Cross-Examination Compared: The Asymmetric Treatment of Vulnerable Defendant and Non-Defendant Witnesses

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This article draws on new data to demonstrate that the asymmetrical provision of special measures in England and Wales of vulnerable witnesses and vulnerable defendants carries through into the manner in which vulnerable defendant witnesses are cross-examined. There has been a concerted effort in recent years to improve the cross-examination experience of vulnerable witnesses to help them achieve best evidence. However, this study found that defendant witnesses are not accorded the same treatment as non-defendant witnesses, and that the use of intermediaries and ground rules hearings to underpin these adaptations to cross-examination are rarely extended to vulnerable defendants. The article argues that intermediaries and ground rules hearings should be deployed more frequently to facilitate the cross-examination of vulnerable defendants and to enhance their effective participation in the trial.

Introduction

Over the past 30 years there has been increasing recognition of the particular difficulties that vulnerable people face when involved in criminal proceedings,[1] but legislative reform in England and Wales to enable them to participate more effectively in such proceedings has largely focused at the trial stage on vulnerable non-defendant witnesses. Vulnerable defendants have, to date, been poorly served by such reform.[2] Yet as a matter of principle, as well as achieving accurate outcomes, it is hard to see why they should be deprived of access to adaptations that are made for non-defendant vulnerable witnesses.

The article examines the position of vulnerable witnesses and defendants in England and Wales[3] and begins by considering the asymmetrical treatment of vulnerable non-defendant witnesses and vulnerable defendants[4] in respect of the direction of special measures. It then discusses more radical changes to the nature of cross-examination itself that have been introduced to enable vulnerable witnesses to give their best evidence. This article then draws on data from a joint University of Nottingham and Nottingham Trent University three-year empirical project, *Mapping the Changing Face of Cross-Examination in Criminal Trials* funded by the Nuffield Foundation to illustrate how the

[1] Burton, M., Evans, R., & Sanders, A. "Vulnerable and intimidated witnesses and the adversarial process in England and Wales" (2007) 11 *International Journal of Evidence & Proof* 1; J. Doak, *Victims' Rights, Human Rights and Criminal Justice* (Hart, 2008); L. Ellison *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2001).

[2] A. Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge, 2017) pp. 70-72.

[3] For fuller discussion of research findings in relation to all jurisdictions included in the research see J. Jackson, J. Doak, C. Saunders, D. Wright and D. Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials* Nuffield Foundation Final Report (Nuffield, 2024) https://www.nuffieldfoundation.org/project/changing-face-of-cross-examination-in-criminal-trials § 4.6.7.

[4] For the purposes of this article, the term non-defendant vulnerable witness is used to describe both vulnerable prosecution witnesses and vulnerable defence witnesses other than the accused. The law makes no distinction between the treatment of vulnerable prosecution and defence witnesses. However, vulnerable defence witnesses other than the accused rarely featured in our research study and accordingly the article does not seek to explore any differential treatment between vulnerable prosecution and vulnerable defence witnesses.

asymmetrical treatment of vulnerable non-defendant and defendant witnesses in respect of special measures has carried through to the changes that have been made to cross-examination. It is argued that vulnerable defendants who choose to give evidence should be able to benefit from these changes in the same way as non-defendant witnesses.

Asymmetric special measures

Increased attention to the needs of vulnerable witnesses can be seen as a response to the dual concerns over historical indifferent, some may say callous, treatment of those groups and the need to ensure their effective participation in the criminal justice process. The last three decades have produced a large body of research that has exposed the difficulties vulnerable witnesses, and victims in particular, face in the witness box and a more "witness/victim" centred approach has developed around the concept of promoting "best evidence" for vulnerable witnesses.[5] Internationally and domestically, a consensus largely shared by legislators, the public at large and the various professional stakeholders emerged on the need for a number of "special" measures to assist such witnesses in giving their evidence. These began as fairly limited and carefully circumscribed exceptions to normal trial procedure (the use of screens or the removal of wigs and gowns, for example), but developed to allow more pronounced departures from traditional procedure such as the use of video-platforms enabling witnesses to give either live or pre-recorded evidence out of the courtroom.

"Special measures" were first introduced for child witnesses in the 1980s, starting with screens[6] and the live televised link,[7] followed in 1991 with pre-recorded video-taped evidence-in-chief.[8] The far-reaching recommendation of the Pigot Committee,[9] that all questioning of child witnesses in serious crimes of sex and violence (including cross-examination) should take place in advance of trial, met with stiff opposition. However, a mounting body of evidence documenting the impact of secondary victimisation on the treatment of vulnerable witnesses, led to a government inter-departmental review of the treatment of vulnerable or intimidated witnesses in the criminal justice system in 1997. The report, *Speaking up for Justice*,[10] made extensive recommendations to ameliorate the position of vulnerable witnesses and the Youth Justice and Criminal Evidence Act 1999, which implemented the vast majority of the recommendations, sought to enable vulnerable and intimidated witnesses to achieve "best evidence" whilst also easing the burden of giving evidence.[11]

The 1999 Act, which provides the contemporary legal framework, made a range of special measures[12] available to all children under the age of 18 years and, with qualifying criteria, to adults with a physical,

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[5] Full details of this research can be found in J. Doak, J. Jackson, C. Saunders, D. Wright, B Gómez Fariñas, and S. Durdiyeva, *Cross-Examination in Criminal Trials: Towards a Revolution in Trial Practice?* (2021) https://irep.ntu.ac.uk/id/eprint/44924/1/1497281_Doak.pdf Chp 1.

[6] First documented in *R v Smellie* (1919) 14 Cr App Rep 128; approved by the Court of Appeal specifically in relation to vulnerable witnesses in *R v X, Y and Z* (1989) 91 Cr App R 36.

[7] Criminal Justice Act 1988 s.32 (child witnesses, with the leave of the court, could give all their evidence by live television link in cases involving offences of a sexual or violent nature).

[8] Criminal Justice Act 1991 s.54 (inserting section 32A into the 1988 legislation).

[9] HH Judge Thomas Pigot QC (Chair) *The Report of the Advisory Group on Video Evidence* (Home Office, 1989).

