A CONSULTATION PAPER

VULNERABLE WITNESSES AND PARTIES WITHIN CIVIL PROCEEDINGS

CURRENT POSITION AND RECOMMENDATIONS FOR CHANGE

AUGUST 2019

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Section 1 - Introduction

1. Access to justice, just procedures and fair hearings are essential elements of our justice system. To ensure the system works properly such elements need to cater for parties and witnesses, who by reason of mental or physical disability/disorder, impairment of intellectual or social functioning, fear or distress, are vulnerable.

2. More than twenty years ago attention became focussed on the need to address the issues faced by vulnerable witnesses before the criminal courts[1] and in 1999 the Youth and Criminal Justice Act set out the structure to enable adequate assistance and protection that is not only still in force, but used on a daily basis in criminal courts. By 2014/15 the President of the Family Division noted the issues faced by vulnerable witnesses and parties in the family courts and stated that family law was "lagging woefully behind criminal law" and set up a working party[2]. Wider appreciation grew amongst the Judiciary and professional bodies that issues such as the nature and extent of questioning of vulnerable witnesses needed to be evaluated and changes made; including through bespoke training[3]. As Mr Justice Green stated in December 2015;

   "...how the courts treat those who are exposed and weak is a barometer of our moral worth as a society. Many of those we encounter in the criminal and family courts are from troubled backgrounds and have suffered a lifetime of disadvantage, prejudice and abuse"[4]

3. In 2017, following detailed analysis by the working party, the Family Procedure Rules were amended to make specific provision for vulnerable parties and witnesses.

4. Since 1999[5] the Civil Procedure Rules allow the use of many of the methods/forms of assistance and protection for vulnerable parties and witnesses used in the criminal and family courts. However, there is no specific rule in relation to vulnerable witnesses/parties and the existing rules have been criticised as being "passive"[6] and inadequate for the purpose of ensuring a sufficiently proactive and consistent approach to enabling the proper participation in civil litigation of those who are, or may become through involvement in the process, vulnerable.

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[1] See generally; the Home Office report "Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System"; Home Office 1998; which contained sections on witness intimidation, vulnerable witnesses, investigative and pre-trial measures, court procedures, court measures, child witnesses, admissibility of evidence and alternative forms of evidence and training.
[2] Vulnerable witnesses and children working group.
[3] E.g. the Advocates Gateway training toolkits which were available in June 2015
[4] Addressing Vulnerability in Justice Systems; The Advocate's Gateway (Wildy, Simmons and Hill); Introduction.
[5] The Civil Procedure Rules 1998 (SI 1998/3132) were made on 10 December 1998 and came into force on 26 April 1999.
[6] See generally the chapter "Vulnerable Witnesses and Parties in all civil proceedings – Dignity, respect and the Advocate's Gateway Toolkit 17"; Felicity Gerry Q.C. in Addressing Vulnerability in Justice Systems [Wildy, Simmonds and Hill]

5. Although this report considers issues arising from the vulnerability of parties and witnesses in all types of civil litigation its provenance lies in a specific recommendation of The Independent Inquiry into Child Sexual Abuse, IICSA.[7]

6. IICSA was established to examine how the country's institutions handled their duty of care to protect children from sexual abuse. It was set up after investigations in 2012 and 2013 into the Jimmy Savile sexual abuse scandal revealed widespread abuse, including claims of abuse stretching back over decades by prominent media and political figures, and inadequate safeguarding by institutions and organisations responsible for child welfare[8].

7. In her introductory statement[9], Justice Goddard set out its procedures, timetables and remit. She said that IICSA;

   "provides a unique opportunity to expose past failures of institutions to protect children, to confront those responsible, to uncover systemic failures, to provide support to victims and survivors, in sharing their experiences, and to make recommendations that will help prevent the sexual abuse and exploitation of children in the future."

8. IICSA has launched thirteen investigations, into a broad range of institutions, each of which will produce a report that will set out conclusions on institutional failings and identify practical recommendations for change. Of immediate relevance to this report, IICSA is investigating the extent to which existing support services, compensation frameworks and the civil justice system are fit to deliver reparations to victims and survivors of child sexual abuse. Within this broad-based investigation, it has been recognised that fair legal processes must be adapted to address the vulnerabilities of witness and parties if victims and survivors of child sexual abuse are to obtain justice.

9. In its Interim Report published in April 2018 the IICSA Panel recommended

   “Special Protections for Vulnerable Witnesses

   The Chair and Panel recommend that the Ministry of Justice provides in primary legislation that victims and survivors of child sexual abuse in civil court cases, where they are claiming compensation in relation to the abuse they suffered, are afforded the same protections as vulnerable witnesses in criminal court cases.

   The Chair and Panel understand that cost is already a barrier to victims and survivors considering a civil claim. In considering how to fund the implementation of this recommendation, the Ministry of Justice must ensure that this barrier is not further increased.

[7] Announced by the then Home Secretary on 7th July 2014

[8] IICSA was reconstituted in February 2015 as a statutory inquiry under the Inquiries Act 2005, giving it greatly increased powers to compel sworn testimony and to examine classified information.

[9] IICSA opened on 9th July 2015

The Chair and Panel recommend that the Civil Procedure Rule Committee amends the Civil Procedure Rules to ensure that judges presiding over cases relating to child sexual abuse consider the use of protections for vulnerable witnesses."

10. The Ministry of Justice asked the Civil Justice Council to consider the issues raised by this recommendation and to compile a report

    "There would seem to be clear room for improvement in the way that claims relating to child sexual abuse cases are managed by parties and the Court. The Ministry of Justice recognises that claims involving child sexual abuse raise particular challenges for both Claimants and Defendants, and that they require careful handling. There is clearly an opportunity for some of the good practice in dealing with vulnerable witnesses and litigants in the criminal and family court to be implemented in the civil litigation context. In this regard the IICSA has heard that the Civil Justice Council is currently working on recommendations to support all vulnerable claimants and defendants by looking at the support already available in the family and criminal courts and how that can be more effectively applied in the civil courts."[10]

    In undertaking this task, the Council was asked to consider vulnerability of parties and/or witnesses in civil actions not just in relation to claims arising from sexual assault/abuse but also more widely i.e. in relation to the wide variety of other types of civil claim.

11. The Council has approached the task by detailed consideration of the nature and extent of assistance that is currently provided in the criminal, family and civil jurisdictions and then, given their different approaches, assessing the extent to which changes are required within civil practice and procedure. It was recognised at the outset that a great deal of work had been carried out within the criminal and family spheres, and other bodies such as the Advocacy Training Council, and that it was necessary to carefully consider and if necessary build upon such work rather than attempt to replicate it.

12. An initial raft of consultation took place with all Designated Civil Judges and High Court Masters. Further, given the specific reference to claims in respect of sexual abuse/assault the Association of Personal Injury Lawyers, APIL, undertook a survey of its members (50 responses)[11]. This report was then compiled by His Honour Judge Cotter Q.C. with the assistance of the working party consisting of

    - Amrita Dhaliwal[12]
    - Mr Justice Pepperall[13]
    - District Judge Byass
    - District Judge Watkins

[10] Closing statement of the Ministry of Justice and Criminal Injuries Compensation Authority to the Accountability and Reparations Investigation (paragraph 12)
[11] See Annexe 2 for a list of those who provided information
[12] Head of Civil Procedure Policy; Ministry of Justice
[13] Former member of the Civil Procedure Rule Committee

- District Judge Gibson[14]
- His Honour Judge Picton
- His Honour Judge Lethem[15]
- Professor Andrew Higgins[16]

13. This report has been prepared to set out the preliminary views reached so that there can now be wider, but more focussed consultation.

14. The Council now invites responses in relation to the three questions raised within this report at section 8. The working party together with additional Judicial/Council members (to ensure the consultation responses are also considered by those without involvement in the preparation of the preliminary report) will then consider all responses before the production of a final report.

15. The consultation period is open until Friday 11th October 2019. Details of how to respond are set out towards the end of this document in Section 8. We acknowledge that this period falls in part over the summer and is relatively short, and appreciate that this is not ideal. These timings have been chosen however to allow responses to be collated with sufficient time to inform the Governments Domestic Abuse Bill 2017-19. A public summary of the consultation responses, and a final report will be published on the Civil Justice Council's website in due course.

[14] Member of the Civil Justice Council

[15] Former member of the Civil Procedure Rule Committee

[16] Member of the Civil Justice Council, Professor of Civil Procedure at the University of Oxford, fellow of Mansfield College and general editor of Civil Justice Quarterly.

Section 2 - The scope of vulnerability in civil cases

16. In the criminal courts 18% of witness attending for cases were recorded by the Crown Prosecution Service as either vulnerable or intimidated in 2015/16[17]. There is no data as to the number of vulnerable parties or witnesses who appear before the civil courts across the range of jurisdictions and types of case. However, of some relevance is that 25% of individual Claimants who answered a civil court user survey indicated that they considered they had a physical or mental condition[18]

17. The very large majority of people who do have dealings with the civil justice system as potentially vulnerable witnesses/parties are not victims and survivors of child sexual abuse. They are not a homogeneous group. Some people have mental and/or physical conditions which render them vulnerable and hamper their access to justice and some (as with victims/survivors of abuse) are vulnerable by reason of the subject matter of the proceedings before the court. By way of an obvious example of the latter many involved in anti-social behaviour cases (particularly concerning the occupation of property) or protection from harassment cases as "the victims", are fearful of reprisal and vulnerable to intimidation (organisations supporting tenants of social housing[19] have long complained of the difficulty in persuading witnesses to attend in cases involving anti-social behaviour). Some Claimants fear, or react adversely to the sight of, the Defendant or other witnesses e.g. in bullying and stress cases such that they cannot adequately participate in a hearing.

18. Vulnerability may be endogenous or arise as a reaction to some step or factor within the litigation process; it may be general or situational, permanent or temporary (or a mixture).

19. In 2010 extensive research[20] carried out on behalf of the Ministry of Justice[21] showed that court users, in both criminal and civil proceedings, with mental health conditions and learning disabilities, experienced various particular difficulties when giving evidence in court. Many court users involved in the study found that legal language and terminology were barriers to their understanding of the court process, whilst a number stated that they experienced problems in understanding questions which they were asked in court. The report concluded that this lack of understanding resulted in confusion for the court users which negatively affected their demeanour in court. Those involved in the study reported that difficulties with understanding were improved by awareness of their particular mental health issue or learning disability amongst legal representatives and the judge, as this allowed the court to take steps to ensure that the proceedings were clearly explained. This approach led to the court user feeling more

[17] Last year of available data

[18] Civil court user survey 2014/15 l individual claims Table 5.3

[19] And Victim Support

[20] Rosie McLeod, Cassie Philpin, Anna Sweeting, Lucy Joyce and Roger Evans, Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity, Ministry of Justice Research Series (London: Ministry of Justice, July 2010)

[21] It was commissioned to explore the assertion made by the mental health charity MIND in 2007 that people with mental health conditions and learning disabilities experience greater difficulties accessing justice than others and possibly also experience greater discrimination and disadvantage.

respected and listened to. However, if this awareness was lacking, court users experienced a sense of exclusion from the proceedings, which the research found to be more acute in civil and family cases. In these cases, court users felt that they were prevented from being able to give evidence. When asked, court users who were living with mental illness or learning disability stated that they would benefit from being able to use special measures when giving evidence in court, particularly if screens or intermediaries were made available to them.

