Cross-Examination in Criminal Trials Towards a Revolution in Best Practice?

A Report for the Nuffield Foundation

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Executive Summary

Introduction

Cross-examination has long been considered an 'iconic' feature of adversarial criminal proceedings used to test oral evidence. Over the course of the 20th century, however, it has been widely criticised as an ineffective investigative tool and it became apparent that many, particularly vulnerable, witnesses found the process distressing. Governments around the world responded by introducing a range of special or alternative measures to ease the burden of testifying and over the last decade there has been a growing acknowledgement that there is a need for more fundamental changes to the nature of cross-examination itself.

This Report explores the changing nature of cross-examination across a range of common law jurisdictions over the past three decades. It considers emerging international trends with reference to international human rights standards and global innovative practices and presents a comprehensive review of law, policy, practice and academic literature across the jurisdictions of England and Wales, Scotland, Northern Ireland, and the Republic of Ireland, drawing comparisons with Australia and New Zealand which were among the first common law jurisdictions to introduce procedural changes to accommodate vulnerable witnesses.

Context and Background

Cross-examination is a formal stage in common law trial procedure which follows after a witness has been called and questioned by one party (a process known as 'examination in chief') when the witness is then questioned by an opposing party in order to weaken the evidence the witness has given in examination-in-chief or to elicit evidence favourable to that party. Its history 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 a failure to cross-examine them could then amount to a tacit acceptance of their evidence in chief. Judges could intervene to prevent unnecessary, protracted or aggressive cross-examination but they were traditionally wary of intruding on advocates' duty to question witnesses on behalf of their clients' case.

Cross-examination is not only considered a fundamental characteristic of the adversarial system; it has come to be considered an important aspect of the defendant's right to a fair trial. It is commonly defended on the ground that it is an effective means of testing a witness's veracity and of enabling defendants to put their case. Although commonly conflated with the right to confrontation, cross-examination need not entail a face-to-face encounter between the witness and accused; rather it has been developed in human rights law as a right on the part of the defence to challenge the testimony of important witnesses put forward by the prosecution.

During the course of the 20th century, however, a growing body of experimental psychological research questioned the overall efficacy of cross-examination as a fact-finding tool. The adversarial nature of the trial demands that witnesses are under close control of advocates, with their testimony carefully kept in check to ensure that it conforms with advocates' case theory. Towards the end of the century cross-examination was also criticised on the ground it gave rise to anxiety and dissatisfaction on the part of witnesses. Research showed that as matter of course witnesses were frequently bullied, harassed and felt as though they were on trial. While many witnesses may feel uncomfortable under cross-examination, research demonstrated that the problems were considerably exacerbated among three groups of particularly vulnerable witnesses: children; those with learning disabilities, and complainants in rape and sexual assault cases. The manner in which questions were put was a source of considerable confusion amongst children and learning-disabled witnesses and effective communication was hindered in a number of respects. Research also highlighted that the nature of cross-examination caused both immediate distress as well as longer term psychological complications for complainants in rape and sexual violence trials.

The International Scene

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. 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 and the concept of effective participation is reflected

in the European Union's Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings. 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. 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. 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 and guard against the use of gender stereotypes and misconceptions around rape and sexuality. There are also standards requiring states to adapt their justice systems to ensure effective access for disabled people on an equal basis. 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. 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. 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.

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. But international bodies consider such rights can

be accommodated without prejudicing the accused's right to a fair trial. The ECtHR has recognised that principles of fair trial require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify, but crucially the defence must be given an opportunity to challenge their evidence. This model of 'participatory proof' embraced by the Court encourages member states to develop less adversarial practices which enable all witnesses (including victims and defendants) to give their best evidence.

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 screens, live TV link, and in 1991 pre-recorded video-taped evidence in chief. The far-reaching recommendation of the Pigot Committee in 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 report, *Speaking up for Justice,* which 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 originally, however, excluded defendants.

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 was not piloted until 2013 and was only made available in all Crown Court centres in November 2020. 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 'un-tagged' questions be used and that a cautious approach be adopted when challenging

or seeking to undermine the testimony of a vulnerable witness. Best practice guidelines were issued urging judges and magistrates to control questioning of vulnerable witnesses and breaking from the rule 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.

The main mechanism for giving effect to this expanding judicial role is the so-called 'Ground Rules Hearing' (GRH) where defence 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. GRHs are now mandatory in all cases involving intermediaries and where there is to be pre-recorded cross-examination and they are regarded as good practice in all cases involving child witnesses and in other cases there is a vulnerable witness or vulnerable defendant with communication needs.

Significant steps have been taken to train advocates in the questioning of vulnerable witnesses. The Inns of Courts College of Advocacy has developed a national programme of *Advocacy and the Vulnerable Training*, in conjunction with the Bar, which is to become mandatory for any advocate wishing to undertake publicly funded work for serious sexual offence cases involving vulnerable witnesses. An independent body known as The Advocate's Gateway (TAG) 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.

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 enacted in the Vulnerable Witnesses Act 2004 extended the categories of vulnerability to include complainants in sexual cases and adults whose live testimony in court might be diminished by reason of mental disorder or fear or distress. 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 categories of vulnerability were created under the Victims and Witnesses (Scotland) Act 2014 and further reforms were introduced under 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 who must convene a GRH for such a purpose. Witnesses who fall under one of the other vulnerable categories may also apply to the court to give evidence in this way.

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.

While the introduction of GRHs creates new obligations for commissioners to manage proactively the questioning of vulnerable witnesses, there have been few rulings recently on the role of the judge in controlling cross-examination. In March 2021 the Dorrian Review recommended 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. 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.

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

cross-examination and the potential utility of GRHs was given impetus with the publication of the Gillen Review in 2019 which was commissioned to review the law and procedures in serious sexual offences in Northern Ireland following a highly publicised nine-week rape trial in 2018 in which four elite rugby players were acquitted of rape, attempted rape, exposure, and perverting the court of justice. 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.

The Republic of 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 legislation 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.

Currently, no statutory provision facilitates the admission of pre-recorded cross-examination but courts now do have a statutory power under the Criminal Justice (Victims of Crime) Act 2017 to appoint an intermediary where it is in the interest of justice for witnesses under the age of 18 as well as for adults with a 'mental disorder', who are delivering, or about to deliver testimony through a live television link in respect any sexual and violent offence. This offence gateway 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' or is adjudged to have a 'special protection need'.

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 relate to the private lives of victims and are unrelated to the offence in addition to provisions already in force 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 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, according to the Review, could be used to review matters relating to disclosure, the appointment and role of an intermediary, for applications to question victims on sexual history evidence and for special measures. It is unclear whether this scheme which has yet to take effect will evolve along the lines of the English GRH model. However, the O'Malley Review and the Oireachtas Joint Committee on Justice have recognised the importance of specialist training and guidelines to improving the quality of questioning vulnerable witnesses.

Australia

As in other jurisdictions, over the last 20-30 years, there has been a growing awareness of the difficulties experienced by vulnerable witnesses under cross-examination**.** Over the course of this period all Australian states and territories have introduced legislation permitting certain witnesses to make use of a range of alternative means of giving evidence. Most jurisdictions did not follow a rigid 'closed category' approach but gave discretion to determine which witnesses should benefit from alternative measures. The live link facility was the most common alternative measure made available in all jurisdictions. All Australian jurisdictions also provided the right for vulnerable witnesses to be accompanied by a 'support person' to provide emotional support to the witness.

In the course of the past five years, three separate commissions of inquiry have considered matters pertaining to access to justice for complainants in cases of sexual violence. Considerable deficits in the treatment of complainants were reported in all three inquiries, including the manner of questioning under cross-examination, and far-reaching recommendations by them have acted as a catalyst for further significant reforms across many Australian jurisdictions.

In 1992 Western Australia became the first common law jurisdiction to provide for pre-recorded evidence to be received in its entirety and in 2017 the report of the Royal Commission into Institutional

Responses to Child Sexual Abuse (RCIRCSA) recommended that all states and territories legislate for the prerecording of the entirety of a witness's evidence in child sexual abuse prosecutions, as well as all other cases involving children and vulnerable adults. This recommendation, coupled with the perceived success of the Western Australian approach, acted as a catalyst for similar reforms in other Australian jurisdictions. All jurisdictions now provide for pre-recorded evidence-in-chief, with pre-recorded cross-examination and re-examination also available in New South Wales (NSW), Victoria, South Australia, Tasmania and the Australian Capital Territory (ACT). The RCIRCSA also recommended that all jurisdictions establish intermediary schemes similar to those that operate in England and Wales and many jurisdictions (including NSW, Victoria, Western Australia, South Australia, ACT and Tasmania) subsequently made (or are in the process of making) legislative provision for intermediaries.

Case law from all the Australian jurisdictions underlines the inherent common law powers of the judiciary to control the conduct of proceedings, however, as in many other jurisdictions, judges have been somewhat reticent to intervene to control cross-examination. Lawmakers across Australia have shown a greater willingness to introduce legislation to restrict or prevent excessive cross-examination than has been the case in other common law countries. Queensland, ACT, Tasmania, and the Northern Territory have enshrined 'general principles' to be applied in all cases involving child witnesses and over the course of the past two decades, many jurisdictions have moved to introduce new legislation to prohibit certain approaches to, or lines of, questioning. Following the recent inquiries relating to complainants in sexual violence cases, several jurisdictions including NSW, Victoria, Tasmania, ACT and South Australia have moved to adopt GRHs, particularly in cases where intermediaries have been appointed, similar to those which were first developed in England and Wales.

New Zealand

In the 1980s growing concerns in New Zealand around the experiences of child witnesses within the criminal justice system led to the establishment of the Geddis Committee on the Investigation, Detection and Prosecution of Offences Against Children and following its recommendations, New Zealand became the first common law country to introduce a comprehensive legislative package of reforms for child witnesses. Under the Evidence Amendment Act 1989 three new statutory means for complainants under the age of 17 in sexual assault offences to give testimony were introduced: the pre-recording of evidence-in-chief; giving evidence via live link, or placing a screen between the child and the accused. Subsequently, the Evidence Act 2006 consolidated and updated the range of

alternative measures available and provided for ten different grounds for applications to be made to the court for adult witnesses. The Act provided for such witnesses to give all of their evidence including cross-examination, in pre-recorded form, however it appears that in practice pre-recorded evidence is largely limited to examination-in-chief and there is a widespread reticence among some practitioners to embrace pre-recorded cross-examination and re-examination. Provision was also made under the Act for all complainants and child witnesses to avail of the presence of a support person and of communication assistance where the child has difficulties in understanding the proceedings or giving evidence. However, there is no centralised system of registration or accreditation for intermediaries as in England and Wales and there are no formal guidelines on the qualifications they should hold or what training they should have received.

As in many other jurisdictions, judges have the common law power to regulate the conduct of cross-examination through discretionary interventions. The Evidence Act 2006 also provides that judges may disallow questions that are considered improper, unfair, misleading, needlessly repetitive, or expressed in a language that is too complicated for the witness to understand. The Act also sets out a set of cross-examination duties. However, in practice, judicial interventions are rare and are perceived to sit uneasily alongside the umpireal role of the trial judge.

Conclusions

There has been a general consensus in recent decades within national and international criminal justice systems on the need to make adjustments to enable vulnerable witnesses to give their best evidence. This consensus has stretched across national and international criminal justice systems and is shared by legislators, the public at large and the various professional stakeholders who play a vital role in delivering justice in the courts. There has also been a broad consensus on the kinds of special or alternative measures that should be available for vulnerable witnesses in order that they can give their best evidence. What began as fairly limited and carefully circumscribed exceptions to normal trial procedure led increasingly to more pronounced departures from the traditional mode of questioning witnesses in open court such as pre-recorded examination in chief and cross-examination, the use of intermediaries and GRHs where directions are given on how witnesses should be questioned. These are all changing the traditional 'advocacy' model of cross-examination.

Although the scale of change in the last three decades has been considerable, the pace of change across the various jurisdictions has been uneven and in most jurisdictions defendants are disadvantaged by having less access to special measures than other witnesses. While independent

reviews have often acted as the catalyst for change, the implementation of certain measures at national level has been hampered by perceived clashes of rights with the accused, institutional 'push-back' from the legal profession and the practical difficulties of accommodating change within a system traditionally centred on the adversarial trial. All this points to the need for more research on how special measures of all kinds are being implemented across jurisdictions, the manner in which different kinds of vulnerable witnesses are cross-examined and whether the new procedures governing cross-examination are effecting change on the ground.

1. Introduction

1.1.1 Cross-examination has long been considered an 'iconic' feature of adversarial criminal proceedings used to test oral evidence (Roberts and Zuckerman, 2010, p. 295). Although traditionally regarded by lawyers as 'the greatest legal engine ever invented for the discovery of the truth' (Wigmore, 1940, §1367), it has been widely criticised as an ineffective investigative tool (Greer, 1971). 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 vulnerable witnesses; the plight of children, complainants in sex cases, and witnesses with learning disabilities (Doak, 2008; Kirchengast, 2016).

1.1.2 Increasingly, governments around the world have introduced a range of special or alternative measures to ease the burden of testifying or as a tool to achieve 'best evidence' (Hayes & Bunting, 2013). Although these reforms have helped alleviate some of the stress and anxiety associated with testifying (Burton et al, 2006; Plotnikoff & Woolfson, 2009), they have not altered the fundamental nature of cross-examination in adversarial systems. Only in the past decade or so has there been a growing acknowledgement that there is a need for more fundamental changes to the nature of cross-examination itself.

1.1.3 This Report explores the changing nature of cross-examination across a range of common law and 'hybrid' common law/civil law jurisdictions over the past three decades. The Report comprises eight chapters. Following this brief introductory chapter, the second chapter provides a legal and policy overview of the how cross-examination has come to be regarded as a cornerstone of adversarial justice; some of the key justifications and critiques of the practice; and how increasing public concern around the treatment of witnesses under cross-examination acted as a catalyst for the recent ascendancy of the 'best evidence' model of advocacy. The third chapter explores emerging international standards, noting recent shifts in international human rights and criminal justice discourse which have evolved in a manner which takes into the account the interests and rights of victims and witnesses, alongside the accused's right to a fair hearing. In particular, it explores developments at the Council of Europe, European Union and United Nations; adaptations for witnesses at the International Criminal Court (ICC) as well as the apparent success of the Nordic *Barnahus* model as a participatory process for young people. Chapters 4-7 provide a detailed overview of recent developments in the four jurisdictions which are the focus of this study (England and Wales, Scotland, Northern Ireland and the Republic of Ireland.) Chapters 8 and 9 explore developments in Australia and New Zealand respectively. These jurisdictions have been selected as comparators on the basis that they were among the first common law jurisdictions to introduce procedural changes

to accommodate vulnerable witnesses, and a recent report by Fair Trials (2020, p. 2) on disabled defendants found that there were considerably more examples and materials on procedural adaptations in these jurisdictions than in any other country. The Report concludes in Chapter 10 with a summary of key trends and emerging issues, highlighting a range of factors that have acted both as catalysts and inhibitors to law reform.

1.1.4 The rules of cross-examination are varied and complex, and these are often subject to numerous tests, conditions and caveats and fall under the purview of the trial judge. The research team have elicited and explained these where they are relevant to the scope of the project, namely how the fundamental nature of cross-examination is changing. However, it is beyond the remit of this Report to evaluate the scope of specific evidential rules concerning, for example, finality, hearsay, character evidence, and sexual history evidence.

2. Context and Background

2.1 Introduction

2.1.1 This Chapter provides a contextual overview of the role that cross-examination has traditionally played within the adversarial criminal trial. It comprises four sections. It begins by tracing how cross-examination has come to be regarded as a cornerstone of adversarial justice, as a hallmark of the accused's right to a fair trial and as the primary means by which the defendant is able to 'put his case' to prosecution witnesses. The second section sets out the core principles and characteristics of the process, alongside some of the traditional justifications that have been used for conventional practices. The third section outlines how, in the latter years of the 20th century, these traditional defences of cross-examination became the focus of increasing criticism. Such concerns were not only reflected in the legal literature, but also in mounting evidence by criminologists, linguists, and psychologists. The final section outlines how increasing public concern about the treatment of witnesses under cross-examination acted as a catalyst towards a 'best evidence' model of advocacy. This entailed significant reform, including the introduction of special measures to protect witnesses, increasing intervention among the judiciary, and widespread questioning of the proper role of cross-examination (and how it should be exercised) against the backdrop of an adversarial trial.

2.2 Historical Context

2.2.1 Giving oral evidence in court, sometimes referred to as the 'orality' principle, has long been a central component of the adversarial trial. Witnesses are initially called and questioned by one party in order to elicit favourable evidence (examination-in-chief), before being challenged by the opposing party through cross-examination. As Du Cann (1964, p. 95) states in *The Art of the Advocate*:

> *The aims of cross-examination are twofold: to weaken the case for the other side and to establish facts which are favourable to the case for the cross-examiner.*

2.2.2 Its history is linked intrinsically to the rise of adversarialism and lawyers in the nineteenth century. Given such a pivotal role in the adversarial trial, it is considered a skill which must be mastered if the advocate is to have any chance of success and it is not surprising that practitioner manuals have devoted considerable space to it (see e.g. Stone, 1984, p. 299; Byrne & Heydon, 1986, §17430).

2.2.3 Up until the latter part of the 18th century, questioning in trials was led by the judge, which then tended to veer towards a 'freewheeling discussion' between the witnesses, the defendant and the judge (Landsman, 1983, p. 727). Early records of the involvement of defence counsel can be traced to the 1730s when their role was to 'supplement rather than supplant questioning by the court' (Langbein, 2003, p. 291). As the number of lawyers increased and litigation grew, the function of the judge as active inquirer was gradually usurped (Langbein, 2003, pp. 242-244). Most legal historians point to the trial having assumed an increasingly adversarial character from the 1780s through to the 1840s, by which point it had come to resemble its contemporary image as a 'gladitorial contest between opposing parties overseen by a neutral judge' (Schneider, 2015, p. 49). The advocate's role was to win the case on behalf of their client, most famously articulated by Lord Brougham's statement that the advocate's 'highest most unquestioned duty' is to save the 'client by all means and expedients, and at all hazards and costs to other persons' (2 *Trial of Queen Caroline* 8).

2.2.4 The primacy of cross-examination as an indispensable feature of the adversarial process was well established by the early nineteenth century (Langbein, 2003, p. 346). In subsequent years, the fervent and aggressive nature of the process became deeply rooted in trial advocacy:

> *Accompanying the increase in counsel's participation in litigation, and especially the intensification of cross-examination, came an amplified acerbity by the advocates. Where once it was the judges who made caustic remarks, it was now the cross-examining lawyers who were sarcastic interrogators.* (Landsman, 1990, p. 536).

2.2.5 Practitioners came to view cross-examination as having superseded the oath as an indispensable method of uncovering the truth by rooting out unreliable witnesses (Landsman, 1990). Although the Llimitations placed on defence counsel from addressing the jury directly were removed by the Prisoners' Counsel Act 1836, cross-examination came to be viewed as the most effective means of undermining the prosecution case and came to be increasingly viewed as a fundamental right of the defence counsel. Any sworn witness was expected to undergo cross-examination as a matter of course. Where no cross-examination was able to be carried out, the evidence-in-chief was still admissible, but was deemed to be incapable of carrying any real weight (see eg *R v Doolin* [1882] 1 Jebb CC 123, where the witness died prior to cross-examination).

2.2.6 The increasing centrality of cross-examination of the trial process meant that defence counsel became more proactive, wherein eloquent advocacy and forensic and zealous questioning became a central skillset for counsel (Landsman, 1990, p. 594). The shift was also mirrored by changes to the role of the prosecutor; cases came to be prosecuted with increased fervour with defence witnesses

also being subject to similar rigorous challenges as their prosecution counterparts (Langbein, 1994, p. 1096). Towards the latter part of the nineteenth century, it became increasingly clear that this new-found zeal in the criminal courtrooms had to be tempered by responsibility (Cairns, 1998, p. 165). This resulted in the closer regulation of advocacy through the development of new evidential rules on matters pertaining to hearsay, character evidence, and similar fact evidence under the common law and Criminal Evidence Act 1898 (see further Langbein, 1994). Also, it also seems that the purpose of questioning was limited to probing the evidence; the use of 'comment' only seems to have come about in the early to mid-20th century (Henderson, 2014, p.104; Du Cann, 1964, p. 108).

2.3 Contemporary Cross-Examination in Practice

2.3.1 Cross-examination continues to be a lynchpin of the modern trial process buttressed by rules of evidence which both empower and require its use. Unlike examination-in-chief, leading questions are permitted in cross-examination. As the celebrated barrister John Mortimer (1982, p. 106) explains:

> *'The art of cross-examination', my father told me, 'is not the art of examining crossly. It's the art of leading the witness through a line of propositions he agrees to until he's forced to agree to the* one fatal question*.'*

2.3.2 During cross-examination, a witness can be questioned on any matter that is deemed to be relevant, either to the facts in issue or to the credibility of the witness. (*Hobbs v Tinling* [1929] 2 KB 1). Moreover, in all cases where counsel intends to challenge or contradict any aspect of a witness's evidence, they are under a duty to pursue a line of questioning against that witness until they are deemed to have 'put their case' (*Brown v Dunn* (1894) 6 R 67).

2.3.3 A failure to do so may amount to acceptance of what the witness has stated in evidence-in-chief (*R v Farooqi* [2013] EWCA Crim 1649). Where a party has been prevented from cross-examining a witness, that witness's testimony may be regarded as inadmissible, or may be afforded little weight. If the testimony is regarded as significant to the outcome of the case, there is the possibility that the verdict may then be overturned on appeal (*R v Lawless* (1993) 98 Cr App R 342; cf. *R v Stretton* (1988) 86 Cr App R 7; *R v Pipe* [2014] EWCA Crim 257).

2.3.4 Training in the 'art' of cross-examination encompasses many well-established techniques. These include the projection of confidence and control, role-playing, intimidation, the use of suggestion, and

the use of carefully devised linguistic techniques designed to limit the scope for free narrative (Doak, 2008). Du Cann (1980, pp. 113-126) refers to using 'weapons of surprise'; 'timing'; 'the last question' (for 'impression'); 'ridicule'; 'repetition'; and 'riveting'.

2.3.5 Counsel are advised to construct a 'case theory' before a case comes to trial (Stone, 1995: 82). This is the version of events which best encapsulates on behalf of their client what has taken place, which will then be relayed to the court in form of a story. Supported by a substantial body of literature, story-telling theory holds that juries deliberate by constructing stories based around the way the evidence is presented to them (see eg Bennet & Feldman, 1981; Pennington & Hastie, 1993; Rieke & Stutman, 1994, pp. 94-102; Taslitz, 1999, pp. 15-18). Stories are selectively prepared to enable the jury to identify the central action in the alleged crime; to make empirical connections among evidential elements based on that storyline; and to then interpret and evaluate those connections for internal consistency, completeness, and for their collective implications for the central action (Bennet & Feldman, 1981, p. 67).

2.3.6 The formulation of a good narrative can provide a coherent 'story frame', which organises all of the events, transactions, and other surrounding facts of the case into an easily understandable context so that it will strike a familiar chord with jurors (Lubet, 2001). As part of this process, counsel may seek to 'construct and represent… a moral identity for the participants in violent incidents that imputes particular attributes to them and accentuates aspects of their identity that speak to these attributes' (Fielding, 2006, p. 192).

2.3.7 The way in which the jury perceives their testimony may then be intensified or diminished as counsel attempt to highlight or downplay respective aspects. Advocates will typically accentuate those parts of the evidence that can be effectively challenged, thus intensifying the effect of any flaws or inconsistencies contained within it (McBarnet, 1983, p. 296). In order to provide a robust story-frame, counsel will need to exert close control over the witness, restricting the number and scope of questions that is strictly necessary, and eliciting only testimony that is likely to support the central narrative (Stone, 1995, p. 94).

2.3.8 Witness testimony is therefore shaped to bring out its maximum adversarial effect (Stone, 1995, p. 120), with advocates reconstructing the evidence to maximise the chances of success:

> *[Lawyers] learn to decontextualize facts and categorize them according to their legal significance, sorting the relevant facts issue by issue. They deconstruct and reduce the experience and then reorganize it to correspond with abstract legal principles.* (Cole, 2001, p. 2)

Everything has to be judged not according to whether it will expose the truth, but according to what will advance the case. In this sense, the adversarial system has been said to turn 'witnesses into weapons to be used against the other side' (Pizzi, 1999, p. 197), with leading advocacy training manuals traditionally making reference to 'butchering', 'breaking' and 'destroying' opposing witnesses (Ellison, 2001, p. 104).

2.3.9 Although the principle of party control dictates that counsel enjoy a broad leeway in determining their lines of cross-examination, this freedom is not unfettered and is subject to a number of controls. First of all, there is a nuanced difference in a criminal trial between the role of prosecution and defence counsel:

> *If the advocate is appearing for the Crown …, he cross-examines in order to get as near to the truth as he can and not to secure a verdict. [But] if he is defending in a criminal case … he is under no duty to continue with questions which might establish facts unfavourable to his client and favourable to his opponent*. (Du Cann 1980, p. 112; see also *R v Puddick* (1865) 4 F&F 497).

2.3.10 Secondly, judges have powers to curtail the scope of cross-examination under the inherent powers of the court at common law to control its own procedure. They have discretion in determining if a witness should be compelled to answer a question put to them in accordance with the principles laid down in *Hobbs v Tinling* [1929] KB 1. Judges also have a duty to curtail unnecessarily protracted cross-examination (*R v Kalia* (1974) 60 Cr App R 200; *Mechanical and General Inventions Ltd and Lehwess v Austin and Austin Motor Co. Ltd* [1935] AC 346, 360). Counsel must not engage in 'aggressive, repetitive or oppressive questioning'; the purpose 'is not to discomfort, harass or abuse a witness for the sake of it' (*Le Brocq v Liverpool Crown Court* [2019] 4 WLR 108 EWCA Crim 1398 [at 62]. See also *R v Milton Brown* [1998] 2 Crim App R 364, 371).

2.3.11 These common law protections are also reflected in Rule C7 of the Bar Code of Conduct (Bar Standards Board, 2020). Under this provision, advocates have a number of obligations:

1) *you must not make statements or ask questions merely to insult, humiliate or annoy a witness or any other person;*
2) *you must not make a serious allegation against a witness whom you have had an opportunity to cross-examine unless you have given that witness a chance to answer the allegation in cross-examination;*
3) *you must not make a serious allegation against any person, or suggest that a person is guilty of a crime with which your client is charged unless:*
    a. *you have reasonable grounds for the allegation; and*

b. *the allegation is relevant to your client's case or the credibility of a witness; and*
c. *where the allegation relates to a third party, you avoid naming them in open court unless this is reasonably necessary.*

4) *you must not put forward to the court a personal opinion of the facts or the law unless you are invited or required to do so by the court or by law.*

2.3.12 However, adversarial trials have traditionally prioritised judicial passivity and judges have remained wary of intervention; case law also suggests that 'interventions should be as infrequent as possible' lest it give witnesses 'time to think out the answer to awkward questions' (per Denning LJ, in *Jones v National Coal Board* [1957] 2 QB 55 at 65). In *R v Sharp* [1993] 3 All ER 225, frequent interruption by the judge resulted in a conviction being quashed by the Court of Appeal, with a warning issued on the dangers of 'seeming to enter the arena … in the sense that he may appear partial to one side or the other' (at 235). This apparent reluctance to intervene has been evidenced through a number of empirical studies (Brown et al, 1993; Davies & Seymour, 1998; O'Kelly et al, 2003; Raitt, 2010; Smith & Skinner, 2012; Zajac et al, 2012).

2.3.13 There are therefore limits to what judges can do to prevent distress to witnesses when the onus is on advocates to examine them. Counsel must be given considerable discretion in conducting cross-examination, to ensure compliance with the rule in *Brown v Dunn* and to test the veracity of witness testimony. In his handbook Colman (1970) illustrates how some degree of latitude is necessary to ensure that counsel are able to perform these roles effectively. Direct questions such as 'are you sure?' are unlikely to be successful. Hence the constant refrain, 'if your lordship will bear with me'. The cross-examiner may find it best to begin by asking questions about the witness himself, or about some matter which is 'no more than marginally relevant to the inquiry [in order to get] the measure of his witness'(pp. 156-7). It may be his duty to inquire 'into details which are of no great importance in themselves' in order to bring out conflicts between his opponent's witnesses and to try to break down a well-rehearsed, shrewd or dishonest witness (p. 158).

2.3.14 While judges have to give latitude to counsel in asking their questions, they can intervene by asking their own questions. However, there are numerous warnings about the dangers of judges descending into the arena on the basis that it could risk compromising perceived impartiality and the fairness and the trial (Auld, 2001: 527; Doran, 1989; Jackson & Doran, 1995).

2.4 Cross-Examination: the Justifications

2.4.1 Cross-examination is not only considered a fundamental characteristic of the adversarial system; it has spread to be considered an important aspect of the defendant's right to a fair trial in criminal cases. Although international human rights instruments do not make express reference to 'cross-examination' as such, they do state that the defendant has a right to *examine* witnesses against him which effectively means a right to cross-examination (cf art 6 ECHR, art 14 ICCR etc). In *Osolin v R* (1993) 86 CCC (3d) 481, the Canadian Supreme Court of Canada summarised the importance of cross-examination:

> *It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence* (at 516-517).

2.4.2 Although it is sometimes argued that the adversarial system has nothing to do with the discovery of the truth (see Spencer, 2012, p. 183), cross-examination is most commonly defended in legal discourses on epistemic grounds. Most famously:

> *Cross-examination is beyond doubt the greatest legal machine ever invented for the discovery of the truth. However difficult it may be for the layman, the scientist or the foreign jurist to appreciate its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a lawyer of experience.* (Wigmore, 1940, §1367)

Wigmore's statement has been widely endorsed in judicial dicta. According to Viscount Sankey LC, in *Mechanical and General Inventions Co. and Lehwess v Austin and the Austin Motor Co: HL* [1935] AC 346, 359:

> *Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of its story*.

2.4.3 According to Colman (1970, p. 4), there is only one aim of cross-examination, 'to assist in the administration of justice by revealing the truth to the court'. However, establishing the facts in the administration of justice may be difficult:

> *In disputes and inquiries which depend upon the evidence of witnesses, there is frequently the danger that the testimony offered may be untruthful. And, even more often, it can be misleading because it is mistaken, or presented in an incomplete or inaccurate form* (Colman, 1970, p. 1).

Colman elaborates, noting that:

> *there are witnesses who testify, with the appearance of candour, to what they know to be false; there are witnesses who, because they are biased, or for other reasons, have deceived themselves into believing that what they say is true; there are witnesses who are honest, but mistaken; there are witnesses whose evidence in chief, although it is true and accurate, tends to mislead because material facts are omitted …; there are witnesses whose evidence ought to be received with caution because of their temperaments, their habits, their history, or their interests* (Colman, 1970, pp. 4-5).

2.4.4 Colman's view that cross-examination can assist in shedding new information on assertions that witnesses have made in their evidence is shared by psychologists. Saks and Spellman (2016) note that cross-examination can help the trier of fact to assess witnesses' truthfulness, accuracy, confidence and judgment. In this sense, it sits alongside other means of evaluating testimony, such as weight that may be attached to the oath, witness demeanour and evidence of character (Saks & Spellman, p. 113, 135).

2.4.5 In addition to epistemological arguments, cross-examination is widely considered to be a corollary of the common law principle of natural justice whereby parties should be given an opportunity to call their own witnesses and to cross-examine opposing witnesses (see *Al-Rawi v The Security Service* [2011] UKSC 34 [14] per Lord Dyson). It is commonly conflated with the right to confrontation enshrined famously in the Sixth Amendment to the US Constitution. However, these rights can be distinguished in as much as confrontation implies more than simply a defendant's right to examine witnesses against him but a right, as put in the Sixth Amendment, 'to be confronted with the witnesses against him', literally a right to 'confront' your accusers physically.