[10] Home Office, *Speaking Up for Justice. The Report of the Home Office Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office, 1998).

[11] On the interplay between the deontological value of humane treatment and the instrumental goal of improving the quality of a vulnerable person's evidence see further S. Fairclough, "The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment" (2021) 41 *Oxford Journal of Legal Studies* 1066.

[12] Youth Justice and Criminal Evidence Act 1999 ss.23 – 30.

mental or learning disability or disorder[13] and to those who are in fear or distress at the prospect of testifying (intimidated witnesses).[14] The special measures regime applies to vulnerable and intimidated defence as well as prosecution witnesses, although research suggests that in practice there is much less uptake of such measures on the defence side. Initially, defendants were explicitly excluded, although the legislation has since been amended to provide for defendants to use live link facilities[15] and the use of intermediaries[16] subject to eligibility criteria that are more restrictive than those that apply to non-defendant witnesses. Thus, child defendants are only eligible for these measures where they have a compromised ability to participate as a witness due to their level of intellectual ability or social functioning. In the case of adult defendants, eligibility only arises where they suffer from mental disorder or otherwise have a "significant impairment of intelligence and social function" and "are unable to participate effectively as a witness".[17] However, the legislative provision enabling intermediaries to assist vulnerable defendants has yet to be implemented and the courts have instead used their common law powers to appoint defence intermediaries.[18] The "gradual, ad-hoc, piecemeal reforms" that have enabled defendants to avail of special measures have created an uncertain legal provision that practitioners find difficult to access.[19] In contrast to the statutory scheme provided for vulnerable non-defendant witnesses, the more limited special measures provision for vulnerable defendants are spread across legislation, common law and the Criminal Practice Directions.[20]

This asymmetry in provision for vulnerable defendants and non-defendant witnesses creates the impression that "defendants whatever their age are somehow less deserving of assistance to give their best evidence than are other witnesses with the same communication difficulties".[21] This stands in contrast to Scotland, where accused children and adults are now afforded the same access to special measures, with the exception of screens and intermediaries (which are not used in Scotland), as other vulnerable witnesses.[22]

As we proceed to consider the increased focus that has been given to the cross-examination experience of vulnerable witnesses, we shall see that the asymmetrical treatment of vulnerable prosecution and defendant witnesses regarding special measures has carried through into the manner in which vulnerable defendant witnesses are cross-examined.

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[13] Youth Justice and Criminal Evidence Act 1999 s.16.
[14] Youth Justice and Criminal Evidence Act 1999 s.17.
[15] Youth Justice and Criminal Evidence Act s.33A(2) inserted by Police and Justice Act 2006 s 47. Defendant use of other special measures (screens, the removal of wigs and gowns, clearing of the public gallery and communication aids) is not provided for by statute but these measures have been made available by the common law. For details see S. Fairclough, "Special measures for vulnerable defendants: the who, what, when, where, why, and how", (2022) 9 *Arch Rev* 6.
[16] Youth Justice and Criminal Evidence Act s.33BA & BB inserted by Coroners and Justice Act 2009.
[17] Youth Justice and Criminal Evidence Act s.33A(4)(5) inserted by the Police and Justice Act 2006 s.47.
[18] *C* v *Sevenoaks Youth Court* [2009] EWHC 3088 (Admin).
[19] S. Fairclough, "The consequences of unenthusiastic criminal justice reform: A special measures case study" (2021) 21 *Criminology and Criminal Justice* 151, 155.
[20] For a detailed analysis of the legal authorities for special measures access for the accused, see S. Fairclough, "Speaking up for injustice: reconsidering the provision of special measures through the lens of equality" [2018] Crim LR 4, 17.
[21] L. Hoyano, "Special Measures Directions Take Two: Entrenching Unequal Access to Justice" [2010] Crim LR 345, 366. See also J. McEwan, "Vulnerable defendants and the fairness of trials" [2013] Crim LR 100 and L. Hoyano and A. Rafferty, "Rationing defence intermediaries under the April 2016 Criminal Practice Direction" [2017] Crim LR 93.
[22] See Vulnerable Witnesses (Scotland) Act 2004 s.271F.

Increased Focus on the Cross-Examination Experience of Vulnerable Witnesses

Although special measures have helped to alleviate some of the stress and anxiety associated with giving evidence,[23] they have not altered the fundamental character of cross-examination in the adversarial system. There has been an increasingly realisation that this causes distress for witnesses generally, but particular distress among the most vulnerable witnesses.[24] Within the last decade, the drive to assist vulnerable witnesses to give their best evidence has permeated the very nature of cross-examination itself. Given the rising prominence that has been given to victims' rights in political, criminological, legal and human rights discourse,[25] it is not surprising that the manner in which they are questioned in the witness box has come under particular scrutiny.

Cross-examination has long been considered an "iconic" feature of adversarial criminal proceedings used to test oral evidence.[26] It is frequently crucial in determining the outcome of a contested trial because it is the point at which there is a "direct confrontation of one point of view by the other" and the "conflict becomes explicit". [27] Although cross-examination has been defended in most legal discourse primarily on epistemic grounds, lawyers who conduct cross-examination are not charged with discovery of the truth but with advocating on behalf of the party they represent, (within the parameters of their duty to the court). When cross-examination is seen as a means of advocating a case, it is not hard to see how it can require advocates to control closely what witnesses say and to coax them to accept statements put to them. In many adversarial systems advocates are required to put their case to witnesses but have traditionally been given considerable freedom to determine how that case should be put.[28] Although judges could in theory intervene to curb aggressive, repetitive or oppressive questioning, descending into the arena was considered an intrusion on the need for an "unbroken sequence of question and answer".[29] The lack of any meaningful control on counsel's questioning led them in turn to infuse comment and advocacy into their questioning as they used witnesses to promote their cases in the adversarial system.