20. It was stated that;

"There are few mechanisms in place to assist in identifying any support needs of court users involved in civil cases. One of the key issues in relation to this is the limited contact between court users, legal representatives and the courts in civil cases[22]."
And,
"Although it is possible to apply for special requirements in civil and family courts, this appears to happen very rarely, and few legal practitioners were aware of the possibility[23]."
And,
"Special measures (a range of provisions to help vulnerable witnesses give best evidence) are available in criminal courts. These have substantially improved the experience of court users with mental health conditions, learning disabilities and limited mental capacity. Strong multi-agency working facilitated their provision, but was restricted by poor provision in certain courts and resistance to their use among some Judiciary and barristers. Their extension to civil and family courts is recommended, alongside training to ensure adherence to protocols."

21. It was recommended that there should be changes in procedure to;

a) make available special measures, such as the use of screens and intermediaries, to court users with mental health conditions, learning disabilities and limited mental capacity who are involved in civil and family cases; and
b) promote the special requirements that can already be applied for in civil and family cases among legal practitioners.[24]

22. Other recommendations directed to the civil courts included

a) Set up small, multi-disciplinary teams to work with court users with mental health conditions, learning disabilities and limited mental capacity. Team members should have clearly defined lines of communication, and an understanding of the available support mechanisms and roles within these. In civil and family proceedings, these should include representatives from the Citizens' Advice Bureau, court staff and voluntary sector support organisations.
b) Offer training to the judiciary
    i) to increase their awareness of the presence of court users with mental health conditions, learning disabilities and limited mental capacity.
    ii) on communicating, engaging and working with court users with mental health

[22] Ibid. Page 10. See also Page 12; "Heavy reliance on written communication in civil cases reduced the chances of early identification, as there was little direct contact with the court user"
[23] Ibid. Page 25
[24] Ibid. Page 31

conditions, learning disabilities and limited mental capacity.

c) Consider how to ensure that court users with mental health conditions, learning disabilities and limited mental capacity are offered support before arrival at court and after a hearing.
d) Provide a case manager for parties with mental health conditions, learning disabilities and limited mental capacity, to provide one point of contact and oversee support
e) Produce an equivalent DVD to "Going to Court – A step-by-step guide to being a witness" used for criminal cases on the civil and family court processes and promote its availability to court users.
f) Introduce the provision of pre-trial visits to users of the civil courts who have mental health conditions, learning disabilities and limited mental capacity, and promote its availability.
g) Provide to those who may be able to make use of it a written guide to the process of civil litigation either in or with the option of an "easy read" format.

23. Save to the extent that training provided by the Judicial College covers vulnerability of parties and witnesses within specific training modules[25] none of these recommendations has yet fully been implemented across all courts/court centres.

24. In 2011 the Northern Ireland Law Commission[26] published a report on vulnerable witnesses in civil proceedings. It followed a Consultation Paper[27] which considered whether there was any merit in introducing the "special measures" then currently used in the criminal courts for witnesses in civil proceedings. The consultation period ran from 1 April 2010 to 30 June 2010. Following the analysis of responses from a wide range of consultees from non-governmental organisations, political parties, local government, non-departmental public bodies and the legal professions, it was clear that the view was that there was inadequate protection for witnesses under the current law and practice in Northern Ireland. All but one of the consultees who responded to the consultation paper agreed that special measures should be made available in civil proceedings in Northern Ireland.

25. The Commission concluded:

"Having taken into account the views of consultees, having deliberated on the merits of introducing a scheme of special measures in civil proceedings and having considered the likelihood of the uptake by witnesses of such measures, the Commission has concluded that protection for certain witnesses in civil proceedings will promote access to justice for those witnesses and will offer valuable practical assistance to people who might experience difficulties in giving oral evidence directly in a courtroom setting. The Commission considers that the best method of achieving such a scheme is to implement it on a statutory basis. Not only does this promote a consistent approach in courts across the jurisdiction, it also allows such a scheme to be exposed to the rigours of a transparent and accountable law-making process"[28]

[25] There is no specific module on vulnerability; see paragraph 130 of this report.
[26] NILC 10 (2011)
[27] NILC 4 (2010)
[28] http://www.nilawcommission.gov.uk/report_vw_july_2011.pdf Para 1.21-1.22

And,
"The Commission has concluded, based on consideration of the current law and practice and the views of consultees, that a strong case can be made for creating a statutory regime for the provision of special measures for certain witnesses in civil cases.[29]"

26. The Commission based its recommendations upon mirroring the special measures available in the criminal courts in Northern Ireland, Scotland and England and Wales and produced a draft bill.

27. In January 2019 Justice[30] published a report "Understanding Courts".[31] In a chapter upon the consistency of support and reasonable adjustments for lay users it set out the conclusion that;

"Lay users in other types of hearings would also benefit from 'reasonable adjustments.' For example, where a victim of abuse (physical or sexual) is suing their perpetrator (either an individual or institution), in some personal injury and clinical negligence cases, perhaps also by virtue of the physical and/or mental injuries suffered. There are also lay users whose needs and vulnerabilities often require special consideration regardless of whether they are giving evidence in civil, tribunal or criminal proceedings, such as where they suffer from a mental disorder, learning disability or other type of physical disability, which would suggest that they may require a reasonable adjustment whatever the nature of the hearing may be."[32]
And,
"...we recommend that reasonable adjustments to enable lay users to provide their best evidence should be available in all courts and tribunals where the needs of a fair trial demand it. This includes an obligation to consider whether any party or witness has a particular vulnerability or other need for an adjustment. In order to achieve this, we consider that best practice should generally be consolidated and promoted across different courts and jurisdictions. Bearing in mind that in the majority of small claims and in a substantial proportion of fast track trials at least one party is a LiP, the Civil Procedure Rules should be amended along the lines of the Family Procedure Rules and similarly require that courts have regard to the civil TAG Toolkit. In particular, expert assistance from the Ministry of Justice Registered Intermediary Scheme should be available for all lay users who need it, across all jurisdictions."[33]

28. So research shows that whilst there is no recorded data covering the civil courts as to the relevant experiences of those who have been or should have been considered as vulnerable, it is likely that, there is a significant body of vulnerable court users within civil proceedings who would benefit from assistance or protection.

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[29] http://www.nilawcommission.gov.uk/report_vw_july_2011.pdf Para 2.1
[30] JUSTICE is an all-party reform and human rights charity
[31] The product of a working party chaired by Sir Nicholas Blake.
[32] https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Understanding-Courts.pdf Paragraph 4.14
[33] https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Understanding-Courts.pdf Paragraph 4.16

29. Turning to the specific recommendation of IICSA in relation to the vulnerability of victims and survivors of sexual abuse/assault, it is necessary to consider the evidence[34] which has underpinned it.

30. As part of the Accountability and Reparations Investigation, IICSA held a seminar on the Civil Justice system across November and December 2016 and covered the following wide ranging issues:

    a) Access to justice for victims and survivors[35];
    b) Limitation of actions, including: limitation as a barrier and a defence in civil litigation; proposals for reform[36];
    c) The complexities and cost of civil litigation, including: the nature of the adversarial system; the spectrum of both claimant and defendant approaches to bringing/defending claims; identifying the correct defendant/insurer; disclosure; investigating the claim; legal issues and defences; the use of single or joint experts; early offers of settlement; settlement without admissions; and apologies;
    d) Compensation, including: proving causation of injury; quantification of damages; provision for treatment; payment options;
    e) Other types of accountability and reparation, including: acknowledgment of abuse; accountability within the civil justice system; admissions of institutional liability; the value of apologies; face-to-face meetings; learning lessons and preventing recurrence; access to wider support;
    f) Possible reforms to civil litigation, including: pre-action protocol; guiding principles; duty of candour; ADR; specialist Judges; increased judicial powers and sanctions; support;
    g) A redress scheme, including: advantages and disadvantages; investigation and assessment process; tariffs; comparative models; funding; legal representation;

31. The Council considers that the majority of these issues are beyond the scope of this preliminary paper, which is solely focused upon the vulnerability of witnesses/parties within civil litigation.

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[34] By the date of publication of the IICSA interim report over 1,000 victims and survivors of child sexual abuse had shared their experience with IICSA's Truth Project. In light of the Interim recommendation anonymised accounts from victims and survivors have been considered. There are several accounts of poor handling of claims by solicitors, unhappiness with group actions, the amount of awards and limitation defences. Apart from setting out the ordeal of having to give evidence within an adversarial process, there are very few negative comments from those who provided evidence about other aspects of the court procedure/experience in civil cases.

[35] "A key issue explored at the seminar was access to justice. The Inquiry [IICSA] was told that the number of solicitors with expertise and experience of handling child sexual abuse claims is limited. It was also raised that some solicitors would not take on claims funded through legal aid due to the administrative complexity involved"; Interim Report.

[36] "The Limitation Act 1980 was identified as an obstacle to accessing justice as some victims and survivors of child sexual abuse are prevented from making a civil claim because too much time has elapsed since the abuse took place. This is an important issue that the Inquiry [IICSA] will consider further, particularly as other jurisdictions, including Scotland, have legislated to exclude limitation considerations from child sexual abuse claims"; Interim Report. Such issue is, however, beyond the scope of this report.

However, within the seminar there was also discussion[37] of the following relevant issues:

a) The need for specialist Judges[38] (but with a concern that they may become "burnt out" if regularly working on child abuse cases);
b) The need for better training, particularly for District Judges who conduct case management and interim hearings[39];
c) The need for model directions;
d) That there should be more use of 'ground rules hearings'.

32. It appears that the matters raised at the seminar taken with first hand reports from victims/survivors provided the foundation for the statement within the preliminary report that:

"The Inquiry [IICSA] has also consistently heard that the civil litigation system is inherently adversarial. Victims and survivors are being asked to provide evidence on the abuse they suffered in an often challenging setting – for example, they can be cross-examined by an unrepresented perpetrator. This is in contrast to a criminal court, where the Youth Justice and Criminal Evidence Act 1999 sets out a range of measures designed to help vulnerable witnesses provide their evidence in court (such as providing pre-recorded evidence).

There is no equivalent legislation in relation to civil courts and the Inquiry considers that victims and survivors of child sexual abuse in civil courts deserve the same protections. As a result, the Inquiry recommend that this is addressed."

[37] See; Accountability and Reparations Investigation - Transcript of Inquiry Seminar Wednesday 30 November 2016
[38] Ibid. p117; per Mr Greenwood
[39] Ibid. p126; per Mr Garsden

Section 3 - The nature and extent of assistance that is currently provided

33. It is necessary to consider the measures currently in place in the criminal, family and civil jurisdictions. This report will not consider the (varying) practice and procedure within the various types of tribunal which are, by their nature, less formal and with rules designed with self-representation in mind.

3.1 Vulnerability and the criminal courts

34. The criminal jurisdiction was the first to address the need to provide assistance and protection for vulnerable witnesses and is the comparator referred to within IICSA's recommendations.

35. Before analysing the protection afforded to vulnerable witnesses in criminal cases it is necessary by way of brief overview to recognise some fundamental differences in practice and procedure between criminal and civil (and family) cases.

36. Criminal cases are heard either in the Magistrates' Court by a lay panel assisted by a legal advisor, or District Judge or in a Crown Court by Judge and jury. The layout of the court is usually different to most civil and family courts (e.g. with a dock/secure facilities) and there is generally a greater air of formality than in civil and family courts. A jury trial necessarily means an additional 13/14 people[40] in the courtroom. Witnesses have in the past been the subject of lengthy and sometimes hostile cross-examination. Save when only sentence is in issue[41], the fact-finding body; either jury or magistrate(s) is not provided with the statement of the complainant and such evidence has to be given, firstly "in chief" and then under cross-examination. In the civil and family courts evidence in chief is provided to the Court in statement form, which is read in advance and the witness does not usually have to repeat it; merely confirm that the content of the statement true. As a result the practice of providing pre-recorded evidence for vulnerable witnesses would ordinarily be of little additional assistance to a witness in a civil or family case.

