 21 March 2023.
- Wright, D. (2023). The cross-examination of vulnerable witnesses in England and Wales: reflections and realities. Aston Institute for Forensic Linguistics, Aston University, Birmingham. 27 April 2023.
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- Wright, D., Jackson, J., Doak, J., Saunders, C. and Cooper, D. (forthcoming). Contemporary cross-examination of vulnerable witnesses in the UK and Ireland. In T. Grieshofer and K. Haworth (eds.), *Communication and Legal Practice*. Cambridge University Press.

Appendix 3: About the Authors

John Jackson is Emeritus Professor of Comparative Criminal Law and Procedure at the School of Law, University of Nottingham. He has led large-scale projects on the criminal courts, including the Nuffield-funded first ever ground-breaking research on witnesses, defendants and jurors' perceptions of the criminal courts in Northern Ireland, a pioneering Leverhulme Trust funded project on the Diplock courts in Northern Ireland comparing judicial intervention and trial conduct in jury and non-jury trials and the first ever Irish Court Service-funded empirical survey on the jurisdiction of the Irish courts. He was a member of the Advisory Panel to the Gillen Review into the law and procedures in serious sexual offences in Northern Ireland.

Professor Jonathan Doak is Professor of Criminal Justice and Associate Dean for Research at Nottingham Law School, Nottingham Trent University. He has published extensively on the experiences of vulnerable witnesses at court, victims' rights, restorative justice and the role of therapeutic interventions within the legal process. He has contributed to policy developments and influenced various government and law reform bodies including the Northern Ireland Law Reform Committee, the Northern Ireland Office, the Victorian Victim Support Agency and the Department of Justice, Equality and Law Reform in Ireland.

Dr Candida Saunders is Assistant Professor of Law at the School of Law, University of Nottingham. She has conducted original empirical research into prosecutorial decision making in cases of male-on-male rape and has published socio-legal research on the production of evidence in rape cases. In addition to conducting her own original empirical research, she has supervised doctoral research studies using both qualitative and quantitative research methods. She is the founder of the School of Law's Criminal Justice Research Centre and has been Chair of the School's Research Ethics Committee and Director of the School's MA Social Science Research (Socio-legal Studies).

Dr David Wright is Associate Professor in Linguistics in the School of Arts and Humanities, Nottingham Trent University. His research as a forensic linguist specialises in applying methods of corpus linguistics and discourse in forensic and legal contexts and aims to help improve the delivery of justice using language analysis. As well as examining courtroom discourse and the language of advocacy in court, his research projects include using corpus approaches to tackling online and offline language crimes, forensic authorship analysis and the use of voice identification evidence.

Dr Debbie Cooper is Associate Research Fellow at the School of Law, University of Nottingham and is also a visiting research fellow at Nottingham Trent University. She has previously been involved as the lead researcher on two research projects conducted by the Human Rights Law Centre at the University of Nottingham for the EU Fundamental Rights Agency: 'Adult Victims of Violent Crime Participation in Justice' and 'Child Participation in Justice'. She has taught criminal law, criminal evidence, policing and judicial review at the University of Nottingham and the University of Leeds.