Many now question Wigmore's famous dictum that "cross-examination is beyond doubt the greatest legal engine ever invented for the discovery of the truth",[30] and there is a growing acknowledgement that, for vulnerable witnesses at least, fundamental change to the nature of cross-examination is required. Spearheaded originally by the senior judiciary in England and Wales, though increasingly also supported in other jurisdictions, a new paradigm is being developed which shifts cross-

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[23] See, e.g. M. Burton, R. Evans and A. Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*, Home Office On-Line Report 01/06 (2006) https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.624.6353&rep=rep1&type=pdf; B. Hamlyn, A. Phelps, J. Turtle, and G. Sattar, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses*, Home Office Research Study 283 (Home Office, 2004); M. Wood, K. Lepanjuuri, C. Paskell, J.Thompson, L. Adams, and S. Coburn, *Victim and witness satisfaction survey* (Crown Prosecution Service, 2015).

[24] Doak, *Victims' Rights, Human Rights and Criminal Justice;* Ellison, *The Adversarial Process and the Vulnerable Witness.*

[25] Doak, *Victims' Rights, Human Rights and Criminal Justice*.

[26] P. Roberts, *Roberts & Zuckerman's Criminal Evidence*, 3rd edn. (Oxford University Press, 2022) 311.

[27] M. Stone, *Proof of Fact in Criminal Trials* (Sweet & Maxwell Ltd, 1984) 296.

[28] The duty to put the case originates in *Brown v Dunn* (1894) 6 R 67. See now CPD 2023 Ch 6.

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

[30] Less cited than this famous dictum is Wigmore's qualification that the advocate "may, it is true, do more than he ought to do… may make the truth appear like falsehood", but he considered that abuse of cross-examination's power could be remedied by proper control. See J.H. Wigmore, *Evidence in Trials at Common Law* (Little, Brown & Company, 1940) §1367. For a modern assessment, see A. Roberts, "The Frailties of Human Memory and the Accused's Right to Accurate Procedures" [2019] Crim LR 912.

examination away from the traditional "advocacy" model towards a "best evidence" model.[31] A series of rulings by the Court of Appeal sought to put greater restrictions on the manner in which vulnerable witnesses are cross-examined. These required that age-appropriate language and short "untagged" questions be used and that a cautious approach be adopted when challenging or seeking to undermine the testimony of a vulnerable witness.[32] Best practice guidelines were issued urging judges and magistrates to control the questioning of vulnerable witnesses. In some circumstances this means breaking from the rule (known as "putting the case") that a failure to cross-examine should be taken as tacit acceptance of the witness's evidence. Such evidence could now be challenged after (rather than during) the witness's testimony.[33] In what has been described as a new "revolution" in practice,[34] advocates are required to adapt their forensic techniques to suit the needs of the witness. If justice is to be done to for? the vulnerable witness and accused, "[a]dvocates must adapt to the witness, not the other way round".[35]

This change in approach has been facilitated by two particular innovations: the use of intermediaries and the use of pre-trial hearings known as Ground Rules Hearings. The concept of a communication specialist, known as an intermediary, was initially proposed by Pigot[36] but was met with significant opposition on the grounds that it presented a fundamental challenge to the freedom of counsel under the adversarial model. The power of the intermediary to re-word questions was said to pose significant challenges to well-established questioning techniques, leading to fears of a loss of meaning or emphasis, which could effectively alter the substance of a question. This, in turn, could lead to disputes between the questioner and the intermediary on which the trial judge would have to adjudicate.[37] Notwithstanding these concerns, intermediaries were eventually introduced by section 29 of the Youth Justice and Criminal Evidence Act 1999, and the scheme was rolled out nationally from 2007.

Since their emergence on an ad hoc basis during the mid-2000s,[38] Ground Rules Hearings have since become formalised as a lynchpin of judicial management in trials involving vulnerable witnesses. They 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 in order to facilitate best evidence.[39]

While Ground Rules Hearings do not have a statutory footing, they were endorsed by the Court of Appeal in *Lubemba*[40] and are now mandatory in all cases involving intermediaries.[41] They are also

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[31] E. Henderson, "Theoretically speaking: English judges and advocates discuss the changing theory of cross-examination" [2015] Crim LR 929.

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

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

[34] Lord Judge, LCJ, *Half a Century of Change: The Evidence of Child Victims*: Toulmin Lecture in Law and Psychiatry (King's College London, 2013).

[35] *Lubemba* [2014] EWCA Crim 2064 [45].

[36] Pigot, *The Report of the Advisory Group on Video Evidence*.

[37] L. Hoyano, "Variations on a theme by Pigot: Special measures directions for child witnesses" [2000] Crim LR 250.

[38] Ground Rules Hearings have been traced back to 2006. See P. Cooper, P. Backen and R. Marchant "Getting to grips with ground rules hearings: A checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court" [2015] Crim LR 420, 424.

[39] Cooper, Backen and Marchant, "Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court".

[40] [2015] 1 WLR 1579

[41] Criminal Procedure Rules (CPR), r. 3.9

regarded as good practice in other cases involving child witnesses or other vulnerable witnesses, including defendants, who have particular communication needs.[42] Following *Sandor Jonas*,[43] the Criminal Procedure Rules were amended to require that Ground Rules Hearings take place to consider the allocation of questions between witnesses in cases where there are multiple defendants.[44]

Mapping the Changing Face of Cross-Examination

Our research project examined the extent to which this heralded revolution in cross-examination practice is being reflected on the ground. Over a 36-month period, it encompassed four jurisdictions, England and Wales, Scotland, Northern Ireland and Ireland,[45] although the focus of this short article is the findings in England and Wales. The project sought to explore (i) the extent to which the new "best evidence" model of cross-examination is displacing traditional theories of cross-examination within the contemporary criminal trial; (ii) the extent to which judges are managing the process of cross-examination for vulnerable witnesses; (iii) how criminal justice professionals are responding to this new style of cross-examination; and (iv) whether there is a material difference in the way in which vulnerable witnesses and defendants are being questioned, as opposed to other types of witnesses.