37. Whilst generally speaking a criminal court will often be a more intimidating environment for a vulnerable witness than a civil or family court, steps have nevertheless been taken to ameliorate the potential adverse impact upon proper participation and the quality of their evidence. In addition to the special measures, which this report comes on to, usually there will be assistance from a member of the witness service[42] and court staff have received dedicated training with regard to vulnerable witnesses. There are protocols /practices in place in relation to witness

[40] Jury together with ushers/jury bailiffs

[41] Disputes as to fact, the basis of plea, when guilt is admitted are determined by a Judge or Magistrates i.e. without a jury.

[42] The Witness services provides free and independent support for both prosecution and defence witnesses in every criminal court in England and Wales. Trained volunteers provide practical information about the process, as well as emotional support to help witnesses feel more confident when giving evidence.

familiarisation and separate waiting areas. All Judges who hear criminal cases alleging sexual assault or abuse have received dedicated training. As will be considered in due course there is a sharp contrast in the determination of such cases in the civil courts where special measures are rarely used, neither judiciary or court staff have had any dedicated training for sexual abuse or assault cases, there is no witness service[43] and suitable and dedicated facilities for witnesses are often not as readily available , if available at all.

38. Turning to the detail of the range of measures designed to help vulnerable witnesses provide best evidence in criminal court the starting point, as identified in the IICSA Interim Report, is The Youth Justice and Criminal Evidence Act 1999, YJCEA[44].

39. There are a range of "special measures" in Chapter 1 of the YJCEA and some other specific prohibitions. Sections 16 and 17 set out the grounds of eligibility.

40. Section 16 caters for witnesses eligible for assistance on grounds of age or incapacity as follows:

(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—
(a) if under the age of 17 at the time of the hearing; or
(b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).

(2) The circumstances falling within this subsection are—
(a) that the witness—
(i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or
(ii) otherwise has a significant impairment of intelligence and social functioning;
(b) that the witness has a physical disability or is suffering from a physical disorder.

(3) In subsection (1)(a) "the time of the hearing", in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.

(5) In this Chapter references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

[43] Save assistance from the Personal Support Unit in some court centres. The "PSU" is a charity which provide comfort, support and guidance before, during and after court for those engaged in civil and family litigation. It started in the Royal Courts of Justice but now has a presence in 18 regional court centres.
[44] https://www.legislation.gov.uk/ukpga/1999/23

41. Section 17 covers witnesses eligible for assistance on grounds of fear or distress about testifying as follows:

(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) In determining whether a witness falls within subsection (1) the court must consider, in particular—
(a) the nature and alleged circumstances of the offence to which the proceedings relate;
(b) the age of the witness;
(c) such of the following matters as appear to the court to be relevant, namely—
(i) the social and cultural background and ethnic origins of the witness,
(ii) the domestic and employment circumstances of the witness, and
(iii) any religious beliefs or political opinions of the witness;
(d) any behaviour towards the witness on the part of—
(i) the accused,
(ii) members of the family or associates of the accused, or
(iii) any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining that question the court must in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection.

42. Where the court determines[45] that the witness is eligible for assistance by virtue of section 16 or 17, the court must then consider a special measures direction. Section 19 sets out that the Court shall;
(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and
(b) if so—
(i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
(ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.

[45] Either upon application or of its own motion.

(3) In determining for the purposes of this Chapter whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular—
(a) any views expressed by the witness; and
(b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

43. Section 21 sets out special provisions relating to child witnesses in relation to sexual offences, kidnapping, assaults etc. The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements[46]:

(a) it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and
(b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24.

44. The special measures available to the court are set out at sections 23 – 30 and are:

(a) Screening a witness[47] from the accused while giving evidence (section 23)
(b) Allowing the witness to give evidence by live link[48] (section 24)
(c) Allowing evidence to be given in private[49] (section 25[50])
(d) Requiring the removal of wigs[51] and gowns (section 26)

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[46] Subject to the need for special protection by virtue of subsection (1)(b)(i), subsection (4)(c) provides that the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).
[47] or "other arrangement" to prevent the witness from seeing the accused
[48] "live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom (or other place where the proceedings are being held), is able to see and hear, and to be seen and heard by, persons in the Courtroom. Section 51 of the Criminal Justice Act 2003 enables the court to allow witnesses (other than the defendant) in the United Kingdom to give evidence by live link if the court is satisfied that giving evidence in this way is in the interests of the efficient or effective administration of justice. The witness does not have to be a special "category" of witness (for instance vulnerable or intimidated as defined by the YJCEA). Live links can be particularly helpful for witnesses with health/mobility issues who do not qualify for live links under the "special measures" provisions of the YJCEA.
[49] The persons who may be excluded do not include (a)the accused, (b) legal representatives acting in the proceedings, or (c)any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness
[50] Section 25(4) sets out that a special measures direction may only provide for the exclusion of persons under this section where—(a)the proceedings relate to a sexual offence; or (b)it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.
[51] Judges do not wear wigs when hearing civil or family cases.

(e) Pre-recorded evidence in chief (section 27)
(f) Pre-recorded cross-examination or re-examination[52] (section 28[53])
(g) Requiring the examination of witness through an intermediary[54] (section 29)
(h) Providing aids to communication[55] (section 30)

45. Chapter II of the Act provides protection for witnesses from cross-examination by accused in person. Section 34 provides a general prohibition in relation to sexual offences:

No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant, either:
(a) in connection with that offence, or
(b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.

46. Section 35 provides a similar prohibition in relation to child complainants and other child witnesses and section 36 provides the Court with a power[56] when neither section 34 nor 35

[52] Such a recording must be made in the presence of such persons as Criminal Procedure Rules or the direction may provide and in the absence of the accused, but in circumstances in which— (a)the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made, and (b)the accused is able to see and hear any such examination and to communicate with any legal representative acting for him.

[53] It is important to note that subsection (7) provides that nothing in section 28 shall be read as applying in relation to any cross-examination of the witness by the accused in person (in a case where the accused is to be able to conduct any such cross-examination). In 2018 the Ministry of Justice commenced a six-month pilot at three Crown Courts in relation to the pre-recorded cross-examination of child witnesses pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999. In R v PMH [2018] EWCA Crim 245 the Court of Appeal provided guidance regarding best practice for trial judges and advocates. Ordinarily a timetable is set at the pre-trial preparation hearing for the proposed questions to be asked in the pre-recorded cross-examination to be submitted. Thereafter a ground rules hearing takes place and following the rulings a hearing takes place at which the witness is cross-examined. See generally R-v-Hampson [2018] EWCA (Crim)

[54] Examination of the witness (however and wherever conducted) through an interpreter or other person approved by the court for the purposes of this section ("an intermediary") .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. A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by Criminal Procedure Rules, that he will faithfully perform his function as intermediary. Section 1 of the Perjury Act 1911 (perjury) shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding. The Equal Treatment Bench Book provides that assessment by an intermediary should be considered if the person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority. Studies suggest that the majority of young witnesses, across all ages, fall into one or other or both categories (Chapter 2, Paragraph 97, Equal Treatment Bench Book 2018). For an overview of the law see R-v-Biddle [2019] EWCA 86 (Crim)

[55] A special measures direction may provide for the witness, while giving evidence (whether by testimony in court or otherwise), to be provided with such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has or suffers from.

[56]Exercisable after application or upon the court acting of its own motion

operates to prevent an accused in any criminal proceedings from cross-examining (or further cross-examining) a witness in person—

(2) If it appears to the court—
(a) that the quality of evidence given by the witness on cross-examination—
(i) is likely to be diminished if the cross-examination (or further cross-examination) is conducted by the accused in person, and
(ii) would be likely to be improved if a direction were given under this section, and
(b) that it would not be contrary to the interests of justice to give such a direction,
(3) In determining whether subsection (2)(a) applies in the case of a witness the court must have regard, in particular, to—
(a) any views expressed by the witness as to whether or not the witness is content to be cross-examined by the accused in person;
(b) the nature of the questions likely to be asked, having regard to the issues in the proceedings and the defence case advanced so far (if any);
(c) any behaviour on the part of the accused at any stage of the proceedings, both generally and in relation to the witness;
(d) any relationship (of whatever nature) between the witness and the accused;
(e) whether any person (other than the accused) is or has at any time been charged in the proceedings with a sexual offence or an offence to which section 35 applies, and (if so) whether section 34 or 35 operates or would have operated to prevent that person from cross-examining the witness in person;

47. Section 38 provides for defence representation for purposes of cross-examination where an accused is prevented from cross-examining a witness in person by virtue of section 34, 35 or 36. The court must invite the accused to arrange for a legal representative to act for him for the purpose of cross-examining the witness; and if the accused has notified the court that no legal representative is to act for him for the purpose of cross-examining the witness, or the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a legal representative appointed to represent the interests of the accused[57].

48. Section 41 provides protection for complainants in proceedings for sexual offences through restriction on evidence or questions about complainant's sexual history.

49. Chapter IV concerns reporting restrictions with section 45 providing a power to restrict reporting of criminal proceedings involving persons under 18 and section 46 power to restrict reports about certain adult witnesses in criminal proceedings.

[57] If the court decides that it is necessary in the interests of justice for the witness to be so cross-examined, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the accused. A person so appointed shall not be responsible to the accused. Section 40 caters for funding of such representation.

50. Since 2013 the criminal procedure rules have also provided for "ground rules hearings". In any case with a witness who is vulnerable or who has a communication need, it is usual practice to discuss and establish how to enable the witness to give their best evidence by agreeing ground rules in advance. In a case in which an intermediary has been appointed, such a hearing is essential[58].There is also detailed guidance provided in respect of the treatment of vulnerable witnesses and the measures that should be adopted to accommodate them in Part V of the Criminal Practice Direction

51. As a result of the combined package of measures set out above there is a comprehensive approach to facilitating the participation of vulnerable witnesses in the criminal justice system.

3.2 Vulnerability and the family courts

52. The family courts are regularly faced with allegations of sexual abuse or assault, particularly within public law cases, as well as other vulnerable witnesses and parties, such as the victims of domestic abuse. The most obvious comparator in terms of protection and assistance afforded for vulnerable witnesses and parties, and specifically victims and survivors of child sexual abuse, engaged in civil court cases, despite IICSA's interim recommendation referring to "the protections" available within the criminal justice system, is the family courts. Although there are differences in practice between family and civil cases (the former is ordinarily held in private and with anonymity orders in place and in public law cases parties will ordinarily have representation), there is obvious practical sense to this comparison. At District Judge level many Judges deal with civil and family cases and, apart from in London[59], cases before Circuit and High Court Judges are usually heard in the same buildings, if not courtrooms, as civil cases.

53. It is only relatively recently that the family courts have recognised and then acted upon what was perceived to be a failure to appropriately assist vulnerable parties/witnesses.

54. In 2014 the President of the Family Court stated that the family justice system lagged behind the criminal justice system in the practices and procedures available to support vulnerable parties and witnesses and announced the setting up of a Children and Vulnerable Witnesses Working Group[60] . The President pointed out that processes which were tolerated in the Family Court were prohibited by statute in the Crown Court[61]. He also noted that:

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[58] Ground rules hearings are also required when cross-examination is to be recorded under section 28 and a list of proposed questions are submitted in advance.

[59] In the Royal Courts of Justice, the Queen's Bench Division (civil) courts and family courts are in separate buildings.

[60] "there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system. This includes the inadequacy of our procedures for taking evidence from alleged victims, a matter to which Roderic Wood J drew attention as long ago as 2006: H v L and R [2006] EWHC 3099 (Fam), [2007] 2 FLR162.; per Munby LJ ;12th 'View from the President's Chambers, published in June 2014, [2014] Fam Law 978, 981.