2.4.6 Although 'face to face' confrontation is an important aspect of the US right, it has not featured as strongly in English common law (see further Doak, 2000; Henderson, 2014, pp. 103-104). In a leading judgment in 2008, the UK Supreme Court expressly referred to the well-established principle of the common law that the defendant in a criminal trial should be confronted by his or her accusers in order that he or she may cross-examine them and challenge their evidence (see *R v Davis* [2008] UKHL 36). However, the English domestic courts have accepted that the right to cross-examination

does not necessarily entail physical confrontation (in the eyeball-to-eyeball sense) at court; witnesses and their evidence may be effectively challenged through alternative means (*R* v *Smellie* (1919) 14 Cr App R 128; *Doorson v Netherlands* (1996) 22 EHRR 330; see also *R v Camberwell Green Youth Court ex p D a minor)* [2005] 1 WLR 393.

2.4.7 As well as aiding truth-finding, cross-examination can claim then to represent an important process value in adversarial procedure enabling the defendant to participate fully in the presentation of evidence to the fact-finder linked to his right to autonomy and dignity (Dennis, 2010, p. 266). Like the right to confrontation, however, this has to be weighed against the affront to dignity that can be caused to victims and witnesses when they are subjected to cross-examination by defendants. Dennis has argued that the defendant's claim to be treated with dignity does not apply uniquely to defendants. Such a claim can also be made by other participants, namely witnesses and victims.

2.4.8 Unlike other participants, however, defendants are *uniquely* in the position of potentially losing their liberty if the verdict goes against them. But this goes more to the epistemic need, linked to the presumption of innocence, that witnesses against them are properly tested before their testimony is relied upon. It does not entitle them to cross-examine witnesses personally and indeed it is commonly considered that a skilled advocate is much better able to fulfil this role.

2.4.9 The right to examine witnesses has been embedded into many international human rights instruments and it is widely regarded as one of the most important rights a defendant has at a criminal trial (see 3.2.1 below). But it is important also to note that the European Court of Human Rights (ECtHR) has never considered that the right to examine witnesses entails the kind of adversarial party-driven form of cross-examination seen in common law courts (Jackson, 2005). In its development of the right the court has had to navigate around fundamental differences between common law adversarial approaches and civil law inquisitorial systems. While the latter often require some form of oral evidence, they have no conceptual equivalent of cross-examination, relying instead on the principle of *contradiction*, which effectively amounts to a right to challenge evidence through having the accounts of opposing witnesses subject to questioning (Pradel, 1996, p. 160).

2.4.10 At the heart of both concepts lies the opportunity of both sides in the criminal trial to put forward and challenge effectively the evidence adduced by the opposition. On this view cross-examination is better justified as an institutional right of the defence to challenge important witnesses put forward by the prosecution than as a personal right of the accused (see Jackson and Summers, 2012). If equality of arms and adversarial procedure are to be 'practical and effective' then the role of the defence lawyer becomes an essential participant in guaranteeing a fair trial. Paradoxically,

however, it is this very role that has come under so much scrutiny in contemporary critiques of cross-examination.

2.5 Cross-Examination: Its Impact and Critique

2.5.1 We have seen that cross-examination is deeply embedded in the adversarial system of justice. It is not surprising then that just as arguments in its defence have been made by those - often legal practitioners - who are closely attached to the adversarial system, so it has come under scrutiny by those who have been critical of such a system. Throughout the 20th century an expanding literature emerged which was critical of the way the adversarial system was used to represent the truth. Jerome Frank (1949, p. 85), the American realist who coined the phrase 'fact-skepticism', famously likened the adversarial trial method to 'the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation'. Cross-examination was a particular target of this scepticism as a growing body of experimental psychological research questioned its overall efficacy as a fact-finding tool. Experiments showed that it was both less complete and less accurate than direct examination in chief as it played upon the suggestibility of witnesses by making them accept and adopt information 'planted' by leading questions (Greer, 1973; Loftus, 1975).

2.5.2 Another critique of the adversarial system which gathered force towards the end of the 20th century was that a considerable body of research evidence showed that it is a significant source of secondary victimisation for many victims and witnesses. Witnesses are very much outsiders to a professionalised process (Rock, 1993). Feelings of stress, anxiety or consternation are commonplace, and these can be aggravated by insensitive treatment and a lack of understanding of their witnesses' needs by agencies and organisations within the criminal justice system (Doak, 2008; Ellison, 2001; Sanders & Jones, 2007).

2.5.3 Cross-examination was signalled out for particular criticism as the manner in which particularly vulnerable witnesses are questioned under cross-examination has been cited as one of the most common factors that give rise to anxiety and dissatisfaction (Brennan & Brennan, 1988; Davies et al, 1997; Ellison & Munro, 2017; Hayes & Bunting, 2013; Kebbell et al, 2000; Zajac et al, 2012). While many witnesses may feel uncomfortable under cross-examination, research has demonstrated that the problems are considerably exacerbated among three groups of particularly vulnerable witnesses: children; those with learning disabilities, and complainants in rape and sexual assault cases.

2.5.6 The plight of child witnesses was widely reported during the late 1980s and early 1990s. In a study of 218 cases, Goodman *et al* (1992) compared the behavioural disturbances between those who testified and those who did not. Of those who testified, the researchers reported that confronting the defendant in court brought back traumatic memories, caused sleep disturbance and exacerbated feelings of pain, hurt and helplessness (see also Flin *et al*, 1989, Freshwater et al, 1994; Myers, 1996).

2.5.7 The language used in cross-examination has been identified as a particular area of concern. Brennan and Brennan's (1988) survey of child witnesses in Australia identified thirteen different linguistic devices which were used regularly to confuse child witnesses. The use of complex sentence structures and advanced vocabulary serve to exacerbate the unfamiliar surroundings which children already experience. Questions are frequently highly stylised, and may include specific linguistic techniques such as nominalisation, juxtapositioning and multi-faceted questioning, which will obviously confuse and cause stress to many young witnesses:

> *Cross-examination is that part of court proceedings where the interests and rights of the child are most likely to be ignored and sacrificed … The techniques used are all created with words, since they are the only currency of the court … Under conditions of cross-examination the child is placed in an adversarial and stressful situation which tests the resilience of even the most confident of adults … The right of the lawyer to directly oppose the evidence given by the child witness, the implicit hostility which surrounds cross-examination, alien language forms, and the sheer volume of questions asked, all conspire to confuse the child. It is a quick and easy step to destroy the credibility of the child witness.* (Brennan & Brennan, 1988, p. 91).

2.5.8 Similar findings were made by Davies and Noon (1991), who found that a quarter of all questions were inappropriate to the witness's age, with just over a third of advocates seeming to alter their questioning style to take account of age. Research also confirms that the judiciary have been historically reticent to intervene to prevent such questioning (Bala, 1999; Davies & Seymour, 1998).

2.5.9 A survey of 50 child witnesses carried out on behalf of the NSPCC, by Plotnikoff and Woolfson (2004) found that over half the children interviewed said that they did not understand some words or found some questions confusing. Cordon *et al* (2003) report that cross-examiners often seek to capitalise on children's tendencies to be suggestible and to fantasise. They contend that the goal in many cross-examinations is to 'keep the child off balance to increase the chance of inconsistencies' (pp. 175-177).

2.5.10 A 2009 study of 182 child witnesses found a 'significant gap between the visions of policy and the reality of many children's experiences' (Plotnikoff & Woolfson, 2009, p. 153). Almost half of the children interviewed described defence counsel as 'aggressive', 'rude' or 'cross', and the same number stated that they did not understand all of the questions. 111 of 172 children (65%) interviewed said they did not understand questions asked in cross-examination, that the pace was sometimes too fast or their answers were interrupted (p. 109). Moreover, a majority of witnesses (58 per cent) said the other side's lawyer tried to make them say something they did not mean or they tried to put words in their mouth.

2.5.11 These findings were re-visited 10 years later (Plotnikoff & Woolson, 2019). The authors found that there had been a 'dramatic shift' in the cross-examination of young witnesses. This was attributed to major shifts in policy including case law from the appellate courts and the introduction of new Criminal Procedure Rules (see 4.2.16). Participants in the study indicated they felt practice had significantly improved, with shortened cross-examinations which were better tailored to take into the account the needs of individual witnesses. While the overall picture had improved, the authors remarked that '[t]he gap between the best and poorest advocacy is wider than it has ever been' (Plotnikoff & Woolson, 2019, p. 15). A recent study in Australia suggested that the format of questioning had changed very little since the 1950s, with child witnesses being asked less open-ended and more complex questions in contemporary trials (Zajac et al, 2018; see further 8.1.7 below).

2.5.12 Change is not uniform, and it is clear that problems persist in some jurisdictions. A small-scale Northern Ireland study by Hayes and Bunting (2013) found that just under half of young witnesses reported feeling upset, scared or shaky, one-quarter feeling confused, and 14.3 per cent (n = 5) feeling physically sick. Over three quarters of witnesses felt the questions asked in cross-examination were repetitive, almost half described them as too long or complicated, and around one-third thought the questions jumped around in terms of time or placed unrealistic demands on their memory.

2.5.13 There is also a large body of literature evaluating the range of problems cross-examination can pose for learning-disabled witnesses There is a broad spectrum of learning disabilities, ranging from mild to severe, or profound and multiple (PMLD). Those with severe disabilities or PMLD may have minimal understanding of the nature and function of testifying, in which case they may not be deemed competent. Similar to many child witnesses, those who are deemed competent are likely to face significant challenges stemming from factors including the language of questioning and the approach of the advocate (Doak & Doak, 2017).

2.5.14 Traditional justifications for cross examination (see above 1.3) rest upon the assumption that witnesses are able to understand questions and communicate responses effectively. Sanders et al (1996) found that communication is often hindered in three respects. First, the ability of such witnesses to absorb, memorise and then recall events is often lessened (see also Agnew & Powell, 2004; Gudjonnson & Henry, 2003). Second, such witnesses may have a restricted vocabulary and be unable to articulate themselves (Gudjonnson & Henry, 2003; White et al, 2015). Thirdly, witnesses will often respond to questioning by an authority figure through responding in a way that seeks to placate the questioner by proffering the answer that they believe the questioner is seeking (see also Drake, 2010; Gudjonsson & Henry, 2003; Mattinson, 2016). Alternatively, they may simply comply in order to escape the confines of a stressful setting (O'Mahony, 2016).

2.5.15 Other studies have echoed these concerns, and have also reported that cross-examiners did little to adjust their questioning style (Kebbell et al, 2003. In many cases, this is due to a lack of knowledge and/or skills (Henderson, 2015; Kebbell et al, 2003). There were also no significant differences in the readiness of the judiciary to intervene to clarify questioning among witnesses with learning difficulties and those without (O'Kelly et al, 2003; Zajac et al, 2012; see further 6.3.4). This may not only be attributable in part to the archetypal umpireal role of the judge, but also to a lack of knowledge and understanding among the judiciary about the specific needs of learning-disabled witnesses (Kebbell et al, 2000; O'Kelly et al, 2003).

2.5.16 Research has also highlighted that cross-examination can be particularly arduous for complainants in sexual cases. By their very nature, sexual offences are invasive and traumatic. Many victims struggle with the emotional and psychological consequences of victimisation for years to come (Bohn & Holz, 1996; Gorcey et al, 1986; Resnick et al, 1993). These offences also carry a notoriously high attrition rate (Iliadis et al, 2021). While this may be attributable to the reticence of prosecutors to take such cases to trial, there is evidence that the prospect of being asked to testify at trial also plays a role in complainants failing to report, withdrawing their complaint, or declining to co-operate with the criminal justice agencies.

2.5.17 Rape trials, in particular, often differ from other criminal hearings in a number of respects. Often, the fact that intercourse actually took place is not a contested issue. Most rape cases usually turn upon the issue of consent which gives rise to a number of evidential difficulties, particularly where the complainant and the accused have previously engaged in a consensual sexual relationship (Doak, 2008; Ellison, 2001). Since the complainant and the accused will usually be the only percipient

witnesses to the incident in question, rape trials frequently boil down to a battle of credibility between the accused and the victim.

2.5.18 Research shows that the nature of cross-examination in such trials can cause both immediate distress as well as longer term psychological complications (Adler, 1987; Lees, 1996; Smith, 2018). Some of the most distressing types of question are likely to be those that relate to the complainant's lifestyle and sexual history. Grohovsky (2000) has likened the complainant's body to a crime scene in itself 'from which evidence must be collected and analysed…[l]ikewise, every aspect of the victim's life is analysed, criticised and often considered fair game for the defence to use against her at trial' (p. 417).

2.5.19 One of the main methods used to attack a sexual complainant's character is to suggest that she is sexually disreputable, alluding to loose moral values and a decadent lifestyle. In assessing this, the jury are invited to take into account a wide range of deeply personal and embarrassing details. Lees (1996) records a number of examples complainants being were asked in detail about their underwear, make-up, social lifestyle, menstrual cycle and drug addiction. In a study of attitudes of the Bar towards rape complainants, one leading QC stated that '[i]f the complainant could be portrayed as a "slut". this was highly likely to secure an acquittal' (Temkin, 2000, p. 234).

2.5.20 In this way, cross-examiners have traditionally sought to exploit the notion of an 'ideal rape', wherein the 'ideal' complainant is sexually inexperienced, respectable, and who suffered at hands of an 'ideal' offender, often portrayed as a sexual predator. Normally, she will have been physically hurt, will have fought back, and will have promptly reported the offence (Adler, 1987). Although this type of portrayal far from matches the lived experiences of most victims, it reflects widely held stereotypical assumptions concerning the nature of rape (McColgan, 1996; Smith, 2018).

2.5.21 While the reform of evidential rules in recent times has sought to restrict the types of irrelevant and intrusive defence questioning of sexual history (Doak et al, 2018), research suggests that unwarranted defence tactics in cross-examination prevail internationally (Booth et al, 2019; McGlynn, 2017; Smith, 2018). The conduct of defence counsel was highlighted in the widely reported *Belfast Rugby Trial,* where the complainant underwent four sets of cross-examination in which she was challenged as to why she 'froze' instead of 'cry[ing] out for help' and her 'hazy' recollection of events were decried as 'false' and 'delusional' (Iliadis et al, 2021). See further 6.1.4).

2.5.22 While the impact of cross-examination upon the three categories of vulnerable witnesses outlined above has been thoroughly documented in the literature, vulnerability does not begin or end with these categories. 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). Put simply, some will be more 'vulnerable' than others irrespective of whether or how the law pigeonholes them. 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).

2.5.23 As noted above in 2.5.1, the adversarial nature of the trial demands that witnesses are under close control of counsel, with their testimony carefully kept in check to ensure that it conforms with the case theory. In an empirical study of six American criminal trials, Danet and Bogoch (1980) attempted to measure the degree of combativeness in the questioning conducted by attorneys. The researchers formulated a measure of categorising questions into two groups 'coercive' and 'non-coercive' questions, based upon the degree to which the advocate attempted to constrain or control the witness. In their findings, the authors concluded that that 87% of questions asked during cross-examination were coercive.

2.5.24 Victim-witnesses, in particular, are prone to 'victim-blaming' tactics by the defence – particularly in trials for offences against the person (McBarnet, 1983). A comparative transcript analysis of 40 rape trials and 44 assault trials found substantial similarities in tactics deployed by defence counsel in both types of trial, whereby 'counsel appeared to rely primarily on a limited number of generic, "tried and true" cross-examination strategies' (Brereton, 1997, p. 242). Whereas complainants in assault trials were likely to be portrayed as troublemakers and bullies, rape complainants were depicted as 'sexually provocative risk takers, and / or as persons of suspect morality who did not live a normal lifestyle' (Brereton, 1997, p. 254).

2.5.25 In a trial study of proceedings at Wood Green Crown Court, Rock (1993, p. 88) found that 'as a matter of course, and in most ordinary trials, gravely wounding allegations would be put to witnesses.' Witnesses, he reported, were frequently bullied, harassed and felt as though they were on trial in 'the most charged of all secular rituals' (Rock, 1991, p. 267). This led to many witnesses being placed in a position where they were required to flout the taboos of language, with the Court hearing details of 'all the violent doings and language of the bedroom, street and public house, witnesses having to cite the heedless and profane speech of angry relationships' (Rock, 1993, p. 50). For most judges and legal professions, distress was a perfectly natural aspect of criminal trials.

2.5.26 A similar ethnographic study by Fielding (2006) identified many similar themes and patterns. Feelings of stress and alienation seemed to be common place for many who testified, with advocates engaging in a range of well-established techniques, including rapid fire questioning:

> *Trials are not, of course, subject to regular etiquette. Virtually any characteristic of the principal parties is fair game, body language is exploited, and innuendo is freely indulged despite judges' interventions* (Fielding, 2006, p. 127).

With the notable exception of witness intimidation, secondary victimisation within the courtroom is mostly inadvertent. As Fielding noted, it was not specifically callous on the part of lawyers since 'there is an inevitable conflict between trial imperatives and acknowledging the feelings involved' (Fielding, 2006).

2.5.27 Despite Wigmore (and many others besides) asserting the potential for cross-examination to uncover truth, Roberts and Zuckerman (2010, p. 295) contend that it is now widely regarded as an 'obstacle, rather than the royal road to effective forensic fact-finding'. In particular, high stress levels, coupled with well-established questioning techniques, may negatively affect the ability of vulnerable witnesses to recall past events accurately (Green, 2014). There is strong evidence to suggest that the more frightened or stressed the witness becomes, their ability to give full and coherent answers decreases (Goodman et al, 1992; Rush et al, 2012; Zajac et al, 2012). Indeed, questioning techniques associated with cross-examination sit at odds with those outlined in the *Achieving Best Evidence* (Crown Prosecution Service, 2011) approach for police interviews, which emphasise the need for breaks, open-ended questions and free narrative.

2.5.28 As Ellison and Munro (2017) highlight, trauma victims often live with fragmented memories, lacking in specific detail and framed without a linear narrative (see also Segovia et al, 2017). If responses to questions appear to be fragmented or lacking in detail, these and can be wrongly interpreted as an indicator of mendacity. Nervousness, hesitancy and other physical reactions during questions may be perceived by the trier to fact to be evidence of lying, may simply be a reaction to the stress of testifying. Such characteristics may be exacerbated by unfamiliarity with courtroom procedure and the nature of cross-examination. In a simulated study involving 60 mock witnesses under cross-examination, Wheatcroft and Ellison (2012) established that the cohort of witnesses who had been provided with guidance on the nature of cross-examination and advocacy techniques gave more accurate evidence and made less factual errors than those who had no familiarisation with the process.

2.6 Conclusion

2.6.1 Cross-examination has been established as a *sine qua non* within the adversarial trial. Its capacity to achieve justice hangs upon its epistemological and rights-based justifications. Cross-examination can play a role in truth-finding and fairness requires that the defence have opportunities to challenge prosecution evidence. But for some decades now, research has highlighted that the procedure can also be detrimental to truth finding and to the rights and interests of victims and witnesses. We shall see that this has led in recent years to calls for it to shift away from its traditional adversarial roots in which it has been used by advocates to advance a case and instead for it to become a purely forensic tool for testing a witness's evidence in order to achieve the 'best evidence' for the court (Henderson, 2015). Such calls have to be seen against the background of an increasing emphasis on international human rights norms recognising the rights and interests of victims and witnesses as well as defendants. The result has been a re-characterisation of the trial from a purely adversarial enterprise dominated by advocates towards one favouring the optimisation of 'best evidence' and fair witness, as well as fair defence, participation. In this new landscape judges are required to play a more central managerial role (McEwan, 2001) but arguably cross-examination itself also needs to be re-cast into a new framework.

3. Trailblazing the International Scene

3.1 Introduction

3.1.1 Recent decades have seen a proliferation of soft law international standards and norms which might be said to reflect something approaching a consensus on best practice in terms of how vulnerable parties ought to be treated within the criminal process (Doak, 2008). Legal and policy 'borrowing' or transfer of what is (rightly or wrongly) perceived to 'work' elsewhere have become more apparent in recent times (Colson and Field, 2016; Pakes, 2014); 'the nice, neat tripartite division between "domestic", "foreign" and "international" law can no longer safely be relied on by any lawyer' (Roberts, 2002, pp. 560-561).

3.1.2 Although the standards fall short of prescribing how exactly the testimony of vulnerable witnesses should be given, they have focused on the need to ensure their effective participation. The general concept of 'participation' is something of an abstract term and lacks any concrete definition. Edwards (2004, p.973) has suggested that it may be perceived as stemming from the broader concept of citizenship, and may include 'being in control, having a say, being listened to, or being treated with dignity and respect.' Traditionally international standards have tended to shy away from laying down explicit requirements in terms of stipulating that participation ought to be enshrined as a generic standard or value. This can be attributed to the fact that different legal orders place different emphases on the role played by the various stakeholders, such as the judges, advocates, defendants, victims and other witnesses.

3.1.3 More recently, a demonstrable shift has occurred clarifying the nature and scope of participatory rights of both defendant and non-defendant witnesses. This trend is particularly apparent in relation to the needs of vulnerable witnesses, where it has become clear that procedures should be adapted appropriately in order to enable effective participation. However, there are few international instruments that lay down specific requirements in relation to all witnesses; they either focus on vulnerable classes of witnesses, vulnerable defendants or vulnerable victim-witnesses. This chapter begins by exploring how the notion of participation is reflected within the defendant's right to a fair trial. It proceeds to examine international standards pertaining to child witnesses including the widely lauded *Barnahus* model. Standards relating to the treatment of victim-witnesses are then considered, including practice at the International Criminal Court (ICC). Finally, we consider how the growing trend towards procedural adaptations may impact upon the fair trial rights of the accused.

3.2 Standards for Vulnerable Defendants

3.2.1 The right to a fair trial is widely recognised within all major international human rights instruments,[1] and the 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 (Colozza v Italy (1985) 7 EHRR 516; Stanford v UK (1994) App. No. 16757/90). Guidance issued by the Court states that Article 6 'guarantees the right of an accused to participate effectively in a criminal trial … this includes, inter alia, not only his or her right to be present, but also to hear and follow the proceedings' (European Court of Human Rights, 2019, p. 27 as cited by Jacobson and Cooper 2020, p. 8). In T and V v United Kingdom (1999) 30 EHRR 121, the European Commission of Human Rights found a breach of a fair hearing in a case where two ten year old boys were subjected to the full rigours of a murder trial in an adult court. Although certain adaptations had been made to render the proceedings more child-sensitive, these were considered insufficient to allow for the effective participation of the juvenile defendants.

3.2.2 Likewise, in *SC v United Kingdom* (2005) 40 EHRR 10, similar arrangements were found to be inadequate given that the 11-year-old applicant had little understanding of what the role of jury was and what his conviction meant. The Court ruled that the lack of understanding resulted in the applicant's inability to participate effectively in trial, a notion which encapsulates the need for all participants to have a clear understanding of the nature of potential penalties, an understanding of the bases of the arguments advanced by the prosecution, and the ability and opportunity to communicate effectively with defence counsel.

3.2.3 As the scope of the right to a fair trial tends to be defined and developed through the jurisprudence of international courts and tribunals, there are few stand-alone instruments which set out specific standards in terms of how defendants are questioned. However, the concept of effective participation is reflected in the European Union's Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.[2] The instrument stipulates that vulnerable persons should be assessed and identified from the moment they are suspected of having committed an offence, with a number of specific procedural rights put in place. These include a right to non-discrimination, a presumption of vulnerability and the audio-visual recording of any pre-trial

[1] See eg Art 10 UDHR; Art 14 ICCPR; Art 6 ECHR; Art 8 ACHR.
[2] Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings 2013/C 378

questioning. However, the instrument does not make specific stipulations in relation to how the witness should be questioned at trial.

3.2.4 In spite of the growing lip-service afforded to the notion of effective participation, Owusu-Bempah (2018) observes that the term remains imprecise and contested. Beyond the generic observations made in *T and V* and SC there is little certainty about the types of measures that might enable all defendants to participate more effectively, irrespective of whether they are considerable 'vulnerable'. Arguing that significant barriers to communication between defendants and the courts, she calls for the right to effective participation to be implicit for all defendants (not just those who are deemed to be vulnerable) (see also Jacobson and Cooper, 2020).

3.3 Standards for Child Witnesses

3.3.1 Both 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. Significant adaptations should be made to conventional trial processes to ensure that such a right is realized.

3.3.2 In addition to the renowned 'best interests of the child' principle, the UN Convention on the Rights of the Child (UNCRC) includes a right to be heard (Art 12) and to participate effectively in proceedings (Art 40(2)(b)(iv). According to the UN Committee, this means:

> *Proceedings should be conducted in a language the child fully understands or an interpreter is to be provided free of charge. Proceedings should be conducted in an atmosphere of understanding to allow children to fully participate. Developments in child-friendly justice provide an impetus towards child-friendly language at all stages, child-friendly layouts of interviewing spaces and courts, support by appropriate adults, removal of intimidating legal attire and adaptation of proceedings, including accommodation for children with disabilities.* (UN General Comment No. 24 (2019) on Children's Rights in Juvenile Justice, CRC/C/GC/24).

3.3.4 The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (GA/RES/2005/20) seek to ensure that children who have been victims or witnesses of crimes are treated in a fair, dignified and secure manner within the criminal justice system. In addition to these generic requirements, Guideline XI contains a specific right 'to be protected from hardship during the

justice process', which encompasses *inter alia*: the use of 'child-sensitive' procedures for questioning, modified court environments and testimonial aids.

3.3.5 A model law, designed to assist states in developing their legislative frameworks to ensure compliance with the UNCRC and UN Guidelines was issued by the United Nations Office on Drugs and Crime (2009). The model law establishes the 'best interests' principle as the starting point in any decision-making process (Art 1), the right to special assistance in testifying 'in view of the child's age, level of maturity or special individual needs' (Art 12(3), the right to the presence of a support person (Arts 15-17, 23, 25) who should 'discuss with the court, the child and his or her parents or guardian the different options for giving evidence, such as, where available, video recording and other means to safeguard the best interests of the child' (Art 17(f)). Recognising the potentially problematic nature of adversarial cross-examination, the instrument includes an optional measure for common law countries. Article 27 stipulates that courts should not permit cross-examination of child witnesses in person by the accused.

3.3.6 Article 28 of the model law sets out a number of measures concerned with the privacy protection and well-being of child witnesses. In addition to various duties to keep details of the case and the identities of the party confidential, the Article specifies a number of protective measures that may be adopted to prevent distress or harm to the child. These include:

- Testifying behind a shield
- Testifying remotely via live link
- Taking evidence pre-recorded form, providing that counsel for the accused is in attendance and given the opportunity to question the child
- Taking evidence through a qualified and suitable intermediary, such as, but not limited to, an interpreter for children with hearing, sight, speech or other disabilities
- Through closed sessions
- Through the temporary removal of the accused from the courtroom in certain circumstances
- Allowing recesses
- Scheduling evidence at an appropriate time of day taking into account the age and maturity of the child
- Any other measure that the court may deem necessary, including, where applicable, anonymity, taking into account the best interests of the child and the rights of the accused.

3.3.7 The Council of Europe's (2010) *Guidelines on Child-Friendly Justice* contain similar recommendations. Language appropriate to the child's age and level of understanding should be used (Guideline 56), court sessions should be adapted to the child's pace and attention span (Guideline 61), pre-recorded hearings should be used and considered as admissible evidence (Guidelines 59, 65), with every effort 'made for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have' (Guideline 64). Children should never be cross-examined by the alleged perpetrators (Guideline 31(b) and should always be questioned in a child-sensitive manner under judicial supervisions, with testimony facilitated through the use of aids or through the appointment of psychological experts (Guideline 31(c)).

3.3.8 One of the most well-known models of participatory justice is the Nordic *Barnahus* (Children's House) system. Originating in Iceland in 1998, the approach draws heavily from the international standards set out above. The model is 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).

3.3.9 In essence, the approach involves live cross-examination being substituted by an investigative interview, conducted during the pre-trial investigation, at a remote location. As Kandal (2020, p. 4) explains:

> *All Nordic Barnahus have a similar interview setup for the child forensic interview. The interview is performed in a child-friendly environment and conducted by a specialist trained in forensic interview techniques. The interview is recorded, and various professionals can follow the interview via video link in an adjacent co-hearing/observation room. Yet another aspect is the importance of safeguarding the defendant's right to a fair trial. This is done by allowing the defence lawyer to ask questions through the professional interviewing the child.* (Kaldal, 2020, pp. 4-5)

In effect, the interviewer (usually a child psychologist in the case of children) acts as an intermediary, receiving questions from the advocates via an earpiece. The interview is recorded and then presented as evidence at the main hearing (Gillen, 2019, p. 147; Kaldal, 2020, p. 4).

3.3.10 The *Barnahus* model is widely regarded as a benchmark of best practice in terms of child-friendly justice and variations of it now exist across many European jurisdictions. It is guided by the 'under one roof principle', which means that professionals, drawn from a multi-disciplinary team, should come to the child and not the other way around' (Johansson et al., 2017, p. 6). This prevents

children being asked to give their account on multiple occasions to multiple audiences, with children never required to give evidence in court.

3.3.11 While the core tenets and principles of the model remain the same across each jurisdiction, some variations exist. Myklebust (2012, pp. 157-168) provides a useful overview of how the system operates within the Danish context:

> *The interviewer first conducts an interview in accordance with his/her professional skills and when he/she considers it complete, the interviewer takes a break to consult counsel and the judge, leaving the camera running. The judge gives both parties the opportunity to suggest topics or identify contradictions that they want investigated. The interviewer then returns to the interview room to address these issues and then consults the observers again. This process continues until the judge and counsel are satisfied*. (Myklebust, 2012, pp. 157-158)

3.3.12 Describing the Polish context, the European Union Agency for Fundamental Rights (2017, p. 26) observed:

> *The use of these rooms is based on clear guidelines. The rooms have colourful walls, child-friendly furniture, toys, drawing materials and children's books. They are also furnished with one-way mirrors and recording equipment. The hearing is conducted by a judge, who conveys questions through a microphone to a psychologist or social worker, who then relays the questions to the child in an appropriate manner. The legal representatives of the accused, the prosecutor, a recording clerk and the parents of the child are among those who observe the hearing from behind the mirror. The people behind the mirror, such as defence lawyers, can also ask additional questions by phone.*

3.3.13 In the last decade, the European Commission has identified the adoption of 'child-friendly' justice models across all member states (European Commission, 2011). In this vein, various EU legislative measures were proposed to strengthen procedural safeguards for children, and Member State efforts to improve child rights protection were supported (European Union Agency for Fundamental Rights, 2017). The Council of Europe (2010) encouraged signatory states to consider adopting the *Barnahus* model. Consequently, over the course of the past decade many European jurisdictions, including Croatia, Estonia, Ireland, Latvia, Lithuania, Spain and Poland have sought to pilot a *Barnahus*-style approach.

3.4 Standards for Victim-Witnesses: International Instruments

3.4.1 The vast majority of international standards focus on the participation of victim-witnesses. Some of these pertain to victim-witnesses generally, whereas others have been designed with specific vulnerable groups in mind. In particular, recent years have witnessed the emergence of new international standards in relation to the treatment of victims of sexual violence. This can be partly attributable to the growing recognition of the unique features of these types of cases. For example, in *VK v Bulgaria* (C/49/D/20/2008), the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) held that states were under an obligation to adequately protect women within criminal proceedings against the use of gender stereotypes and misconceptions around rape and sexuality**.**

3.4.2 The Council of Europe's Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011) requires that 'measures … be adopted to protect the privacy' of complainants (Article 56(1)(f)), and signatory states should enact legislative changes that enable victims 'to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered' (Article 56(1)(d)). These changes are encouraged alongside the need to 'provide victims with appropriate support services so that their rights and interests are duly presented and taken into account' (Article 56(10)(e)).