The project adopted a mixed methodology to give a rounded picture of cross-examination practice and comprised observations of 40 trials involving vulnerable and "non-vulnerable" witnesses; 60 interviews with judges, advocates and intermediaries; and corpus linguistic analysis of transcripts of cross-examinations of vulnerable and non-vulnerable witnesses from 23 out of 40 observed trials. Whilst acknowledging that vulnerability is both a contested concept and an imprecise measure,[46] the research project operationalised "vulnerable" to reflect the eligibility criteria for special measures set out in the legislation adopted in the jurisdictions studied.[47] Sexual offences cases were prioritised when selecting trials (n = 25) to maximise the number of vulnerable witnesses observed, although a spread of non-sexual offences trials (n =15) were included to provide a broader view of the conduct of cross-examination of different types of witnesses in a variety of cases. Of 33 defendants who were observed giving evidence, only two were classified as "vulnerable" in accordance with our adopted definition. However, many of the judges, advocates and intermediaries who were interviewed (total n = 60),[48] had considerable experience of vulnerable defendants giving evidence and expressed strong views about their treatment.

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[42] Judicial College, *Equal Treatment Bench Book*. https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2020.pdf (2020) §120. Principles of best practice have also been outlined by the Court of Appeal: see *PMH* [2018] EWCA Crim 2452 and *YGM* [2018] EWCA 2458.

[43] [2015] EWCA Crim 562.

[44] Rule 3.9(7)(b)(v).

[45] See Jackson, Doak, Saunders, Wright and Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials*.

[46] See, e.g. M. A. Fineman, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge, 2013); R. Dehaghani, *Vulnerability in Police Custody: Police Decision Making and the Appropriate Adult Safeguard* (Routledge, 2019).

[47] Specifically in England & Wales, witnesses eligible for special measures under the Youth Justice and Criminal Evidence Act are classified as "vulnerable" if they satisfy the criteria relating to "age and capacity" (s.16) and are classified as "intimidated" if they satisfy criteria relating to "fear or distress about testifying" (s.17). In Scotland all witnesses who are eligible for special measures are classified simply as "vulnerable" (Criminal Procedure (Scotland) Act 1995 s.271(1).) For the purposes of simplicity, we opted to follow the Scottish approach and use the term "vulnerable" to encapsulate all eligible witnesses.

[48] Comprising 21 judges, 24 advocates and 15 intermediaries.

Although the focus of much research hitherto has been on the experiences of vulnerable victims or witnesses who give evidence for the prosecution,[49] evidence suggests widespread vulnerability amongst defendants and that considerable numbers suffer from mental illness, cognitive impairment, neuro-diverse condition or communication difficulties.[50] In their report *Inclusive Justice*, the Equality and Human Rights Commission detail the difficulties that defendants with such conditions may encounter during a criminal trial: memory loss or difficulty retaining information, a short attention span, a reluctance to speak up, extreme anxiety, an inability to control impulses or thoughts, difficulty in understanding complex language and legal processes.[51] In principle, it is difficult to see why vulnerable defendants are any less deserving of the new "best evidence" approach to cross-examination than other vulnerable witnesses with the same communication difficulties.[52] However, one of the persistent themes to emerge from the research, and which is the focus of this article, is the differentiation in the cross-examination experience of vulnerable non-defendant and defendant witnesses and their access to procedural accommodations which specifically underpin the new approach to cross-examination: intermediary support and ground rules hearings.

Cross-Examination Adaptations for Vulnerable Witnesses

This section begins with a brief overview of the research findings on the extent to which cross-examination styles and techniques have been adapted to suit the needs of vulnerable witnesses generally. It provides the context necessary for the later examination of the extent of change evidenced for vulnerable defendants.

Guidance to advocates on the general principles of questioning vulnerable witnesses is laid out in the Advocates' Gateway[53] and in the 20 principles of questioning set out in the Inns of Court College of Advocacy's guidance.[54] They can be categorised as follows: duration of questioning; the focus and organisation of cross-examination; the complexity and length of questions; use of open and closed questions; the tone and manner of questioning; and the lack of direct challenge ("putting the case"). The research found significant commitment to these principles amongst both judges and counsel,

[49] See, e.g. Burton, Evans and Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*; J. Plotnikoff and R Woolfson, *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (2009) https://www.nuffieldfoundation.org/wp-content/uploads/2019/11/measuring_up_report_wdf665791.pdf; J. Plotnikoff, and R. Woolfson, *Falling Short? A Snapshot of Young Witness Policy and Practice*: *a Report for the NSPCC, Revisiting "Measuring up? Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings* (2019).

[50] See, e.g. J. Jacobson and J. Talbot, *Vulnerable Defendants in the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust, 2009); Hoyano and Rafferty, "Rationing defence intermediaries under the April 2016 Criminal Practice Direction", Fairclough, "Speaking up for Injustice: Reconsidering the provision of special measures through the lens of equality"; Equality and Human Rights Commission, *Inclusive justice: a system designed for all* (Equality and Human Rights Commission, 2020).

[51] Equality and Human Rights Commission, *Inclusive justice: a system designed for all* (2020), 6-7. https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf

[52] For a persuasive critique of the rationale put forward by the Home Office in *Speaking Up for Justice* as to why vulnerable defendants were initially denied access to special measures support see Fairclough, "Speaking up for Injustice: Reconsidering the provision of special measures through the lens of equality"

[53] Advocate's Gateway, *General principles from research, policy and guidance: planning to question a vulnerable person or someone with communication needs. Toolkit 2* (2019). https://www.theadvocatesgateway.org/_files/ugd/1074f0_d7792470860f4f8e8b0a1e3116cdbd94.pdf.

[54] Inns of Court College of Advocacy, *Advocacy for Vulnerable People and Children (Criminal Course) National Training Programme*. The 20 Principles of Questioning (2022). https://www.icca.ac.uk/wp-content/uploads/2023/03/20-Principles-of-Questioning.pdf.

though there were varying assessments by interviewees on the extent to which advocates are implementing them and the linguistic sample of cross-examinations highlighted instances of bad as well as good practice.[55] There was a general view amongst interviewees, largely backed up by trial observations and the linguistic analysis, that the court system has embraced a significant change of approach particularly towards vulnerable non-defendant witnesses. The cross-examination experience was thought to have become less negative for many vulnerable witnesses and there has been considerable movement away from the use of "coercive" questioning techniques.