[61] See observations of HHJ Wildblood QC in Re B (A Child) (Private law fact Finding –unrepresented father), D v K [2014] EWHC 700 (Fam), paragraph 6(ii),

"We must be cautious before we rush forward to reinvent the wheel. A vast amount of thought has gone into crafting the arrangements now in place in the criminal courts...We need to consider the extent to which this excellent work can be adapted for use in the Family Division and the Family Court."

55. In November 2017 the Family Procedure Rules were amended to include specific provisions in relation to vulnerable witnesses[62] (rule 3A and Practice Direction 3AA; see below)

56. However, unlike the YJCEA[63], the new rules still did not address the issue of the cross-examination of witnesses by respondents/defendants. In 2017 the President of the Family Division pointed out that an alleged perpetrator could still cross-examine an alleged victim in person; something which, in relation to rape or other sexual offences, would be prohibited in a criminal court. In May 2015 in Re K and H (Children) [2015] EWCA Civ 543, [2015] 1WLR the Court of Appeal held that the Family Court did not have the power to order that the Court Service provide funding for legal representation outside the legal aid scheme for an unrepresented party to cross-examine a child in family proceedings. The court had to respect the boundaries drawn by Parliament for public funding of legal representation and suggested possible case management orders[64] to deal with cross-examination and suggested that consideration be given to a statutory provision enabling payment out of central funds.

57. The Master of the Rolls, Lord Dyson stated:

"For those of us who have been schooled in an adversarial system, questioning by a judge of a key witness on controversial and centrally important issues may cause unease. I have already referred to the "profound unease" expressed by Roderic Wood J in *H v L and R* at the thought of a judge having to question a witness in the family jurisdiction. He said that it should not be regarded as impossible, but should be done only in "exceptional circumstances". I have set out at para 22 above what Sir James Munby said on the subject in *Q v Q.* Sir James was, however, careful to say no more than that questioning by a judge where the issues are "grave and forensically challenging" may not be sufficient to ensure compliance with the Convention…"

"I have no doubt that questioning by a judge of a witness in any circumstances *can* be a difficult task. It always calls for sensitive handling. But as Lord Bingham CJ said in *R v Brown (Milton)* (1998) 2 Cr App R 364:

[62] The Family Procedure (Amendment No 3) Rules 2017

[63] See paragraphs 39-51 of this report.

[64] Suggested case management directions were a) a direction that the order that the child should give oral evidence was conditional on the father cross-examining her through a legal representative; (b) the child should be questioned by the Judge; (c) The child should be questioned by the Judge's clerk (following the reorganisation of the Family Court, the justices' clerks, who are legally qualified, are now available to assist the court in any part of the Family Court and not only when Magistrates are hearing cases), (d) a guardian should be appointed to conduct proceedings on behalf of the other two children

"Without either descending into the arena on behalf of the defence or, generally speaking, putting any sort of positive case on behalf of the defence, this is a difficult tight-rope for the trial judge to walk. However, he must do his best according to the circumstances of the particular case."

The fact that this was said in the context of criminal proceedings does not detract from its relevance in the present context."
And,
"In a simple straightforward case, questioning by the judge is likely to be the preferred option and it should present no difficulties. The judge will know what the unrepresented party's case is. It may be helpful for the judge to ask him or her to prepare written questions for the court to consider in advance. Sometimes, unexpected answers may be given to the judge. These may require the judge to ask the unrepresented party to comment on the unexpected answers and to suggest supplementary questions for the judge's consideration."

But significantly he added this caveat:

"I acknowledge that there may be cases where the position is different. I have in mind, for example, a case where the oral evidence which needs to be tested by questioning is complicated. It may be complex medical or other expert evidence. Or it may be complex and/or confused factual evidence, say, from a vulnerable witness. It may be that in such cases, none of the options to which I have referred can make up for the absence of a legal representative able to conduct the cross-examination. If this occurs, it may mean that the lack of legal representation results in the proceedings not being conducted in compliance with article 6 or 8 of the Convention. This is the concern expressed by Sir James Munby at para 76 in *Q v Q.* In order to avoid the risk of a breach of the Convention, consideration should be given to the enactment of a statutory provision for (i) the appointment of a legal representative to conduct the cross-examination and (ii) the payment out of central funds of such sums as appear to be reasonably necessary to cover the cost of the legal representative, i.e. a provision in civil proceedings analogous to section 38(4) of the Youth Justice and Criminal Evidence Act 1999 and section 19(3)(e) of the Prosecution of Offenders Act 1985[65]."

58. Subsequently in October 2017 Practice Direction 12 J of the Family Court rules (which covers fact-finding hearings in private law contact disputes), was revised and now states[66] that the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved and that:

"The Judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case."

59. In January 2019 the Government set out its commitment to reform the law in relation to

[65] Re K and H (Children) [2015] EWCA Civ 543 [62]
[66] https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12j Paragraph 28

domestic abuse in the paper; "Transforming the Response to Domestic Abuse Consultation Response and Draft Bill"[67]. It set out proposals to significantly enhance the assistance and protection afforded to victims in domestic abuse cases in the criminal and family courts[68], stating that:

"We recognise that family court proceedings can be incredibly difficult for victims, and over the past year we have taken several steps to improve the family court process for vulnerable people in the family justice system[69].

60. The draft Domestic Abuse Bill put forward proposals for legislative changes to provide:

a) for automatic eligibility for special measures in domestic abuse cases, removing the burden on the victim to prove they are in fear or distress (with the Judge making the final decision on which special measures will be appropriate in each case); and,[70]

b) measures to prohibit direct cross-examination of a victim by their abuser[71]. By an amendment to the Matrimonial and Family Proceedings Act 1914 a party convicted, given a caution or charged with a specified offence or against whom an "on notice" protective injunction has been made will not be allowed to cross- examine a victim or alleged victim in any family proceedings. The court would also have a power to prevent cross-examination in other cases if either a quality (of evidence) condition or significant distress condition were met. Significantly the Court would be duty bound to consider alternative ways that the party denied the opportunity to cross-examine could put his case and if he/she could not appoint a lawyer the Court could appoint a legal representative for the purpose.[72]

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[67] www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill

[68] It aims to; "transform the justice process – to prioritise victim safety in the criminal and family courts, and review the perpetrator journey from identification to rehabilitation". The civil justice system was not considered in detail. However, in relation to the proposed new domestic abuse protection order which would be available in the criminal and family courts the draft bill also states at section 27 (7) "The county court may make a domestic abuse protection order against a Person ("P") in any relevant proceedings to which both P and the person for whose protection the order would be made are parties" and at subsection (8). In subsection (7) "relevant proceedings" means proceedings of a description specified in regulations made by the Secretary of State. It is unclear what proceedings are proposed to be covered. A court when imposing an order will have the power to impose positive requirements; see section 31 of the draft bill and also will have to deal with any breach of the order; see section 36.

[69]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf Paragraph 3.3.1

[70] See draft bill section 44

[71] The Paper stated "Although we only asked about cross-examination in the criminal courts, your responses to this question overwhelmingly focused on family proceedings. You were unanimous on the need to give family courts the power to stop unrepresented perpetrators of abuse directly cross-examining their victims. This was also a key issue raised with us through stakeholder events".
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS12181 58068-Web_Accessible.pdf

[72] The Lord Chancellor would have the power to provide that the costs be met through central funds

61. The proposals, including that in defined circumstances within proceedings in the family court a Judge will have the power to appoint and fund a legal representative to conduct cross-examination is a significant change, and appears to go a long way[73] towards meeting the concerns expressed by the Court in Re K and H (Children).

62. Parliament established a Joint Select Committee to scrutinise the draft Domestic Abuse Bill. That Committee's first report from June this year[74], has expressed concern, at the potential for inconsistency in application of these measures because too many victims of domestic abuse would be protected only at the discretion of the court. The Joint Select Committee instead recommend that the mandatory ban is extended so that it applies where there are other forms of evidence of domestic abuse, as in the legal aid regime threshold.

63. It is also recorded within the Domestic Abuse paper[75] that all family courts have been asked to draw up local protocols setting out their operational procedures for dealing with vulnerable court users and that:

    "Her Majesty's Courts and Tribunals Service and the Ministry of Justice will develop a series of videos to explain the process of giving evidence to court and how special measures might assist"[76].

64. As regards training it states:

    "In addition, we provide ongoing training to all professionals working within the family justice system. Her Majesty's Courts and Tribunal Service is committed to increasing the awareness and understanding of domestic abuse among all family court staff. At the end of November 2017, a new training programme was rolled out to all court staff focusing on the needs of vulnerable court users, including victims of domestic abuse.

    The Judicial College also ensures that awareness and understanding of domestic abuse are addressed on an ongoing basis as part of the College's regular training for family judges and magistrates. Between April 2016 and April 2018, all family court judges received training from

[73] The Law Society informed the Parliamentary Committee that, whilst the cross-examination measures in the Bill were very welcome, there were problems with their implementation. It suggested judicial practice on prohibiting cross-examination might be inconsistent and that this would require "adequate training and education for the judiciary, in order to avoid relying on gendered or stereotyped interpretations of the party's behaviour in determining whether cross-examination will indeed cause stress". The Law Society said that the ban should apply to cross-examination in all circumstances where there was a history of domestic abuse. It also questioned whether advocates appointed by the court would have the capacity to prepare a witness statement for the victim. The Law Society also recommended that the prohibition should extend to cover questioning of witnesses called by the alleged abusive party themselves: for example, where they called a child of the relationship to give evidence

[74] https://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-domestic-abuse-bill/

[75]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf

[76] Ibid. Page 55

the Judicial College on how to address the challenges faced by vulnerable persons in the courts, including those who are victims of domestic abuse"[77].

65. The paper also contained a commitment to improve the court environment, albeit with a focus on the criminal courts. It was set out that there will be a move to new waiting areas designed to ensure victim safety and a new court design guide focusing on accessibility for the most vulnerable. It stated:

"Model waiting rooms for victims and witnesses have already been established in five criminal courts across the country. These are intended to improve the experience of the criminal justice system for all victims, including victims of domestic abuse. Her Majesty's Courts and Tribunals Service is using these model waiting rooms along with a new design guide and the results of a facilities audit to target further improvements. As an early priority, it is focusing on increasing the number of privacy screens available to allow vulnerable and intimidated victims and witnesses to give evidence without being seen by the defendant or the defendant's family".[78]

66. Whilst obviously proving a significant step forward in the provision of assistance and protection of a category of vulnerable witnesses these changes will further accentuate the gap between the level of protection afforded to the criminal and family courts and that available in the civil justice system.

67. Unlike the Civil Procedure Rules, the Family Procedure Rules ("FPR") [79] now make specific provision for vulnerable witnesses within PART 3A FPR and Practice Direction 3AA. As set out above Practice Direction 12J which deals with domestic abuse[80] also sets out requirements in relation to vulnerability[81] (including that a fact-finding hearing may be inquisitorial[82]).

68. Part 3A provides under the rubric "Vulnerable persons: participation in proceedings and giving evidence" as follows[83];

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[77] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777220/CCS1218158068-Web_Accessible.pdf Page 66

[78] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777220/CCS1218158068-Web_Accessible.pdf Page 55

[79] The Family Procedure Rules are a single set of rules governing the practice and procedure in family proceedings in the High Court, County Court and Magistrates' courts.