3.4.3 In *Y v Slovenia* (App No 41107/10, May 2015), the ECtHR held that cross-examination by the accused in person could amount to a breach of the Article 8 rights of the complainant, stating that:

> *A person's right to defend himself [sic] does not provide for an unlimited right to use any defence arguments. … While the defence had to be allowed a certain leeway to challenge the applicant's credibility, cross-examination should not be used as a means of intimidating or humiliating witnesses* (at paras 106-108).

3.4.4 In contrast to the relatively specific and wide-ranging international provisions that relate to child witnesses and growing recognition of the needs of victims of sexual violence, there is a paucity of international standards on the treatment of other types of vulnerable witnesses, including witnesses with disabilities. An exception can be found in Article 13 of the UN Convention on the Rights of Persons with Disabilities also indicates that states should adapt their justice systems to ensure effective access for disabled people on an equal basis. The provision calls on states to 'facilitate their effective role as direct and indirect participants, including as witnesses', and to ensure that

appropriate training is in place for all those involved in the administration of justice (see further Flynn, 2015; Gooding and O'Mahony, 2016).

3.4.5 One of the most comprehensive frameworks for protecting victim-witnesses generally is provided by the EU Victims' Directive of 2012,[3] which sets out a wide range of rights for victims of crime and corresponding obligations of member states. A clear symbiosis has emerged between the EU and ECtHR in acknowledging the growing emphasis placed upon the rights of victims and witnesses (Heffernan, 2017).

3.4.6 Under the Directive's predecessor, the Framework Decision on the Standing of Victims in Criminal Proceedings of 2001,[4] member states were obliged under Article 2 to ensure 'victims are treated with due respect for the dignity of the individual during proceedings' and that 'victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances'. Among other key provisions Article 8 sought to safeguard the 'right to protection' through measures to ensure the victim's privacy, to protect victims from the effects of giving evidence in open court, and ensure that contact between victims and offenders within court premises may be avoided. Article 3 conferred victims with a procedural right to be heard during proceedings and to supply evidence, and the same provision stipulated that they should only be questioned insofar as necessary for the purpose of criminal proceedings.

3.4.6 The justiciability of such rights in domestic courts was affirmed by the European Court of Justice (ECJ) in the case of *Pupino* (16 June 2005, in Case C-105/03)**.** The case concerned criminal proceedings in Italy against a nursery school teacher for offences relating to cruelty of children in her care. Like the English legal system, Italian law stipulates that evidence should be heard in an oral form at trial. However, one procedure (*incidente probatorio*) did exist through which the court did have the power to order pre-trial witness examination in exceptional circumstances. The prosecution sought to have a number of the child witnesses examined in this way, but the court refused on the grounds that under the Criminal Code, none of the exceptional circumstances applied in the instant case. The procedure was challenged before the Luxembourg Court on the grounds that this particular provision of the Italian Criminal Code was incompatible with the Framework Decision.

3.4.7 The ECJ held that the Framework Decision 'must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be

[3] 2012/29/EU.
[4] EU 2001/220/JHA.

guaranteed an appropriate level of protection, for example outside the trial and before it takes place' (at para 61). The Italian court was therefore under an obligation to interpret the terms of the Criminal Code 'in the light of the wording and purpose of the Framework Decision'. Despite a longstanding reticence on the part of the Court to become embroiled in matters pertaining to domestic criminal procedures, the decision in *Pupino* underlined the direct applicability of the right of victims to be protected from secondary victimisation within legal proceedings and to participate effectively within them.

3.4.8 Yet even in the aftermath of *Pupino*, it became increasingly apparent that the text of the Framework Decision was overly obscure or imprecise at a number of junctures, and – whilst directly applicable in domestic courts – the Commission itself lacked any enforcement power. A perceived lack of progress prompted the Commission to begin formulating a proposal for a new enforceable Directive establishing minimum standards on the rights, support and protection of victims of crime (Pemberton and Groenhuijsen, 2011).

3.4.9 The Victims' Directive marked the high water point; as will be shown in subsequent chapters, it has acted as a significant catalyst for reform across all four jurisdictions in this study. It directly led to significant legislative reform in Scotland (see Ch 4) and Ireland (Ch 7) and was cited extensively by the Gillen Review (2019) in Northern Ireland (see Ch 6). The Directive – which had an implementation date of 16 November 2015 - requires Member States to ensure that all crime victims 'are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner' in all contacts with criminal justice agencies.

3.4.10 While the Directive covers a wide range of victims' rights from the point of first contact through to post-conviction, it contained a number of specific provisions relating to the questioning of witnesses at court. Article 10 confers a right of victims to be heard and provide evidence, with 'due account to be taken of the child's age and maturity'. Under Art 18, Member States are under a duty 'to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying'. The provision is buttressed further by specific requirements contained in Articles 21 (right of protection to privacy), 22 (right to an individual assessment of victims to identify specific protection needs), 23 (right of protection for victims with specific protection needs and 24 (right to protection of child victims).

3.5 Standards for Victim-Witnesses: the ICC

3.5.1 Apart from the requirement on states to ensure that witnesses are protected and able to participate effectively in criminal proceedings, international criminal tribunals have been given specific mandates to protect victims and witnesses in international criminal trials. When the Rome Statute of the International Criminal Court entered into force in 2002, its inclusion of a variety of measures to ensure effective participation by victim-witnesses was positively received by many commentators (Doak, 2003; Mekjian and Varughese, 2005; Zappalà, 2003). Although international criminal proceedings deal with offences of a different magnitude and different social context than domestic trials, they are often upheld as exemplar of best practice and as a benchmark of fairness for domestic systems to replicate (McDermott, 2016).

3.5.2 Although the general consensus is that the Court's proceedings are largely adversarial in character (Cainaniello, 2012),[5] its rules of procedure and evidence were constructed to minimise the trauma associated with giving evidence in cases involving genocide, crimes against humanity or war crimes (Lara, 2011). From the outset, these were created to conform with emergent best practice, drawing from international human rights standards to protect the physical and psychological integrity of witnesses (Beriqi, 2017).

3.5.3 Article 68 of the Rome Statute provides that 'the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. In doing so, it has to take into account all relevant factors, including age, gender, and the nature of the crime (in particular where it involves sexual or gender violence against children). Under Article 68(3), the Court has the discretion to permit the views of victims and their concerns to be presented and considered at whatever stages in the proceedings it thinks fit, where the personal interests of victims are affected. Victims may choose their own legal representatives,[6] who in turn may present their views and make submissions when their interests are likely to be affected provided that the leave of the Court is obtained.

3.5.4 The provision complements Rule 86 of the Rules of Procedure and Evidence (RPE), which specifies a presumption that vulnerable parties (including children, elderly persons, persons with disabilities, and victims of sexual or gender violence) should benefit from the protective measures

[5] The Court has also affirmed that this is how it perceives its own approach: see *Katanga and Ngudjolo Chui* (tCC-01/04-01/07), Trial Chamber II, 20 November 2009).

[6] However, this right is not absolute. In certain cases the court has required groups of victims to choose a common legal representative (Killean and Moffet, 2017: 719).

established by the regulatory framework, as long as the rights of the accused and a fair and impartial trial are not compromised.

3.5.5 The Court may order measures to protect vulnerable witnesses upon the motion of the Prosecutor, a witness or a victim, or their legal representative, and after having consulted with the Victims and Witnesses Unit (VWU), which was specifically created to provide support and facilitate the testimony of all witnesses. The VWU recommends the adoption of protective measures to the Court for specific victims and witnesses, formulates long- and short-term plans for their protection, assists them in obtaining medical, psychological and other appropriate assistance, and makes available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality. Under Rule 88(2) RPE, the Court may order that a counsel, a legal representative, a psychologist or a family member be permitted to attend as a 'support person' during the testimony of the victim or the witness. This is seen as particularly trite where the witness is a child; in that case, Rule 17(3) recognises the competence of VWU to assign a child-support person to assist a child through all stages of the proceedings.

3.5.6 In order to protect the safety of witnesses and victims and members of their families, the Chamber dealing with the matter shall take the necessary steps to ensure the confidentiality of their identity prior to the commencement of the trial. This constitutes an exception to the general rule stated in Rule 76(1), which establishes the duty of the Prosecutor to provide the defence with the names of witnesses whom the Prosecutor intends to call to testify sufficiently in advance to enable the adequate preparation of the defence. As stated by McLaughlin, this measure protects the witness from the accused during the early part of the trial and provides extra time for the VWU to accommodate victims and witnesses (McLaughlin, 2007).

3.5.7 The Court can further order measures to prevent the release to the public or press and information agencies of the identity or the location of a victim, a witness, or other persons at risk on account of testimony given by a witness. It includes five protection mechanisms:

(a) To expunge the name or any identifying information of a witness from the public records.

(b) To prohibit the prosecution, the defence or any other participant in the proceedings from disclosing identifying information to a third party (Rule 87(b)(3) RPE).

(c) Testimony via electronic or other special means. This includes the use of voice and/or picture alteration, videoconferencing, closed-circuit television, and exclusive use of the sound media.

(d) To provide a pseudonym to be used instead of the person's actual name.

(e) To hold part of its proceedings in closed sessions or in camera (Regulation 94(d)-(e)).

3.5.8 The possibility of giving live testimony by means of audio or video-link is regulated in Rule 67, in accordance with Article 69(2) of the Rome Statute, and it constitutes an exemption to the rule that the testimony of a witness at trial shall be given in person. In certain cases, the Court may permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as long as this measure is not prejudicial to or inconsistent with the rights of the accused. It shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological wellbeing, dignity and privacy of the witness.

3.5.9 In addition, the Court may allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused. Under Rule 67 RPE, where the witness who gave the previously recorded testimony is not present at the trial, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances:

(a) Both the Prosecutor and the defence had the opportunity to examine the witness during the recording.

(b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused.

(c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally.

(d) The prior recorded testimony comes from a person who has been subjected to interference.

3.5.10 If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings. However, as the Court made clear in the *Lubanga* case,[7] live testimony remains the preferred means of giving evidence:

The Chamber accepts the submissions of the parties that the presumption is that witnesses will give evidence by way of live in-court testimony, in accordance with Article 69(2) of the Statute. However, the Chamber will authorise the use of audio or video-link whenever necessary (see particularly Article 68 of the Statute), having ensured 'that the venue chosen for the conduct of the audio or

[7] *Lubanga* (ICC-01/04-01/06-1140), Trial Chamber 1, 29 January 2008.

video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness' (Rules 67(3)). This will be dealt with on a case-by-case basis, taking into account the views and concerns of the witness, the parties and, where relevant, the participants. (§41)

3.5.11 Specific controls on cross-examination are contained in Rule 88(5) RPE which provides:

> *Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.*

Similarly, the Regulations of the Registry establish that this body should issue specific guidelines to advocates to adapt the manner of questioning to the needs of the person and his or her capacity to appear before the Court (Regulation 94bis (3)).

3.5.12 Although the Statute and the RPE contains a number of mechanisms to improve the participation of victim-witnesses, concerns have been raised as to how effectively these provisions operate in practice. In particular, commentators have expressed concern about resourcing and effectiveness of the VWU, counsel and the Registry which tend to stem from the sheer number of cases and related resourcing issues (McGonigle-Leyh, 2011; Hirst & Sayouno, 2020). Particular problems can also face 'dual status' victim-witnesses, who are called to give evidence in addition to their distinct role as participating victims. The credibility of such witnesses is subject to a 'high level of testing' through cross-examination (Samson, 2020, p. 43), which may involve questioning on the accuracy of their accounts, the consistency of their accounts or whether are driven by ulterior motives to lie (Samson, 2020).

3.5.13 A final point to make about the ICC is that while the Statute, rules and regulations set down procedures for all the Chambers to follow, a degree of legal uncertainty remains (Hirst & Sayouno, 2020). Within these parameters, there is considerable scope for Chambers to adopt their own particular practices and develop best practice. One of the continuing controversies between Chambers which has yet to be settled by the Appeals Chamber has been the extent to which, if at all, parties should be able to prepare witnesses for examination and cross-examination by means of what is known as 'witness proofing' (Jackson and Brunger, 2015). This controversy has highlighted the different approaches that are adopted within common law and civil law countries on this issue, with the US at one extreme permitting a high degree of witness preparation and various civil law and

common law procedures (for example, England and Wales) taking a much more restrictive approach towards this practice (Ellison, 2007; Vasiliev, 2012).

3.5.14 Another example is the freedom given to Chamber to develop their own rules on how witnesses should be questioned at trial. Combs (2010) has pointed out that the Rome Statute does not prescribe any one method of evidence presentation but rather authorises the presiding judge of a Trial Chamber to 'give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner' (ICC RPE Rule 1402). Although the ICC's procedural rules envisage that parties will call their own witnesses in the adversarial tradition, judges are given considerable discretion over which procedural model to follow at trial.

3.6 Protections for Victim-Witness and the Right to a Fair Trial

3.6.1 International human rights standards have clearly evolved to encompass the rights of victims and witnesses to effective protection and participation at trial. However, this new normative stance has given rise to concerns that measures giving effect to such rights risk interfering with the fair trial rights of the accused (Blondel, 2008; Spencer and Spencer, 2001). The idea that the rights of victims and offenders are strictly oppositional is reflected by frequent resort to the metaphor of 'balance' in political rhetoric and official publications (Jackson, 2003; Sanders, 2002).

3.6.2 The current general position is that the accused's right to a fair trial and the witness's right to protection, effective participation, and privacy are legitimate interests which should be considered alongside each other. As Spencer (1994) argues, a fair trial does not mean a trial which is free from all possible detriment or disadvantage to the accused; Article 6 rights are not absolute. While the accused's right to a fair hearing is in no way subservient to the rights of victims and witnesses, the preferred international approach would indicate that both rights should be considered in a principled and consistent manner on a case-by-case basis.

3.6.2 The ECtHR has long recognised that departures from conventional forms of oral testimony do not contravene the fair trial rights under Article 6 of the Convention, providing that effective counter-balancing measures in place that allow the evidence to be challenged (*Kostovski* v *Netherlands* (1989) 12 EHRR 434, para 41; *Baegen* v *Netherlands* App No 16696/90, 27 October 1995). In a passage that has been much cited, the Court in *Doorson* v *Netherlands* (1996) 22 EHRR 330 stated:

> *It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However,*

their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention... Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify (at para 70).

3.6.3 In the recent case of *Mraovič v Croatia* (App No30373/13, 14 May 2020), the Court held that the exclusion of the public from a rape trial did not interfere with the applicant's Article 6 rights to a public hearing, since the state was under an obligation to protect the complainant from embarrassment and stigmatisation which could constitute secondary victimisation. The cross-examination had probed highly sensitive matters pertaining to her private life, and thus it was reasonable to restrict the applicant's Article 6 rights to a public hearing in order to protect the Article 8 rights of the complainant. The Court rejected the applicant's contention that the judge should only have closed the relevant part of proceedings, since such information could have been alluded to at any point during the proceedings.

3.6.4 Yet the dilution of the rights of the accused should not be undertaken lightly since the accused stands to lose a lot more than the victim if the trial process is flawed. In *Van Mechelen* v *Netherlands* (1998) 25 EHRR 657, it was held that any measures restricting the rights of the defence should be strictly necessary, and if a less restrictive measure can suffice, then it is that measure which should be applied (at para 59). Breaches of the right to a fair trial are unlikely to be found on the basis of evidential or procedural rules per se, with the Court looking instead at the trial process as a whole in order to ascertain whether the fundamental requirements of fairness have been observed (*Barbera, Messegue and Jabardo* v *Spain* (1988) 11 EHRR 360). Crucially, the defence must be afforded an opportunity to challenge the complainant's evidence, albeit not necessarily through direct questioning. In *SN* v *Sweden* (App No 34209/96, 2 July 2002), the Court held that, whilst the pre-recorded testimony of the child was virtually the sole evidence on which the defendant had been convicted, the fact that the defence had been allowed to test the evidence by putting questions indirectly to the victim through a police officer acting as a conduit meant that the applicant had not been denied a fair trial (cf. *Bocos-Cuesta* v *The Netherlands* App No 54789/00, 10 November 2005; *Kovač v. Croatia* (App No 503/05, 12 July 2007).

3.6.5 The case law discussed above, considered alongside trends towards increasing global harmonization (Colson and Field, 2016) and the ascendancy therapeutic/problem-solving approaches (King et al 2014) have cast some doubt on the utility of the traditional adversarial / inquisitorial

typology. Reflecting on the case law of the European Court of Human Rights, Jackson (2005) considers that the jurisprudence from Strasbourg has spearheaded a shift away from our tendency to categorise systems according to the adversarial or inquisitorial spectrum; the Court has developed a new model of proof that is better characterised as 'participatory'. While international instruments and case law have provided some insights as to what an effective participatory model may look like, both courts and policymakers have largely eschewed a detailed exploration of this question (Owusu-Bempah, 2018).

4. England and Wales

4.1 Background

4.1.1 While the criminal justice system of England and Wales developed over many centuries, its court structure was not modernised until 1971 when a new Crown Court was established to try indictable offences, summary offences having been tried in magistrates' courts long before then. Summary trials take place before a bench of (usually lay) magistrates while trials on indictment take place before a professional judge with the issue of guilt or innocence in contested cases being determined by a jury. The most serious Crown Court cases are tried by High Court judges, less serious cases are tried by circuit judges and the least serious are tried by part-time recorders. Traditionally, only independent barristers could appear on behalf of the prosecution or defence in Crown Court trials but solicitor advocates who come from the solicitors' branch of the profession may also now appear in such trials. In-house salaried lawyers in the Crown Prosecution Service (known as Crown Advocates) who may be either barristers or solicitors may also appear in the Crown Court on behalf of the prosecution.

4.1.2 Criminal procedure in England and Wales has its roots in the common law but legislation has now eclipsed case law as the predominant source of criminal procedure, taking a variety of forms including primary legislation but also embracing a range of secondary, delegated or 'soft law' sources, including since 2005 annually up-dated Criminal Procedure Rules. Another change has been the increased emphasis on human rights in criminal procedure which was hastened considerably by the enactment of the Human Rights Act 1998 throughout the UK. Under this Act primary and subordinate legislation must be read and given effect in a way which is compatible with the ECHR, so far as it is possible to do so. Victims' rights in the criminal justice system have also been given increasing attention by ministers responsible for criminal justice and by criminal justice agencies in England and Wales. The EU-wide Victims' Directive (see 3.4.5 *et seq*) which provides legal rights to victims of crime

remains part of domestic law after Brexit and the latest Victims' Bill in England and Wales aims to further simplify and strengthen the rights of victims of crime and improve victims' experience of the criminal justice system.

4.1.3 As far back as the mid-1970s, the Heilbron Commission (1975) noted a number of concerns over the nature of cross-examination of complainants in rape cases, while during the 1980s similar concerns were being voiced over the questioning of children (Flin et al, 1989; McEwan, 1988; Spencer et al, 1989). Change was incremental at first but since the turn of the century it has quickened considerably, with Lord Judge, a former Lord Chief Justice of England and Wales, describing recent changes that have occurred a 'revolution' (Lord Judge, 2013).

4.1.4 The first significant statutory reforms, contained in the Criminal Justice Act 1988, provided for child witnesses to give all of their evidence by live television link in Crown Courts and Youth Courts in all cases involving offences of a sexual or violent nature (subject to the leave of the court). An Advisory Group was subsequently established to review the procedural rules concerning the evidence of children. Criticising the piecemeal approach under the existing legislative framework, the Pigot Report (1989) subsequently recommended that no child under the age of 14 (17 in sexual offences) should be compelled to give live evidence in court where the offence was of a violence or sexual nature, or as a result of cruelty or neglect.

4.1.5 The Government made clear in its terms of reference that it would not contemplate any perceived infringement of the accused's right to cross-examination. The Pigot Report met with stiff opposition on these grounds, and the subsequent Criminal Justice Act 1991, which made provision for video-recorded evidence-in-chief for child witnesses, did not alter the need for them to attend court for cross-examination.

4.1.6 Reform during the late 1980s and early 1990s was thus limited to providing for televised (live-link) and pre-recorded examination-in-chief for two narrow categories of witnesses deemed vulnerable: complainants in sex trials and child witnesses. The provisions of the 1988 and 1991 Acts were overly complex, poorly drafted, and gave rise to various legal lacunae (Doak et al, 2018). The decision of whether or not to grant such measures was subject to a vague 'interests of justice' test, and no provisions were in place to ascertain the child's wishes as to how s/he would like to give evidence. Moreover, the practice of live cross-examination in court (albeit through live link) remained untouched.

4.1.7 Following the election of a new Labour Government in May 1997, the Home Secretary announced the setting up of a Home Office interdepartmental working group to examine and make

recommendations on the treatment of vulnerable and intimidated witnesses. Its terms of reference included the identification of measures at all stages of the criminal justice process that would improve the treatment of vulnerable witnesses, and further measures that might encourage witnesses to give evidence in court.

4.1.8 *Speaking up for Justice* (Home Office, 1998) made 78 recommendations in total, proposing a range of reforms to improve the treatment of vulnerable and intimidated witnesses. The group identified two categories of witness who should receive assistance at the discretion of the court. First, the Report concluded that those witnesses whose vulnerability related to the effects of age, disability or illness (Category A witnesses) would automatically be entitled to some form of special protection. However, in the case of witnesses who may be vulnerable or intimidated for reasons relating to their particular situation or the circumstances of the case (Category B witnesses), it was recommended that the trial judge retain discretion in determining whether the granting of such measures would be appropriate.

4.2 Special / Alternative Measures

4.2.1 The *Speaking up for Justice* report laid the foundation for many of the special measures that now govern the treatment of vulnerable witness testimony in both the Crown and Magistrates' Courts and crucially it included cross-examination within the measures it recommended. The majority of its recommendations were subsequently enacted under Part II of the Youth Justice and Criminal Evidence Act 1999 (YJCEA). In keeping with the recommendations of the Working Group, the eligibility of a witness for a special measures direction depends upon the characteristics of an individual witness, rather than on whether the witness falls within a list of closed categories. Eight special measures are contained with the Act:

- Screens;
- Live links;
- Giving evidence in private;
- Removal of removing wigs and gowns;
- Pre-recorded evidence- in-chief;
- Pre-recorded cross-examination or re-examination;
- Examination through an intermediary;
- Aids to communication.

4.2.2 Child witnesses (under 18) and witnesses with a mental or physical disability (if the court considers that the quality of their evidence is likely to be diminished) are automatically eligible for all special measures under section 16 on grounds of 'age' or 'incapacity'. Section 21 of the Act (as amended by s 100 of the Coroners and Justice Act 2009) provides in the case of children that evidence-in-chief must be pre-recorded under section 27, and, in addition, cross-examination should take place through the live link provision under section 24. This 'primary rule' is subject to section 16(4), which provides that the court must take into account the views of the witnesses. If the witness wishes to give live evidence, the rule does not apply to the extent that the court is satisfied that not complying with the rule would not diminish the quality of the witness's evidence.

4.2.3 Other witnesses may also be eligible for special measures under section 17 if the court considers that the quality of the evidence given by a witness is likely to be diminished by 'fear or distress'. For these 'intimidated' witnesses, entitlement is not automatic, and the court is required to consider a range of circumstances under section 17(2) to determine whether special measures should be applied. These include:

- the nature and alleged circumstances of the offence
- age
- social and cultural background and ethnic origins
- domestic and employment circumstances
- religious and political beliefs / opinions
- behaviour towards the witness on the part of the accused, his/her family or associated, or any other potential witness.

The court must also consider any views expressed by witnesses themselves. The Act also prohibits the accused from cross-examining in person complainants and child witnesses in sexual cases, witnesses under 14 in cases involving kidnapping, false imprisonment, modern slavery, cruelty or violence, and any witness where the quality of their evidence is likely to be diminished if the cross-examination is conducted by the accused (ss 34-36). Where the defendant is unable or unwilling to have a legal representative appointed to conduct the cross-examination, the court may appoint a legal representative to do so over the defendant's objection (s 38).

4.2.4 The court must presume that a sexual complainant is an 'eligible witness' under s 17(4), unless the witness expresses the wish not to be treated as one. The defence may attempt to rebut the presumption. The Coroners and Justice Act 2009 inserted a new s 17(5) into the 1999 Act, creating a similar presumption for homicides and offences against the person in which firearms or knives were used.

4.2.5 Once the court determines that the adult witness is eligible for a special measures direction, it must determine which measure(s) would be likely to optimise the quality of the evidence under section 19. In doing so, it should have regard to all of the circumstances of the case, including, in particular, any views expressed by the witness and whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

4.2.6 Since the passage of the 1991 legislation, the Government has formulated a number of controls in relation to the manner in which questioning should be conducted in pre-recorded interviews and on how recordings should be used in evidence. The *Memorandum of Good Practice* (Home Office, 1992) introduced a number of guidelines to ensure that witnesses would be questioned in ways that broadly aligned with evidential rules. The *Memorandum* was revised and updated over the best part of two decades, before being replaced by *Achieving Best Evidence* (ABE) (Ministry of Justice, 2011).

4.2.7 Like the *Memorandum*, ABE is purely advisory though any significant departure from the guidance may have to be justified to the court (see e.g. *Re E (A Child)* [2016] EWCA Civ 473; *R v Krezolek* [2015] Crim LR 628). Interviewers are encouraged to follow a four-phase structure to the interview, which should begin establishing rapport and initiating a 'free-narrative' account from the witness, during which the interviewer poses a series of open-ended questions. From there, the interview should increasingly move on to the use of more specific questions to further explore and probe facts, but without any pressure being applied to the witness. Furthermore, interviewers should avoid the use of suggestion and leading questions as far as possible, and the witness should not be placed under pressure to recollect. Benchmarks regarding safeguarding duties and other standards required of those who support young witnesses are also laid out in light of recommendations from a study by Plotnikoff and Woolfson (2009).

4.2.8 The majority of special measures have proved relatively uncontentious and many were already available either under common law (e.g. *R v X, Y and Z* (1990) 91 Cr App R 36, sanctioning the use of screens) or statute (Criminal Justice Act 1988, s 32, providing for children's evidence through live link; Criminal Justice Act 1988, section 32A, admitting a pre-recorded interview as the child's evidence in chief). These measures were subject to relatively positive evaluations during the 1990s (Davies and Noon, 1991; Davies et al, 1995), with more recent evidence emerging that the vast majority of victims and witnesses who used such measures find them helpful (Hamlyn et al, 2004; Wood et al, 2015), a perception that is shared among judges and Witness Service staff (Victims' Commissioner, 2021). However, the Victims' Commissioner (2021) also reported that less than half of judges and magistrates felt that the needs of vulnerable and intimidated witnesses were being completely met under trials taking place under Covid-19 arrangements. Surveying the recent research evidence, Fairclough (2020)

found that the live link now appears to be the most common means of giving evidence for the majority of child witnesses,[8] while screens are used widely for eligible adult witnesses. Closure of the public gallery, under section 25 of the Act, appears to be rarely used, and applications from non-defendant defence witnesses were also highly uncommon.

4.2.9 Other measures have been much more contentious. In particular, the introduction of pre-recorded cross-examination under section 28 of the YJCEA was highly controversial, with pilots not commencing until 2013 (see 4.2.11 below). The provision allows for the pre-recording of cross-examination or re-examination on video (commonly referred to as a 'section 28 hearing') to replace live cross-examination for child witnesses, complainants in sexual offences, and complainants in respect of an offence under sections 1 or 2 of the Modern Slavery Act 2015. The recording may (but need not) take place in the physical presence of the judge or magistrates and the defence and legal representatives, although the proceedings must be subject to judicial control. Participants should also be able to see and hear the witness being cross-examined and communicate with anyone who is in the room with the witness (such as an intermediary acting under s 29 - see 4.2.12 below).

4.2.10 Citing concerns among the profession about its practical operation (primarily regarding post-recording disclosure), the Government declined to implement this provision when most of the other special measures came into force in July 2002. The provision remained dormant until the Ministry of Justice eventually launched fresh consultations on the matter, with a pilot programme being introduced at three Crown Court Centres at the end of 2013. A subsequent evaluation found that the provision had resulted in more guilty pleas and fewer 'cracked' trials (though there was little difference in conviction rates: see Baverstock, 2016).

4.2.11 Following the success of a pilot scheme for children and other witnesses classified as vulnerable under section 16 of the YJCEA, the Government announced a national rollout of section 28 for such witnesses. This was originally planned for March 2017 but was not completed until November 2020 when pre-recorded cross-examination was finally made available for all witnesses classified as vulnerable under section 16 in all Crown Court centres in England and Wales (Ministry of Justice & Chalk, 2020).[9] The measure has been successfully piloted at a number of magistrates' courts, with a national rollout now underway. A pilot has also begun in certain Crown Courts for victims of sexual and modern slavery offences (Crown Prosecution Service, 2021).

[8] The live link may be situated within a separate area of the court precinct, or within an approved remote evidence centre: Criminal Justice Act 2003, s 51.

[9] Procedural arrangements are contained in Criminal Practice Direction V Evidence 18E (Amendment No. 5 [2017] EWCA Crim 1076) and guidance issued by HMCTS (2019).

4.2.12 Section 29 of the YJCEA provides for the use of registered intermediaries (RIs) to improve the quality of communications between certain categories of vulnerable witnesses and the court. Although the concept of an intermediary was first proposed by the Pigot Committee in 1989, it was met with significant opposition on the grounds that it appears to pose a fundamental challenge to the freedom of counsel under the adversarial model (Hoyano, 2000). The power of the RI to re-word questions posed significant challenges to well-established questioning techniques, leading to fears of a loss of meaning or emphasis, which could effectively alter the substance of the question. This, in turn, could lead to disputes between the questioner and the intermediary on which the trial judge would have to adjudicate (Hoyano, 2000).

4.2.13 RIs are generally communication specialists who come from a range of professional backgrounds including speech therapy, education, social work and counselling / forensic psychology. Intermediaries must be registered and complete a mandatory training programme developed by the Ministry of Justice. In relevant cases, RIs are assigned by the Witness Intermediary Service, with their initial role being to assist vulnerable witnesses in giving evidence in the *Achieving Best Evidence* (ABE) interview. They may also attend GRHs (see 4.2.14 below), advise on the nature of any questioning and the use of communication aids, and accompany the vulnerable witness during questioning, to monitor their understanding and ensure their answers are understood (Victims' Commissioner, 2021, p. 12).

4.2.14 Eligibility is confined to child witnesses (under 18), and adult witnesses whose quality of evidence is likely to be affected by a mental disorder or impairment of intelligence and social functioning, and those with a physical disorder or disability. 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.[10] The judge, jury and legal representatives must be able to see and hear the proceedings, and to communicate with the intermediary. In addition to providing direct assistance to the witness and those questioning/ planning to question the witness, the intermediary will usually prepare a report for the judge in advance of the trial about specific communication needs of the witness and any special measures and other mechanisms by which best evidence may be elicited during the GRH (see further 2.4.1 *et seq*). Their role is impartial, and to this end intermediaries must take an oath to the effect that they will conduct their role honestly and faithfully and to the best of their ability.