There was a general consensus that this change of approach has not necessitated any change in what counsel seek to achieve by cross-examination. When counsel were asked what they sought to achieve by cross-examination, the answer invariably was not the discovery of the truth; rather it was to undermine testimony challenging the opposing side's case, or to elicit testimony favourable to their own. According to one counsel, when vulnerable witnesses are involved, there are "massive differences" in the way counsel would go about furthering these objectives (CC1).[56] One judge neatly characterised the changes that advocates have been required to confront:

> "So, the interminable long question, the question with the tag on the end of it, the question that was three questions in one, the questions that jumped about, the questions that were too confrontational, the questions that made statements… all of that had to change." [CJ3]

Judges, counsel and intermediaries described softer, less aggressive and clearer approaches to questioning, with greater use of signposting topics ahead of detailed questions. As one counsel observed, "for the most part, my cross-examinations are far more forensic and they are far more direct, tailored to specific questions that need asking" (BC3). Judicial control over the format (and sometimes scope) of questions has increased and, for the most part, advocates appeared to accept this increased level of case management. Cross-examination was generally felt to be more time-limited than in the past, sometimes to the point of not cross-examining at all, and this perception was supported by the analysis of a sub-sample of court transcripts from the observed trials. There are limits on "putting the case", particularly to a young witness, when alternative ways of admitting evidence of inconsistency can be used and, again, in the linguistic sample there were fewer direct challenges to the truthfulness of vulnerable witnesses than non-vulnerable witnesses.

However, interviewees suggested the existence of a perceived hierarchy between "more deserving" non-defendant witnesses and "less deserving" defendants. The research data coalesced around four main issues. First, there was increasing recognition by judges, counsel and, unsurprisingly, intermediaries of the vulnerability (and unmet need) of defendants, but participants also indicated that structural provision for specific support is lacking. Secondly, clear distinctions were apparent between the approaches to cross-examination for vulnerable non-defendant and defendant witnesses. The research identified pockets of recognition of the need to make special adaptations in questioning style and technique for vulnerable defendants but suggests that these are not routinely or consistently applied. Thirdly, there is limited intermediary support for vulnerable defendants. Finally, whilst Ground Rules Hearings are increasingly commonplace for many non-defendant

[55] For a fuller treatment of the research findings see Jackson, Doak, Saunders, Wright and Cooper, *Mapping the Changing Face of Cross-Examination in Criminal Trials*, Part 4.

[56] Quotations are identified as, for example ABJ1 where the first letter denotes jurisdiction (A England and Wales, B Scotland, C Northern Ireland and D Ireland), the second letter denotes court area within the jurisdiction (A, B, C or D), the third letter denotes type of practitioner (J = judge, C = counsel and R = registered intermediary) and the number denotes the particular interviewee quoted within these categories.

vulnerable witnesses, our research suggests that they are rarely held for vulnerable defendants. These four key themes are considered in more detail below.

Cross-Examination Adaptations for Vulnerable Defendants

1. *General Recognition of the Vulnerability of Defendants*:

The research detected an increasing recognition by criminal justice professionals of the widespread vulnerability of defendants in criminal trials. One counsel noted that there are "probably more vulnerable defendants than vulnerable witnesses in so far as one could generalise" [BJ3]. Another observed:

> "I mean, nearly everybody who appears in front of the courts is vulnerable in some way. Most of them are sad, not bad, right? So something's going wrong somewhere. I would say, a huge percentage have mental health problems, but we don't routinely make accommodations for that really, properly, in my view." [CC4]

There was, however, a general consensus amongst interviewees that vulnerable defendants are not accorded the same kind of modifications to cross-examination afforded to other kinds of vulnerable witness. A particular cause of this deficit was attributed to difficulties in identifying an individual defendant's vulnerability. The Equality and Human Rights Commission found that:

> "…. legal professionals rely strongly on the defendant or accused person themselves to disclose any impairment and/or say whether they face any barriers. Many will not do so. Some people don't know they have an impairment, while others choose not to offer this information."[57]

This conclusion is borne out in the research findings. One prosecutor posited that the criminal justice profession is so accustomed to defendant vulnerability that it has become the norm, saying, "actually, you see it so often that you stop seeing it". Counsel, in particular, highlighted the structural obstacles to identification of the precise nature of a defendant's vulnerabilities. The prosecutor and judge are reliant on defence counsel to alert them to any issues, particularly because intermediaries are infrequently appointed to work with defendants. One counsel pointed out that "the one person as a prosecutor you never ever get to know is the defendant" [CC1]. Elaborating, she gave a vivid example of only discovering the extent of a defendant's difficulties during his testimony:

> "And quite often you can be told, 'Well, look, he's only 16 so we're going to need to take breaks.' Well, fine, but… the first time you hear maybe about his background is when he's in the witness box and he's answering the first few questions… You know, 'Well, your mum died when you were three and then your dad left Mogadishu with you and you came over here and you went to school and you didn't speak any English, just talk us through [that]'." [CC1]

It is, of course, the responsibility of defence lawyers to highlight defendants' vulnerabilities. While there were indications that some defence counsel – or more likely solicitors – are becoming more alert to their client's vulnerabilities, there was also recognition that limited pre-trial contact and lack of experience can frustrate that awareness:

> "You will find a lot of barristers who are obviously very experienced… but they generally have less contact with defendants… and there may not… have been sufficient interaction for them to have picked up that there are issues there… And the other problem is that, unfortunately, most criminal work is publicly funded, it's not so well remunerated and therefore you don't get the most

[57] Equality and Human Rights Commission, *Inclusive justice: a system designed for all*, 9.

experienced people conducting it on the litigation side and therefore, again, there may be deficits in the experience of the people that should be picking up on these matters." [BC2]

Despite this awareness of widespread need, intermediaries and defence counsel drew a clear contrast between the cross-examination experience of and wider special measures support for vulnerable witnesses and vulnerable defendants. One intermediary commented that "defendants do not get the same treatment as complainants, regardless of their need. Vulnerability does not come into it" [BR1]. Counsel agreed, one stating that they had "absolutely no doubt that the vulnerable defendant is not treated the same way as a vulnerable witness" [AC3]. This differential treatment is not simply a product of structural failure to identify need. Some interviewees described a criminal justice system lacking in commitment to equal treatment in terms of facilitating best evidence and a culture where, as Hoyano observed in relation to special measures support,[58] defendants are seen as less deserving of assistance to give their best evidence:

"[The criminal justice system] just takes the view that if someone asks for a break, we'll give them a break… You want a box of tissues? We'll pass them. But, otherwise, we're carrying on because you committed a specific crime… I think for me, as a practitioner, the culture there is really very different and very far behind the way that we treat witnesses." [AC4]

"The accused person or the defendant is very much an afterthought in most of the thinking and most of the planning… We're trying to do the right thing in relation to vulnerable witnesses… but we're not really where we should be for the accused." [AC4]

"If you're a witness, the chances are you are a victim, and you are therefore always treated more favourably than somebody who is accused of stabbing someone, hurting someone, sexual abusing them?" [ABC1].

One intermediary gave a vivid example of the indifference with which a vulnerable youth defendant was treated which might reasonably be described as a system lacking in basic humanity:

"I had a child, a 14-year-old child with autism and ADHD. And he sat in the court building for eight hours on a metal chair and he wasn't allowed to go out of the court building to get anything to eat and drink because he was on a tag. His mother wasn't allowed to go out of the court building to get him anything to eat and drink because she was responsible for him… They were left without food and drink for a whole court day. He was told to be there at 9:00 o'clock in the morning and at 4:30 his case is still not being called on. And then they said, 'no, you'll have to come back tomorrow'… He had autism and ADHD and he's 14 years old, sat on a metal chair in a really noisy, cold, busy court building. That's just not OK. They wouldn't have done that to a vulnerable witness, never.' [BR1]

2. The Approach Towards Cross-Examination of Vulnerable Defendants

The research revealed clear distinctions between the approach towards cross-examination for vulnerable witnesses and vulnerable defendants. Although pockets of recognition of the need for accommodations and restrictions to the traditional cross-examination approach for vulnerable defendants were seen, it appears that they are not routinely applied. Some judges insisted that a consistent approach to cross-examining any vulnerable witness, defendant or non-defendant, is

[58] Hoyano, "Special Measures Directions Take Two: Entrenching Unequal Access to Justice". See also Fairclough, "Using Hawkins's surround, field, and frames concepts to understand the complexities of special measures decision making in crown court trials", identifying a 'presumption of guilt' among some legal professionals (at 472).

required. One told us that the same approach is required "for a vulnerable defendant as would be for a vulnerable witness" [ACJ1] stressing that the defendant is a witness like any other. Some counsel similarly showed empathy for the vulnerable defendant's needs. One [AAC2] spoke of requesting the advice of an intermediary formally supporting a vulnerable prosecution witness on how best to structure and phrase questions in cross-examination of the defendant. Another [AAC5] acknowledged that, for vulnerable defendants, counsel "row back" from their normally more assertive style. One judge indicated that this is possibly a spill-over effect of the modern approach to vulnerable witnesses:

> "Prosecution counsel are usually, if they prosecute a lot, they're used to the whole process and procedure of dealing with vulnerable witnesses… I've not seen anyone take advantage of a witness simply because they are a defendant." [BJ2]

Other counsel pointed to the instrumental consideration that it is not always in prosecution counsel's interest to be aggressive with a vulnerable defendant:

> "There's such an obvious power imbalance between you and the defendant anyway when you're cross examining them, that I think… if you're seen to bully a defendant — apart from anything else—it's self-defeating. So I think most people would be quite careful to take on board those vulnerabilities, providing they thought they were well-founded." [CC1]

However, more broadly there appeared to be acceptance that a marked contrast exists between the treatment of vulnerable witnesses and defendants. One judge commented that: "I don't think at the moment it seems to be applying across the board. I still find that defendants are being cross examined in a more robust fashion" [BJ4]. Another said that cross-examination is adapted "to an extent, but much less so than it is with vulnerable prosecution witnesses" [BJ3]. A third judge conceded that "they probably do get a slightly tougher time than a vulnerable complainant" [CJ3]. Many counsel openly acknowledged that they take a more aggressive, assertive, approach with vulnerable defendants, one asserting that "the way that I cross-examine a defendant is just worlds apart from the way in which the defence barrister is allowed to cross-examine a vulnerable witness. There's no comparison" [AC3]. Another was explicit about his tactics, admitting that:

> "I'll be honest, sometimes I've used sarcasm in cross examination… I'll be looking at the jury, almost drawing them in… you have people nodding along or they're pulling those faces when the defendant says something ridiculous, you know, that's completely in the face of other evidence." [AC5]

Allied to the manner and tone of the cross-examination, it appears that vulnerable defendants do not benefit from the same style of judicial management of cross-examination, which limits the length and content of questioning. One counsel told us that in his experience, prosecution counsel are not case managed in the same way as defence counsel [BC1] and another that defendants "are asked a lot more questions… It's almost like questioning for questioning's sake, at times" [BR1]. Although the research included observation of the cross-examinations of only two vulnerable defendants, and it would be wrong to draw any conclusions from these, in each case the cross-examinations were particularly lengthy; one where an adult defendant with significant communication difficulties was asked 693 questions (the most of any witness, vulnerable or non-vulnerable, in the linguistic sample) and another where a child defendant with ADHD was asked 265 questions, far more than the average for non-defendant vulnerable witnesses.

3. Intermediaries for Vulnerable Defendants

The use of an intermediary specifically underpins the new approach to cross-examination for vulnerable witnesses. Whilst adaptations to cross-examination style and technique are within the competence of trial advocates, as one judge put it, intermediaries are far more "able to help the witness than judges and lawyers are because they are true communication specialists and they haven't learned the language of the law as their first tongue", a language which is "a highly peculiar one which we don't work hard enough to simplify" [CJ1]. However, both within the law and our research we see a reluctance to recognise that vulnerable defendants are as deserving of intermediary support as vulnerable non-defendant witnesses.