[80] "domestic abuse" is defined as "including any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment";

[81] See e.g. paragraphs 10 and 19(j)

[82] See paragraph 28

[83] See also Part 1 (Overriding Objective) and Part 4 (General Case Management Powers);

Interpretation

3A.1. In this Part—

"child" means a person under the age of 18 years whether or not the child is the subject of the proceedings, except that—

(a) in adoption proceedings, it also includes a person who is the subject of proceedings and has attained the age of 18 years before the proceedings are concluded; and
(b) in proceedings brought under Article 11 of the Council Regulation ( ), the 1980 Hague Convention( ) or the European Convention( ), it means a person under the age of 16 years who is the subject of proceedings;

"intermediary" means a person whose function is to—

(a) communicate questions put to a witness or party;
(b) communicate to any person asking such questions the answers given by the witness or party in reply to them; and
(c) explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions;

"live link" means a live television link or other arrangement whereby a witness or party, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the judge, legal representatives acting in the proceedings and other persons appointed to assist a witness or party;

"mental disorder" has the meaning given in section 1 of the Mental Health Act 1983( );

"participation direction" means—

(a) a general case management direction made for the purpose of assisting a witness or party to give evidence or participate in proceedings; or
(b) a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8; and

references to "quality of evidence" are to its quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness's or a party's ability in giving evidence to give answers which address the questions put to the witness or the party and which can be understood both individually and collectively.

Application of provisions in this Part

3A.2.

(1) Rule 3A.4 does not apply to a party who is a child.
(2) Rules 3A.3 to 3A.5 do not apply to a party who is a protected party.

Court's duty to consider vulnerability of a party or witness

3A.3.

(1) When considering the vulnerability of a party or witness as mentioned in rule 3A.4 or 3A.5, the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule

3A.7.(2) Practice Direction 3AA gives guidance about vulnerability.

Court's duty to consider how a party can participate in the proceedings

3A.4

(1) The court must consider whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making such participation directions, the court must consider any views expressed by the party about participating in the proceedings.

Court's duty to consider how a party or a witness can give evidence

3A.5.

(1) The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence.

Protected parties

3A.6.

(1) The court must consider whether it is necessary to make one or more participation directions to assist—

(a) the protected party participating in proceedings; or
(b) the protected party giving evidence.

(2) Before making such participation directions, the court must consider any views expressed by the protected party's litigation friend about the protected party's participation in the proceedings or that party giving evidence.

(Part 15 contains rules about representation of a protected party. Practice Direction 15B contains provisions about the ability of a protected party to give evidence.)

What the court must have regard to

3A.7

When deciding whether to make one or more participation directions the court must have regard in particular to—

(a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—
  (i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or
  (ii) any members of the family of the party or witness;
(b) whether the party or witness—
  (i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;
  (ii) has a physical disability or suffers from a physical disorder; or
  (iii) is undergoing medical treatment;
(c) the nature and extent of the information before the court;
(d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;
(e) whether a matter is contentious;
(f) the age, maturity and understanding of the party or witness;
(g) the social and cultural background and ethnic origins of the party or witness;
(h) the domestic circumstances and religious beliefs of the party or witness;
(i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act[84];
(j) any characteristic of the party or witness which is relevant to the participation direction which may be made;
(k) whether any measure is available to the court;
(l) the costs of any available measure; and
(m) any other matter set out in Practice Direction 3AA.

Measures

3A.8

(1) The measures referred to in this Part are those which

(a) prevent a party or witness from seeing another party or witness;
(b) allow a party or witness to participate in hearings and give evidence by live link;

[84] Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to— (a)ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and (b)put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper ; section 31 G (6) Matrimonial and Family Proceedings Act 1984

(c) provide for a party or witness to use a device to help communicate;
(d) provide for a party or witness to participate in proceedings with the assistance of an intermediary;
(e) provide for a party or witness to be questioned in court with the assistance of an intermediary; or
(f) do anything else which is set out in Practice Direction 3AA.

(2) If the family court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the family court sits and the measure is available

(3) If the High Court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the High Court sits and the measure is available.

(4) Nothing in these rules gives the court power to direct that public funding must be available to provide a measure.

(5) If a direction for a measure is considered by the court to be necessary but the measure is not available to the court, the court must set out in its order the reasons why the measure is not available.

3A.9

(1) The court's duties under rules 3A.3 to 3A.6 apply as soon as possible after the start of proceedings and continue until the resolution of the proceedings.

(2) The court must set out its reasons on the court order for—

(a) making, varying or revoking directions referred to in this Part; or
(b) deciding not to make, vary or revoke directions referred to in this Part, in proceedings that involve a vulnerable person or protected party.

Application for directions under this Part

3A.10

(1) An application for directions under this Part may be made on the application form initiating the proceedings or during the proceedings by any person filing an application notice.
(2) The application form or application notice must contain the matters set out in Practice Direction 3AA.
(3) Subject to paragraph (2), the Part 18 procedure applies to an application for directions made during the proceedings.
(4) This rule is subject to any direction of the court.

Procedure where the court makes directions of its own initiative

3A.11

Where the court proposes to make a participation direction of its own initiative the procedure set out in rule 4.3(2) to (6) applies.
Functions of officers of the Service and Welsh family proceedings officers

3A.12

Nothing in this Part gives the court power to direct that an officer of the Service or a Welsh family proceedings officer should perform any function beyond the functions conferred upon such officers by any other enactment.

69. The rule is supplemented by Practice direction 3AA which provides

1. Preamble and interpretation

1.2 This Practice Direction sets out the procedure and practice to be followed to achieve a fair hearing by providing for appropriate measures to be put in place to ensure that the participation of parties and the quality of the evidence of the parties and other witnesses is not diminished by reason of their vulnerability.

1.3 It is the duty of the court (under rules 1.1(2); 1.2 & 1.4 and Part 3A FPR) and of all parties to the proceedings (rule 1.3 FPR) to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings.

1.4 All parties and their representatives are required to work with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings.

1.5 In applying the provisions of Part 3A FPR and the provisions of this Practice Direction, the court and the parties must also have regard to all other relevant rules and Practice Directions and in particular those referred to in the Annex to this Practice Direction.

2. Factors to which the court has to have regard when considering the vulnerability of a party or witness mentioned: rule 3A.3(1) FPR

2.1 Rule 3A.3 FPR makes clear that when considering the vulnerability of a party or witness for the purposes of rule 3A.4 FPR (the court's duty to consider how a vulnerable party other than a child can participate in the proceedings) or rule 3A.5 FPR (the court's duty to consider how a vulnerable party or witness can give evidence), the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7 FPR. Where rule 3A.7(d) refers to questions of abuse, this includes any concerns arising in relation to any of the following-

a) domestic abuse, within the meaning given in Practice Direction 12J;
b) sexual abuse;
c) physical and emotional abuse;
d) racial and/or cultural abuse or discrimination;
e) forced marriage or so called “honour based violence”;
f) female genital or other physical mutilation;
g) abuse or discrimination based on gender or sexual orientation; and
h) human trafficking.

3. Guidance about vulnerability: rule 3A.3(2) FPR

3.1 Rule 3A.3 FPR requires the court to have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7 FPR when considering the vulnerability of a party or witness other than a protected party. The court should require the assistance of relevant parties in the case when considering whether these factors or any of them may mean that the participation of any party or witness in the case is likely to be diminished by reason of vulnerability. When addressing this question, the court should consider the ability of the party or witness to-

a) understand the proceedings, and their role in them, when in court;
b) put their views to the court;
c) instruct their representative/s before, during and after the hearing; and
d) attend the hearing without significant distress.

4. Participation directions: participation other than by way of giving evidence

4.1 This section of the Practice Direction applies where a court has concluded that a party’s participation in proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability, including cases where a party might be participating in proceedings by way of asking questions of a witness.

4.2 The court will consider whether it is necessary to make one or more participation directions, as required by rule 3A.4. The court may make such directions for the measures specified in rule 3A.8. In addition, the court may use its general case management powers as it considers appropriate to facilitate the party’s participation. For example, the court may decide to make directions in relation to matters such as the structure and the timing of the hearing, the formality of language to be used in the court and whether (if facilities allow for it) the parties should be enabled to enter the court building through different routes and use different waiting areas.

5. Participation directions: the giving of evidence by a vulnerable party, vulnerable witness or protected party

5.1 This section of the Practice Direction applies where a court has concluded that a vulnerable party, vulnerable witness or protected party should give evidence. In reaching its conclusion as to whether a child should give evidence to the court, the court must apply the guidance from

relevant caselaw and the guidance of the Family Justice Council in relation to children giving evidence in family proceedings.

Ground rules hearings

5.2 When the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence there shall be a "ground rules hearing" prior to any hearing at which evidence is to be heard, at which any necessary participation directions will be given-

a) as to the conduct of the advocates and the parties in respect of the evidence of that person, including the need to address the matters referred to in paragraphs 5.3 to 5.7, and
b) to put any necessary support in place for that person.

The ground rules hearing does not need to be a separate hearing to any other hearing in the proceedings.

5.3 If the court decides that a vulnerable party, vulnerable witness or protected party should give evidence to the court, consideration should be given to the form of such evidence, for example whether it should be oral or other physical evidence, such as through sign language or another form of direct physical communication.

5.4 The court must consider the best way in which the person should give evidence, including considering whether the person's oral evidence should be given at a point before the hearing, recorded and, if the court so directs, transcribed, or given at the hearing with, if appropriate, participation directions being made.

5.5 In all cases in which it is proposed that a vulnerable party, vulnerable witness or protected party is to be cross-examined (whether before or during a hearing) the court must consider whether to make participation directions, including prescribing the manner in which the person is to be cross-examined. The court must consider whether to direct that-

a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court;
b) questions or topics to be put in cross-examination should be agreed prior to the hearing;
c) questions to be put in cross-examination should be put by one legal representative or advocate alone, or, if appropriate, by the judge; and
d) the taking of evidence should be managed in any other way.

5.6 The court must also consider whether a vulnerable party, vulnerable witness or protected party has previously-

a) given evidence, and been cross-examined, in criminal proceedings and whether that evidence and cross-examination has been pre-recorded (see sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999); or
b) given an interview which was recorded but not used in previous criminal or family proceedings.

If so, and if any such recordings are available, the court should consider their being used in the family proceedings.

5.7 All advocates (including those who are litigants in person) are expected to be familiar with and to use the techniques employed by the toolkits and approach of the Advocacy Training Council. The toolkits are available at. Further guidance for advocates is available from the Ministry of Justice at http://www.justice.gov.uk/guidance.htm.

6. Matters to be included in an application form for directions: rule 3A.10(2) FPR

6.1 An application for directions under Part 3A FPR should contain the following information, as applicable:

a) why the party or witness would benefit from assistance;
b) the measure or measures that would be likely to maximise as far as practicable the quality of that evidence;
c) why the measure or measures sought would be likely to improve the person's ability to participate in the proceedings; and
d) why the measure or measures sought would be likely to improve the quality of the person's evidence.

70. So, there is now a comprehensive framework for the consideration of vulnerability within any family law proceedings. The rules and practice direction have reflected and built upon the criminal provisions in the 1999 Act and seek to ensure that the family court no longer "lags behind" the criminal courts in terms of the protection/assistance provided to vulnerable witnesses.

3.3 Vulnerability in the Civil Courts

71. There are no specific provisions dealing with vulnerable parties or witnesses within the Civil Procedure Rules[85].

72. There is a requirement (as in the Family Procedure Rules) for a litigation friend in proceedings by or against children or protected parties; a protected party being a party, or an intended party, who lacks capacity to conduct the proceedings. [86] However many vulnerable parties will have capacity[87].