4.2.15 The scheme was rolled out nationally from 2004 following a positive evaluation of pilot schemes (Plotnikoff & Woolfson, 2007). Early evaluations indicated a lack of awareness of uptake of

[10] For an overview of how the scheme works in practice, see https://www.theadvocatesgateway.org/intermediaries [accessed 11 August 2021]

the measure (McLeod et al, 2010; Plotnikoff & Woolson, 2009), although there is now evidence that demand has increased considerably in recent years (Cooper & Mattison, 2017; Plotnikoff & Woolfson, 2019; Fairclough, 2020) and far outstrips the capacity of the 141 RIs who are currently registered Cousins & Mellors, 2021). Although attempts are made to match intermediaries with eligible witnesses based on geographic availability and skillsets, recent research has found evidence of a 'postcode lottery', with an estimate that only between one in six and one in 10 young witnesses had intermediary assistance at the trial stage (Plotnikoff & Woolfson, 2019). Although the task of matching available intermediaries with witnesses in need continues to pose a significant challenge, research nonetheless suggests that their role is viewed positively by judges and advocates (Henderson, 2015) and is now well embedded within the English criminal process (Plotnikoff & Woolfson, 2015; Plotnikoff & Woolfson, 2019).

4.2.16 Section 30 of the YJCEA provides that witnesses eligible for special measures by virtue of section 16 may be provided with such aids as the court considers appropriate. Such aids may be used to enable questions or answers to be communicated to, or by, the witness and are designed to counteract any disability or disorder that impedes effective communication. Intermediaries will usually recommend which aids might improve communication on the basis of the individual needs of the witness. Aids to communication may thus not only enhance the quality of evidence, but may also reduce stress levels of the user (Plotnikoff & Woolfson, 2015). The legislation provides no definition of what might constitute such an aid; anything deemed appropriate to the court is permissible, although both the *Equal Treatment Bench Book* (ETBB) (Judicial College, 2020) and the and the Criminal Procedure Rules 2020 refer to an array of tools such as pictures, plans, symbols, dolls, figures, models, body maps as well as electronic communication devices and interpreters. Where on a trial on indictment evidence has been given in accordance with a special measures direction, section 32 requires the judge to give the jury such warning as s/he considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

4.2.17 Defendants are excluded from the special measures regime (section 16(1)). This restriction has been criticised as being anomalous on the grounds that the principle of best evidence may perceived to be somehow less desirable for defendants as opposed to non-defendant witnesses (Doak et al, 2018). It has also been criticised on grounds that it could potentially breach the principle of 'equality of arms' or procedural equality (Fairclough, 2018a) according to which there must be a fair balance between the opportunities afforded the parties involved in litigation, in this case prosecution witnesses and defence witnesses. This principle is well established under Article 6 ECHR (see *Delcourt v Belgium* (1970) 1 EHRR 355; see also 3.2.1).

4.2.18 Following concerns expressed by Baroness Hale in *R v Camberwell Green Youth Court* [2005] 1 WLR 393, section 33A was inserted into the 1999 legislation, providing for the use of live links and video links for defendants under the age of 18 or for those whose ability to participate effectively as a witness is compromised by reason of mental disorder, impaired intellectual ability or social functioning. This provision is subject to two stipulations: first, the mechanism must actually be capable of improving the ability of the witness to participate (i.e. there is a causal link between the two) and, second, the court must be satisfied that it is in the interests of justice for the defendant to give evidence through a live link. In 2009, the Act was further amended to provide for the use of an intermediary when certain vulnerable accused persons give evidence in court.[11] This amendment has not yet entered into force, though some vulnerable defendants do receive support from third parties from non-registered intermediaries (Cooper & Wurtzel, 2013; Victims' Commissioner, 2021). Critics have argued that these corresponding measures for vulnerable defendants are considerably more restrictive than those in place for non-defendant witnesses (Fairclough, 2018a; Hoyano & Rafferty, 2017).

4.2.19 Although no legislative provision is currently in force to provide communication support for defendants, the most recent Crim Practice Direction confirms the existence of judicial common law powers to make adaptations to trial procedure to assist vulnerable defendants. Such adaptations may include the removal of wigs and gowns; allowing defendants to be seated with a family member or supporter in a position that facilitates communication with their legal representative; the use of clear and understandable language; allowing for regular breaks in proceedings and, in cases where a defendant with communication needs is to give evidence, a discussion of appropriate lines of questioning as part of a GRH (see 4.4.1 below).

4.3 The Changing Role of Judges and Advocates: Judicial Intervention

4.3.1 As noted at 2.5.15, The traditional 'umpireal' role of the adversarial trial judge sits uneasily alongside a duty to intervene in order to prevent over-zealous, irrelevant or protracted cross-examination. The higher courts have traditionally shied away from laying down specific guidelines as to how and when judges should intervene, or seeking to place controls of the questioning practices of

[11] See ss 33BA and 33BB. In *R (on the application of OP) v The Secretary of State for Justice and Others* [2014] EWHC 1944 (Admin) it was stated that intermediaries should only be available to a defendant when the 'most pressing need' arises, and this need only be for the duration of the defendant's testimony, rather for entirety of the trial (see also *R v Rashid* [2017] EWCA Crim 2).

advocates. However, a marked shift in judicial attitudes as regards their duty to protect vulnerable witnesses at trial has been evidenced by a series of cases from the Court of Appeal over the course of the past decade (see further Henderson, 2014).

4.3.2 The Court of Appeal heard four significant cases, all involving sexual offences on young children between 2010 and 2012: *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. This line of case law elicits three key rules that cross-examiners ought to bear in mind. First, age-appropriate language must always be used. As the court remarked in *Barker*, 'the task of the advocate is to formulate short, simple questions which put the essential elements of the defendant's case to the witness' (at [42]). Secondly, cross-examiners must restrict the use of suggestion and use 'short and untagged questions' (at [30]). Thirdly, cross-examiners should adopt a cautious approach when challenging or seeking to undermine the testimony of a vulnerable witness. In *E*, the Court noted that 'direct challenges', such as accusations of lying, are unhelpful and risk confusion (at [28]). As the court explained in *Wills*, such necessary limitations to protect witnesses impact upon the traditional approach to cross-examination insofar as comment should not be made on any inconsistencies (at [39]). Instead, the evidence could be challenged after the witness had finished providing testimony (see also *R v Edwards* [2011] EWCA Crim 3028. *Wills* also underscores that 'there is a duty on the judge to ensure that limitations are complied with' (at [36]).

4.3.3 In the subsequent case of *R v Pipe* [2014] EWCA Crim 2570, the trial judge stopped the defence cross-examination before the witness could be questioned about inconsistencies between her testimony and evidence given at an earlier medical appointment. The Court of Appeal found that this intervention did not impede the appellant's right to a fair hearing, since it did not impact the ability of the defence to rely on the alleged inconsistencies. Moreover, since she had broken down whilst giving evidence, any decision to allow the questioning to continue would have deprived the complainant of the opportunity to explain such inconsistencies (see also *Wills* and *Edwards* above).

4.3.4 In *R v Sandor Jonas* [2015] EWCA Crim 562, the trial judge had restricted the questioning of a complainant in a sexual offences case as to her credibility. In that case, counsel for the defence had cross-examined the complainant for nearly a week with the majority of questions spent on the complainant's account of her life in her home country. The trial judge subsequently limited counsel for the co-accused from pursuing a similar line of questioning. Dismissing the appeal, Hallett LJ stated that 'in our view her timely and sensible interventions ensured that the whole process was fair to everyone. She protected the witness from unnecessary and oppressive questioning, but not at the

expense of a fair trial for the defendants' (at [37]). It was further held in *R v Lubemba; JP* [2015] 1 WLR 1579 that '[a]dvocates must adapt to the witness, not the other way around' (at [45]).

4.3.5 Best practice guidelines are now consolidated in the latest version of the ETBB (Judicial College, 2020). Citing much of the case law above, the ETBB underlines that judges and magistrates have a duty to control questioning, since '[w]itness testimony must be adduced as effectively and fairly as possible' (§126). It clarifies that '[t]he manner, tenor, tone, language and duration of questioning should be appropriate to the witness's developmental age and communication abilities which may necessitate a departure from normal practice whereby the case is "put" to the witness' (§§126-127). In a clear break from the longstanding rule in *Brown v Dunne* (see 2.3.2), failure to cross-examine should not be taken as tacit acceptance of the witness's evidence since such evidence could be challenged after (rather than during) the witness's testimony (§126, §132). Limits on questioning should be imposed where they are 'necessary and appropriate', such limits must be clearly defined, and the judge should explain them to the jury and the reasons for them (§126).

4.3.6 Drawing on the Inns of Court College of Advocacy national training programme, *Advocacy and the Vulnerable* (see 4.5 below), the ETBB proceeds to offer specific guidance on the duration on cross-examination, the avoidance of complex vocabulary, syntax, multi-faceted questions, and leading questions. Questions should also be in a chronological order, avoid repetition and only one cross-examination should take place in cases involving multiple defendants (§§134-141).

4.4 The Changing Role of Judges and Advocates: Ground Rules Hearings

4.4.1 The main mechanism for giving effect to this expanding judicial role are GRHs, which began to emerge on an ad hoc basis during the 2000s following recommendations made by RIs in their reports (Cooper & Wurtzel, 2013). GRHs have since become formalised as a lynchpin of judicial management and are now widely adopted in involving vulnerable witnesses. The Hearing basically entail judges pre-determining the nature and extent of proposed questioning as well as any adaptations to trial procedure may enable vulnerable witnesses to give best evidence. In practice, this usually entails the defence advocate preparing and furnishing 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.

4.4.2 While GRHs do not have a statutory footing, they were endorsed by the Court of Appeal in *R v Lubemba; JP* [2015] 1 WLR 1579 and are now mandatory in all cases involving intermediaries: Criminal

Procedure Rules (CPR), r. 3.9. They are also regarded as good practice in all cases involving child witnesses and all other cases a vulnerable witness or vulnerable defendant with communication needs (Judicial College, 2020, §120). Following *Sandor Jonas*, the CPR were amended to require that GRHs take place to consider the allocation of questions between witnesses in cases where there are multiple defendants (Rule 3.9(7)(b)(v)).

4.4.3 GRHs entail discussion between counsel and the judge on matters such as the need to avoid repetitive questioning; controlling comment and accusations of lying; time limits on cross-examination and appropriate breaks; the nature of the phrasing and vocabulary used in questioning; and the practicalities surrounding any intervention by the intermediary (Cooper et al, 2015).

4.4.4 Principles of best practice have subsequently been elicited by the Court of Appeal. In *R v PMH* [2018] EWCA Crim 2452, it was held that the judge should discuss with the advocates how and when any limitations on questioning will be explained to the jury and should consider if it is necessary to have a further discussion with the advocates before their closing submissions and the summing-up on the limitations imposed and any areas where those limitations have had a material effect. As part of the summing-up and in any written directions to the jury, the judge should include with the standard special measures direction a general direction that limitations have been imposed on the cross-examination. Other principles of best practice to emerge in *R v YGM* [2018] EWCA 2458 include:

- The identification of any limitations on cross-examination should take place at an early stage.

- Before the witness is cross-examined, it is best practice, (as recommended by the Judicial College) that as well as giving the standard special measures direction, the trial judge also directs the jury in general terms that limitations have been placed on the defence advocate.

- If any specific issues of content have been identified that the cross-examiner cannot explore, the judge may wish to direct the jury about them after the cross-examination is completed.

- Every advocate and trial judge is expected to ensure that they are up to date with current best practice in the treatment of vulnerable witnesses.

4.5 The Changing Role of Judges and Advocates: Training and Accreditation

4.5.1 In 2011, the Advocacy Training Council (ATC) published *Raising the Bar*, a major report exploring training options for advocates working with children and other vulnerable witnesses. Based on evidence and consultation with a range of practitioners including judges, intermediaries, psychiatrists, police officers and social workers, the report made a total of 48 recommendations revolving around three 'virtues':

> *First, it should at all times be sensitive and understanding with regard to the needs and vulnerabilities of the person concerned. Second, it should uphold the requirement rigorously to examine the evidence and fulfil the barrister's duty both to court and client. Third, it should seek to elicit 'Best Evidence'. (Advocacy Training Council, 2011, p. 2)*

4.5.2 Subsequently, a working group at the Inns of Courts College of Advocacy (ICCA, successor to the ATC) developed a national programme, *Advocacy and the Vulnerable Training*, in conjunction with the Bar 'to help solicitor advocates and barristers strike the balance between advancing their client's case effectively in court whilst ensuring vulnerable witnesses are not subjected to undue stress' (ICCA, 2021). The training involves three sequential phases consisting of an online course, virtual training (four delegates, one facilitator) and reflection based on exemplar films and consolidation. The training has thus far been delivered to 'over 4,000 members of the Bar, Crown Prosecutors and Solicitors' and 'will become mandatory for any advocate wishing to undertake publicly funded work for serious sexual offence cases involving vulnerable witnesses' (ICCA, 2020).

4.5.3 The training is based around 'The 20 Principles' covering three main areas: preparation, conduct and questioning, covering a range of specific practices emphasising the importance of the GRH, the need for careful pre-drafting of questions, strategies for eliciting best evidence, and very specific guidelines on the nature and form of questioning. The ICCA has claimed that the Principles constitute 'practice-led guidance', but are not exhaustive nor are they 'necessarily intended to be empirically supported' (ICCA, 2020). Reviewing the empirical basis for each of the principles, Cooper et al (2018, pp. 402-403) noted that:

> *[t]wo of the rules are supported by scientific research with vulnerable witnesses. The majority of the rules (16) are not… Two of the rules are contrary to the available empirical evidence and may impair rather than enhance the cross-examination of vulnerable witnesses.*

4.5.4 The two principles / 'rules' which were deemed to run contrary to empirical research concerned matters pertaining to rapport-building and the need for chronological questioning; though the wording of both sections was amended in the latest version of the principles (ICCA, 2019).

4.5.5 The Principles themselves make cross-reference to a set of toolkits found on The Advocate's Gateway (TAG) website. Founded as an independent body in 2012, the website notes that the Gateway?group aims to 'promote the maintenance of the highest ethical and professional standards in the questioning of people who are vulnerable in justice settings and to provide practitioners with evidence-based guidance and support in the form of toolkits'.[12] To that end, TAG has 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. In addition to being referenced by the ICCA, the toolkits have also been endorsed by the CPS (2021) and the Judicial College (2021), and have been cited as a source of 'best practice' by the Court of Appeal (see *R v Grant-Murray and Henry; R v McGill and Hewitt* [2017] EWCA Crim 1228; *R v RK* [2018] EWCA Crim 603).

4.5.6 The latest edition of the ETBB (Judicial College, 2021 §41) affirms that:

> *Courts and tribunals are expected to adapt normal trial procedure to facilitate the effective participation of witnesses, defendants and litigants, by taking 'every reasonable step to facilitate the participation of any person, including the defendant' in preparation for trial.*

[12] https://www.theadvocatesgateway.org/

5. Scotland

5.1 Background

5.1.1 Although it shares many features with that of England and Wales, Scotland has had its own criminal justice system for centuries. As in England and Wales, there are two different modes of trial known as summary and solemn procedure with contested cases in solemn procedure tried by jury. Unlike England and Wales, however, there are three courts for trying criminal cases: justice of the peace (formerly district) courts which conduct summary trials only and are presided over mainly by lay justices: sheriff courts where both summary and solemn trials are held are presided over by sheriffs who are full-time professional judges or temporary sheriffs who sit part-time; and the High Court whose judges conduct the most serious solemn trials and which has exclusive jurisdiction over murder, treason and rape. Cases in the district courts and sheriff courts are prosecuted by procurator fiscals - the name given to crown prosecutors in Scotland – and defended by solicitors. Advocates in the High Court used to be restricted to members of the Scottish Bar but solicitor advocates may also now appear as advocates. Those who prosecute for the Crown in the High Court are known as advocates depute.

5.1.2 Criminal procedure in Scotland has come to be increasingly regulated by legislation with many of its distinct procedural rules contained in the Criminal Procedure (Scotland) Act 1995 and the Scottish Criminal Procedure Rules 1996. Before 1999 all legislation derived from the UK Parliament but with the re-establishment of the Scottish Parliament in 1999 criminal procedure is now the responsibility of the Scottish government. As in England & Wales, there has been an increasing emphasis on human rights as a result of the passage of the Human Rights Act 1998 and much attention has also focused on victims' rights in the criminal justice system. As discussed below, the Victims and Witnesses (Scotland) Act 2014 made provision for certain rights and support for victims and witnesses and implemented the EU Victims' Directive (see 3.4.5 *et seq*).

5.1.3 Until recently, legislation governing criminal procedure made little attempt to regulate the evidence of vulnerable witnesses. Courts were given powers to exclude the public from the courtroom in certain cases involving child witnesses under ss 166 and 362 of the Criminal Procedure Act 1975, but in the years since many calls for further reform were met with resistance from certain quarters of the legal profession. In many cases, practitioners held a deep-rooted belief that best evidence was always achieved through live testimony given in the presence of the accused, notwithstanding any

negative impact on the quality and coherence of that evidence that may come about through the stress of appearing in court (Sharp & Ross, 2008).

5.1.4 In 1988, the Lord Advocate invited the Scottish Law Commission to examine the law on the evidence of children and other potentially vulnerable witnesses, which resulted in the publication of a discussion paper on *The Evidence of Children and other Potentially Vulnerable Witnesses* (Scottish Law Commission, 1988). The Commission examined the existing law and practice for the giving of evidence by children and other potentially vulnerable witnesses in criminal proceedings and the perceived challenges that arose for such witnesses in certain types of cases. The Scottish Law Commission (1990) subsequently published its *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses*, which made several recommendations for legislative reform. As a result, 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 (s 271). Protections contained within that legislation were subsequently extended through amendments contained in the Vulnerable Witnesses Act 2004, the Victims and Witnesses Act 2014, and the Vulnerable Witnesses (Criminal Evidence) Act 2019.

5.1.5 In 1995, the Lord Advocate established a working group to improve arrangements for the support and preparation for court of child witnesses, reporting in 1999 with 16 sets of recommendations (Lord Advocate, 1999). A Child Witness Support Implementation Group (CWSIG) was subsequently set up in 2001 by the Scottish Executive with the task of implementing those recommendations. At the same time, in November 1998, the Scottish Office issued a consultation document on vulnerable and intimidated witnesses in criminal and civil cases, entitled *Towards a Just Conclusion*, and sought views on the types of measures that might be appropriate to help such witnesses give their best evidence. Alongside a further government paper, *Vital Voices: Helping Vulnerable Witnesses Give Evidence* (Scottish Executive, 2002), these reports formed the basis of sweeping reforms recommending a number of further alternative measures to assist vulnerable witnesses under examination-in-chief and cross-examination. These were contained in the Vulnerable Witnesses Act 2004 (Scottish Government, 2008).

5.2 Special / Alternative measures

5.2.1 The 2004 Act substantially overhauled the regime for protecting vulnerable witnesses and amended the 1995 legislation in a number of respects. Section 1 extends the definition of vulnerability to cover complainants in sexual assault cases and adults (over 16 at the date of commencement of

proceedings) where the court is of the view that there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of mental disorder or fear or distress in connection with giving evidence at the trial. The provision also stipulates that children under the age of 12 who are witnesses in 'solemn' cases (such as murder, culpable homicide, most sexual offences, and certain other serious offences against the person), should not give evidence in the courtroom or by live television link from elsewhere in the same building in which the courtroom is located. This stipulation is subject to the wishes of the child, and the court may disapply it where there would be a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made.

5.2.2 The most significant amendments were made to the range of available measures, with a distinction being drawn between measures that should be standard in all cases involving child witnesses under 16, and those that would be available, on application, to other vulnerable witnesses. An automatic entitlement was created for child witnesses to use televised links, screens and supporters. Other measures remained subject to application to the court, including taking of evidence by a commissioner, and giving evidence-in-chief in the form of a prior statement. Non-child witnesses could apply to the court to make use of live links, screens and supporters. Although consideration was given to the introduction of intermediaries, the Scottish Executive opted not to legislate given that the results of a pilot programme in England were then pending (Scottish Government, 2008).

5.2.3 Despite these developments, widespread concern continued to be voiced on how vulnerable witnesses were treated, with growing evidence that sexual offence complainers, in particular, were not sufficiently protected under the 2004 reforms (Scottish Courts and Tribunals Service, 2016). Further amendments to the 1995 legislation were subsequently introduced under the Victims and Witnesses (Scotland) Act 2014. This legislation further broadened the definition of 'vulnerable witness', raising the age limit for child witnesses to 18 (on the date of commencement of the proceedings). A second category of vulnerable witness was created to cover those suffering from a mental disorder or fear or distress in connection with giving evidence at the trial, where there is a significant risk that the quality of the evidence to be given by the person will be diminished. A third category was created to cover complainers in respect of specific offences in cases of sexual assault, trafficking, domestic abuse and stalking, while a fourth category was created for any witness considered to be at 'a significant risk of harm' by reason only of the fact that he/she is giving or is to give evidence in the proceedings' (s 10). Complainers in sexual offence cases were deemed automatically entitled to use the "standard special measures" (use of a live television link, a screen

and a supporter[13]), with the use of additional special measures available upon application to the court. Provision was also made to exclude the public while the witness gives evidence (s 20).

5.2.4 While the changes introduced by the 2014 Act were broadly welcomed, the range of measures still fell short of those available south of the border. The Scottish regime was criticised on the grounds that the definition of vulnerability did not explicitly cover witnesses with communication difficulties. No mechanism for substituting either examination-in-chief or cross-examination with pre-recorded evidence was available. Intermediaries were notably absent from the scheme, nor was there a legal basis for GRHs (Scottish Courts and Tribunals Service, 2016).

5.2.5 In March 2017 a High Court Practice Note was issued to improve the process of taking evidence by a commissioner.[14] This process basically entails a pre-trial hearing, comprising both examination-in-chief and cross-examination, overseen by a judge who may or may not be the presiding judge at trial. Questioning is conducted through the advocates in the usual way subject to any stipulations made in the GRH. The Practice Note provides for a Scottish version of the GRH, requiring all parties to consider which measures should be put in place, and which rules should govern the questioning, when the evidence is received by the commissioner. The Practice Note requires parties to consider:

- the best location and environment for the recordings to take place;
- the timing of the session;
- the nature of the communication that may be required;
- the lines of inquiry to be pursued;
- the form of questions to be asked; and the extent to which it is necessary for the defence case to be put to the witness.

5.2.6 The same year the Government subsequently launched a consultation as to whether the use of prior statements of evidence-in-chief and evidence taken by a commissioner should become a 'standard' special measure. A Report by the Scottish Courts and Tribunals Service (2017) also recommended the adoption of a *Barnahus* model whereby all child witnesses under 16 should be questioned by a forensic interviewer and used to substitute the child's evidence in its entirety at trial (see 3.3.10).

[13] Under s 271L, a supporter is someone who remains by the witness's side while they give evidence. They can be someone the witness knows, a person from a support organisation or from the social work department. Supporters must not prompt, interfere or influence the evidence in any way.
[14] High Court of Justiciary, Practice Note No.1 of 2017.

5.2.7 Further reform followed under the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019. This legislation plugged an obvious gap in earlier reform efforts, enabling courts to take children's evidence in full in advance of the trial in 'solemn' cases via a commissioner, though stopping short of implementing the *Barnahus* model. Section 271I of the 1995 Act (as amended) stipulates that – in solemn cases – the evidence of any witness under the age of 18 must be given in such a manner unless it is satisfied that to do so would significantly prejudice the interests of justice.[15] Witnesses who fall under one of the other vulnerable categories may also apply to the court to give evidence in this way. The same legislation also provides a statutory basis for GRHS.[16]

5.2.8 The commissioner must convene a GRH and therein exercise a number of duties, including ascertaining the likely timing of questioning, determining the form and wording of questioning, authorising the use of a supporter where appropriate or direct that other steps be taken to enable vulnerable witnesses to participate more effectively in proceedings. Such hearings may take place via a live television link and should be recorded, and the accused – while having to right to see and hear proceedings – should not be in the same room as the witness.

5.2.9 In summary, many of the alternative measures bear some similarity with those introduced in England & Wales, including use of live link and the use of screens (Criminal Procedure (Scotland) Act 1995, s 271K) and the exclusion of the public from the court room (s 271HB). Pre-recorded evidence through a commissioner is also now the norm for child witnesses in serious cases (s 271I), and GRHs are also operative in both jurisdictions. The major difference with England & Wales lies in the fact that there is no conceptual equivalent of an intermediary, although language and sign interpreters and specialist support workers are used where appropriate. 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 they are giving evidence.

[15] This exception applies where 'the giving of all of the child witness's evidence in advance of the hearing would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice', and 'that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to give evidence at the hearing'. Such an exception is only justified if (a)the child witness is aged 12 or over on the date of commencement of the proceedings in which the hearing is being or is to be held, (b)the child witness expresses a wish to give evidence at the hearing, and (c) it would be in the child witness's best interests to give evidence at the hearing. The provision is not yet fully in force and is expected to take effect towards the end of 2021.

[16] Section 1ZD, inserting section 271I(1)(1ZA) into the Criminal Procedure Act 1995.

5.3 The Changing Role of Judges and Advocates

5.3.1 Significant concerns remain within the legal profession as to whether it is legitimate for the court to regulate cross-examination. For some, it is difficult to accept the notion that the 'unfettered right to ask any question of any witness' should be curtailed or compromised, even in relation to children and vulnerable witnesses (Scottish Courts and Tribunals Service, 2016). Yet, as noted above, the introduction of GRHs (under s 271L) creates new obligations for judges and/or commissioners to manage proactively the questioning of vulnerable witnesses. In presiding over a GRH, the judge/commissioner must ensure that measures are put into place to prevent inappropriate questions or cause excessive distress to the witness.

5.3.2 Unlike their English counterparts, the Scottish judiciary have remained largely silent on the role of the judge in controlling cross-examination. However, an exception is to be found in *R v Begg* [2015] HCJAC 69, where the appellant had been convicted of two rapes, one indecent assault, and one assault. One complainant had been subject to a lengthy cross-examination, which opened with the question: '*you are a wicked, deceitful, malicious, vindictive liar?*' The advocate continued with comments such as '*because you've been trying to get [the appellant] into trouble for the last twenty years?... and this is your last hurrah?*'

5.3.3 Lord Carloway, Lord Justice General (the most senior judge in Scotland), issued a strong rebuke to this line of questioning:

> *Due regard must be had to the right or privilege under domestic law to test a witness's evidence by properly directed and focused cross-examination. That right, however, does not extend to insulting or intimidating a witness… It also requires to be balanced against the right of a witness to be afforded some respect for her dignity and privacy... The court must be prepared, where appropriate, to interfere when cross-examination strays beyond proper bounds, both in terms of the nature of the questioning and the length of time for which a complainer can be expected to withstand sustained attack. In this case, it is doubtful whether the ubiquitous informed bystander would have regarded the conduct of this trial as affording due respect for this complainer's rights.*

5.3.4 Citing the Scottish case of *Inch v Inch* (1856) 18 D 997, referring to the power of the judge to stop questioning that was 'protracted, vexatious and unfeeling' as well as the English cases of *Lubemba* and *Jonas* (see 4.3.4), he concluded that where a proper balance cannot be achieved by the representatives of the Crown and defence, the court may have a duty to intervene (at [40].

5.3.5 In March 2021, a cross-justice Review Group led by the Rt Hon Lady Dorrian published a wide ranging review containing far-reaching recommendations on the prosecution of sexual offence cases (Lord Justice Clerk's Review Group, 2021, the 'Dorrian Review'). The core recommendation of the Group was the creation of a specialist court, where trauma-informed practices would be embedded and a presumption would apply to the effect that all evidence would be taken at an early stage by pre-recorded means. These hearings would be overseen by a commissioner, who would also hold GRHs to determine their format and the nature of the questioning.

5.3.6 The Review also made a number of recommendations regarding the Children's Hearings, which deal with juvenile criminal matters through a non-adversarial approach. It was recommended that pre-recorded cross-examination of complainants in sexual offence cases occur at an early stage in the process, with trauma informed practices also embedded throughout the system. Other matters touched on by the Review relating to sexual offences generally. include the provision of more accessible information, improved communications and steps to enhance the understanding and involvement of juries in all such cases.

5.3.7 As in England & Wales, professional bodies and regulators have taken separate steps to influence how witnesses are questioned. The *Guide to the Professional Conduct of Advocates* (Faculty of Advocates, 2019) warns that advocates must not make unsubstantiated allegations or intimate crime, fraud or other illegal or improper conduct on the part of the witness (at §6.3.4) and should be mindful 'particularly in the cross-examination of hostile witnesses… that the law places him in a privileged position which he should not abuse - for example, by bullying or insulting behaviour or by making offensive or personal remarks' (at §6.4.2).

5.3.8 The Judicial Institute of Scotland has developed a training programme (known as 'Project Echo') in line with the phased implementation of the 2019 Act. The first phase involves events for advocates and an online resource kit for judges which includes written material, filmed expert contributions and scripted and filmed hearings showing examples of good practice. In collaboration with the Faculty of Advocates and the Law Society, the second phase comprises the publication of guidelines and hosting of training events for sheriffs and High Court judges (Judicial Institute, 2019, p. 4).

6. Northern Ireland

6.1 Background

6.1.1 Northern Ireland has had its own criminal justice system since the partition of the island of Ireland in 1921. Summary offences are tried in the magistrates' court by a district judge sitting with lay magistrates. Indictable offences are tried in the Crown Court usually by a judge and jury, although provision is made for certain offences to be tried without a jury where the offence appears to be connected to terrorism or religious or political hostility (see Justice and Security (NI) Act 2007).[17] Magistrates' courts also deal with committal proceedings which are used to determine whether there is sufficient evidence to justify putting a person on trial in the Crown Court. Although barristers traditionally had exclusive rights of audience in the Crown Court, solicitor advocates can also now appear on behalf of the prosecution or defence.

6.1.2 Criminal justice and policing powers were transferred to the devolved Stormont government in 2010 but the rules of criminal procedure and evidence still largely mirror those of England and Wales. Human rights have played a prominent role in recent changes to the criminal justice system and were a central part of the recommendations of Criminal Justice Review established under the terms of the Belfast (Good Friday) Agreement (1998). More recently, the protection of victims' rights in the criminal justice system has come under particular scrutiny. Recent reforms restricting the practice of hearing oral evidence in committal procedures have been largely motivated by the need to minimise victims and witnesses having to give (sometimes traumatic) evidence more than once in criminal proceedings (see Justice (NI) Act 2015).

6.1.3 Evidence by live link and pre-recorded evidence were made available to child witnesses during the 1990s (see Police and Criminal Evidence (NI) Order 1989, as amended by the Children's Evidence (NI) Order 1995). The regime was overhauled by Part II of Criminal Evidence (NI) Order 1999, which provides for the same range of special measures as those contained in Part II of the Youth Justice and Criminal Evidence Act 1999 (see further 4.2 below).

6.1.4 Unlike England and Wales, there is no equivalent line of appellate case law regarding the proper judicial role in controlling cross-examination, nor for the need for advocates to adapt cross-examination to the needs of the witnesses (see 2.3.2). However, the need for closer judicial control of

[17] The Director of Public Prosecutions makes the decision on whether a case should be heard by a jury or a judge sitting without a jury.

cross-examination and the potential utility of GRHs became the focus of criminal justice policy debates following a highly publicised nine-week rape trial in 2018 in which four elite rugby players were acquitted of rape, attempted rape, exposure, and perverting the court of justice in what became known as the 'Belfast Rugby Trial'. Media coverage of the trial not only highlighted the prevalence of misogyny in men's elite sport, but also the manner in which the complainant had been subject to a lengthy cross-examination involving repeated intimate questioning by four different defence advocates over 9 days. The outcome of the trial resulted in widespread public protests under the hashtag 'I believe her' (see Iliadis et al, 2021).

6.1.5 The Criminal Justice Board subsequently commissioned a review of the law and procedures in serious sexual offences in Northern Ireland, chaired by Sir John Gillen. The *Report into the law and procedures in serious sexual offences in Northern Ireland* (hereinafter the 'Gillen Review') was published in April 2019. The Review set out a plan for transformative change, entailing 'a new culture of cross-examination, which departs from the conventional adversarial approach' (149). To this end, it identified a 'need to redefine conventional rules for cross-examining children and vulnerable people in criminal trials, coupled with the delivery of a strong direction to advocates to change their current practice'. A total of 253 recommendations were made; those which impact directly on cross-examination are discussed at 6.3 below.