As with all special measures, intermediaries were not initially available to defendants and, although as we have seen the legislation was later amended to allow their use for certain vulnerable accused persons,[59] these provisions never entered force. However, the appellate courts have acknowledged that judges may exercise their inherent authority to provide for an intermediary, although it was held in *R v Yahya Rashid* that it would be a "rare case where the threshold of disability is crossed such that an intermediary is required when the defendant gives his evidence" and "cases in which an order will be made for an intermediary to be present for *the whole trial* will be very rare".[60] This rarity provision was incorporated in the April 2016 update to the Criminal Practice Directions.[61]

In rationalising intermediary support for defendants as an exception, Lord Thomas CJ in *Rashid* asserted that defence counsel would ordinarily be able to make adaptations for a vulnerable defendant's communication needs including:

> "… the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions."[62]

He further asserted that an advocate would "be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks."[63]

The law's policy on limited intermediary support was reinforced in the research by broadly held judicial perceptions of lack of need. The overwhelming sense from the interview data was that practice in England & Wales is faithful to case law and the provisions of the CPD 2015; it is difficult to secure an intermediary for a vulnerable defendant, and extremely rare for the intermediary to support the defendant throughout the whole trial.

> "The defendant is not entitled to an intermediary throughout the entire trial… You really do have to battle to get one for a defendant… There is arguably an imbalance in the system." [AC2]

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[59] Youth Justice and Criminal Evidence Act 1999, ss 33BA-BB, as amended by Coroners and Justice Act 2009, s 104.

[60] *Yahya Rashid* [2017] EWCA Crim 2, per Lord Thomas CJ at [84]. Approved in *Biddle* [2019] EWCA Crim 86.

[61] Paras 3F, 11-16 and 12-13, which applied at the time of the fieldwork. However, as noted in the conclusion to this section, the wording of the Crim PD has since been amended.

[62] [2017] EWCA Crim 2 at [80].

[63] Though, interestingly, the Court of Appeal in *Biddle* acknowledged that not all advocates appearing in cases involving vulnerable witnesses have undergone training and that judges should be alert to ensuring that only appropriate trained advocates act in such cases. See [2019] EWCA Crim 86 at [27].

Many judges took the view, as outlined in *Rashid*, that they and/or counsel are perfectly able to explain necessary matters to a vulnerable defendant and that judges are generally alert to situations where "the defendant does not understand the question" [AJ3]. Counsel confirmed this judicial stance:

> "Judges that are perhaps more anti-intermediary, they often say, 'We've got experienced counsel on both sides, you've all had the training, modify the way in which you cross-examine to be appropriate to what we know'." [AC3]

In contrast, Hoyano and Rafferty have criticised limited defence access to intermediaries, calling it a retrograde step:

> "It did not seem to occur to English policymakers that defence counsel must be able to communicate with their clients in order to obtain instructions, and that defendants with impairments must be able to communicate with the advocates questioning them..." [64]

The dispute, if it can be characterised as such, centres firstly on whether advocates have the skills and the time to assess defendants' communication difficulties and are then able to identify and implement the necessary accommodations. Secondly, if it accepted that intermediaries have a role to play in supporting defendants, whether that role should be expanded beyond the period when the defendant gives evidence. It is here that the full potential of intermediary support for defendants falls to be considered.

In examining the question of intermediary support for defendants, it is important to consider the function of the intermediary as initially envisaged and how that function has evolved from purpose described in legislation. The Youth Justice and Criminal Evidence Act 1999 s.29 states that:

> "The function of an intermediary is to communicate—
> (a) to the witness, questions put to the witness, and
> (b) to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question."

However, as intermediary practice has developed, they have been trained to facilitate communication rather than act "as the conduit for questions and answers" and this is now the purpose of the intermediary in all the common law jurisdictions that have utilised the role.[65]

Our research confirmed this "facilitator" type role in relation to vulnerable non-defendant witnesses in that, in addition to their role in reviewing and monitoring questions asked and answered in cross-examination, they also take a prominent position in discussing myriad other matters: the time of day a witness will appear in court; how and when memory refreshing will take place; the use of props or topic cards; how the witness will meet the judge and counsel; whether judges and counsel will wear formal court attire; whether counsel will stand or sit whilst asking questions; whether questioning will based in the courtroom or the live-link room; how the witness will communicate with the intermediary; whether the witness may write down answers for the intermediary to read out; and whether regular breaks will be helpful or distracting and, if helpful, their frequency.

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[64] For a review of the background to this more restrictive approach to defence intermediaries see Hoyano and Rafferty, "Rationing defence intermediaries under the April 2016 Criminal Practice Direction".

[65] P. Cooper and M. Mattison, "Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model" (2017) 21 *International Journal of Evidence & Proof* 351, 354.

The question then is whether this facilitator role is, or should be, even more pronounced for vulnerable defendants. Some judges took the view that ensuring vulnerable defendants' access to and participation in proceedings is a responsibility of counsel.

> "The advocate's perfectly able to communicate with him throughout the trial and explain things and doesn't need an intermediary there for the whole trial." [AJ1]

> "Communication involves listening to what's happening when the defendant is not taking an active role in the trial, but the barrister ought to be able to ensure that the defendant is kept fully abreast of the hearing." [BJ3]

This conception of counsel's role did not go unchallenged. A number of counsel, judges and intermediaries posited, contrary to the view of the Court of Appeal, that counsel may lack the time or skills to ensure vulnerable defendants' full understanding of the case against them or the detail of the prosecution evidence presented, matters which go the heart of a vulnerable defendant's ability to properly instruct their legal representative.