[85] In Scotland children or adult witnesses whose evidence may be diminished in quality because of mental distress or they are suffering fear or distress in civil proceedings in Scotland are eligible for special measures; see the Vulnerable Witnesses (Scotland) Act 2004. The 2004 Act abolishes any test for competence for all witnesses in civil proceedings. This effectively has the result that any witness can give evidence without his competence first being ascertained: the weight or significance of that evidence then has to be assessed by the judge.
[86] CPR 21.2
[87] See generally Wookey v Wookey [1991] 2 FLR 319

73. Further, save in respect of possession claims involving social landlords, there are no express requirements in any pre-action protocols that impose on a party the requirement to consider any form of vulnerability of an opposing party or witness (or to notify the court). The pre-action protocol for possession claims by social landlords[88] requires that;

    1.6 …

    a) If the landlord is aware that the tenant has difficulty in reading or understanding information given, the landlord should take reasonable steps to ensure that the tenant understands any information given. The landlord should be able to demonstrate that reasonable steps have been taken to ensure that the information has been appropriately communicated in ways that the tenant can understand.
    b) If the landlord is aware that the tenant is under 18 or is particularly vulnerable, the landlord should consider at an early stage–

    i. whether or not the tenant has the mental capacity to defend possession proceedings and, if not, make an application for the appointment of a litigation friend in accordance with CPR 21;

    ii. whether or not any issues arise under Equality Act 2010; and

    iii. in the case of a local authority landlord, whether or not there is a need for a community care assessment in accordance with National Health Service and Community Care Act 1990.

74. The lack of a general requirement upon parties to consider if an opposing party (or witness) is vulnerable, before or after the commencement of civil litigation, and the increasing number of litigants in person, act synergistically and heighten the need for the Judiciary to be alert to the possibility that a party or witness may be vulnerable.

75. In the event that a party or witness is identified as vulnerable there are a number of steps which provide protection and assistance that can be taken within existing practice and procedure and a number of rules which provide relevant powers and guidance.

76. The appropriate starting point is the overriding objective to deal with cases justly[89] and at proportionate cost which includes, so far as is practicable, "ensuring that the parties are on an equal footing"[90]; which includes addressing disability issues and facilitating equivalent access to justice. Article 13(1) of the UN Convention on the Rights of People with Disabilities 2006 sets out that:

[88] This protocol is presently under review by the Civil Procedure Rule Committee
[89] "Accommodating a vulnerable person's needs (as required by case law, the Equality Act 2010, the European Convention on Human Rights, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Persons with Disabilities) requires the court or tribunal to adopt a flexible approach in order to deal with cases justly" (ETTB)
[90] CPR 1.1(2)(a)

'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."[91]

77. As Stewart J stated in Kimathi & others-v- Foreign and Commonwealth Office[92]:

"The Defendants point out that neither the CPR or statute prescribes special procedures for the handling of vulnerable witnesses, there being no civil equivalent of the Youth and Criminal Evidence Act 1999. They point out that the civil courts serve a very different purpose to the criminal courts. Of course, that is right. Further they say that litigants initiate civil compensation claims voluntarily and in the expectation that their evidence will be tested by cross-examination at trial notwithstanding their personal disabilities. They say that the court should be wary of importing automatic protection into the civil courts and that in this case, particularly where to do so would undermine rather than advance the objective of achieving justice for the parties.

59. There is some force in what the Defendants say but in my judgment, it is limited. A vulnerable litigant should not face a choice of initiating a claim and necessarily facing "exposure to the full forensic process" or being, in effect, barred from bringing their claim. The courts exist so as to provide access to justice not to prevent access to justice. If providing special measures does undermine the object of achieving justice for the parties then the court will so decide.

60. I return to the overriding objective. The Court must deal with every case "justly and at proportionate cost". One of the important factors is ensuring that the parties are on an equal footing so far is practicable, therefore the door must be open as a matter of principle to witnesses (whether they be parties or not) to having the appropriate assistance

78. The Court must seek to give effect to the overriding objective when it exercises any power given to it by the rules or interprets any rule and must further the overriding objective by actively managing cases. Also, the parties are required to help the court to further the overriding objective[93]

79. CPR 3 is important as it provides wide and flexible powers of case management[94], which can be used to make tailored directions to provide necessary assistance to those who are vulnerable.

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[91] Article 13(2) states, "In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."

[92] [2015] EWHC 3116 (QB)

[93] CPR 1.3

[94] Including the power to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective"; CPR3.1(2)(m)

80. However, as a number of responses to the initial consultation under taken by this working group have highlighted, there is currently no set method to elicit information about vulnerability or potential vulnerability and much depends upon an individual Judge detecting an issue on the paperwork, online submission, or at a hearing.

81. Civil cases proceed upon one of three tracks (usually as a result of the amount of money at stake); small claims, fast track and the multi- track. The breakdown of allocated claims between the tracks is as follows:

Number of claims allocated to track in 2018, by the type of track, England and Wales[95]

Type of Track	Number of Allocations	Proportion of allocations
Small claim	91,610	52%
Fast track	70,440	40%
Multi track	13,525	8%
Total	175,575	100%

82. For each track, after the pleadings have been received, the parties are requested to fill in directions questionnaires before a Judge considers giving any directions.

83. There is a specific directions questionnaire for the small claims track[96]. Save for a question about the need for an interpreter there is no reference to the need for any form of assistance for a vulnerable or potentially vulnerable party or witness. For the fast track and multi-track (which have the same directions questionnaire[97]); again, there is no specific reference to the need for any form of assistance for a vulnerable person[98].

84. As a consequence, the court may progress to make directions (even if just in relation to the setting up of a case management hearing) ignorant of an issue of vulnerability.

85. The tracks have different procedural rules. In the small claims track the court may, if all parties agree, deal with the claim without a hearing[99]. If either side requests a hearing then CPR 27.8 provides the court with a great deal of flexibility as to how it proceeds:

    (1) The court may adopt any method of proceeding at a hearing that it considers to be fair.
    (2) Hearings will be informal.

[95] Source; Civil Justice Statistics Quarterly, October to December 2018
[96] Form N180
[97] Form N181
[98] There is a question as to whether the case needs to be heard at a particular centre and a box for "any other information you consider will help the Judge to manage the claim"
[99] CPR 27.10; the direction questionnaire asks the parties if they wish to proceed to a paper determination.

(3) The strict rules of evidence do not apply.
(4) The court need not take evidence on oath.
(5) The court may limit cross-examination.

86. In contrast fast track[100] and multi-track[101] trials usually follow a far more formal and set procedure.

87. The court reform programme has at its heart a move away from a paper based to an electronic system. Through the Money Claims Online portal ("MCOL") it is now possible to commence a claim online provided that the claim is for a fixed amount of money not over £100,000 (so not a claim for compensation for an accident, injury or abuse). MCOL cannot be used by a person eligible for legal aid or help with fees[102]

88. PD51R and 51S set out the procedure for a pilot to test an online claims process, called "Online Civil Money Claims" ['OCMC']. Claimants who could otherwise make their claim through the main Money Claim Online system may use the pilot to make their claim, if their claim is suitable for the pilot. The pilot is to run from 7th August 2017 to 30th November 2021. The pilot applies in the County Court. Sub-paragraph (3) sets out the conditions that need to be met for a claim to be suitable for the pilot. In order to be eligible, the claim must be:

a) a Part 7 claim for a specified amount of money not exceeding £10,000 including interest;
b) the claimant will not be getting help with bringing the claim from a "legal representative" (as defined);
c) the claim is not for personal injury;
d) there is only one claimant making the claim, and the claimant informs the court that there is only one defendant;
e) the claimant believes that the defendant will not be getting help with defending the claim from a "legal representative" (as defined);

89. While these online procedures do not specifically request information in relation to potential vulnerability and there remains no requirement on a litigant to inform the court if there is a concern that the other party may have difficulty using an online system, a new question has been introduced into the 'Hearing Requirements' questions, which replaced the Directions Questionnaire. The question asks, 'do you require any support for the hearing?' and could potentially identify vulnerable witnesses although it is drawn in very general terms[103].

90. If the court becomes alert to vulnerability there are a number of orders which can be made or steps taken to facilitate the progression or defending of a clam or the giving of evidence by a vulnerable party including:

[100] See CPR 28
[101] See CPR 29
[102] Practice direction (PD) 7E specifically deals with MCOL and PD 51R
[103] The questions in relation to hearing requirements are under review.

a) Orders in relation to the nature and extent of evidence (including the extent of questioning
b) Allowing evidence by deposition
c) Use of video link
d) Assistance to litigants in person (and questioning on their behalf)
e) Use of an interpreter
f) Use of an intermediary
g) Appointment of an assessor
h) Conduct all or part of a hearings in private
i) Imposing reporting restrictions
j) Use of technology and other forms of assistance

91. These are now taken in turn and in more detail;

92. Evidence. In civil cases CPR 32.1[104] gives to the Court a broad power to control evidence;

Power of court to control evidence

32.1

(1) The court may control the evidence by giving directions as to –
(a) the issues on which it requires evidence;
(b) the nature of the evidence which it requires to decide those issues; and
(c) the way in which the evidence is to be placed before the court.
(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
(3) The court may limit cross-examination.

As a result, the court can limit the issues to be determined upon evidence and the nature and extent of any cross-examination, so the power is potentially much wider than the protection afforded in the criminal courts by section 41[105]. However, in the absence of mandatory direction the existence of a power does not necessarily mean that it is usually the case that consideration is given to its exercise; or the basis upon which it may be exercised. Several of those who responded to the survey we conducted with APIL members reported a failure to adequately address the extent or method of giving of evidence by vulnerable witnesses (e.g. if any available special measures were appropriate or how cross-examination would proceed if there was an unrepresented Defendant).

93. Deposition. CPR 34.8 permits the evidence of a witness to be taken by way of a deposition. This is, however, a very rarely used power.

[104] Which applies to each of the three tracks;
[105] Youth Justice and Criminal Evidence Act 1999, Section 41
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667675/limiting-the-use-of-sexual_history-evidence-in-sex_cases.pdf

94. Video link. CPR 32.3. states that:

> "The court may allow a witness to give evidence through a video link or by other means"[106].
>
> CPR PD 32 paragraph 29 states:
>
> "Guidance on the use of video conferencing in the civil courts is set out at Annex 3 to this practice direction.
>
> A list of the sites which are available for video conferencing can be found on Her Majesty's Courts and Tribunals Service website."

95. Paragraph 2 of the Annex 3 (which gives detailed practical guidance) states:

> "A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but also as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation. In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it"

96. There has been a widely expressed view that, to date, the lack of sufficient suitable equipment and the reference to achieving an overall cost saving has resulted in a reluctance to order the use of video link in civil cases unless it is considered truly unavoidable (usually because a witness is geographically distant/overseas); and that as a result often the threshold for use has been set too high by the Judiciary. However, as a result of the reform programme there is now a drive to explore the greater use of video link and "fully-video" hearings[107] have taken place as part of a pilot.[108]

97. Litigants in person. There are specific rules with regard to unrepresented parties, which may be relevant when a party is vulnerable or wishes to ask questions of a vulnerable witness. CPR 3.1.A states:

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[106] Guidance on the use of video conferencing in the civil courts is set out in Annex 3 to Practice Direction 32. See further Chancery Guide, Ch.21, para.21.100, Queen's Bench Guide, Ch.2, para.2.9.6, Admiralty and Commercial Courts Guide, Section H3 and Technology and Construction Court Guide, Section 4, para.4.6

[107] With fully video hearings, all parties appear by video.

[108] See "Video hearings tested in domestic abuse cases": Press release; HMCTS 9th May 2019 in relation to a pilot at Manchester Civil Justice Centre (reference to six domestic injunction cases already having used this procedure). The release states "Fully-video hearings are being tested in a small number of cases involving civil or family law at Manchester and Birmingham Civil Justice Centres. In civil law, one type of case involved is set-aside judgements. In family law, we are testing first-direction appointments. Those involved need to be legally represented. Two law firms are involved in the testing in Manchester, all of which is done using their own equipment; no special kit is needed."