6.2 Special / Alternative measures

6.2.1 As noted above, the special measures regime in Northern Ireland is largely the same as in England and Wales. Under Article 4 of the Criminal Evidence (NI) Order 1999, child witnesses (under 18) and witnesses with a mental or physical disability (if the court considers that the quality of their evidence is likely to be diminished) are automatically eligible for special measures on grounds of 'age' or 'incapacity'. Under Article 5, the court is entitled to order special measures where it considers that the quality of the evidence given by a witness is likely to be diminished by 'fear or distress' in connection with testifying, and the use of such measures would be capable of improving this. In order to make such a determination, the court is required to consider a range of circumstances outlined in Article 5(2). The range of measures available are identical to England and Wales, and set out in Articles 11-18 (screens; video links; evidence given in private; removal of wigs and gowns; pre-recorded evidence-in-chief; pre-recorded cross-examination / re-examination; examination through an intermediary and aids to communication). As in England and Wales, these measures exist alongside

a prohibition preventing the accused from cross-examining certain witnesses (see Arts 22-27 and 4.2.3 above).

6.2.2 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 the use of an intermediary.[18] Further clarification and guidance is contained in the Protocol for Vulnerable Defendants (annexed to Practice Direction No. 2/2019) which states that the following overarching principles should apply:

> *The trial process should not itself expose the vulnerable defendant to avoidable intimidation, humiliation or distress. All reasonable steps should be taken to assist the vulnerable defendant to give their best evidence, understand and participate in the proceedings, and engage fully with their defence. The ordinary trial process should, so far as necessary, be adapted to meet those ends* (at 33).

6.2.3 The Protocol includes a broad and non-exhaustive definition of 'vulnerable defendant' as well as details of the process to be followed and appropriate roles to be exercised by judges, advocates and intermediaries from the Plea and Case Management Hearing through the GRH and trial.

6.2.4 Before making such an order for use of the live link under the 1999 Order, 'the court must be satisfied that it is in the interests of justice to do so and that the use of a live link would enable the vulnerable defendant to participate more effectively as a witness in the proceedings' (p. 34). Use of an intermediary may be directed where a young defendant's (under-18) ability to give evidence is compromised by their level of intellectual ability or social functioning, or, in the cases of adult defendants, where suffer from a mental disorder / significant impairment of intelligence and social functioning that renders them unable reason unable to participate effectively in the proceedings (ibid.). In addition, the court should consider any practical arrangements that may make it easier to vulnerable defendants to testify (familiarisation visits, seating alongside family etc), as well as whether wigs and gowns should be removed.

6.2.5 The roll-out of intermediaries and pre-recorded cross-examination has experienced significant delays. In May 2013, intermediaries were piloted in proceedings in the Crown Court as well as committal proceedings in the magistrates' courts in the Belfast area. Concluding that the scheme had

[18] Criminal Justice (NI) Order 1999, Part 2A as amended by Criminal Justice (NI) Order 2008 and the Justice Act (NI) 2011. As at 1 September 2021 these measures had not yet entered into force.

a positive impact on the quality of evidence, the Department of Justice began rolling out the scheme throughout the province in 2016 (Department of Justice, 2016).

6.2.6 The function of the intermediary in Northern Ireland is almost identical to that described in the legislation of England and Wales (see 2.2.10 *et seq* above), although in Northern Ireland they are also available to defendants (Cooper & Mattison, 2017). Both jurisdictions have referral services that match intermediaries with witnesses according to the skills and geographical availability of the intermediary. All Registered Intermediaries (RIs) are trained and regulated by the Department of Justice and must adhere to a Code of Ethics and a Code of Practice. RIs must update their knowledge and skills through continuing professional development (see further Cooper & Wurtzel, 2014; Cooper & Mattison, 2017). Following assessment of a witness's communication needs, the RI will produce a report recommending any limitations or adaptations that should be made, as well advising on practical matters including how s/he will alert the court if the witness has not understood the question or requires a break, and whether wigs and gowns should be removed (Lord Chief Justice's Office, 2019).

6.2.7 As in England and Wales, the RI's report informs the GRH, which will enable the judge to direct on matters such the structure of questions, frequency of breaks, and use of communication aids. It also provides a framework for agreeing how the intermediary should intervene in cross-examination if a breakdown in communication occurs or there is a risk of one (Cooper and Mattison, 2017, p. 359). Unlike in England and Wales, however, the current Crown Court rules do not contain express provision as to when a GRH may be necessary and there is no indication that they were ever utilised prior to the publication of the Gillen Review.

6.2.8 Lengthy delays also occurred in implementing Article 16 (pre-recorded cross-examination). In April 2017, the Criminal Evidence (NI) Order 1999 (Commencement No. 11) Order 2017 partially introduced the measure for trials on indictment in Belfast Crown Court and committal proceedings in the magistrates' courts. This partial implementation was intended to allow for the scheme to be piloted. Gillen (2019) noted that as of April 2019 no applications had been made in Northern Ireland for the pre-recorded cross-examination and re-examination of a vulnerable witness.

6.2.9 Gillen (2019) also referred to the fact that there was significant opposition to the measure within the profession. Such concerns stemmed from difficulties arising from late disclosure, fears over technical difficulties that may arise, reaching agreement over the nature and form of questions to be asked, and increased workloads upon practitioners which might in turn lead to cases involving pre-recorded cross-examination going to the 'back of the queue' (at 152). In addition, the Bar Council of

Northern Ireland opposed the wider used of pre-recorded cross-examination, arguing that the jury should be able to witness a cross-examination in person to assess credibility.

6.3. Changes to the Role of Judges and Advocates

6.3.1 In Gillen's view, addressing the problems experienced by vulnerable witnesses under cross-examination could only be achieved through 'redefining conventional rules for cross-examining children and vulnerable people in criminal trials, coupled with the delivery of a strong direction to advocates to change their current practice'. (Gillen, 2019, p. 480).

6.3.2 The Review strongly implies that the primary responsibility rests with the trial judge to ensure that advocates adapt their practice to the needs of the vulnerable witness. It recommended that consideration should be given to extending the court's power to prevent repetitious or unnecessary evidence and protracted, oppressive or irrelevant questions (Gillen, 2019, p. 293). However, GRHs were identified as the primary tool to place checks on cross-examination. It was 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 all vulnerable witnesses (including the accused). Issues to be resolved at the GRH should include:

- defining the issues for trial;
- proposed questions to be asked in cross-examination, with written notice in advance to the judge and the intermediary of their content for his/her approval (mandatory in all cases involving children);
- emphasis on the need to avoid tag questions, to use short and simple sentences and easy-to-understand language, and to avoid a tone of voice that implies an answer;
- time limits on cross-examination;
- if limitation is to be put on cross-examination, how the jury will be directed;
    - the presence of an intermediary and the Young Witness Service;
    - an emphasis on agreed evidence to shorten the trial;
    - any legal aid complications arising;
    - disclosure in general and third-party disclosure in particular, with firm involvement of the defence and prosecution;
    - venue including live links;
    - special measures;

- timings; and
- the need for a more interventionist judicial approach.

All directions issued as part of the hearing should be given in written form (Gillen, 2019, pp. 500-501).

6.3.3 Effecting the 'new culture' of cross-examination also requires significant investment in education and training. Moreover, Gillen's conception of training goes much further than merely understanding the function of the GRH and the need to adapt questioning; the Review makes a number of specific training recommendations for witnesses who may be vulnerable on different (or multiple grounds).

6.3.4 For sex cases, it was recommended that the public at large should be excluded in all serious sexual offence hearings in the Crown Court (Gillen, 2019, p. 134) and that judges should consider 'the use of closed courts and combined measures for the child in every Crown court case involving sexual offences against a child', either as a complainant or defendant (Gillen, 2019, p. 499). Training was identified as a key priority. The police, the Public Prosecution Service, legal practitioners and the judiciary must receive specialised training (Gillen, 2019, p. 152), with counsel under an obligation to certify prior to the GRH that they have read the judicial protocol and the Bar Council manual on the implementation of GRHs. Specialist training through CPD should be provided on law, practice and procedure (Gillen, 2019, p. 267). Legal aid should be withheld where such specialist training has not been certified (Gillen, 2019, p. 273). Training on the use of IT, social media, trends and language was also identified as an important priority for CPD (Gillen, 2019, p. 237). Specific recommendations were also made on educating and training jurors, legal professional advocates and judges on issues pertaining to rape mythology and stereotypes (see 2.5.19 above), drawing on the expertise of external expert bodies where necessary (Gillen, 2019, p. 216). Widespread training was also identified as a priority on issues affecting marginalised communities, including witnesses with learning and physical disabilities, BAME groups, the elderly, the LGBT+ community, sex workers, and male complainants (Gillen, 2019, pp. 409-452).

6.3.5 An Implementation Plan was published by the Department of Justice in June 2020 which identified Strategic Priority Areas for action, based on prioritising those actions which would carry 'the greatest impact on complainants going through the criminal justice system' (Department of Justice, 2020). Plans were originally made to phase in the reforms over a three-year period, though this was extended to five years (until 2024/25) following the impact of Covid-19. However, the Plan contained

no concrete detail on Gillen's recommendations regarding the expansion of pre-recorded cross-examination, possibly due to the concerns expressed by the Bar Council.

6.3.6 The first major changes to take effect were contained in Practice Direction No. 2/2019, *Case management in the Crown Court including protocols for vulnerable witnesses and defendants*. The Practice Direction made substantial updates to case management procedures contained in Practice Direction No.5/2011. Two separate protocols have been appended to the Practice Direction. The Protocol for Vulnerable Witnesses (Annex A) outlines the additional steps and provisions necessary to encourage, facilitate and support the attendance and participation of vulnerable witnesses to give their best evidence in all trials. Detail is given on the purpose and nature of GRHs, as well as RIs and the Witness Service / Young Witness Service in preparation for, and during, their evidence in court. Annex B contains a similar protocol specifically outlining support and special measures for young defendants.

6.3.7 Practice Direction No. 2/2019 clarifies that the principle of best evidence applies to all witnesses, including the accused. It proceeds to note that '[t]his may mean departing radically from traditional questioning techniques in the cross-examination of a vulnerable witness. The form and extent of the cross-examination of a vulnerable witness will vary from case to case' (at 25). In order to achieve this, a GRH should be held to consider how questioning should be adapted to meet the needs of the witness; such hearings should ordinarily be held in all cases involving vulnerable complaints and are mandatory in all cases involving a child witness or where an intermediary has been appointed to assist in communication. Moreover, '[a]ll legal representatives in the case should ensure they are fully conversant with current best practice in the examination and cross examination of vulnerable witnesses' (at 26).

6.3.8 The GRH should result in a 'trial practice note' setting out clearly any directions given or agreements made at the GRH. It is the responsibility of the legal representatives to ensure they comply with the agreements made at the GRH. However, the document also imposes certain duties on both judges and advocates (pp. 30-32):

- *The judge shall stop the questioning of a vulnerable witness where there is persistent breach of the ground rules; for example where the questioning is overly-rigorous or repetitive; or where counsel requests the vulnerable witness to point to a part of the witness' own body when it has been agreed that a body map is to be used. Similarly, the judge shall stop any photographs of the vulnerable witness' body being shown around the court while the witness is giving evidence.*

- *Judges also have safeguarding responsibilities. They should be alert to vulnerabilities that may not have been previously identified and ask for relevant information to be obtained and provided where they feel this is necessary.*
- *Where evidence has been given in accordance with a special measures direction, the judge must give the jury (if there is one) such warning as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.*
- *While it is normally incumbent on a legal representative to put their client's case to a witness so that the witness will have the opportunity to comment upon it, where the witness is a vulnerable witness the judge may dispense with this normal requirement, and impose restrictions on the legal representative 'putting their case' where the judge considers that there is a risk of the witness failing to understand, becoming distressed or acquiescing to leading questions. In such circumstances, the judge has a duty to explain to the jury the directions, limitations or adaptations that have been placed on the legal representative and the reasons for them.*
- *If the legal representative fails to comply with the directions, limitations or adaptations, the judge should give relevant directions to the jury when that occurs.*

6.3.9 The Protocol also recommends that in cases where there is a child victim of a sexual crime, their evidence should be heard in a closed court (A.67), which partially implements Gillen's recommendation that the public at large should be excluded in all serious sexual offence hearings in the Crown (see 6.1.5).

7. Ireland

7.1 Background

7.1.1 Many of the basic foundations of the Irish criminal justice system can be traced back before 1922 when Ireland was still part of the United Kingdom of Great Britain and Ireland. Modern criminal procedure, however, has been increasingly shaped by the Irish Constitution. Under the Constitution, save in particular cases (namely those involving minor offences, those involving military offences and those for which the ordinary courts are considered inadequate to secure the effective administration of justice), no person shall be tried on any criminal charge without a jury (Art 38.5). Minor offences, which may be tried by courts of summary jurisdiction, are tried in District Courts. Indictable offences, meanwhile, are usually tried in the Circuit Court or in the Central Criminal Court which is where the High Court exercises a criminal jurisdiction in cases involving murder and serious sexual assault and treason offences.[19] There is also a Special Criminal Court established under the Offences Against the State Act 1939 which comes into operation when the government deems the ordinary courts inadequate to secure the effective administration of justice.[20] All judges who sit in criminal cases are professional judges and there are no lay magistrates. Solicitors and barristers have full rights of audience in all courts in Ireland.

7.1.2 One of the distinctive features of the Irish criminal justice system is the emphasis given to due process values as a result of the importance these are given in the Constitution. Of particular relevance Article 38.1 enshrines the guarantee that 'no persons shall be tried save in due course of law'. Within the last 50 years the Irish judiciary has given the due process provisions of the Constitution a dynamic interpretation which has led to the recognition of a number of unspecified constitutional rights which are of particular relevance to accused persons. In recent years successive governments, and indeed the courts, have turned their attention to victims' rights in the criminal justice system and the EU Victims' Directive has been implemented by the Criminal Justice (Victims of Crime) Act 2017 (see 3.4.5 *et seq* above and generally Campbell et al, 2021, pp. 1102-1157).

7.1.3 Given the shared common law roots, criminal proceedings in Ireland closely resemble those in England and Wales; cross-examination is a core feature of the Irish criminal trial. Following a report

[19] There is a mechanism whereby certain indictable offences (that can be tried summarily) are heard in the District Court. This can only occur where: (a) the District Court judge is satisfied on the facts that the case involves a minor offences; and (b) the defendant must waive his or her right to trial by jury. It certain cases the consent of the DPP is also required.

[20] Offences Against the State Act 1936, s 36.

from the Law Reform Commission (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 (under-17s) and persons with 'mental handicap' to give evidence in cases of physical or sexual abuse. However, the measures included in the Act were somewhat limited, only applying to these two particular groups of witnesses in a relatively narrow range of specified offences contained in section 12 of the Act.[21]

7.1.4 The legislation was largely unchanged for a quarter of a century (Cusack, 2020a: 280). As with many other jurisdictions, heightened awareness of the issues facing vulnerable witnesses and, in particular, the advent of the EU Victims' Directive (see 3.4.5 *et seq* above) acted as catalysts for a major overhaul of the law. The 1992 Act legislation 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.

7.2 Special / Alternative Measures

7.2.1 The Criminal Evidence Act 1992 (as amended) includes a number of special measures available to vulnerable witnesses in proceedings that relate to a 'relevant offence'.[22] It should be noted that not all measures are applicable in all criminal courts but are restricted to those trying the most serious offences (including the Central Criminal Court and the Dublin Circuit Criminal Court).

7.2.2 Irish law does not contain a definition of 'vulnerable witnesses'; eligibility under the Act is determined by reference to a range of criteria.[23] For example, under the Criminal Evidence Act 1992,

[21] Special measures were only available to complainants in sexual offences; offences involving violence or the threat of violence to a person; and offences consisting of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission such offences.

[22] In accordance to section 12 of the Criminal Evidence Act 1992, as amended s.30(a) of the Criminal Justice (Victims of Crime) Act 2017 and s.44(b) of the Domestic Violence Act 2018, 'relevant offence' means:
(a) a sexual offence;
(b) an offence involving violence or the threat of violence to a person;
(c) an offence under section 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998;
(d) an offence under section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008;
(da) an offence under section 33, 38 or 39 of the Domestic Violence Act 2018;
(e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c), (d) or (da).

[23] Rape Crisis Network Ireland (2018: 7-8) has suggested that the term is capable of covering 'all witnesses whose capacity to take part fully in criminal proceedings is reduced for some reason or reasons connected with personal characteristics, such as youth (meaning, under 18 years of age), or a physical or intellectual disability, or with the nature of the offence'.

special measures are available to witnesses and complainants who are under 18 years of age or have a 'mental disorder'. The latter categorisation includes individuals who suffer from 'a mental illness, mental disability, dementia or disease of the mind'.[24]

7.2.3 Certain limited special measures (namely, tv link, intermediaries, screens) are also available to adult victims with a 'specific protection need' under section 19 of the Criminal Justice (Victims of Crime) Act 2017. The criteria that are considered by An Garda Siochana and/or the Ombudsman Commission when deciding whether or not a victim falls within this category are delineated in section 15(2) of the 2017 Act.

7.2.4 Section 13 of the 1992 Act created a mandatory presumption in favour of giving evidence via television link if the person is under 18 years of age in connection with a 'relevant offence' or in any other case with the leave of the court (see below). For victims of crime specifically, as opposed to witnesses more generally, eligibility to invoke this special measure is no longer governed by an offence gateway following a significant amendment introduced by the Criminal Justice (Victims of Crime) Act 2017.[25] Consequently, under section 13(1A) of the 1992 Act, a victim of any alleged offence, including those of a non-violent or non-sexual nature, may apply, for this first time under Irish law, to give evidence through a live television link.[26] Eligibility to apply to use the measure, subject to the leave of the court, has been extended under section 19(2)(c) of the Act to include (a) child witnesses to a relevant offence; (ii) adult witnesses with a 'mental disorder' to a relevant offence; and (iii) to all victims of any offence generally (Campbell et al, 2021: 1123).

7.2.5 Where a child under 18 years of age is giving evidence (other than through a live television link) as a witness to an alleged sexual or violent offence (i.e, a 'relevant offence' under s 12 of the 1992 Act, as amended), the court may direct that a screen be positioned so as to prevent the witness from seeing the accused (unless the court is satisfied that such a direction would be contrary to the interests of justice).[27] This measure is also equally available to all alleged victims of crime regardless of the nature of the alleged act of victimisation. In addition, victims of crime who are deemed to have a 'specific protection need' have a supplementary right to apply for this special measure under the parallel terms of section 19(2)(b) of the Criminal Justice (Victims of Crime) Act which permits, at the court's

[24] Criminal Justice Act 1993, s 5, as amended by Criminal Procedure Act 2010, s 4.

[25] Traditionally access to this special measure could only be secured through a strict offence gateway whereby tv link testimony was denied to victims and witnesses in cases which did not involve a violent or sexual offence as defined by s 12 of the Criminal Evidence *Act 1992* (as substituted by s 12(b) of the Criminal Law (Human Trafficking) Act 2008).

[26] Section 13(1A) of the Criminal Evidence Act 1992 as inserted by s 30(b)(ii) of the Criminal Justice (Victims of Crime) Act 2017.

[27] Indeed, the court may issue such a direction when a victim of any offence is giving evidence, even if the victim is 18 years or older, if satisfied that the interests of justice so require (O'Malley, 2020, p. 23).

discretion, the extension of the facility to members of this victim constituency regardless of the nature of the alleged offence (see further Campbell et al 2021: 1123-1124).

7.2.6 Video-recorded evidence-in-chief is admissible for child witnesses under the age of 18, as well as for adult witnesses with a 'mental disorder' for a specified range of offences, namely any alleged sexual offences; or an alleged child trafficking or child pornography offence or a human trafficking offence (s 16(1)(b)(ii)). Importantly, this offence gateway restriction does not arise where the child witness or adult with a 'mental disorder' is the alleged victim of a crime. Accordingly, any statement made by a victim of any offence who under the age of 18, or is an adult with a 'mental disorder', during an interview with a member of An Garda Síochána, is admissible at trial as evidence of any fact stated therein of which direct oral evidence by that person would be admissible.

7.2.7 Currently, no statutory provision facilitates the admission of pre-recorded cross-examination; the witness who provided the recorded statement must be available for cross-examination at trial, and such evidence will not be admitted if the court is of opinion that its admission would be contrary to the interests of justice (s 16). The O'Malley Review (2020, p. 73) declined to recommend the use of pre-recorded cross-examination due to concerns around sufficient disclosure to the defence, though stated that it had merit for future consideration. Both Rape Crisis Ireland (2018) and the Oireachtas Joint Committee on Justice (2021) have called for the development of a pilot programme.

7.2.8 Section 14 of the Criminal Evidence Act 1992 (as amended by s 257(3) of the Children Act 2001 and s 30(c)(i) of the Criminal Justice (Victims of Crime) Act) empowers the court to appoint an intermediary to relay 'in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked'. The 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 relation to a sexual or 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'.[28] 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

[28] Section 14(1A) of the Criminal Evidence Act 1992 as inserted by s 30(c)(ii) of the Criminal Justice (Victims of Crime) Act 2017.

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.

7.2.9 Notwithstanding these statutory provisions, there is evidence to suggest that the intermediary procedure has been rarely utilised in Irish courts, which may be attributable to the fact that the legislation is vague about how, when and for what purpose intermediaries should be used, and there have never been any Rules of Court to address these issues (Rape Crisis Network Ireland, 2018, pp. 10-11). Work in this area is currently ongoing, with a national training programme recently having been approved with a pilot planned for the Limerick area (personal communications, 25 June 2021 and 21 July 2021).

7.2.10 In deciding whether to grant leave for use of live link (s 13), intermediaries (s 14) or screens (s 14A), the court shall have regard to the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation, taking into account (i) the nature and circumstances of the case, and (ii) the personal characteristics of the person.

7.2.11 Section 14B of the 1992 Act (as inserted by s 30(f) of the Criminal Justice (Victims of Crime) Act) provides for the mandatory removal of wigs and gowns where a child, or adult with a 'mental disorder' is giving evidence in respect of a relevant offence, or is giving evidence in respect of any other offence of which he or she is a victim (s 14B).

7.2.12 Section 14C of the 1992 Act, introduced pursuant to the 2017 reforms, mandatorily prohibits cross-examination in person of all witnesses (including complainants) under the age of 18 for a 'relevant offence'. A court may only depart from this strict mandatory protection in circumstances where it 'is of the opinion that the interests of justice require the accused to conduct the cross-examination personally'.[29] In addition, under section 14C(2) of the 1992 Act, victims of 'sexual offence' who are older than 18 years of age are entitled to apply for this protection.[30] In such cases, the adult complainants of the alleged sexual offence (in contrast to child witnesses of a 'relevant offence') do not enjoy the benefit of a statutory presumption in the direction of granting the accommodation. The relief is awarded at the trial court's discretion.

7.2.13 As in England and Wales, judges should inform the jury that they should not draw any inferences where the accused has been prevented from cross-examining the witness in person, or where the witness has been cross-examined by a legal representative appointed by the court. Section

[29] Section 14C(1) of the Criminal Evidence Act 1992, as inserted by s 36 of the Criminal Law (Sexual Offences) Act 2017.

[30] A listed of recognised "sexual offences" for the purposes of s 14C(2) of the Criminal Evidence Act 1992 can be found in the Schedule to the Sex Offenders Act 2001.

19(2)(a) of the Criminal Justice (Victims of Crime) Act 2017 provides that a Court may exclude members of the public from proceedings where there is a need to protect the victim from victimisation, intimidation or retaliation. This is without prejudice to the right of a parent, relative or friend of the victim, a support worker of the victim's choice, or an appropriate person under section 18 to remain in court.

7.3 The Changing Role of Judges and Advocates

7.3.1 Cross-examination in Ireland has remained largely unregulated and has been subject to relatively little judicial comment (Cusack, 2020b). However, as noted above, the EU Victims' Directive provided fresh legislative impetus for reform. Section 21 of the Criminal Justice (Victims of Crime) Act 2017 introduced a new power for the court to restrict any question asked in cross-examination at the trial, which relates to the private life of a victim and is unrelated to the offence provided that (a) the nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and (b) it would not be contrary to the interests of justice in the case. The provision complements other restrictions on the use of sexual history evidence in court under the Criminal Law (Rape) Act 1981 which are beyond the purview of this report.

7.3.2 Traditionally, Irish courts lack any tradition of holding pre-trial hearings for dealing with evidential matters that will arise in the trial as such issues have been typically addressed at the trial within a voir dire (Heffernan, 2020). Until very recently, there has therefore been no conceptual equivalent of a GRH, and no legislative framework has made provision for a preliminary hearing wherein judges and advocates can discuss the acceptable parameters of questioning in cases that involve a vulnerable witness (Cusack, 2020a, p. 297). However, 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. For example, in *DPP v FE* [2015] unreported, (Hunt J) (Bill No. 84/2013 Central Criminal Court), the judge convened a preliminary pre-trial hearing to determine an appropriate questioning strategy for an adult female complainant with Down's Syndrome. The same occurred in *DPP v NR and RN* [2016] IECCC 2 (Central Criminal Court), concerning the examination of a 12-year-old complainant in sexual abuse proceedings against his parents. Here the court permitted the use of an intermediary throughout the trial on the basis of the psychological trauma to the child of giving evidence against both parents of depraved abuse.

7.3.3 In both cases, the court was invited by the Director of Public Prosecutions to invoke its inherent jurisdiction to conduct these preliminary hearings (Cusack, 2020a, p. 298), and the O'Malley Review (2020: 63, 108) expressed strong support for the concept and stated that although legislation should be implemented as soon as possible, the courts already had inherent powers to establish such hearings (see also Rape Crisis Network Ireland, 2018, p. 18).

7.3.4 Following the O'Malley Review, a legislative scheme for pre-trial hearings was provided by the Criminal Procedure Act 2021. Section 6(1) of the Act provides a general power for a court to hold a preliminary hearing, of its own motion, for any indictable offence, where the court is satisfied that it would be in the interests of justice and conducive to the expeditious or efficient conduct of the proceedings, regardless of whether the prosecution or the defence is requesting one. At least one pre-trial hearing must take place in cases involving a 'relevant offence.'[31]

7.3.5 Section 6(7) of the Act sets out a list of case management matters that the court may take into account at the preliminary hearing. These cover a wide range of practical, procedural and evidential matters, with the court empowered to make any order relating to the conduct of the trial of the offence as appears necessary to the court to ensure due process and the interests of justice. Although the legislation does not provide a detailed breakdown of how cross-examination might be regulated through the procedure, the O'Malley Review (2020, p. 59) had envisaged that they could be used in relation to 'matters relating to disclosure, the appointment and role of an intermediary, applications to question a victim [on sexual history] …, and any special measures required for vulnerable witnesses.' Although section 6(7) makes an explicit cross-reference to the special measures under the 1992 Act, it remains unclear whether the model will evolve to encompass a similar array of issues that are currently resolved within the English GRH model. At the time of writing, the legislation has yet to take effect.

7.3.6 Both the O'Malley Review (2020, pp. 122-129) and the Oireachtas Joint Committee on Justice (2021, p. 8) have recently recognised the importance of specialist training and guidelines to improving the quality of questioning vulnerable witnesses. The Oireachtas Joint Committee on Justice (2021, p. 8, 17) has also recently pressed for the national rollout of training and accreditation for intermediaries, the increased use of video technology, and the expansion of special measures to cover all complainants in sexual assault cases.

[31] Section 6(5) defines a relevant offence as one which carries a maximum sentence of ten years or more, or one which has been specified by the Minister for Justice in an Order.

8. Australia

8.1 Background

8.1.1 Australia is a federal common law jurisdiction, with the mechanics of the criminal justice system largely modelled on the English adversarial system given its former colonial status. The Australian Courts Act 1828 stipulated that the law of England and Wales was applicable throughout Australia. During the latter part of the 19th century, increased autonomy was afforded to local governments until the Commonwealth was established under the Commonwealth of Australia Constitution Act 1900. The Act, which founded Australia as an independent country under the Crown, signalled a gradual departure from the formal influence of English law. Although the courts continued to be influenced by English precedent well into the 20th century, the Statute of Westminster 1931 (UK) and the Australia Act 1986 (Cth) have removed any direct effect of legislation passed by Westminster.

8.1.2 The 1900 Act serves as the written constitution of the Commonwealth, though it primarily acts to outline the powers of the branches of government, as well as the division of powers between the Commonwealth and the states. It does not contain a Bill of Rights, although it does confer a right to trial by jury for indictable offences under Commonwealth (though not State) law.[32] As a dualist legal order, international instruments are not binding in Australia unless expressly incorporated in federal or state law. Criminal courts in the majority of states operate at three levels, covering summary offences: the Magistrates' Court (or Local Court in NSW), the District Court (or County Court in Vic) and the Supreme Court. For the most part, all judges are professional rather than lay, and are generally experienced practitioners. Although the legal profession is fused in the majority of states, most states retain a specialist bar whilst New South Wales and Queensland retain distinct roles for solicitors and barristers which are separately regulated.

8.1.3 While the format of criminal trials remains adversarial, mirroring that of England and Wales, the rules of evidence and procedure have diverged significantly. The bulk of criminal offences are prosecuted under the law of individual states and territories, with each state or territory operating its own rules of evidence and procedure that determine how witnesses are cross-examined (see below). The Commonwealth courts exercise a limited criminal jurisdiction over issues of a 'national'

[32] Australia Constitution Act 1900, s 80.

character relating including drug trafficking, customs breaches, terrorism offences, the postal service and piracy pursuant to the Crimes Act 1914 (Cth).

8.1.4 Following a draft Bill proposed by the Australian Law Reform Commission (2005), there has been a drive towards a unified evidence regime. In 1995, the Commonwealth and New South Wales (NSW) each enacted legislation based on the draft Bill (Evidence Act 1995 (Cth); Evidence Act 1995 (NSW)). The provisions of the 1995 Act are also broadly mirrored in Victoria (Evidence Act 2008), the ACT (Evidence Act 2011), Tasmania (Evidence Act 2001) and the Northern Territory (Evidence (National Uniform Legislation) Act 2011).[33] However, the majority of reforms providing for giving evidence under the kind of special measures discussed above have been deemed to fall outside the scope of the uniform evidence acts and, as documented below, have instead been enacted in separate legislation. Queensland, South Australia and Western Australia opted not to pursue the uniform approach at all. Thus while many of the reforms to cross-examination share certain commonalities across the different states and territories, there is some degree of divergence on the types of mechanisms that have been introduced.

8.1.5 Many Australian jurisdictions differ from other common law jurisdictions insofar as committal proceedings may require the attendance and testimony of witnesses. The proceedings are held before a magistrate to determine whether there is sufficient evidence against an accused for the case to proceed to trial at a higher court. Recent years have seen many jurisdictions move to a paper/digital-based approach, including the wider use of written or recorded statements, or allow for a conferencing process with the DPP in chambers. Anecdotal evidence from practitioners suggests that such a trend has apparently accelerated during the pandemic. Most states contain express prohibitions on calling child witnesses, witnesses with learning disabilities and complainants in sex cases to testify,[34] with the exception of Queensland this remains possible, subject to stringent conditions.[35]

8.1.6 Over the last 20-30 years, there has been a growing awareness of the difficulties experienced by vulnerable witnesses under cross-examination. As in many other jurisdictions, children and persons with learning disabilities were considered 'inherently unreliable' as witnesses until the 1990s. (Bowden et al., 2014, pp. 546-547; Powell et al., 2015, p. 499). Cossins (2009, 2020) discusses a poignant range of issues that have typically confronted vulnerable witnesses under cross-examination.