> "I worry about defendants who don't have an intermediary throughout the trial because… solicitors are almost never there, counsel don't have enough time during the course of an ordinary court day to ensure that a defendant has processed the evidence that's being given and often they don't." [BC3]

> "How [is the defendant] going to answer questions about a case where he hasn't understood what the prosecution evidence is? And many people don't... When I ask… they say 'I sit in that glass box, and I wait till the judge tells me my punishment'. That's it. There is no other participation whatsoever." [XR1]

Not all judges in the research were unsympathetic to requests for a defence intermediary, but the commonly expressed view, certainly amongst counsel, was that resistance is largely fiscal: "There's a massive opposition from the judges because of the cost of paying for an RI" [AC1]; "Let's not beat around the bush, the only reason they are trying to restrict them is intermediaries are expensive" [BC2]. There are separate funding mechanisms and gatekeepers for Registered Intermediaries, who act for vulnerable witnesses, and HMCTS appointed intermediaries, who act for vulnerable defendants. Judges are the gatekeepers of the HMCTS scheme, in contrast to the Ministry of Justice for the Registered Intermediary scheme, and this together with a limited judicial appetite for their use seems to translate into a reluctance to grant the defendant an intermediary in anything other than exceptional circumstances.[66]

Going forward, there is potential for a less restrictive approach to the appointment of defence intermediaries with the removal of the "rarity provision" from the most recent edition of the Criminal Practice Directions.[67] The new direction is that the court may use its inherent powers to direct the appointment of a defence intermediary, "there is however no presumption that a defendant will be so assisted and, even where an intermediary has the potential to improve the trial process, appointment is not mandatory".[68] Significantly, the 2023 Practice Direction removes the presumption against appointment and directs that the court may appoint an intermediary, "when giving evidence

[66] See also S. Fairclough, J. Taggart and P. Backen, "Lost in translation?: Perceptions of defendant intermediaries in the legal profession" [2023] Crim LR 440.
[67] CPD May 2023, Para 6. The removal of the "rarity provision" would appear to follow from criticism by the High Court as to the manner in which it was being interpreted: *TI v Bromley Youth Court* [2020] EWHC 1204 (Admin).
[68] Para 6.2.4.

or for the entire trial". [69] However, *Rashid* remains good law and it remains to be seen whether the new, more neutrally worded, practice direction will result in a change to judicial practice.

4. Ground Rules Hearings for Vulnerable Defendants

Our research suggests that Ground Rules Hearings are increasingly commonplace for many vulnerable non-defendant witnesses, but that they are rarely held for vulnerable defendants. This is largely because, in practice, the driver for a Ground Rules Hearing tends to be the appointment of an intermediary, which is rare for a vulnerable defendant, or the use of s.28, which is not available under statute to vulnerable defendants. Clearly defendants and witnesses occupy different structural positions in the criminal trial and for the purposes of the Ground Rules Hearing, the primary distinction is that it is not known, pre-trial, whether the defendant, vulnerable or not, will give evidence. As a result, where a review of questions – either by the judge or an intermediary – does take place, it will most likely take place mid-trial.

As we have seen above, however, when an intermediary is involved with any vulnerable witness they make recommendations on matters over and above advice on the structure and phrasing of questions in cross-examination. These non-linguistic matters are no less relevant when it is the defendant who is vulnerable and therefore uncertainty about whether the defendant will testify is not a reason in itself to dispense with a Ground Rules Hearing. Once again, however, the fact of legal representation was cited as justification for lack of collective consideration of a vulnerable defendant's support needs.

> "The ground rules hearing doesn't generally take place far in advance of the trial. I suspect the reason for that is that they are in a different category to a prosecution witness in the sense that they have people there to support them at court anyway. They've got a solicitor, they've got counsel who are there to explain things and take them through and explain the process to them in the way that an intermediary might do to a prosecution witness." [AJ2]

Not only do many not share this judicial confidence that counsel are able to properly fulfil that role, but defence counsel cannot alone make provision for the adaptations required without the agreement and cooperation of judges and prosecution counsel.

Where the defendant does give evidence, judicial directions to share and review prosecution questions for the defendant are infrequent: "With a defendant I'm often rejected… by the judge, by the court. I very rarely get questions in advance for a defendant" [BR1]. Prosecutors too seem reluctant to share their questions with the defence, with one judge pointing to potential concerns over a defence barrister's advance sight of prosecution questions, "because the basic principle is the defendant's barrister is entitled to share everything with his client" [BJ3]. This seems not to have caused significant problems to date because written prosecution questions are so rarely required but, interestingly, it may support an argument for differential scheduling of Ground Rules Hearings for defendants: one pre-trial to consider the welfare needs of vulnerable witnesses and a second mid-trial to review prosecution counsel's questions if the defendant testifies.[70] This, as one intermediary suggested, avoids potential allegations of coaching:

> "One of my recommendations would be that when the defence have finished evidence-in-chief, there is then a break, maybe an extended lunchtime, and I could talk to the prosecution in confidence after they've heard the defendant give their evidence, and I would just be with the

[69] Para 6.2.6.

[70] The need for two hearings, one pre-trial and another if the defendant is to give evidence, is in line with the *Advocate's Gateway: Ground Rules Hearing Checklist.*

prosecution so I would have no opportunity to go running to tell the defendant what the questions are going to be." [AR2]

However, in the intermediary's experience, courts were reluctant to accept even this compromise.

Conclusion

The research study on which this article draws seems to confirm that, in common with special measures access, certain types of vulnerable witnesses are more advantaged than others in relation to adaptations to cross-examination. In particular, it suggests a perceived hierarchy between "more deserving" non-defendant witnesses and "less deserving" defendants and shows that the progress seen for vulnerable non-defendant witnesses is not emulated in the cross-examination experience of vulnerable defendant witnesses.

Whilst there are emerging positive signs, if cross-examination is to be truly transformed for all categories of vulnerable witness, there is some considerable way to go to include vulnerable defendants. Reform is needed to ensure more equitable treatment. First, counsel should adopt for vulnerable defendants the same linguistic adaptations now commonly accepted for vulnerable non-defendant witnesses. Secondly, defendant intermediaries should be appointed to undertake the wider facilitator role that they undertake for vulnerable non-defendant witnesses. Thirdly, the Criminal Practice Directions should be amended to require a pre-trial Ground Rules Hearing for all vulnerable defendants followed by a second one at trial if the defendant later elects to give evidence. Finally, the Bar Council should consider, and make recommendations on, whether defence counsel should be entitled to see written prosecution questions in advance. Such progressive steps are required to properly strengthen the vulnerable defendants' right to effective participation at trial.

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