(1) This rule applies in any proceedings where at least one party is unrepresented.
(2) When the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented.
…
(4) The court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective.
(5) At any hearing where the court is taking evidence this may include—
(a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and
(b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper.

98. Given recent funding changes there has been a significant increase in the number of litigants in person in recent years, and this trend is likely to continue. One of the consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is that public funding in civil and family cases is now available in only exceptional circumstances. Litigants in England and Wales have the right to conduct litigation and address the court personally. In most tribunals, litigants can freely choose to be helped or represented by non-lawyers, but the position is different in civil courts (and family proceedings), where a litigant requires permission from the court to receive assistance or be represented by a person without rights of audience[109]. Such a person might, for example, be a friend, member of the family, or charity worker, whether or not they are described as a McKenzie Friend[110].

99. As with the Family Court, the civil courts have to deal with the difficulties presented by unrepresented Defendants seeking to cross-examine parties/witnesses. It is clear that what a civil court cannot currently do is require the Court service to provide funding for representation/for the purpose of questioning of a witness. As the Master of the Rolls stated in Re K & H when referring to Section 19 of the Prosecution of Offenders Act 1985 which now provides for a power to pay the fees or costs of a legal representative[111] appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999:

[109] Guidance as to the circumstances in which permitting a McKenzie friend in civil and family proceedings will be appropriate, and related advice, can be found in the 'Practice Guidance (McKenzie Friends: Civil and Family Courts)' issued by the Master of the Rolls and the President of the Family Division on 12 July 2010. This Practice Guidance states, "Litigants have the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation." So, there is a general presumption of a right to assistance.

[110] See generally the ETBB. "In a climate where legal aid is virtually unobtainable in certain cases and lawyers may not be affordable, the McKenzie friend and lay representatives make a significant contribution to access to justice. The Judge has to identify those situations where such support is beneficial and distinguish circumstances where it should not be allowed.".

[111] The Court did not accept that interpreters or intermediaries were "representatives" within the meaning of section 42, still less that they provide the services of a legal representative, so relevant costs could be met by the Court Service; see paragraph 39.

"This provision is clear as to its scope and application. There is no corresponding provision in section 31G(6) of the 1985 Act or anywhere else in relation to civil proceedings. Section 19(3)(e) is an example of the kind of provision expressly authorising payment of public fund which Lord Bridge had in mind in the passage that I have cited from Holden & Co. A yet further point is the fact that section 19(1) of LASPO provides that regulations may provide that a court in criminal proceedings may determine whether an individual qualifies for legal representation at public expense. There is no corresponding provision in relation to civil proceedings.

36. Thus Parliament has not given the court the same power in relation to legal representation in civil proceedings as it has given in relation to criminal proceedings. Section 3 of the HRA cannot be invoked to make the provision that Parliament has not made.

37. For these reasons, I consider that section 1 of the 2003 Act does not give the court the power to require the Lord Chancellor to incur public expenditure in payment for legal representation in civil and family proceedings. The provision of legal services cannot be described as coming within the scope of the duty to ensure that there is an efficient and effective system to support the carrying on of the business of a court.

100. As set out above[112] in the paper; "Transforming the Response to Domestic Abuse Consultation Response and Draft Bill" the Government proposed measures to prohibit direct cross-examination of a victim by their abuser and, further, if there was a prohibition in any case that the Court would be duty bound to consider alternative ways that the party denied the opportunity to cross-examine could put his case. If he/she could not appoint a lawyer the Court could appoint a legal representative for the purpose.[113] It was not proposed in the paper that either the restrictions upon cross-examination or the ability to appoint a legal representative to undertake questioning would be extended to civil proceedings.

101. Although civil Judges are understandably wary of "putting a case" to a witness, it does happen and it is likely in some circumstances to be the only proper way to proceed given the vulnerability of, or difficulties faced by, the witness or the party who would otherwise have to conduct the questioning.

102. Although expressed as specific to the family courts, in which the procedure is investigative[114], in PS v BP [2018] EWHC 1987 (Fam), Hayden J recently made observations in the absence of definitive guidance on the correct approach where a self-represented alleged perpetrator wanted to cross-examine their accuser directly. He stated that once it became clear to the court that it was required to hear a case "put" to a key factual witness, and where the allegations were serious and intimate, a "ground rules hearing" would always be necessary. The

[112] See paragraphs 59-65 of this report.

[113] The Lord Chancellor would have the power to provide that the costs be met through central funds

[114] In the overarching framework of Children Act proceedings, the central philosophy is investigative

ground rules hearing should, in most cases, be conducted prior to the hearing of the factual dispute and judicial continuity between the ground rules hearing and the substantive hearing was essential. The investigative process in the courtroom, however painful, had to ensure fairness to both sides and there was no presumption that the accused would automatically be barred from cross-examining the accuser in every case: the judge had to consider whether the accuser's evidence was likely to be diminished if cross-examination was conducted by the accused, and whether it was likely to be improved if a prohibition on direct cross-examination was imposed. If the court decided that cross-examination would not be permitted by the accused and there was no other available advocate to undertake it, it should require questions to be reduced to writing; and submitted to the judge for consideration. In most cases it would be helpful if "grounds of cross-examination" were identified under specific headings. Further, a Judge should never feel constrained to put every question the lay party sought to ask: he/she had to evaluate its relevance and also proportionality. Cross-examination was inherently dynamic, the Judge inevitably had to craft and hone questions that responded to the answers given and it might be perfectly possible, without compromising fairness to either side, for the judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate. This guidance was approved and applied in a civil hearing concerning historic sexual abuse by HHJ Robinson; LXA & BXL -v- Wilcox and Wilcox [2018] EWHC 2256 (QB)[115].

103. Interpreters. The court allows the use of interpreters at hearings when necessary[116]. Current HMCTS guidance provides that an interpreter will normally be available only during the hearing. They might be able to take part in legal discussions before or after the hearing if the judge permits.

104. A party/witness will always be given an interpreter if they are deaf[117] or have difficulty hearing. If a party has difficulty with English he/she will be provided with an interpreter if the case involves possession of property or land or committal. As for other types of case a party might still be able to get an interpreter if he/she
   a) cannot afford to pay for an interpreter
   b) does not qualify for legal aid
   c) “does not have a friend or family member who the judge says can act as your interpreter” (it is acknowledged that this would require permission from the Judge)

105. Intermediaries. An intermediary can fulfil a number of roles depending of the degree of vulnerability. Usually the intermediary prepares a report for the Court making

[115] See paragraphs 13-17.
[116] There is provision in the CPR for people whose English is poor signing statements of truth; CPR 22 PD 3A (1) of the Practice Direction
[117] Since 2005 British Sign Language has been an officially recognised language and is the main language of the deaf community in the UK. There is a specific Advocates Gateway toolkit No 11 “Planning to question someone who is deaf”

recommendations as to the format and style of questions to be put to a competent[118] witness, and how and from where the evidence should be given. In some cases, the intermediary will attend the hearing and communicate or assist in the communication of questions to, and answers from, the witness.

106. As is stated in respect of intermediaries the Equal Treatment Bench Book ("ETBB"[119]):

> Their use should be considered by parties at an early stage so that assessments do not delay proceedings. Any resulting applications should be made in good time. Intermediaries are not always available, and the court may need to consider how best to adapt its procedure and language to ensure effective participation with the assistance of other tools. Although the decision whether to use an intermediary is ultimately the judge's, it is important to remember that the extent of communication difficulties can sometimes be hidden, and that despite best intentions, advocates do not necessarily have the required expertise either to diagnose difficulty, or to adapt their questioning.

107. Although there is no direct reference to the use of intermediaries in the CPR[120], their use has been permitted in the civil courts (see e.g. Connor (a protected party by his wife and litigation friend) -v-Castle Cement & others [2016] EWHC 300[121] . However as several of those who responded to the Council's request for information stated the appointment of an intermediary is rare and greater awareness of this option is needed. In part restricted use of intermediaries to date may be because confusion remains in relation to the funding and the lack of approved providers. One Designated Civil Judge gave the example of a trial with vulnerable autistic Claimant witness who needed an intermediary while giving evidence but there was no funding. It took time for HMCTS to agree to fund the intermediary as part of reasonable adjustments under the Equality Act.

108. This current position contrasts unfavourably with that in the Family Court where the use

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[118] The test of a witness's competence is different from a test of his /her capacity. In R v Hayes [1977] 1 WLR 238 (CA) the Court concluded that the key ingredients for competence were that the witness would understand the solemnity of the occasion and the responsibility to tell the truth; if so, that witness could be sworn to give evidence. Different considerations may apply to the evidence of children in proceedings under the Children Act 1989 or to any witness in criminal proceedings; see section 53 of the Youth Justice and Criminal Evidence Act 1999 and R v B [2010] EWCA Crim 4

[119] Para 2-4

[120] In A County Council -v- AB & others [2016] EWCOP 41, HHJ Rogers held that The Court of Protection was governed by civil rules of procedure and evidence, albeit that specific Court of Protection Rules had been made. Using r.95(e) of the Court of Protection Rules, which is very similar in content to CPR 32.1, the Court might admit the via a skilled intermediary.

[121] A claimant who lacked capacity and who also had communication difficulties was allowed to be assisted by a registered intermediary whilst giving evidence via video link. The intermediary prepared a report and although there were no formal ground rules hearing Counsel confirmed that they understood the need to formulate questions in accordance with the Intermediary's guidance. However, when attempted no questioning proved possible.

(and funding) of intermediaries is specifically covered within training documents[122], including suggested intermediary companies. The Council believes that the lack of guidance and funding should be addressed as a matter of urgency[123].

109. Assessors. There is a power to sit with an assessor in civil cases; section 63 of County Courts Act 1984 states:

63 Assessors.
(1) In any proceedings in the county court a judge of the court may, if he thinks fit, summon to his assistance, in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with a judge of the court and act as assessors.

Section 70 of the Senior Courts Act 1981 states:

70 Assessors and scientific advisers.
(1) In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance.

110. Rule 35.15 of the CPR states:

35.15

(1) This rule applies where the court appoints one or more persons under section 70 of the Senior Courts Act 19811 or section 63 of the County Courts Act 19842as an assessor.
(2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.
(3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –
(a) prepare a report for the court on any matter at issue in the proceedings; and
(b) attend the whole or any part of the trial to advise the court on any such matter.
(4) If an assessor prepares a report for the court before the trial has begun –
(a) the court will send a copy to each of the parties; and
(b) the parties may use it at trial.
(5) The remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings.[124]

[122] "Special measures and facilities for vulnerable family court users" (HMCTS internal training document) and "guidance to court staff on intermediaries in family proceedings".
[123] See also the recommendation in the 2019 JUSTICE report; paragraph 4.16
[124] As to further guidance: a letter from the Government Equalities Office to the president of the employment tribunals (E & W) in October 2010 sets out the government's position on the maintenance of lists of assessors; and following Cary v Commissioner of Police for the Metropolis [2014] EWCA Civ 987, a revised guidance on lay assessors was issued by HM Courts & Tribunals Service (HMCTS) on 12 November 2015. The list is mainly of Tribunal lay members. A list of

111. Section 114(7) of The Equality Act 2010 sets out that in proceedings in England and Wales on a claim within subsection (1)[125], the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so.

112. Consultees have indicated that assessors have been appointed in a number of housing cases where the tenant has a disability and Equality Act issues have been raised (either through preparation of a report or assisting the judge at trial).

113. Hearings in Private. Unlike the position in certain areas of family law, most notably public law hearings[126], CPR 39.2 sets out that the general rule is that hearings in civil cases are to be held in public and that

"The court shall take reasonable steps to ensure that all hearings are of an open and public character, save when a hearing is held in private[127].