[33] On divergence from the Uniform Act, see https://www.ag.gov.au/legal-system/publications/uniform-evidence-acts-comparative-tables [accessed 01 July 2021]
[34] See eg; CPA (NSW) s 83 which stipulates that certain complainants cannot be directed to attend committal proceedings, ie cognitively impaired person, complainant of child sexual abuse.
[35] Evidence Act 1977, s 31AG(4).

These include mental abuse, intimidation and humiliation by defence lawyers, the use of complex and leading questions to produce inaccuracies and inconsistencies in children's testimony and the prevalence of myths and stereotypes among jurors that are reinforced through defence cross-examination strategies. Cross-examination, she concludes, is an 'instrument of injustice' that may produce inaccurate evidence favouring the defence case (Cossins, 2020, pp. 90-91). A comparative study between the cross-examination of Australian child sexual abuse complainants in the 1950s with the present day found that the format of cross-examination questions has remained largely unchanged (Zajac et al, 2018). The majority of questions were still leading in nature, with the format being less open-ended and more complex than those used in the 1950s. On average, complainants in contemporary cases were asked three times as many cross-examination questions as they were 60 years ago.

8.1.7 In the course of the past five years, three separate commissions of inquiry have considered matters pertaining to access to justice for complainants in cases of sexual violence (Royal Commission into Family Violence (RCFV), 2016; Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA), 2017; Victorian Law Reform Commission on the Role of Victims of Crime in the Criminal Trial Process (VLRC), 2016). Considerable deficits in the treatment of complainants were reported in all three inquiries, including the manner of questioning under cross-examination, and cited as major factors contributing to their dissatisfaction with justice processes. The recommendations of these inquiries have acted as a catalyst for further significant reforms across many jurisdictions over the past five years. However, by the same token, the recommendations in all three reports stopped short of altering the fundamental adversarial character of criminal hearings.

8.1.8 In response, many states and territories have updated the procedural and evidence rules relating to the questioning of vulnerable witnesses. The tendency has been to focus on the specific needs of particular vulnerable groups in order to reduce attrition rates and reduce fears of secondary victimisation (Kirchengast, 2021, p. 54). However, the intended effect of legislative change is, on occasion, offset by the wide-ranging discretionary powers that judges retain in most jurisdictions.

8.1.9 The majority of the provisions governing the cross-examination of vulnerable witnesses across the states and territories are consolidated within the following pieces of legislation:

- NSW: Evidence Act 1995 / Criminal Procedure Act 1986
- Victoria: Evidence Act 2008 / Criminal Procedure Act 2009
- Queensland: Evidence Act 1977
- Western Australia: Evidence Act 1906

- South Australia: Evidence Act 1929
- Tasmania: Evidence Act 2001 / Evidence (Children and Special Witnesses) Act 2001 and Evidence (Children and Special Witnesses) Amendment Act 2020
- ACT: Evidence Act 2011 / Evidence (Miscellaneous Provisions) Act 1991
- Northern Territory: Evidence Act 1939, Evidence (National Uniform Legislation) Act 2011.

8.2 Alternative Means of Giving Evidence

8.2.1 All Australian states and territories permit certain witnesses to make use of a range of alternative means of giving evidence. Legislation variously makes reference to vulnerable witnesses / persons, affected witnesses / child witnesses and 'special witnesses'. In all jurisdictions these categories will include children either under the age of 16 (e.g. NSW, Queensland, South Australia) or under the age of 18 (e.g. Western Australia, Tasmania, Northern Territory). Witnesses with learning and physical disabilities / impairments are also eligible in all jurisdictions. Other common categories of witnesses include complainants in sexual offence cases (Western Australia, Northern Territory), complainants in domestic violence cases (Northern Territory) and those testifying in proceedings for a criminal organisation offence (Queensland, Western Australia, South Australia).

8.2.2 Most jurisdictions do not follow a rigid 'closed category' approach but give discretion to determine which witnesses should benefit from alternative measures. For example, in Tasmania a 'special witness' is defined as a person that is likely 'to suffer severe emotional trauma, or to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reason of intellectual, mental or physical disability; age, cultural background, relationship to any party; or the person is likely to suffer severe emotional trauma; or be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily'.[36] In Western Australia, witnesses may be eligible where they are likely to 'suffer severe emotional trauma or to be so intimidated or distressed as to be unable to give evidence satisfactorily'.[37] South Australia also provides for alternative measures for alleged victims where 'the offence is a serious offence against the person; or where, because of the circumstances of the witness or the circumstances of the case, the witness would, in the opinion of

[36] Evidence (Children and Special Witnesses) Act 2001, s 8(1).
[37] Evidence Act 1906, s 106R(3).

the court, be specially disadvantaged if not treated as a vulnerable witness'.[38] Measures are applicable in the Northern Territory to 'a person considered vulnerable by the court'.[39]

8.2.3 The live link facility is the most common alternative measure available in all jurisdictions. There is a presumption in favour of its use for certain classes of vulnerable witnesses in Queensland, Western Australia and Tasmania, the Northern Territory and the ACT (subject to availability). Where facilities are unavailable (either within the court precinct or an approved place), legislation provides for the use of a screen or other arrangements where such facilities are unavailable (e.g. NSW, Victoria, WA). Oliver (2006) argues that the live link provisions were often disregarded in practice in Queensland, with insufficient facilities in certain courts meaning that children will be required to give evidence in the same room as the accused. (Oliver, 2006, p. 64). In South Australia use of the live link is not restricted to vulnerable witnesses.[40] Screens are also available in all jurisdictions on the basis of common law discretionary powers.

8.2.4 In 1992, Western Australia became the first common law jurisdiction to provide for pre-recorded evidence to be received in its entirely. Sections 106HA–106HD of the Evidence Act provide for the pre-recording of interviews with children and persons with mental impairment which serves as a substitution for live evidence at trial. The procedure is now 'firmly embedded' within the criminal justice process and is broadly supported by defence and prosecution counsel, as well as the judiciary (Bowden et al., 2014, pp. 567-571; Henderson et al, 2012).

8.2.5 The report of the RCIRCSA recommended that all states and territories legislate for the pre-recording of the entirety of a witness's evidence in child sexual abuse prosecutions, as well as in all other cases involving children and vulnerable adults (RCIRCSA, 2017, p. 107). This recommendation, coupled with the perceived success of the Western Australian approach, acted as a catalyst for similar reforms in other Australian jurisdictions. All jurisdictions now provide for pre-recorded evidence-in-

[38] Evidence Act 1929, s 4. "vulnerable witness" means— (a) a witness who is under 16 years of age; or (b) a witness who is cognitively impaired; or (c) a witness who is the alleged victim of an offence to which the proceedings relate— (i) where the offence is a serious offence against the person; or (ii) in any other case— where, because of the circumstances of the witness or the circumstances of the case, the witness would, in the opinion of the court, be specially disadvantaged if not treated as a vulnerable witness; or (d) a witness who— (i) has been subjected to threats of violence or retribution in connection with the proceedings; or (ii) has reasonable grounds to fear violence or retribution in connection with the proceedings; or (e) in the case of proceedings for a serious and organised crime offence (within the meaning of the *Criminal Law Consolidation Act 1935*)—a person who will only consent to being a witness in the proceedings if he or she is treated as a vulnerable witness for the purposes of the proceedings.

[39] Evidence Act 1939, s. 21AB

[40] Evidence Act 1929 s 13(1).

chief, with pre-recorded cross-examination / re-examination in certain circumstances also available in Victoria, Queensland, South Australia, Tasmania, ACT and the Northern Territory.

8.2.6 In NSW, a general rule applies that all children under the age of 16 and those with cognitive impairments are entitled to give evidence in chief by pre-recorded interview (s. 306U), unless it is not in the interests of justice to do so (s 306Y). Indeed, a vulnerable person must not be called to give evidence-in-chief by means other than a pre-recording, unless the person calling the witness has taken into account the wishes of the vulnerable person (s 306T). The witness must be available for cross-examination and re-examination, either orally in the courtroom or by way of closed circuit television (s. 306U(3), 306ZA). The Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 provided for a pilot of pre-recorded cross-examination and re-examination, alongside the use of intermediaries for child witnesses at Newcastle and Sydney District Courts. After a three year pilot and evaluation finding broad support for the initiative (Cashmore et al, 2017), the programme was rolled out permanently to all District Courts and Child Abuse Unit locations from April 2019. Following the onset of the Covid-19 pandemic, the 1995 Act was amended to allow for the admission of pre-recorded evidence-in-chief and pre-recorded cross/re-examination subject to certain requirements contained in section 356 of the legislation.

8.2.7 In Victoria, legislation provides for a 'special procedure' whereby the evidence in its entirety must be pre-recorded at a pre-trial hearing where children under 18 or those with a cognitive impairment are testifying (s 370, see further Cossins, 2020, p. 604). Pre-recorded evidence-in-chief is also provided for such witnesses in indictable offences involving an assault, injury or threat of injury, and certain offences involving child pornography. Similar special procedures which allow evidence to be fully pre-recorded are available in South Australia and Tasmania.

Support persons / intermediaries

8.2.8 All Australian jurisdictions provide the right for vulnerable witnesses to be accompanied by a 'support person'. In NSW, the Evidence Act 1995 provides that that person may be a parent, guardian, relative, friend or support person of the vulnerable person, and may sit alongside the vulnerable person as an interpreter, for the purpose of assisting the vulnerable person with any difficulty in giving evidence associated with an impairment or a disability, or for the purpose of providing the vulnerable person with other support. A similar provision exists for complainants in cases involving prescribed

sexual offences or domestic violence (s 294C) and similar provisions are in place in all states and territories.

8.2.9 The role of a support person is distinct from that of an intermediary – also referred to as a communicator (WA), communication assistant / partner (South Australia), or a 'children's champion' (NSW). The function of an intermediary is to support effective communication, rather than provide emotional support to the witness (NSW Government, 2016). The RCIRCSA (2017, p. 107) recommended that all jurisdictions establish intermediary schemes similar to those that operate in England and Wales, stating that government should ensure that any scheme:

> *a. requires intermediaries to have relevant professional qualifications to assist in communicating with vulnerable witnesses*
>
> *b. provides intermediaries with training on their role and in understanding that their duty is to assist the court to communicate with the witness and to be impartial*
>
> *c. makes intermediaries available at both the police interview stage and trial stage*
>
> *d. enables intermediaries to provide recommendations to police and the court on how best to communicate with the witness and to intervene in an interview or examination where they observe a communication breakdown.*

8.2.10 All jurisdictions (with the exception of the Northern Territory) now facilitate the involvement of intermediaries within the criminal process. The Criminal Procedure Act 1986 (NSW) provides for the use of a witness intermediary (labelled 'children's champion') for children who are complainants or prosecution witnesses in relation to one or more prescribed sexual offences. The court must appoint a children's champion for any witness who is under 16 years of age, and has the discretion to appoint an intermediary for any witness over that age where the witness has difficulty communicating. The role of the children's champion is to communicate and explain the questions put to the witness, as well as explaining the witness's answers to any person asking such a question. The person appointed as a children's champion has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the best evidence (NSW Government, 2016).

8.2.11 Intermediaries were introduced in Victoria under the Justice Legislation Amendment (Victims) Act 2018, inserting a new Part 8.2A to the Criminal Procedure Act 2009. The wording of the legislation in both NSW and Victoria closely mirrors the English provisions (see 4.2.12 *et seq* above). The function of an intermediary is to communicate questions to the witness, and communicate answers back to

the court. As an officer of the court, the intermediary is under a duty to act impartially and must not advocate for the witness. An intermediary pilot programme commenced in Victoria on 1 July 2018 and was completed on 30 June 2020 (Children's Court of Victoria, 2018). Subsequently, all courts in Victoria are empowered to appoint an intermediary to assist child witnesses under the age of 18.[41]

8.2.12 In Queensland, the Department of Justice and the Attorney-General launched a two-year intermediary pilot programme in December 2020. It will apply to any child sexual offence prosecution witness who is under 16, or to any witness with an impairment of the mind, or with difficulty in communicating. This programme is currently being piloted in Brisbane and Cairns (Queensland Government, 2020).

8.2.13 In Western Australia, section 106F of the Evidence Act 1906 provides for the appointment of a 'communicator' for child witness. Despite the difference in terminology, the role is basically akin to that of an intermediary with the communicator empowered to explain difficult questions to child complainants and explain children's evidence to the court (Bowden et al., 2014, pp. 574-575; Richards, 2009, p. 3). However, the use of the intermediary is rarely used in practice; which may be attributed to a broad judicial discretion and a lack of clear policy or guidelines (Powell et al., 2015, p. 501).

8.2.14 In South Australia, the entitlement of parties with complex communication needs to 'communication assistance' and 'communication partners' to perform this role was established in South Australia in 2016 as a trained volunteer program which was part of a Disability Justice Plan under? the Statutes Amendment (Vulnerable Witnesses) Act 2015. Section 14A of the Evidence Act 1929 provides that the court has the discretion to allow 'communication assistance' for witnesses with complex communication needs to facilitate the understanding and communicating of the witness with the court during proceedings (on application). However, the scheme was relatively little used in practice, and funding was withdrawn in March 2020.[42] The South Australian scheme now engages the services of paid practitioners as communication partners for a fee, with partners required to be qualified in speech pathology, occupational therapy, psychology, developmental education or social work (D Plater, 2021, personal communication).

8.2.15 The ACT has adopted a near-identical regime to NSW and Victoria. The Evidence (Miscellaneous Provisions) Amendment Act 2019 amends the Evidence (Miscellaneous Provisions) Act 1991. Intermediaries must be appointed for all child complainants in sexual offence proceedings and all child witnesses in homicide proceedings (subject to a small number of exceptions). Courts may appoint

[41] Criminal Procedure Act 2009, ss. 389F–389K.
[42] The independent South Australian Law Reform Institute based at the University of Adelaide is currently evaluating the SA intermediary model.

intermediaries in the ACT for a witness with a communication difficulty on its own initiative or on application (Evidence Act 1995, s. 4AG–4AN). ACT is one of only two jurisdictions (with South Australia) which facilitate the use of intermediaries by defendants (Giuffrida and Mackay, 2021).

8.2.16 Tasmania became the latest state to pilot the use of intermediaries pursuant to an amendment to the Evidence (Children and Special Witnesses) Act 2001 which was enacted in 2020. The amending legislation is near-identical to statutory reforms in Victoria and the ACT, making use of intermediaries to facilitate the evidence of children (under 18) and vulnerable adults with communication needs. The pilot began in March 2021 and will operate for three years (Archer, 2020). The accused is ineligible for this measure. No legislative provisions exist governing the use of intermediaries in the Northern Territory.

Other mechanisms

8.2.17 As in many other common law jurisdictions, all Australian jurisdictions preclude the accused from conducting cross-examination in person in cases involving child witnesses or sex complainants. South Australia and Tasmania prohibit in-person cross-examination of any alleged victim of an offence. Most jurisdictions, with the exception of Western Australia, and South Australia permit the judge to exclude the public from the hearing while vulnerable witnesses are giving evidence. Victoria, Queensland and South Australia contain separate provisions for the exclusion of the accused from the court room with provision to monitor proceedings remotely via live link.

8.2.18 The use of therapy dogs / 'canine companions' is also becoming more widespread throughout Australia. It is claimed that the presence of a therapy dog reduces anxiety for some witnesses and has significantly assisted witnesses' communication of their evidence (see further Cooper, 2020, pp. 151-154). A well-embedded scheme, the *Canine Court Companion Program*, operates across ACT and NSW following a recommendation from the RCIRCSA,[43] while in South Australia the Evidence Act 1929 was recently amended to provide for witnesses to be accompanied by a canine companion for the purpose of providing emotional support while they are giving evidence.[44]

[43] RCIRCSA (2017), s 62(b).
[44] Evidence (Vulnerable Witnesses) Amendment Act 2020, Pt II.

8.3 Changes to the Roles of Judges and Advocates

8.3.1 Case law from all the jurisdictions underlines the inherent common law powers of the judiciary to control the conduct of proceedings (Bowden et al., 2014, pp. 548-50). Examples include curtailing irrelevant, unnecessary, or repetitive questions (*R v Kelly; Ex parte Hoang van Duong* (1981) 28 SASR 271); restricting leading questions (*Mooney v James* [1949] VLR 22 at 28; *Stack v State of Western Australia* (2004) 29 WAR 526), and imposing limits on protracted questioning where it serves no forensic purpose (*GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (no 3)* (1990) 20 NSWLR 15 at 23) (Hopkins & Boyd, 2010). The common law rules also aim to prevent questions that are offensive, intimidating, harassing, badgering, belittling, bullying, abusive or sarcastic; questions taking the form of comments on the witness or their testimony, or that cut off a witness's answers; compound questions, or questions that are otherwise misleading and confusing, for example, because they may be lengthy, include difficult vocabulary or use the negative; and argumentative questions and questions resting on controversial assumptions (see *Libke v The Queen* (2007) 230 CLR 559).

8.3.2 However, as in many other jurisdictions, judges have been somewhat reticent to intervene (see 2.3.15, 4.3.1 above, 9.3.4 below). The High Court in *Wakely v R* (1990) 64 ALJR 321 stated that the limits of cross-examination are not susceptible of precise definition and that, whilst courts have an overriding duty to control cross-examination, trust is placed in the professional role of counsel and courts should not be too swift to intervene:

> *[A] judge should allow counsel some leeway in cross-examination in order that counsel may perform the duty … of testing the evidence given by an opposing witness … It is the duty of counsel to ensure that the discretion to cross-examine is not misused. That duty is more onerous because counsel's discretion cannot be fully supervised by the presiding judge. Of course there may come a stage where it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached — and it is for the judge to ensure that the stage is not passed — the court is, to an extent, in the hands of cross-examining counsel*. (at 325)

8.3.3 This problem was recognised by the Australian Law Reform Commission as far back as 1995, noting that the power to control questions during cross-examination was 'patchy and inconsistent' (Australian Law Commission, 2005, §5.91). In 2002, the NSW parliamentary *Report on Child Sexual Assault Prosecutions* (NSW Standing Committee on Law and Justice, 2002, pp. 78-79) stated that

existing common law protections were inadequate, and their lack of effectiveness could be attributed in part to judges' lack of awareness about the impact on children of such questioning, fears of appeals arising from 'excessive' intervention, or a belief that distress to the child complainant is necessary or inevitable (see also Drabsch, 2003; Oliver, 2006; Cossins, 2009).

8.3.4 The essence of the problem is neatly summarised by Hopkins and Boyd (2010, p. 149):

> *[D]rawing the line between acceptable and unacceptable cross-examination is not simply a matter of legislative definition or mandated powers of intervention – it is a question of perspective. The questions asked in cross-examination of a child witness may appear improper from the perspective of a child, a lay person or a person with specialised knowledge of child development and child behaviour. And yet, those same questions may be viewed as entirely proper from the perspective of legal participants, long trained in the adversarial process and cognisant of the centrality of cross-examination to the defendant's right to a fair trial. Ultimately it is the latter perspective that counts in court.*

8.3.5 As the authors intimate, lawmakers across Australia have shown a greater willingness to introduce legislation to restrict or prevent excessive cross-examination than has been the case in other common law countries including the UK and Ireland. This is attributable in part to a growing acceptance that the defendant's right to cross-examination is not absolute (Cossins, 2020). For example, Queensland, ACT, Tasmania, and the Northern Territory have enshrined 'general principles' to be applied in all cases involving child witnesses. These are contained in section 9E of the Evidence Act 1977 (Qld), section 4A of the Evidence Act 2011 (ACT), and section 3A(2) of the Evidence (Children and Special Witnesses) Act 2001 (Tas):

> *(a) The child is to be treated with dignity, respect and compassion.*
>
> *(b) Measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence.*
>
> *(c) The child should not be intimidated in cross-examination.*
>
> *(d) The proceeding should be resolved as quickly as possible.*

The Northern Territory (Evidence Act 1939, s 21D) adds a fifth principle:

> *(e) All efforts must be made to ensure that matters that may delay or interrupt a child's evidence in a proceeding are determined before a special sitting or trial commences.*

8.3.6 Many jurisdictions have moved to introduce new legislation which prohibits certain approaches to, or line of, questioning. In 2005, the NSW Law Reform Commission – together with the Australian Law Reform Commission and the Victorian Law Reform Commission – agreed that the uniform Evidence Acts should be amended to impose such a duty on judges to overcome judges' long-standing reluctance to intervene in cross-examination (ALRC et al, 2005). Consequently, the uniform Acts in NSW, Victoria, Tasmania, the ACT and the Northern Territory were amended to provide courts with a broad discretion to make any such order that they consider just in relation to the way in which witnesses are to be questioned (s 26), and it may even order that the witness give evidence completely or partly in narrative form (s 29). In addition, section 41 of the uniform Acts stipulates that the court must disallow any improper questions put to a witness if that question:

(a) is misleading or confusing.

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive.

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate.

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

8.3.7 Additionally, the court has the power to curtail leading questions, disallowing them if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used (s 42). New Bar Association Rules have also been introduced in NSW to prevent barristers from asking sexual assault complainants improper questions and to encourage them to take into account 'any particular vulnerability of the witness' in the way questions are put (NSW Bar Association, 2008, r 35A(b)). Similarly, regulations in Queensland, Victoria and Western Australia state that '[a] barrister must take into account any particular vulnerability of the witness in the manner and tone of the questions that the barrister asks.'[45]

8.3.8 In Queensland, section 21 of the Evidence Act 1977 does not impose a duty on the court to disallow those questions that may be considered improper, but empowers them to do so if the question uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive. In determining whether a question is an improper question, the court must take into account any mental, intellectual or physical impairment the witness has or appears to have, and any other matter about the witness the court considers relevant (e.g. age,

[45] Bar Association of Queensland Barristers' Conduct Rules (23 February 2018), s. 61(b); - Legal Profession Uniform Conduct (Barristers) Rules 2015 (Current version for 18 January 2019 to date), s. 62(b); Western Australian Barristers' Rules (amended as at 23 February 2017), s. 61(b).

education, level of understanding, cultural background, relationship to any party to the proceeding, etc.).

8.3.9 In Western Australia it is for the court to decide whether or not the witness should answer a question relating to credit only (Evidence Act 1908, s 25). It also grants the court the power to disallow improper questions in cross-examination, including those which are misleading, or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive (s 26). Western Australia has also developed best practice guidelines to provide appropriate guidance during the questioning of vulnerable witnesses which are contained within the Bench Book and a circular issued to practitioners.[46]

8.3.10 In South Australia, the court may disallow any questions considered to be vexatious or irrelevant to any matter proper to be inquired into in the proceeding (Evidence Act 1929, s 22). Questions relating solely to the credit of the witness may be asked, subject to the court's power to disallow them. The court is also under a duty to disallow any inappropriate questions, which under s 25 are considered to arise where the question is misleading or confusing; is expressed in language that is unnecessarily complicated; is apparently based on a stereotype; is unnecessarily repetitive, offensive or oppressive (or one of a series of questions thereof); or if the question is put in a humiliating, insulting or otherwise inappropriate manner or tone (see further Caruso et al, 2012).

8.3.11 Following the VLRC report of 2016 and the 2017 report of the RCIRCSA, several jurisdictions have adopted GRHs similar to those which were first developed in England and Wales (see 4.4 above). Although originally discouraged in NSW, the jurisdiction moved to introduce them in cases involving intermediaries from 2016 (Cooper & Mattinson, 2017).[47]

8.3.12 GRHs were first provided for on a legislative basis in Victoria alongside intermediaries through the Justice Legislation Amendment (Victims) Act 2018, inserting a new Part 8.2A to the Criminal Procedure Act 2009. GRHs are required in any proceedings in which an intermediary has been appointed for child witnesses (under 18) and cognitively impaired witnesses with the exception of the accused. They are available in sexual offence / family violence hearings, indictable offences which

[46] See Department of the Attorney General (WA), 2009: .4.6–4.4.10 [4.4.3.3.2]–[4.4.3.3.5], 5.5.6–5.5.11 [5.5.5]–[5.5.6]) and the *Circular to Practitioners: Guidelines for Cross-Examination of Children and Persons Suffering a Mental Disability* (District Court of Western Australia, 2010). See further Bowden et al., 2014: 564-65).

[47] Guidance is now contained in the Criminal Trial Courts Bench Book, District Court, Criminal Practice Note 11 (Judicial Commission of New South Wales, 2021).

involves assault, injury or threat of injury to a person; or common assault or aggravated assault if such offences relate to one of the above-listed offences (Criminal Procedure Act 2009, s 389A(1)).

Section 389E sets out a series of non-exclusive directions which may arise from a GRH:

> (a) A direction about the manner of questioning a witness;
>
> (b) A direction about the duration of questioning a witness;
>
> (c) A direction about the questions that may or may not be put to a witness;
>
> (d) If there is more than one accused, a direction about the allocation among the accused of the topics about which a witness may be asked;
>
> (e) A direction about the use of models, plans, body maps or similar aids to help communicate a question or an answer;
>
> (f) A direction that if a party intends to lead evidence that contradicts or challenges the evidence of a witness or that otherwise discredits a witness, the party is not obliged to put that evidence in its entirety to the witness in cross-examination.

8.3.13 In Tasmania, the Evidence (Children and Special Witnesses) Amendment Act 2020 amends the Evidence (Children and Special Witnesses) Act 2001 to replicate the regime in Victoria; section 12(7)K provides the same examples of non-exclusive directions. In the ACT, the Evidence (Miscellaneous Provisions) Amendment Act 2019 amends the Evidence (Miscellaneous Provisions) Act 1991 to establish the legislative framework for the use of intermediaries and GRHs. One unique feature is that the ACT programme often uses therapy dogs to work alongside intermediaries while witnesses give evidence at police interviews. It is claimed that the presence of a therapy dog reduces anxiety for some witnesses and has significantly assisted witnesses' communication of their evidence (ACT Government, 2020; see further Cooper, 2020). To this end, in addition to replicating the sample directions set out in the Victorian legislation, the ACT legislation provides for 'a direction about the use of a support animal by the witness' (Evidence (Miscellaneous Provisions) Amendment Act 2019, s 4AF(f)). Similar provisions now also exist in South Australia.

9. New Zealand

9.1 Background

9.1.1 Like Australia, New Zealand inherited a colonial legal system based on the English common law tradition. English law was routinely applied from the earliest days of colonisation, with the English Law Act 1858 stipulating that English law (as it stood at 1840) was applicable throughout the country. The Treaty of Waitangi, signed in 1840 between the Crown and Mäori Chiefs, is widely recognised as the founding constitutional document although its precise legal status remains contested (McDowell and Webb 2006, p. 80). Under the Treaty, all people are considered equal under the law as citizens of New Zealand under colonial law, with equal protections afforded to the Mäori, and specific responsibilities were set out in relation to chieftainship of their lands.

9.1.2 The legal basis of New Zealand's constitution was further clarified through Westminster's passage of Constitution of Government in the New Zealand Islands Act 1846 and the New Zealand Constitution Act 1852 which created a representative parliamentary democracy and a system of provincial government. Following the declaration of Dominion status in 1908, the country began to exercise increasing legal independence. The Judicature Act 1908 established a new judicial system and clarified that a distinct legal order existed, separate from that of England and Wales. Most remaining legislative limitations were removed by the Statue of Westminster 1831 (adopted by New Zealand in 1947),[48] while the Constitution Act 1986 confirmed the supremacy of the New Zealand parliament and ended any remaining jurisdiction of Westminster.[49]

9.1.3 New Zealand lacks a unitary written constitution; like the British Constitution, it draws from a range of written and unwritten sources including general principles (such as the rule of law), legislation (from both the imperial and New Zealand parliaments), the Treaty of Waitangi, constitution

[48] The Westminster Parliament effectively conceded that the New Zealand parliament had the power to amend, suspend and repeal its own constitution under the New Zealand Constitution (Amendment) Act 1947.
[49] A small number of English statutes remain in force, including the Magna Carta and the Bill of Rights: Imperial Laws Application Act 1988, s 3.

conventions, and the common law. Human rights and fundamental freedoms are provided for under the New Zealand Bill of Rights Act 1990, which entrenches a range of civil and political rights including the right to a fair trial.[50] For present purposes, section 25 of the Act contains nine 'minimum standards of criminal procedures', including 'the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution.'[51]

9.1.4 In terms of the criminal courts system, summary offences and the majority of indictable offences are heard in the District Court. Depending on the offence, these may be heard before two Justices of the Peace, a Community Magistrate or a District Court judge. The most serious indictable offences are tried by jury in the High Court, which also exercises an appellate function for cases heard at the District Court.[52] The Supreme Court replaced the Privy Council as the highest court in New Zealand following its creation in 2004. Criminal proceedings are adversarial in nature, with the majority of rules of evidence and criminal procedure consolidated under the Evidence Act 2006.

9.1.5 The New Zealand legal profession is largely fused; while barristers and solicitors still notionally exist as separate branches of the profession, the distinction is largely moot with most lawyers practising both roles. However, a small number of lawyers practice as 'barristers sole', meaning that they specialise in court-based advocacy and work must be referred to them from solicitors (McDowell and Webb 2006, p. 80).

9.1.6 In the 1980s, there were growing concerns in New Zealand about the experiences of child witnesses within the criminal justice system. Debates about the need for alternative measures prompted the establishment of an Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children' (the 'Geddis Committee') in 1985. The Committee's report, *A Private or Public Nightmare?*, noted that some measures – such as the use of screens, removal of wigs and gowns, or closure of the court to the public – were already available under the court's inherent jurisdiction (Department of Social Welfare, 1988). However, the Committee concluded that significant changes were required to the law of evidence in order to bring about meaningful change for child witnesses.

[50] The Act specifically states that it is not superior to other legislation and that the judiciary are not empowered to declare any non-conforming legislation as non-applicable (s 4). However, s 5 contains a preferential interpretation clause, meaning that wherever an enactment can be given a meaning that is consistent with the Act, that meaning shall be preferred to any other meaning.
[51] New Zealand Bill of Rights Act 1990, s 25(f).
[52] Unless – in the case of certain specified offences – the accused opts to be tried by judge alone.

9.1.7 In 1990, New Zealand became the first common law country to introduce a comprehensive legislative package of reforms for child witnesses (Hanna et al., 2012a). The Evidence Amendment Act 1989 (amending the Evidence Act 2006) introduced three new statutory means for complainants under the age of 17 in sexual assault offences to give testimony: the pre-recording of evidence-in-chief; giving evidence via live-link; and or placing a screen between the child and the accused. The same legislation also restricted the defendant's right to cross-examine children or mentally impaired persons and abolished the judicial practice of requiring corroboration of children's evidence.

9.1.8 By the mid-1990s, the use of these alternative modes was so common as to be 'the norm rather than the exception' (New Zealand Law Commission, 1996, p. 25). However, in spite of these reforms, it became apparent that, in practice, courts were not always making use of the power to utilise special measures under the legislation and that courts were continuing to fail child witnesses (Davies et al, 1997; Davies & Seymour, 1998). Henderson (2012) suggests that this may have been attributable in part to the lack of governmental investment in infrastructure, training and organisation. In 1996, the Law Commission and the Working Party of the Courts Consultative Committee released proposals for reform of the infrastructure and the evidence law. Its report, *The Evidence of Children and other Vulnerable Witnesses*, advocated for the extension of alternative ways of giving evidence to all witnesses:

> *123. Children and mentally handicapped witnesses can, under the current provisions, give evidence in alternative ways, but only if they are complainants in cases of sexual offending. We consider that many of the reasons for allowing children, or intellectually disabled adults, to give evidence in alternative ways apply irrespective of whether the witness is a complainant and whatever the nature of the crime alleged. These reasons include the possibility of memory deterioration, unfamiliarity with the courtroom environment, adverse reaction to stress and a lack of sophisticated communication skills.*
>
> *124. Other people have very real disadvantages in carrying out many activities of daily living in relation to employment, education, transportation, communication and management of financial affairs. These disadvantages are likely to have implications for their ability to perform effectively as witnesses in the courtroom, although research specific to the legal context is limited. We consider that it is appropriate to allow more people to use the alternative procedures. There is widespread acceptance of the alternative ways of giving evidence, no major problems have arisen, the disadvantages are minimal, and the benefits for people to whom the provisions presently apply are clear.'* (Law Commission, 1996, pp. 31-32)

9.1.9 The Commission proposed a mandatory application for directions about the way a child complainant will give evidence and a discretionary application for all other witnesses, including defendants in criminal cases (Law Commission, 1996, pp. 34-35). It also endorsed pre-trial videotaped cross-examination for two groups of witnesses: child complainants who have given evidence-in-chief on videotape, and any witnesses whose evidence-in-chief had been pre-recorded and who were able to demonstrate an inability to retain and recall information over time (Law Commission, 1996, pp. 37-39). Following the adoption of intermediaries in certain Australian jurisdictions, the Commission also recommended that a programme be developed in New Zealand to appoint intermediaries in order to enable witnesses 'to understand the questions put to them in court'. As in the English model, intermediaries may 'rephrase questions to assist witness comprehension' (Law Commission, 1996, pp. 44-46).

9.1.10 However, in a subsequent report, *Reform of the Law*, the Commission changed its view. Both pre-recorded cross-examination and intermediaries were widely opposed by the Bar, and a number of concerns were raised following research published on the use of intermediaries within the United States (Law Commission, 1999, pp. 100-101, 120-121; Cooper & Mattison, 2017, p. 534).

9.2 Alternative means of giving evidence

9.2.1 The Evidence Act 2006 consolidated and updated the range of alternative measures available, and the Pre-Trial Case Management Guideline (2018) confirms that these exist alongside common law powers to close the hearing to the public or impose entry restrictions upon the court, to schedule breaks where witnesses appear distressed, or to reduce formality – such as the removal of wigs and gowns (at pp. 16 *et seq*.).

9.2.2 Under section 107 of the Act, a child witness is entitled to give evidence in one or more of the following alternative ways:

- Through a pre-recorded video;
- While in the courtroom but unable to see the defendant or some other specified person (use of screens or similar devices);
- From an appropriate place outside the courtroom using a televised link.

9.2.3 Where a video recording is used as a child witness's evidence in chief, the witness is entitled to give the other parts of his or her evidence, including any further evidence-in-chief (and by implication cross-examination), in any other alternative ways (s 107(2)).

9.2.4 There is an identical provision in place for all other witnesses under section 105, although such an order may only be made taking into account a range of ten factors set out in section 103(1). These include age, psychological / intellectual / psychiatric condition, trauma, nature of proceedings / evidence. The judge should also have regard to the need to ensure a fair trial, take into account the views of the witness, the need to minimise the stress on the witness and to promote the recovery of a complainant from the alleged offence (s103(2)). Section 106A provides a mandatory presumption that complainants in family violence cases will provide their evidence-in-chief through a video recording, with the Court determining the most appropriate means for the other parts of their testimony. In 2017, the 2006 legislation was amended to provide for a presumption in favour of child witnesses (under 18 years) to give evidence in alternative ways (pre-recording and CCTV), and the extension of the right to have a support person to all child witnesses (not only the complainant).

9.2.5 Section 79 of the Act states that all complainants and child witnesses in any proceedings are entitled to the presence of a support person, while other witnesses may give evidence with a support person with permission of the judge subject to the factors outlined in section 103. Section 80 provides all witnesses (irrespective of age, and including the defendant) with the right to communication assistance where they have difficulties in understanding the proceedings or giving evidence, and may be ordered by the judge for any witness having regard to the factors in section 103.

9.2.6 However, section 80 itself is relatively brief and gives no indication on either the scope of the role, the duties to the court / witness, or who may act as a communicator. Unlike England and Wales, there is no centralised system of registration or accreditation and there are no formal guidelines on the qualifications they should hold or what training they should have received (Giuffrida and Mackay, 2021; McGregor, 2017). In *R v Hetherington* [2015] NZCA 248, the Court of Appeal endorsed the appointment of a speech-language therapist as a communicator for an adolescent complainant with Down's Syndrome, rejecting complaints that his interventions during the trial had prevented defence from putting its case:

> *The Judge was right to recognise that a fair trial requires fairness towards both the defendant and the complainant, and this requires the complainant to be able to communicate in a way which best presents his or her evidence to the jury.* (at 22).

9.2.7 Since the new measures came into effect, they have been widely used. Tinsley (2011, p. 715) cites examples of adult complainants in sex cases being permitted to give evidence from behind a screen (see *Mussa v R* [2010] NZCA 123), via video-link from overseas (*R v Simi* [2008] NZCA 515), via CCTV (*R v Ashby HC Whangarei* CRI-2009-027-3088, 13 December 2010), and by pre-recorded video (*R v Willeman* [2008] NZAR 644 (HC)).

9.2.8 However, there is also evidence that - despite the fact that sections 105 and 107 permit evidence to be pre-recorded in full – in practice pre-recording is largely limited to examination-in-chief. It appears that there is still widespread reticence among some practitioners to embrace pre-recorded cross-examination and re-examination (McGregor, 2017).

9.2.9 In the early 2010s, a local-level decision was taken by Auckland prosecutors and judges to make use of the provision, and they began an initiative to routinely pre-record children's evidence in its entirely. However, in *R v M* (CA335/2011); *R v E* (CA339/2011) the Court of Appeal ruled against this practice. While confirming that section 105 allows full pre-recording, the Court warned that it should be restricted to extreme situations given the potential dangers to the defendant's fair trial rights (see further Henderson, 2012, p. 50).

9.2.10 As with most other common law jurisdictions, restrictions are also in place regarding cross-examination inperson. A defendant in a sexual case, or a defendant in or a party to criminal or civil proceedings concerning family violence or harassment, is not entitled to personally cross-examine a complainant or a party who has made allegations of family violence or harassment (s. 95(1)). This provision is also applicable to child witnesses.

9.2.11 In this case, the defendant or party who is precluded from personally cross-examining a witness may have his or her questions put to the witness by a lawyer engaged by the defendant. If the defendant is unrepresented and fails or refuses to engage a lawyer for the purpose within a reasonable time specified by the judge, the judge will appoint a person to question the witness in the defendant's name.

9.3 Changes to the Roles of Judges and Advocates

9.3.1 Although the New Zealand Law Society has previously suggested that advocates are aware of the importance of specialist training and willing to participate in specific programs, research suggests that many cross-examiners continue to ask inappropriate questions to child witnesses in a manner that causes confusion or distress (Henderson, 2012, p. 55). Randell et al (2020, pp. 60-61) state that

many practitioners lack the necessary knowledge and skill-sets on how to adapt the questioning to these witnesses, so that 'any expectation in changes to questioning practices need to be accompanied by education as to how to do so'.

9.3.2 Prosecution guidelines (Crown Law, 2014) state that prosecutors must take into account the needs of vulnerable victims in their decision-making, including victims of sexual offences, children, and those who have been the victims of a crime involving a death (Crown Law, 2014, p. 2). In each case, the prosecutor should consider whether a particular mode of evidence is appropriate and would improve the quality of the evidence given (Crown Law, 2014, p. 4).

9.3.3 As in many other jurisdictions, judges have the common law power to regulate the conduct of cross-examination through discretionary interventions to prevent confusing, complex, or overly aggressive lines of questioning. This power is also enshrined in section 85 of the Evidence Act 2006, which provides that the judge may disallow any question that he or she considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand. Additionally, section 92 establishes a set of cross-examination duties. In particular, it states that in any proceeding 'a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters'.

9.3.4 In practice, however, such interventions are rare and are perceived to sit uneasily alongside the umpireal role of the trial judge (Hanna et al., 2012b, pp. 542). In a recent study of young witnesses giving evidence in sexual offence cases, Randell et al (2020) report that previous research has suggested that judicial intervention tended to be rare, though it has become more common in recent years (citing Davies & Seymour, 1998; Hanna et al., 2010).

10. Conclusions

10.1.1 In this closing chapter we draw conclusions on the various initiatives that have been taken to ease the plight of vulnerable witnesses who are cross-examined in the various criminal justice systems that we surveyed and the extent to which these have become embedded within these systems. The first point is how much general consensus there has been across all national systems on the need to change the way these witnesses have been traditionally questioned. Whatever the benefits of the orality principle and cross-examination as tools for eliciting the truth and giving defendants an opportunity to test the case against them, discussed in Chapter 1, over the course of the last three decades a broad consensus has emerged on the need to make adjustments for vulnerable witnesses. This consensus is largely shared by legislators, the public at large and the various professional stakeholders who play a vital role in delivering justice in the courts. We have seen that judges have played their part in shaping changes and advocates have undertaken training specifically tailored to questioning vulnerable witnesses.

10.1.2 This broad consensus on the need for change can be attributed to a number of factors. Across all national systems the role of the victim in the criminal trial and in the criminal justice process generally has come to assume much more salience. Victims' rights have featured prominently in political, criminological, legal and human rights discourse (Doak, 2008). Against this background, it is not surprising that the manner in which they are questioned in the witness box has come under particular scrutiny. As we charted in Chapter 1, a large body of research has exposed the difficulties that particularly vulnerable witnesses and victims face in the witness box. In Chapter 2 we noted that international human rights law and a large body of 'soft' international human rights instruments now 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.

10.1.3 The second point to make is how much consensus there has been on the steps taken to assist vulnerable victims and witnesses in giving their best evidence. As we have charted across the jurisdictions surveyed, a number of 'special' or 'alternative' measures have been enacted to assist vulnerable and intimidated witnesses in giving their evidence which have tended to take on a very similar character. What 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) increasingly became more pronounced departures from the traditional orality principle (for example, the widespread use of video-platforms including video pre-recorded cross-examination).

10.1.4 On top of this, we have seen in recent years that the measures taken 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.

10.1.5 As we have seen, some jurisdictions are going further and experimenting with processes such as the Nordic *Barnahus* model which is widely regarded as a benchmark of best practice in terms of child-friendly justice but which bears very little resemblance, if any, to the traditional adversarial model. Much of this policy transfer can be attributed to the influence of globalisation which has meant that criminal justice policies are no longer restricted to the boundaries of individual nation states (Misileglas et al, 2015). This had the effect of breaking down the adversarial / inquisitorial dichotomies that have long characterised national criminal procedures and encouraged greater experimentation with mixed converging models (Jackson, 2021).

10.1.4 A third point, however, is that it is still too early to say whether there has truly been a 'revolution' in cross-examination. Special measures have been criticised on the ground that they merely 'accommodate' particular categories of 'vulnerable' or 'intimidated' witnesses within the adversarial trial model and do little to ameliorate the problems that the model continues to pose for witnesses outside these categories who are disabled from participating effectively when they are questioned (Ellison, 2001). It can also be seen from our survey that while the scale of change in the last three decades has been considerable, the pace of change across the various jurisdictions has been uneven. Whilst changes have generally been travelling in the same direction there have been examples, such as in the use of pre-recorded cross-examination in New Zealand, where some changes have been reversed and the *status quo ante* has prevailed.

10.1.5 Some jurisdictions have moved quicker than others to embrace change, only then to fall back and be overtaken by others. In the 1990s and 2000s, for example, New Zealand and various jurisdictions in Australia were trail-blazers in their experimentation with alternative measures while in the last decade England and Wales would seem to have led the way amongst common law countries with the introduction of 'ground rules hearings' and use of intermediaries. The catalyst for change has often been the establishment of reviews that have made far-reaching recommendations for reform. In 1989 the Pigot Committee (1989) in England and Wales famously recommended a completely new system for questioning child witnesses in advance of trials for serious crimes of sex and violence. The Gillen Review (2019) has recently made a number of proposals for Northern Ireland

to become an exemplar of best practice and a number of recent reviews and inquiries in Australia have made proposals that are enabling Australia to catch up on some of the reforms made in England and Wales in the last decade.

10.1.6 While independent reviews have often acted as the catalyst for change, the implementation of certain measures at national level has been hampered by perceived clashes of rights with the accused, which can lead to institutional 'push-back' from the legal profession. Three well embedded common law principles may act (or interact) to impede reform: the principle of open justice, the right to confrontation and the principle of orality.

10.1.7 The principle of open justice, which stipulates that all proceedings and written judgments of the courts are to be held in open court and to be freely reported has, on occasions, served to quell the pace of reform. The principle protects against the administration of justice in secret without public scrutiny. However, while the starting point of the principle is that all proceedings should be open to the public, the common law has long recognised exceptions to it (*Scott v Scott* [1913] AC 417). While the principle of open justice is also enshrined in an array of international standards (eg Art 6 ECHR, Article 14(1) ICCPR), many international instruments have increasingly acknowledged that criminal proceedings should be carried out with the public excluded in cases involving children, domestic and sexual violence and those involving, for example, organised crime where witnesses are at heightened risk of intimidation.

10.1.8 Provision is made in many of the jurisdictions surveyed for vulnerable witnesses to give their evidence in private but there has been variance between jurisdictions on their willingness to provide for this. In Scotland it is common practice for members of the public to be excluded where child witnesses are giving evidence in rape cases. By contrast the English courts have been reluctant to clear the court when a child gives evidence (Spencer & Flin 1990, pp. 115-116). Some jurisdictions such as Ireland have gone further and prevented the public from attending the trial altogether in rape and aggravated sexual assault cases, not only when complainants are giving evidence.[53]

10.1.9 The Gillen Review's recommendation that the public at large be excluded from serious sexual offence hearings was supported by the Law Society and received the overwhelming support of respondents to its online survey but was opposed by the Bar Council. One of the arguments of the Bar Council and the Northern Ireland Human Rights Commission was that this was a disproportionate infringement on the principle of open justice as there were already sufficient measures in places to

[53] See Criminal Law (Rape)(Amendment) Act 1990.

protect complainants in individual cases (and there certainly would be if the other recommendations to the Review were carried forward such as pre-recorded cross-examination).

10.1.10 Secondly, the right to confrontation has served to inhibit change particularly in the United States where the so-called 'confrontation clause' contained in the Sixth Amendment of the US Constitution has been interpreted as conferring a right for the accused to 'face-to-face' encounter with opposing witnesses (*Dowdell v United States*, 221 US 325, 330 (1911). It has traditionally meant that all witnesses must testify in presence of the accused and even being subject to an obligation to be cross-examined in person where the accused represents herself (Coulborn et al, 2012, p. 1).

10.1.11 The case-law has endorsed different positions over the years. Prior to 2004 the courts were prepared to admit the testimony of children via live link (see eg *Maryland v Craig* 497 US 836, 859–60 (1990) but in *Crawford v Washington 124 S Ct. 1354* (2004) the Supreme Court ruled that the Sixth Amendment barred the admission of 'testimonial' statements without a prior opportunity for confrontation and this has made it extremely difficult to adapt criminal proceedings to vulnerable witnesses' needs (see Clow 2015: 814-15). As a result, pre-recording is rarely used in the United States and many prosecutors conceive it as a 'last resort' (Henderson, 2012, pp. 51-53).

10.1.12 The ECtHR has not considered that the right to examine witnesses extends to confrontation in the 'eyeball to eyeball' sense and we have noted that in many of the jurisdictions surveyed the right of defendants to cross-examine vulnerable witnesses in person has been abolished. 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 were 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]

10.1.13 The ECtHR has also consistently held that the right to examine witnesses does not have to be exercised at the trial itself but may be exercised at a pre-trial hearing (see eg *Kostovski v Netherlands* (1989) 12 EHRR 434, p. 447-448; see also 3.6.2 above). But we have seen that of all the special measures the use of pre-recorded cross-examination has been the most contentious in the jurisdictions surveyed. Where all the evidence of a witness has been recorded pre-trial this makes a considerable inroad into the principle of orality, whereby the accepted norm is for live testimony to be given under oath in open court, subjected to cross-examination, in the presence of the accused

and in the presence of the trier of fact. The objections to pre-recorded cross-examination from the legal profession, however, have not tended to be based on the principle of orality per se but rather on the practical difficulties of accommodating pre-recorded cross-examination within a trial system dedicated to orality (see e.g. Gillen, 2018, pp. 155-165).

10.1.14 One of the concerns has been the difficulty of ensuring that timely disclosure is made to the defence in readiness for the cross-examination at the pre-trial stage. Another is that depriving the jury of seeing the cross-examination live might create an imbalance between the video evidence of the complainant and the live evidence of the defendant. A review of the research has not found evidence that jurors are less likely to believe video evidence due to its 'distancing' effect (Munro, 2018). But this does not mean that there is not a perception on the part of witnesses that they may be disadvantaged by video evidence with the result that they may be less likely to avail of giving evidence by means of video platforms. Except in the case of children where in some jurisdictions such as England and Wales the 'primary rule' is for their evidence in chief to be video-recorded, the parties retain considerable control over whether evidence should be presented in this way.

10.1.15 We have seen that in most jurisdictions defendants are disadvantaged by having less access to special measures than other witnesses and even when they are eligible for them there is evidence that defence practitioners are reluctant to apply for them (Fairclough, 2018b). Compelling arguments have also been advanced that the denial of such measures to defendants could potentially breach their fair trial rights and raise instances of wrongful convictions (Giuffrida and Mackay, 2021). Further research is necessary to ascertain the degree to which the prosecution and defence apply for special measures even when they are eligible and the attitudes of witnesses towards them. The recent Covid-19 pandemic would seem to have acted as a catalyst for the wider user of video-technology in courts and as a result a 'new normal' may be emerging whereby eliciting evidence in this way becomes more mainstream and accepted by parties (Doak & Jackson 2020; Rossner, 2021). But this remains to be tested by research.

10.1.16 This leads to a final point which is that there is a need for more research generally on how special measures of all kinds are being implemented and in particular on the need to monitor whether the new procedures governing cross-examination are effecting change on the ground. In Chapter 1 we noted the impact that research had played in exposing the difficulties that vulnerable witnesses face when questioned in court and throughout the report we have drawn attention to academic literature and research on the implementation of the new measures. While some of the research has focused specifically on the cross-examination reforms (see eg Henderson 2015; Baverstock 2016; Henderson & Lamb, 2017; Henderson et al, 2019), there remains much more work to do before a comprehensive

assessment can be made of the manner in which different kinds of vulnerable witnesses are cross-examined and the impact of recent changes as a whole.

Bibliography

Adler, Z. (1987). *Rape on Trial*. Routledge and Kegan Paul.

Advocacy Training Council. (2011). *Raising the Bar*. https://www.magistrates-association.org.uk/Portals/0/Files/Resources/Mental%20Health/raisingthebar-2011.pdf?ver=2019-06-04-105318-557

Agnew, S. E., & Powell, M. B. (2004). The effect of intellectual disability on children's recall of an event across different question types. *Law and Human Behavior, 28*(3), 273–294. https://doi.org/10.1023/B:LAHU.0000029139.38127.61

ALRC. (1997, November). *Seen and heard: priority for children in the legal process* (ALRC Report 84). https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/

Auld, R. (2001). *Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld*. https://www.criminal-courts-review.org.uk/auldconts.htm

Australian Law Reform Commission, the New South Wales Law Reform Commission & the Victorian Law Reform Commission. (2010). *Uniform Evidence Law* (ALRC 102 (2005), NSWLRC 112 and VLRC FR). Australian Government.

Bala, N. (1999). Child witnesses in the Canadian criminal courts: Recognizing their capacities and needs. *Psychology, Public Policy and Law, 5*, 323-354. https://doi.org/10.1037/1076-8971.5.2.323

Bar Standards Board. (2020, December). *The BSB Handbook*. https://www.barstandardsboard.org.uk/the-bsb-handbook.html

Baverstock, J. (2016). *Process evaluation of pre-recorded cross-examination pilot (Section 28)* (Ministry of Justice Analytical Series) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf

Bennett, W. L., & Feldman, M. S. (1981). *Reconstructing Reality in the Courtroom*. Tavistock.

Beriqi, R. (2017). Reflections on Certain Witnesses: Protective Measures under the Rome Statute of the International Criminal Court. *European Scientific Journal*, 17(34), 342-362.

Blondel, E.C. (2008). Victims' Rights in an Adversary System. *Duke Law Journal*, *58(2)*, 237-274.

Bohn, D. K., & Holz, K. A. (1996). Sequelae of abuse: Health effects of childhood sexual abuse, domestic battering, and rape. *Journal of Nurse-midwifery*, *41*(6), 442-456. https://doi.org/10.1016/S0091-2182(96)80012-7

Booth et al. (2019). Family Violence, Cross-examination and Self-represented Parties in the Courtroom: The Differences, Gaps and Deficiencies. *University of New South Wales Law Journal, 42*(3), 1106–1142. http://hdl.handle.net/10453/136238

Bowden, P., Henning, T., & Plater, D. (2014). Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: An impossible triangulation? *Melbourne University Law Review*, *37*(3), 539-584.

Brennan, M., & Brennan, R. (1988). *Strange Language: Child Victims under Cross-Examination.* Wagga Wagga.

Brereton, D. (1997). How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials. *British Journal of Criminology*, *37*(2), 242–261. https://doi.org/10.1093/oxfordjournals.bjc.a014157

Brown, B., Burman, M., & Jamieson, J. (1993). *Sex Crimes on Trial: Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials Edinburgh*. Edinburgh University Press.

Brown D. A., & Lewis C. N. (2013). Competence is in the Eye of the Beholder: Perceptions of intellectually disabled child witnesses. *International Journal of Disability, Development and Education*, *60*(1), 3-17. https://doi.org/10.1080/1034912X.2013.757132

Burton, M., Evans, R., & Sanders, A. (2006). *Are Special Measures for Vulnerable Witnesses Working? Evidence from the Criminal Justice Agencies* (Home Office Online Report 01/06). https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.624.6353&rep=rep1&type=pdf

Byrne, D., & Heydon, J.D. (1986). *Cross on Evidence*. Butterworths.

Cairns, D. (1998). *Advocacy and the Making of the Adversarial Trial 1800-1865.* Clarendon Press.

Cainaniello, M. (2012). The Orić Appeal Judgment before the ICTY: Some Considerations on the Nature of the Appeal in International Criminal Justice. In A. Klip & G. Sluiter (Eds.), *Annotated Leading Cases of International Criminal Tribunals, The International Criminal Tribunal for the Former Yugoslavia* (pp. 578-589). Intersentia.

Caruso, D., & Cross, T. (2012). 'The case in Australia for further reform to the cross-examination and court management of child witnesses'. *International Journal of Evidence & Proof*, *16*(4), 364-397.

Cashmore, J. Katz, I., Shackel, R. & Valentine, K. (2017). *Evaluation of the Child Sexual Offence Evidence Pilot.* http://unsworks.unsw.edu.au/fapi/datastream/unsworks:47324/bine3142a02-4797-46a0-a21a-1abadc867a92?view=true

Children's Commissioner (2017) *Barnahus – Improving the response to child sexual abuse in England*. Children's Commissioner for England. https://dera.ioe.ac.uk/27972/1/Barnahus%20-%20Improving%20the%20response%20to%20child%20sexual%20abuse%20in%20England.pdf

Children's Court of Victoria (2018). *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings*. Melbourne: Children's Court of Victoria. https://childrenscourt.vic.gov.au/legal/guidelines-intermediary-pilot-program#:~:text=This%20Guide%20relates%20to%20the,2018%20and%2030%20June%202020

Chin, K. Y. (2010). 'Minute and Separate': Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After Crawford and Davis. *Boston College Third World Law Journal*, *30*(1), 67-101.

Clow, J. (2015). Throwing a Toy Wrench in the "Greatest Legal Engine": Child Witnesses and the Confrontation Clause. *Washington University Law Review*, *92*(3), 793-829.

Cole, D. (2001). Psychodrama and the Training of Trial Lawyers: Finding the Story. *North Illinois University Law Review, 21*, 1-35.

Colman, G. (1970). *Cross-Examination: A Practical Handbook*. Juta & Company.

Colson, R. and Field, S. (2016). *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice.* Cambridge University Press.

Combs, N. (2010). *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*. Cambridge University Press.

Cooper, P. (2018). 'Moving at a pace': Towards a new approach to vulnerability in courts and tribunals? In P. Cooper & L. Hunting (Eds.), Access to justice for vulnerable people. Simmonds & Hill.

Cooper, P. (2020). Looking Ahead: Towards a Principled Approach to Supporting Participation. In J. Jacobson & P. Cooper (Eds.), *Participation in Courts and Tribunals – Concepts, Realities and Aspirations* (pp.141-176). Bristol University Press.

Cooper, P., Backen, P., & Marchant, R. (2015). Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court. *Criminal Law Review*, *6*, 420-435.

Cooper, P., Dando, C., Ormerod, T., Mattison, M., Marchant, R., Milne, R., & Bull, R. (2018). One step forward and two steps back? The '20 Principles' for questioning vulnerable witnesses and the lack of an evidence-based approach. *The International Journal of Evidence & Proof, 22*(4), 392–410. https://doi.org/10.1177/1365712718793435

Cooper, P., & Mattison, M. (2017). Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model. *The International Journal of Evidence & Proof*, *21*(4), 351-370. https://doi.org/10.1177/1365712717725534

Cooper, P., & Wurtzel, D. (2014). Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales. *Northern Ireland Legal Quarterly, 65*(1), 39-61.

Cordon, I. M., Goodman, G. S., & Anderson, S. J. (2003). Children in court. In P. van Koppen & S. D. Penrod, (Eds.), *Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (pp. 167-189). Springer.

Cossins, A. (2009). Cross Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse? *Melbourne University Law Review, 33*(1), 68-104.

Cossins, A. (2020). *Closing the Justice Gap for Adult and Child Sexual Assault*. Palgrave Macmillan UK.

Cousins, A. & Mellors, S. (2021) *Reflections on the Role of Registered Intermediaries*, paper presented at the Mapping the Changing Face of Cross-Examination: Practitioner Perspectives. Nottingham Trent University / University of Nottingham.

Coughlin, S., & Jarman, R. (2002). Can the intermediary system work for child victims of sexual abuse? *Families in Society*, *83*(5), 541-546. https://doi.org/10.1606/1044-3894.52

Coulborn Faller, K., & Vandervort, F. (2012). What works in protecting child witnesses. In Patrick A. Curtis & Gina Alexander (Eds.), *What works in child welfare*. Child Welfare League of America. https://cacnc.org/wp-content/uploads/2016/06/Powerpoint-on-protecting-child-witnesses-in-court-mental-health-issues-and-legal-provisions.pdf

Council of Europe. (2010). *Building a Europe for and with children. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*. Council of Europe Publishing. https://rm.coe.int/16804b2cf3

Crown Prosecution Service. (2011). *Achieving Best Evidence (ABE) in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children*. London.

Crown Prosecution Service. (2021). *Legal Guidance – Special Measures*. https://www.cps.gov.uk/legal-guidance/special-measures

Crown Law. (2014). *Victims of Crime – Guidance for Prosecutors*. https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/victims-guidance-2014.pdf

Criminal Procedure Rule Committee and Ministry of Justice. (2020). Criminal Procedure Rules and Practice Directions 2020. https://www.gov.uk/guidance/rules-and-practice-directions-2020

Cusack, A. (2020a). Addressing vulnerability in Ireland's criminal justice system: A survey of recent statutory developments. *The International Journal of Evidence & Proof*, *24*(3), 280-306. https://doi.org/10.1177/1365712720922753

Cusack, A. (2020b). Beyond special measures: Challenging traditional constructions of competence and cross-examination for vulnerable witnesses in Ireland. *Irish Judicial Studies Journal*, *3*(1): 98-115.

Danet, B., & Bogoch, B. (1980). Fixed fight or free-for-all an empirical study of combativeness in the adversary system of justice. *British Journal of Law and Society, 7(1),* 36-60.

Davies, G., & Noon, E. (1991). *Evaluation of the Live Link for child Witnesse*s. HMSO.

Davies, E., Henderson, E., & Seymour, F. W. (1997). In the interests of justice? The cross-examination of child complaints of sexual abuse in criminal proceedings. *Psychiatry, Psychology and Law, 4*(2), 217–229. https://doi.org/10.1080/13218719709524912

Davies, E., & Seymour, F. (1998). Questioning child complainants of sexual abuse: Analysis of criminal court transcripts in New Zealand. *Psychiatry, Psychology and Law, 5*, 47-61. https://doi.org/10.1080/13218719809524919

Dehaghani, R. (2019). *Vulnerability in Police Custody: Police Decision Making and the Appropriate Adult Safeguard*. Routledge.

Dennis, I. (2010). The Right to Confront Witnesses: Meaning, Myths and Human Rights. *Criminal Law Review, 4,* 255-274.

Department of Justice. (2016). *Northern Ireland Registered Intermediaries Schemes Pilot Project Phase II Review*.http://www.justice-ni.gov.uk/sites/default/files/publications/justice/registered-intermediaries-phase-2.pdf

Department of the Attorney General (WA). (2009). *Bench Book*. Western Australia Government.

District Court of Western Australia. (2010). *Circular to Practitioners: Guidelines for Cross-Examination of Children and Persons Suffering a Mental Disability.* Western Australia Government.

Doak, J. (2000). Shielding vulnerable witnesses from showdown in the courtroom: a bridge too far? *Journal of Civil Liberties*, *16*(3), 296-319.
Doak, J. (2003). The victim and the criminal process: an analysis of recent trends in regional and international tribunals. *Legal Studies*, *23*(1), 1-32.
Doak, J. (2008). *Victims' Rights, Human Rights and Criminal Justice.* Hart.
Doak, J., & Doak, L. (2017). Non-verbal victims in the adversarial criminal process: communication, competency, and credibility. *Northern Ireland Legal Quarterly, 68*(4), 451-468. https://doi.org/10.53386/nilq.v68i4.59
Doak, J, McGourlay, C., & Thomas, M. (2018). *Evidence Law in Context.* Routledge.
Doran S. (1989). Descent to Avernus. *New Law Journal, 139*, 1147-1160.
Lord Justice Clerk's Review Group (2021). *Improving the Management of Sexual Offence Cases: Final Report*. Scottish Courts and Tribunals Service.
Drake, K. (2010). The psychology of interrogative suggestibility: A vulnerability during interview. *Personality and Individual Difference, 49*(7), 683-688. https://doi.org/10.1016/j.paid.2010.06.005
Du Cann, R. (1964, reprinted 1980). *The Art of the Advocate*. Penguin Books.
Edwards, I. (2004). An ambiguous participant: The crime victim and criminal justice decision-making. *British Journal of Criminology*, *44*(6), 967-982.
Ellison, L. (2001). *The Adversarial Process and the Vulnerable Witness*. Oxford University Press.
Ellison, L. (2007). Witness Preparation and the Prosecution of Rape. *Legal Studies, 27*(2), 171-187.
Ellison L., & Munro, V. (2017). Taking Trauma Seriously. *International Journal of Evidence & Proof*. *21*(3), 183-208. https://doi.org/10.1177/1365712716655168
European Commission. (2011). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. An EU Agenda for the Rights of the Child* (COM (2011) 60 final). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0060
European Court of Human Rights (2019) Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb), updated on 31 December 2019. Council of Europe/European Court of Human Rights. https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf
European Union Agency for Fundamental Rights. (2017). *Child-friendly justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*. Publications Office of the European Union. https://fra.europa.eu/en/publication/2017/child-friendly-justice-perspectives-and-experiences-children-involved-judicial
Faculty of Advocates. (2019, October), *Guide to the Professional Conduct of Advocates* http://www.advocates.org.uk/media/3199/guide-to-conduct-7th-edition-october-2019.pdf
Fair Trials (2020) *Study on Procedural Adjustments for Defendants with Cognitive Impairments, Neuro-Diverse Conditions, Mental Health Conditions*. Fair Trials.
Fairclough, S. (2018a). Speaking up for Injustice: Reconsidering the provision of special measures through the lens of equality. Criminal Law Review, (1), 4-19.
Fairclough, S. (2018b). Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials. *Journal of Law and Society*, *45*(3), 457-485.
Fielding, N. (2006). *Courting Violence*. Oxford University Press.
Fineman, M. (2008). The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism, 20*, 177-191.
Fineman, M. A. (2013). *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. Routledge.
Flin, R., Stevenson, Y., & Davies, G. M. (1989). Children's knowledge of court proceedings. *British Journal of Psychology, 80*, 285–297.
Flynn, E. (2015) Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities. New York.
Frank, J. (1949). *Courts on trial: myth and reality in American justice.* Princeton University Press.

Freshwater, K., & Aldridge, J. (1994). The knowledge and fears about court of child witnesses, schoolchildren and adults. *Child Abuse Review, 3*(3), 183–195. https://doi.org/10.1002/car.2380030307

Gillen, J. (2019). *Guillen Review. Report into the law and procedures in serious sexual offences in Northern Ireland*. https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf

Gillen Review Implementation Team. (2020). *Implementation Plan. The Gillen Review into the law and procedures in serious sexual offences in Northern Ireland*. https://www.justice-ni.gov.uk/sites/default/files/publications/justice/the-gillen-review-implementation-plan.PDF

Giuffrida, J., & Mackay, A. (2021). Extending witness intermediary schemes to vulnerable adult defendants. *Current Issues in Criminal Justice*, 1-19. https://doi.org/10.1080/10345329.2021.1955459

Gooding, P., & O'Mahony, C. (2016). Laws on unfitness to stand trial and the UN convention on the rights of persons with disabilities: Comparing reform in England, Wales, Northern Ireland and Australia. *International Journal of Law, Crime and Justice*, *44*, 122–145.

Goodman, G., Taub, E. P., Jones, D. P H., England, P., Port, L. K., Rudy, L., & Prado, L. (1992). Testifying in criminal court. *Monographs of the Society for Research in Child Development*, *57*(5), 1-142.

Gorcey, M., Santiago, J. M., & McCall-Perez, F. (1986). Psychological consequences for women sexually abused in childhood. *Social Psychiatry, 21*(3), 129–133. https://doi.org/10.1007/BF00582682

Government of Canada. (2012). *A Handbook for Police and Crown Prosecutors on Criminal Harassment*. Department of Justice. https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/har/toc-tdm.html

Government of Canada. (2016). *Testimonial Support for Vulnerable Adults (Bill C-2): Case Law Review (2009-2012)*. Department of Justice. https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rr13_15b/index.html

Green, M. (2014). Credibility Contests: The Elephant in the Room. *The International Journal of Evidence & Proof, 18*, 28 - 40. https://doi.org/10.1350/ijep.2014.18.1.441

Green, S. (2007). Crime, Victimisation and Vulnerability. In S. Walklate, (Ed.), *Handbook of Victims and Victimology* (pp. 91-117). Routledge.

Greer, D.S. (1971). Anything But The Truth? The Reliability of Testimony in Criminal Trials. 11 *British Journal of Criminology* 147-154.

Grohovsky, J. A. (2000). Giving Voice to Victims—Why the Criminal Justice System in England and Wales Should Allow Victims to Speak up for Themselves. *The Journal of Criminal Law*, *64*(4), 416–430. https://doi.org/10.1177/002201830006400411

Gudjonsson, G.H., & Henry, L. (2003). Child and adult witnesses with intellectual disability: The importance of suggestibility. *Legal and Criminological Psychology, 8*(2), 241-252. https://doi.org/10.1348/135532503322363013

Hanna, K., Davies, E., Crothers, C., & Henderson, E. (2012a). Child Witnesses' Access to Alternative Modes of Testifying in New Zealand. *Psychiatry, Psychology and Law*, *19*(2), 184-197. https://doi.org/10.1080/13218719.2011.559153

Hanna, K., Davies, E., Crothers, C., & Henderson, E. (2012b). Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-Examination Fair? *Psychiatry, Psychology and Law*, *19*(4), 530-546. https://doi.org/10.1080/13218719.2011.615813

Hanna, K., Davies, E., Crothers, C., Henderson, E. and Rotherham, C. (2010). *Child witnesses in the New Zealand criminal courts: A review of practice and implications for policy*. Institute of Public Policy, New Zealand. https://www.researchgate.net/publication/265107106_Child_witnesses_in_the_New_Zealand_criminal_courts_A_review_of_practice_and_implications_for_policy

Hayes, D., & Bunting, L. (2013). 'Just be Brave' - The Experiences of Young Witnesses in Criminal Proceedings in Northern Ireland. *Child Abuse Review, 22*(6), 419-431. https://doi.org/10.1002/car.2242

Heffernan, (2017). The Criminal Justice (Victims of Crime) Bill 2016: Special Measures for Victims who Give Evidence at Trial. *Dublin University Law Journal*, *40*(1), 37–61.

Heffernan, L. (2020). *Evidence in Criminal Trials*. Bloomsbury Professional.

Heilbron Committee. (1975). *Report of the Advisory Group on the Law of Rape* (Cmnd.6352).

Henderson, E. (2012). Alternative Routes: Accusatorial Jurisdictions on the Slow Road to Best Evidence. In J. Spencer & M. E. Lamb (Eds.), *Children and cross-examination: Time to change the rules?* (pp. 43-74). Hart Publishing.

Henderson, E. (2014). All the Proper Protections – the Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses. *Criminal Law Review*, *1*, 93-108.

Henderson, E. (2015). Communicative competence? Judges, advocates and intermediaries discuss communication issues in the cross-examination of vulnerable witnesses. *Criminal Law Review, 9*, 659-678.

Henderson, E., Hanna, K., & Davies, E. (2012). Pre-recording children's evidence: The Western Australian experience. *The Criminal Law Review*, *1*, 3–14.

Henderson, H. M., & Lamb, M.E. (2017). Pre-recording Children's Testimony: Effects on Case Progression. *Criminal Law Review,* 345-356.

Henderson, H. M., Lamb, M. E., & Rafferty, A. (2019). The Discussion of Ground Rules Issues in Pre-Trial Preparation for Vulnerable Witness. *Criminal Law Review,* 599-610.

Henry, L., Ridley, A., Perry, J., & Crane, L. (2011). Perceived credibility and eyewitness testimony of children with intellectual disabilities. *Journal of Intellectual Disability Research, 55*, 385-391. https://doi.org/10.1111/j.1365-2788.2011.01383.x

Hirst M. & Sahyouni S. (30 November 2020). Effective Legal Representation for Participating Victims: Principles, Challenges and Some Solutions. In R. Jasini & G. Townsend (Eds.), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (ESRC) https://www.law.ox.ac.uk/sites/files/oxlaw/iccba__oxford_publication_30_november_2020_.pdf

Hurley, P. (2013). *Vulnerable Adult Witnesses: The perceptions and experiences of Crown Prosecutors and Victim Services Providers in the use of testimonial support provisions*. Study prepared for the Research and Statistics Division, Department of Justice, Canada.

HMCTS (2019), Guidance on the use of s. 28 The Youth Justice and Criminal Evidence Act 1999; pre-recording of cross-examination and re-examination for witnesses captured by s.17(4) YJCEA. https://www.judiciary.uk/publications/guidance-on-the-use-of-s-28-yjcea-1999-pre-recording-of-cross-examination-and-re-examination-for-witnesses-captured-by-s-174-yjcea-1999/

Home Office. (1992). *Memorandum of good practice: on video recorded interviews with child witnesses for criminal proceedings*.

Home Office. (1998). *Speaking up for justice: report of the Interdepartmental Working Group on the treatment of vulnerable or intimidated witnesses in the criminal justice system*.

Hopkins, A. & Boyd, R. (2010). Cross-examination of child sexual assault complainants: concerns about the application of s 41 of the Evidence Act. *Criminal Law Journal*, *34*(3), 149-166.

Hoyano, L. C. H. (2000). Variations on a theme by Pigot: Special measures directions for child witnesses. *Criminal Law Review,* 250–272.

Hoyano L. C. H., & Keenan C. (2007). *Child Abuse: Law and Policy Across Boundaries*. Oxford University Press.

Hoyano, L. C. H. (2010). Coroners and justice act 2009: (3) Special Measures Directions take two: Entrenching unequal access to justice? *Criminal Law Review, 5*, 345–367.

Hoyano, L. (2015). Reforming the adversarial trial for vulnerable witnesses and defendants. *Criminal Law Review*, *2*, 107-129.

Hoyano, L., & Rafferty, A. (2017). Rationing defence intermediaries under the April 2016 Criminal Practice Direction. *Criminal Law Review, 2*, 93–105.

Hurley, P. (2013). *Vulnerable Adult Witnesses: The perceptions and experiences of Crown Prosecutors and Victim Services Providers in the use of testimonial support provisions*. Study prepared for the Research and Statistics Division, Department of Justice, Canada. https://publications.gc.ca/collections/collection_2013/jus/J4-18-2013-eng.pdf

Hurley, P. (2016). *A Resource Guide for Justice Professionals Working with Child Witnesses in Northern Canada*. Project Lynx. https://cac-cae.ca/wp-content/uploads/Web-Resource-Guide_Lynx-1.pdf

ICCA. (2019). *The 20 Principles of Questioning*. https://www.icca.ac.uk/wp-content/uploads/2019/05/20-Principles-of-Questioning.pdf
ICCA. (2020). Advocacy and the Vulnerable. https://www.icca.ac.uk/advocacy-the-vulnerable-crime/
Iliadis, M., Smith, O. and Doak, J. (2021). Independent separate legal representation for rape complainants in adversarial systems: lessons from Northern Ireland. *Journal of Law and Society* 48(2), 250-272.
Jackson, J. D. (2003). Justice for all: putting victims at the heart of criminal justice?. *Journal of Law and Society*, *30*(2), 309-337.
Jackson, J.D. (2005). The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?' *Modern Law Review, 68*(5), 737-764.
Jackson, J.D. (2021). The Case for a Hybrid Jury in Europe. In S.K. Ivković, S.S. Diamond, V.P. Hans, & N.S. Marder (Eds.), *Juries, Lay Judges and Mixed Courts* (pp. 304-322). Cambridge University Press.
Jackson, J. D., & Brunger, Y. M. (2015). Witness Preparation in the ICC: An Opportunity for Principled Pragmatism. *Journal of International Criminal Justice, 13*(3), 101-124. https://doi.org/10.1093/jicj/mqv024
Jackson, J.D., & Doran, S. (1995). *Judge Without Jury: Diplock Trials in the Adversary System*. Oxford University Press UK.
Jackson, J.D., & Summers, S.J. (2012). *The Internationalisation of Criminal Evidence*: *Beyond the Common Law and Civil Law Traditions.* Cambridge University Press.
Jacobson, J. & Cooper, P. (2020). *Participation in Courts and Tribunals*. Bristol University Press.
Jaconelli, J. (2002). *Open Justice: a critique of the public trial*. Oxford University Press.
Johansson, S., Stefansen, K., Bakketeig, E., & Kaldal, A. (2017). *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model*. Palgrave Macmillan.
Jonker, G., & Swanzen, R. (2007). Intermediary services for child witnesses testifying in South African criminal courts. *International Journal on Human Rights*, *6*(4), 91-113. https://doi.org/10.1590/S1806-64452007000100006
Judge, Rt Hon Lord. (2013). Half a Century of Change: The Evidence of Child Victims. Toulmin Lecture in Law & Psychiatry, 20 March 2013.
Judicial College. (2020). *Equal Treatment Bench Book*. https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2020.pdf
Judicial Commission of New South Wales. (2021). *Criminal Trial Courts Bench Book, District Court*.
Judicial Institute of Scotland. (2019). *Annual Report 2019-2020*. https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/annual-report-2019-2020.pdf?sfvrsn=c6882555_4
Kaldal, A. (2020). *Comparative Review of Legislation Related to Barnahus in Nordic Countries*. Public consultation process of the draft Child protection in criminal proceedings and comprehensive treatment of children in the Children 's House Act of 1 June 2020, Joint EU DG Reform- Council of Europe project to Support the Implementation of Barnahus in Slovenia (phase II). https://rm.coe.int/barnahus-comparative-review-anna-kaldal-14092020/1680a0437f
Kebbell, M. R., & Johnson, S. D. (2000). Lawyers' questioning: The effect of confusing questions on witness confidence and accuracy. *Law and Human Behavior, 24*(6), 629–641. https://doi.org/10.1023/A:1005548102819
Killean, R., & Moffett, L. (2017). Victim Legal Representation before the ICC and ECCC. *Journal of International Criminal Justice*, *15*(4), 713-740.
King, M., Freiberg, A., Batagol, B., & Hyams, R. (2014). *Non-Adversarial Justice*. Federation Press.
Kirchengast, T. (2016). *Victims and the Criminal Trial*. Palgrave Macmillan.
Kirchengast, T. (2021). Victim legal representation and the adversarial criminal trial: A critical analysis of proposals for third-party counsel for complainants of serious sexual violence. *The International Journal of Evidence & Proof, 25*(1), 53–72. https://doi.org/10.1177/1365712720983931
Law Reform Commission. (1990). *Report on Child Sexual Abuse*. https://www.lawreform.ie/_fileupload/Reports/rChildSexAbuse.pdf
Landsman, S. (1983). "A Brief Survey of the Development of the Adversary System" 44 *Ohio State Law Journal* 713-739.

Landsman, S. (1990). "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" 75 *Cornell Law Review* 497-609.
Langbein, J.H. (1994). "The Historical Origins of the Privilege Against Self-Incrimination at Common Law" 92 *Michigan Law Review* 1047-1085.
Langbein, J. H. (2003). *The Origins of the Adversary Criminal Trial*. Oxford University Press.
Lara, C. E. (2011). Child Soldier Testimony Used in Prosecuting War Crimes in the International Criminal Court: Preventing Further Victimization. *Southwestern Journal of International Law*, *17*(2), 309-330.
Lees, S. (1996). *Ruling Passions: Sexual Violence, Reputation and the Law*. Open University Press.
Loftus, E.F. (1975). Leading questions and the eyewitness report. *Cognitive Psychology, 7*(4), October 1975, 560-572.
Lord Advocate. (1999). *Report of the Lord Advocate's Working Group Report on Child Witness Support*.
Lord Chief Justice's Office. (2019). *Case management in the Crown Court including protocols for vulnerable witnesses and defendants. Practice Direction No. 2/2019*. https://www.judiciaryni.uk/judicial-decisions/practice-direction-no-22019
Lord Judge. (2013). *Constitutional Change: Unfinished Business*. https://www.ucl.ac.uk/constitution-unit/news/2013/dec/video-lord-judge-constitutional-change-unfinished-business
Lubet, S. (2001). *Nothing But the Truth: Why Trial Lawyers Don't, Can't, and Shouldn't Have to Tell the Whole Truth*. New York University Press.
Matthias, C. R., & Zaal, F. N. (2011). Intermediaries for Child Witnesses: Old Problems, New Solutions and Judicial Differences in South Africa. *International Journal of Children's Rights*, *19*, 251–269.
Mattinson, M. (2016). Putting Theory into Practice: A Comparison of the Guidance Available to Investigative Interviewers and Advocates when using Communication Aids in the Criminal Justice System. In P. Cooper & L. Hunting (Eds.), *Addressing Vulnerability in Justice Systems*. Wildy, Simmonds and Hill Publishing.
McBarnet D. J. (1983). *Conviction: Law, the State and the Construction of Justice.* Palgrave Macmillan.
McColgan, A. (1996). Common law and the relevance of sexual history evidence. *Oxford Journal of Legal Studies*, *16*(2), 275-307.
McDermott, Y. (2016). *Fairness in International Criminal Trials*. Oxford University Press.
McEwan, J. (1988). Child Evidence: More Proposals for Reform. *Criminal Law Review,* 813-822.
McEwan, J. (2011). From adversarialism to managerialism: criminal justice in transition. *Legal Studies*, *31*(4), 519-546.
McGregor, K. (2017). *Child witnesses in the NZ criminal courts: Issues, responses, opportunities*. Chief Victims Advisor to Government. https://chiefvictimsadvisor.justice.govt.nz/assets/Documents/Publications/Child-witnesses-report.pdf
McGonigle Leyh, B. (2011). *Procedural Justice? Victim Participation in International Criminal Proceedings*. Intersentia.
McGlynn, C. (2017). Rape Trials and Sexual History Evidence: Reforming the Law on Third Party Evidence. *Journal of Criminal Law*, *81*(5), 367-392. https://doi.org/10.1177/0022018317728824
McLaughlin, C. T. (2007). Victim and Witness Measures of the International Criminal Court: Comparative Analysis". *Law and Practice of International Courts and Tribunals*, *6*(1), 189-220.
Mekjian, G. J., & Varughese, M. C. (2005). Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court. *Pace International Law Review*, *27*(1), 1-46.
Ministry of Justice. (2011). *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Guidance on using Special Measures*. https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf
Ministry of Justice, & Chalk, A. (2020). *New courtroom protections for vulnerable victims available nationwide*. https://www.gov.uk/government/news/new-courtroom-protections-for-vulnerable-victims-available-nationwide

Misileglas, V., Alldridge, P., Cheliotis, L. (2015). *Globalisation, Criminal Law and Criminal Justice*. Hart Publishing.
Mortimer, J. (1982). *Clinging to the Wreckage*. Penguin Modern Classics.
Munro, V. (2018). *The Impact of the Use of Pre-recorded Evidence on Juror Decision-Making*. Scottish Government.
Müller, K. (2001). An inquisitorial approach to the evidence of children. *Crime Research in South Africa*, *4*(4).
Müller, K., & Hollely, K. (2009). *Introducing the Child Witness* (2nd edn). Printrite.
Myers J. (1996). A Decade of International Reform to Accommodate Child Witnesses. *Criminal Justice and Behavior, 23*(2), 402–422. https://doi.org/10.1177/0093854896023002009
Myklebust, T. (2012). The Position in Norway. In J. Spencer & M. E. Lamb (Eds.), *Children and cross-examination: Time to change the rules?* (pp. 147-170). Hart Publishing.
National District Attorneys Association. (2013, January). *Case law & Statutory Compilation Regarding the Presence of Support Person for Child Witnesses*. National Center for Prosecution of Child Abuse. https://ndaa.org/wp-content/uploads/Support-Person-Compilation2013.pdf
New Zealand Law Commission. (1996). *The evidence of children and other vulnerable witnesses: A discussion paper* [PR26]. https://www.lawcom.govt.nz/our-projects/evidence-law-evidence-children-and-other-vulnerable-witnesses
NSW Bar Association. (2008). *New South Wales Barristers' Rules*.
NSW Government (2016). *Children's Champion (Witness Intermediary) - Procedural Guidance Manual*. NSW Department of Justice. https://www.victimsservices.justice.nsw.gov.au/Documents/child-champ_manual.pdf
Oireachtas Joint Committee on Justice (2021). *Report on Victims' Testimony in Cases of Rape and Sexual Assault*. https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2021/2021-06-11_report-on-victim-s-testimony-in-cases-of-rape-and-sexual-assault_en.pd
Oliver, J. (2006). The legislation changed, what about the reality?. *Queensland University of Technology Law and Justice Journal*, *6*(1), 55-65.
O'Kelly, C. M. E., Kebbell, M. R., Hatton, C., & Johnson, S. D. (2003). Judicial intervention in court cases involving witnesses with and without learning disabilities. *Legal and Criminological Psychology, 8*(2), 229–240. https://doi.org/10.1348/135532503322363004
O'Mahony, B. (2016). How effective are judges and counsel at facilitating communication with vulnerable persons in a criminal trial? In P. Cooper & L. Hunting (Eds.), *Addressing Vulnerability in Justice Systems.* Wildy, Simmonds & Hill Publishing.
O'Malley, T. (2020). *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*. http://www.justice.ie/en/JELR/Pages/O'Malley_Report
Orenstein, A. A. (2007). Children as Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses. *Indiana Law Journal*, *82*, 909-915. http://dx.doi.org/10.2139/ssrn.1551364
HRW, A. (2018). The interpretation and application of the right to effective participation. *International Journal of Evidence & Proof*, *22*(4), 321-341.
Pakes, F. (2014). *Comparative Criminal Justice*. Routledge.
Pemberton, A. & Groenhuijsen, M. Developing Victim's Rights within the European Union: Past, Present and Future. In G. Kirchhoff (Ed.), *Proceedings of the 13th World Society of Victimology Symposium*. Wolf Legal Publishers. http://dx.doi.org/10.2139/ssrn.1947236
Pennington, N., & Hastie, R. (1993). The story model for juror decision making. In R. Hastie (Ed.), *Inside the juror: The psychology of juror decision making* (pp. 192–221). Cambridge University Press.
Pigot, Judge T. (1989). *Report of the Advisory Group on Violence Evidence*. HMSO.
Pizzi, W.T. (1999). *Trials without truth: why our system of criminal trials has become an expensive failure and what we need to do to rebuild it*. New York University Press.
Plotnikoff, J, & Woolfson, R. (2004). *In their own words: the experiences of 50 young witnesses in criminal proceedings.* NSPCC.

Plotnikoff, J. & Woolfson, R. (2007). *Evaluation of Young Witness Support: Examining the Impact on Witnesses and the Criminal Justice System*. Ministry of Justice.

Plotnikoff, J., & Woolfson, R. (2009, July). *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings*. https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/measuring_up_report_wdf665791.pdf

Plotnikoff, J. & Woolfson, R. (2015). *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants*. Policy Press.

Plotnikoff, J., & Woolfson, R. (2019, February). *Falling short? A snapshot of young witness policy and practice (NSPCC).* https://learning.nspcc.org.uk/media/1672/falling-short-snapshot-young-witness-policy-practice-full-report.pdf

Pradel, J., (1993). 'France' in C. Van Den Wyngaert (Ed.), *Criminal Procedure Systems in the European Community.* Butterworths.

Powell, M. B., Bowden, P., & Mattison, M. (2015). Stakeholders' perceptions of the benefit of introducing an Australian intermediary system for vulnerable witnesses. *Journal of Criminology*, *48*(4), 498-512. https://doi.org/10.1177/0004865814543391

Queensland Government (2020). Intermediaries to assist vulnerable witnesses to give their best evidence. Department of Justice and Attorney-General https://www.justice.qld.gov.au/community-engagement/news/2020/intermediaries-to-assist-vulnerable-witnesses-to-give-their-best-evidence

Qureshi, A. M. (2014). Relying on demeanour evidence to assess credibility during trial: critical examination. *Criminal Law Quarterly, 61*(2), 235-267.

Raitt, F. E. (2010). Independent legal representation for complainers in sexual offence trials: research report for Rape Crisis Scotland. Rape Crisis Scotland. http://www.rapecrisisscotland.org.uk/publications/research/

Randell, I., Seymour, F., McCann, C., Anderson, T., Blackwell, S. (2020). *Young witnesses in New Zealand's sexual violence pilot courts*. The University of Auckland and New Zealand Law Foundation.

Rape Crisis Network Ireland. (2018, March). *Hearing Every Voice—Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings*. https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf

Resnick, H. S., Kilpatrick, D. G., Dansky, B. S., Saunders, B. E., & Best, C. L. (1993). Prevalence of civilian trauma and posttraumatic stress disorder in a representative national sample of women. *Journal of Consulting and Clinical Psychology, 61*(6), 984–991. https://doi.org/10.1037/0022-006X.61.6.984

Richards, P. (2009). Child complainants and the court process in Australia. T*rends and Issues in Crime and Criminal Justice*, 380, 1-6.

Rieke, R.D., & Stutman, R. (1994). *Communication in Legal Advocacy*. University of South Carolina Press.

Roberts, P. (2002). On Method**:** The Ascent of Comparative Criminal Justice**.** *Oxford Journal of Legal Studies, 22*(3), 539-561.

Roberts, P., & Zuckerman, A. (2010). *Criminal Evidence*. Oxford University Press.

Rock, P. (1991). Witnesses and Space in Crown Court. *British Journal of Criminology, 31*(3), 266-179.

Rock, P. (1993). *The Social World of an English Crown Court: Witnesses and Professionals in the Crown Court Centre at Wood Green*. Claredon Press Oxford.

Rossner, M. (2021). Remote Rituals in Virtual Courts. *Journal of Law and Society, 48*(3), 334-361.

Royal Commission into Family Violence (RCFV). (2016). *Royal Commission into Family Violence: Summary and recommendations.* (Parl Paper No 132 (2014–16)). http://rcfv.archive.royalcommission.vic.gov.au/Report-Recommendations.html

Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA). (2017). *Final Report: Preface and Executive Summary*. https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_preface_and_executive_summary.pdf

Rush, E., Quas, J. A., & McAuliff, B. D. (2012). Child witnesses' experiences of distress in criminal courts: sources, consequences and solutions. In M. K. Miller & B. H. Bornstein (Eds.), *Stress, trauma, and well-being in the legal system* (pp. 89-121). Oxford University Press.

Samson, N. (2020). Dual Status Victim-Witnesses at the ICC: Procedures and Challenges. In R. Jasini & G. Townsend (Eds), *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap Between Research and Practice* (ESRC) https://www.law.ox.ac.uk/sites/files/oxlaw/iccba__oxford_publication_30_november_2020_.pdf

Sanders, A. (2002). Victim Participation in an Exclusionary Criminal Justice System. In C. Hoyle and R. Young (Eds.), *New Visions of Crime Victims*. Hart.

Sanders, A., Creation, J., Bird, S., & Weber, L. (1996). *Victims with Learning Disabilities: Negotiating the Criminal Justice System.* Home Office Research Findings No.44.

Sanders, A., & Jones, I. (2007). The victim in court. In S. Walkate (Ed.), *Handbook of victims and victimology* (pp. 282-308). Routledge.

Saks, M. J., & Spellman, B.A. (2016). *The Psychological Foundations of Evidence Law.* New York University Press.

Schneider,W.E. (2015). *Engines of Truth*. Yale University Press.

Scottish Courts and Tribunals Service (2016). *Evidence and Procedure Review: Next Steps*. https://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-report---next-steps---february-2016.pdf?sfvrsn=2

Scottish Courts and Tribunals Service. (2017). *Evidence and Procedure Review Child and Vulnerable Witnesses Project Pre-Recorded Further Evidence Workstream Project Report*. https://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-pre-recorded-evidence-report-28-09-17.pdf?sfvrsn=2

Scottish Executive. (2002). *Vital voices: Helping Vulnerable Witnesses Give Evidence*. *Policy Paper*. https://lx.iriss.org.uk/sites/default/files/resources/122.%20Vital%20Voices%20-%20Helping%20Vulnerable%20Witnessess%20Give%20Evidence.pdf

Scottish Government (2008). *Turning Up The Volume: The Vulnerable Witnesses (Scotland) Act 2004*. Scottish Government Social Research. https://www.scie-socialcareonline.org.uk/turning-up-the-volume-the-vulnerable-witnesses-scotland-act-2004/r/a11G00000017sEdIAI

Scottish Law Commission. (1988). *The Evidence of Children and other Potentially Vulnerable Witnesses*. (Discussion Paper No 75). https://trove.nla.gov.au/work/18750074

Scottish Law Commission. (1990). *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Scot Law Com No 125). https://www.scotlawcom.gov.uk/files/9512/8015/1888/26-07-2010_1444_651.pdf

Shapland, J., & Hall, M. (2007). What do we know about the effects of crime on victims?. *International Review of Victimology*, *14*(2), 175-217. https://doi.org/10.1177/026975800701400202

Sharp L., & Ross M. (2008). *The Vulnerable Witnesses Scotland Act 2004: Text and Commentary*. Edinburgh University Press.

Segovia, D. A., Strange, D., & Takarangi, M. K. (2017). Trauma memories on trial: is cross-examination a safeguard against distorted analogue traumatic memories? *Memory*, *25*(1), 95-106. https://doi.org/10.1080/09658211.2015.1126608

Smith, O. (2018). *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths.* Palgrave Macmillan.

Smith, O., & Skinner, T. (2012). Observing Court Responses to Victims of Rape and Sexual Assault. *Feminist Criminology*, *7*(4), 298–326. https://doi.org/10.1177/1557085112437875

Spencer J. R., Nicholson G., Flin R., & Bull R. (1990). *Children's Evidence in Legal Proceedings*: An International Perspective. Cambridge University Law Faculty.

Spencer, J. & Spencer, M. (2001). *Witness Protection and the Integrity of the Criminal Trial*, paper presented at the Second World Conference on the Investigation of Crime. Institute of Human Rights and Criminal Justice Studies.

Stobbs, G. and Kebbell, M.R. (2003). Jurors' Perception of Witnesses with Intellectual Disabilities and the Influence of Expert Evidence. *Journal of Applied Research in Intellectual Disabilities, 16*(2), 107-114. https://doi.org/10.1046/j.1468-3148.2003.00151.x

Stone, M. (1984). *Proof of Fact in Criminal Trials*. Sweet & Maxwell Ltd.

Stone, M. (1995). *Cross-Examination in Criminal Trials* 2nd ed. Butterworths.

Tanovich, D. (2003). Starr Gazing: Looking into the Future of Hearsay in Canada. *Queen's Law Journal 28*(2), 371-410.

Taslitz, A. (1999). *Rape and the Culture of the Courtroom*. New York University Press.

Temkin, J. (2000). Prosecuting and Defending Rape: Perspectives From the Bar. *Journal of Law and Society, 27*(2), 219-248. https://doi.org/10.1111/1467-6478.00152

Tinsley, I., & McDonald, E. (2011). Use of alternative ways of giving evidence by vulnerable witnesses: Current proposals, issues and challenges. *Victoria University of Wellington Law Review*, *42*(4), 705-741. https://doi.org/10.26686/vuwlr.v42i4.5112

United Nations Office on Drugs and Crime. (2009). *Justice in Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary*. https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf

Van den Wyngaert, C. (2012). Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge. *Case Western Reserve Journal of International Law, 44*(1), 475-496.

Vasiliev, S. (2011). From Liberal Extremity to Safe Mainstream? The Comparative Controversies of Witness Preparation in the United States. *International Commentary on Evidence,* 9(2), 1-67.

Victorian Law Reform Commission (VLRC). (2016). *The Role of Victims of Crime in the Criminal Trial Process*. https://www.parliament.vic.gov.au/file_uploads/VLRC_Victims_Of_Crime-Report_2016_sMw0x7nm.pdf

Wellborn III, O. G. (1990). Demeanor. *Cornell Law Review*, *76*(5), 1075-1105.

Westman, J. N. (2018). No matter how small: Child witnesses in Canadian Criminal trials. *Appeal: Review of Current Law and Law Reform*, *23*, 65-88.

Wheatcroft, J.M. and Ellison, L.E. (2012). Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy. *Behavioral Sciences & Law*, *30*(6), 821-840. https://doi.org/10.1002/bsl.2031

White, R., Bornman, J., & Johnson, E. (2015). Testifying in court as a victim of crime for persons with little or no functional speech: Vocabulary implications. *Child abuse research in South Africa*, *16*(1), 1-14.

Wigmore, J. H. (1940). *Evidence in Trials at Common Law*. Little, Brown & Company.

Zajac, R., O'Neil, S., & Hayne H. (2012). Disorder in the courtroom? Child witnesses under cross-examination. *Developmental Review 32*(3), 181-204. https://doi.org/10.1016/j.dr.2012.06.006

Zajac, R., Westera, N., & Kaladelfos, A. (2018). The "good old days" of courtroom questioning: Changes in the format of child cross-examination questions over 60 years. *Child maltreatment*, *23*(2), 186-195.

Zappalà, S. (2003). *Human Rights in International Criminal Proceedings*. Oxford University Press.