114. CPR 39.2 (3) provides that a hearing, or any part of it, may be held in private in certain prescribed circumstances, including if:

a) publicity would defeat the object of the hearing;
…
d) a private hearing is necessary to protect the interests of any child or protected party;
…
g) the court considers this to be necessary, in the interests of justice.

115. Whilst there can be little doubt that the fact that a hearing is in public may produce an additional level of stress/distress for some vulnerable parties/witnesses there was no suggestion within the responses to the Council of those who have provided views to date that the general rule should be relaxed.

116. Reporting restrictions. CPR 39.2 (4) provides that the court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness. This power is frequently used in relation to

judicial fees, last updated on 1 April 2017, provides for an assessor's remuneration for attendance at hearings.

[125] This refers to the County Court jurisdiction to hear claims under the Act alleging a contravention of Part 3 (services and public functions); (b)a contravention of Part 4 (premises); (c)a contravention of Part 6 (education); (d)a contravention of Part 7 (associations); (e)a contravention of section 108, 111 or 112 that relates to Part 3, 4, 6 or 7.

[126] In private law family cases the presumption is that cases concerning children will be heard in private; see FPR 17.6(3) and 7.16

[127] CPR 39.2 (2A)

litigation involving children and protected parties who may receive compensation[128]

117. Use of technology and other assistance. HMCTS can provide documents online or in document form in enlarged font. On occasions as part of reasonable adjustments the use of live note has been funded by HMCTS for a hearing. If helpful figures and models are often used (many Judges have toy cars available so a witness can use them to describe an accident).

118. It was the view of the majority of Designated Civil Judges and Masters who responded to the Council's request for views upon the issue of vulnerable parties/witnesses in the civil Courts, that there are currently extensive powers within the CPR which, if properly used, could be used to ensure full and proper participation. However, there was recognition for the need for an overarching reference within the rules to vulnerability, increased judicial training and the provision of adequate resources (such as live link facilities).

119. However, whilst Judges may be able to deal with obvious issues[129], and/or issues raised by the parties, concern has been expressed in relation to the ability to detect and assess less obvious vulnerability and to adequately address the relevant issues of likely trial management sufficiently in advance of the hearing[130]. A consistent theme within the non-judicial responses has been the need for focussed training for civil Judges on vulnerability. During the seminar IICSA heard the view from one practitioner that in relation to civil claims based on sexual abuse/assault that:

"...there are so few cases that actually end up at trial that I think it is not the judges that need the training but the District Judges, who routinely deal with interlocutory applications and…talking about. I think there is a need for specialist District Judges to be allocated"[131]

120. In light of these comments it is necessary to consider the relevant information, guidance and training available to civil Judges and the legal professionals who appear before them.

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[128] See generally AXMX-v-Dartford & Gravesham NHS Trust [2015] EWCA Civ 96 in which the court gave guidance on anonymity orders in regard to applications by children for approval of settlements for personal injury damages. Unless it was judged unnecessary, an order should normally be made without the need for a formal application, prohibiting publication of the names and addresses of the claimant, the immediate family and the litigation friend, but the press had a legitimate interest in the proceedings and should have the chance to make submissions before the order was made

[129] "Where possible, judges should ensure that information is obtained in advance of a hearing about any disability or medical or other circumstance affecting a person so that individual needs can be accommodated, e.g. access to interpreters, signers, large print, audio tape …. more frequent breaks and special measures for vulnerable witnesses can and should be considered. Very often the steps that will be required will be obvious and may require little more than pragmatic alterations to normal procedures" (ETBB).

[130] Docketing of cases is still not the norm in multi-track and High Court cases and very often case management and interim hearings will not be carried out by the trial Judge.

[131] The IICSA Accountability and Reparations Investigation-Transcript of Inquiry Seminar; Day 2; 30th November 2016

Section 4 - Sources of information, guidance and/or training

121. There are three main sources of guidance and assistance available to the civil judiciary in relation to vulnerable parties/witnesses; the ETBB, the Advocates Gateway and toolkits and training through the Judicial College[132]

The Equal Treatment Bench Book

122. The ETBB [133] provides comprehensive guidance to the Judiciary[134] aimed at helping make the court experience more accessible for all parties and witnesses.[135] The stated goal of the ETBB is to increase awareness and understanding of the different circumstances of people appearing in courts and tribunals. It helps enable effective communication and suggests steps which should increase participation by all parties. It sets out comprehensive and practical guidance

123. At the outset of the chapter on Children, Young People and Vulnerable Adults it is recognised that the civil courts have no set procedural regime to ensure that proper assistance is provided to vulnerable parties/witnesses, so the focus is on the criminal jurisdiction:

Who is covered by this chapter?

Witnesses and parties may be 'vulnerable' in court as a result of various factors, and reasonable adjustments need to be made. Although touching on the wider powers to make adjustments, this chapter focuses on the statutory regime in criminal cases for taking 'special measures' for 'vulnerable' witnesses. Those are defined as witnesses who are under 18, have a disability, or where various other factors apply. Family courts have increasingly adopted the regime of 'special measures', and certain other courts and tribunals have derived ideas and guidance to adopt within their own general procedures.

124. The ETBB gives detailed guidance covering physical and mental disability[136] of parties and witnesses. It is 'important advice which every judge and every justice of the peace is under a duty to take into account when hearing a case involving people with one disability or

[132] There is also a system of LIP liaison Judges for all courts. Such Judges can assist other Judges with sourcing relevant guidance.
[133] Updated in March 2019 and also made available online.
[134] The Guide to Judicial Conduct sets out six core judicial 'values' which include ensuring equality of Treatment. The Guide also includes the Equality and Diversity Policy for the Judiciary".
[135] Contents include chapters concerning litigants in person and lay representatives; young people and vulnerable adults; physical disability and mental disability.
[136] Mental disability is a broad concept which includes: mental ill health e.g. depression, anxiety, personality disorder; learning disabilities as well as developmental disorders / neuro-diverse conditions such as autism and 'specific learning difficulties' such as dyslexia and brain damage.

another'[137]. The ETBB is clearly an essential tool for a civil Judge. However, it still requires a Judge to recognise that an issue has arisen in the case which needs to be addressed, something which some consultees to date suggest can only properly be achieved after appropriate training. By way of example mental disability is common[138] and often not visible or is visible only in some contexts[139].

The Advocates Gateway

125. Since 2015 The Advocates Gateway (TAG) has provided free access to practical, evidence-based guidance on vulnerable witnesses and defendants. It was founded in 2012 and is an independent body run by a volunteer management committee chaired by Professor Penny Cooper. TAG's main aims are 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. TAG's toolkits have been widely endorsed by senior judges and by professional bodies and as set out above there is now direct reference to them in the Criminal Practice Direction[140] and the Family Procedure Rules.

126. The overarching aim is described out as follows:

> The Advocate's Gateway toolkits aim to support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process. The handling and questioning of vulnerable witnesses and defendants is a specialist skill (Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court, 2011)[141]. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules. These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.

127. In R-v-Biddle [2019] EWCA 86 9 Crim), a case concerning the use of an intermediary, the

[137] See (R (on the application of King) v Isleworth Crown Court [2001] All ER (D) 48 (Jan)) per Lord Justice Brooke at paragraph 43.
[138] 1 in 4 people experience a diagnosable mental health condition in any given year; (ETBB)
[139] Notably in the context of the interim recommendation of IICSA, mental ill health issues are common amongst those who have been subject to sexual abuse.
[140] See Criminal Practice Direction 2015; Part V Evidence; Annex for section 28 ground rules hearings at the Crown Court when dealing with witnesses under s.16 YJCEA 1999; paragraph 6
[141] A report prepared by The Advocacy Training Council ("ATC") (the body responsible for overseeing standards of advocacy training for the Bar of England & Wales) which was the first major research project in England & Wales "specifically directed to considering the training barristers need to develop the right skills and understanding in how to interview, examine and cross-examine those in our Court system - whether witness, victim or defendant – who are most vulnerable by reason particularly of their young age, learning difficulties, or state of mental health". The ATC set up a Working Group on vulnerable witness and defendant handling in June 2009 "following a number of striking cases that emphasised the urgent need to ensure that all advocates, in whatever field, were equipped to handle and question vulnerable people in Court, in a manner which was appropriate, sensitive and effective".

Vice President of the Court of Appeal Lady Justice Hallett stressed the importance of training for advocates and the need for Judicial oversight, stating:

Since delivering this judgment extempore the Court has learned that there may still be some advocates appearing in cases involving vulnerable witnesses who have not undergone training. We hope that is not the case. If it is, we suggest that judges conducting pre-trial and ground rules hearings check with the advocates instructed that they have undergone the necessary training

128. Of particular relevance for civil cases are the following Toolkits:
   a) Toolkit 5; "Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)"
   b) Toolkit 10; "Identifying vulnerability in witnesses and parties and making adjustments"
   c) Toolkit 12; "General principles when questioning witnesses and defendants with mental disorder"
   d) Toolkit 17; "Vulnerable witnesses and parties in the Civil Courts"
   e) Toolkit 18; "Working with traumatised witnesses, defendants and parties".

129. The responses of several consultees referred to the civil Judges' lack of familiarity with these toolkits which are an extremely valuable aid for Judges and practitioners and should be consulted before any hearing involving a vulnerable or potentially vulnerable party or witness.

Judicial training

130. There is no specific civil training module/course run by the Judicial College solely concerning vulnerability issues for parties or witnesses. Whilst some differing aspects of vulnerability are considered within specific modules[142] e.g. capacity, delivering justice, housing and social issues; choice of courses is optional (indeed there is no requirement to attend civil courses as opposed to family or other courses) and a Judge may attend an annual training seminar and not consider any issues relating to vulnerability.

131. When amendments to incorporate Rule 3A and PD3AA of the Family Procedure Rules were being proposed the Judicial College incorporated specific training on vulnerability within the family courses and this training has now been in place for over two years.

[142] It is considered within the seminar "The Business of Judging".

Section 5 - Are additional measures needed within the civil jurisdiction?

132. Having set out the relevant current rules of practice and procedure in the criminal, family and civil jurisdictions, and the support, training and information available to Judges and advocates, it is now necessary to consider the extent to which the existing rules and everyday practice provide adequate assistance for vulnerable parties and witnesses in the civil justice system.

133. In its report on the Draft Domestic Abuse Bill The Parliamentary Joint Committee[143] welcomed the strengthening of the provision of special measures in criminal courts and noted that the Family Court had introduced a new set of rules (Family Procedure Rules, Part 3A) regarding vulnerable people, and a new practice direction about domestic abuse in cases about children (Practice Direction 12J) with the result that arrangements were similar to those in the criminal courts. The committee then stated:

> In the civil courts, there is little specific provision. The court has an overriding objective to deal with cases fairly and to manage cases actively. The court can control how evidence is put before the court, and can allow witnesses to give evidence by "video link or other means". But, as the Inns of Court College of Advocacy pointed out in 2015:
>
> there is no focussed practice direction in civil proceedings on the issue of vulnerability, no accepted procedure for advocates, representatives or judges to identify vulnerable people in civil proceedings, no specific special measures and no requirements on judges to manage cases in relation to vulnerable witnesses or parties, including where the case involves litigants in person.
>
> Women's Aid pressed for "equal access to special measures for victims across the family, criminal and civil courts", a call echoed by Dame Vera Baird QC.
>
> 150.The Minister told us that special measures were already available in both family and civil proceedings. He said Practice Direction 3AA places a duty on the court to consider whether a party's application in the proceedings is likely to be diminished by reason of vulnerability, including if they are a victim of domestic abuse, and to consider whether any in-court protections are needed, which can then be ordered by the judge. He added that there were similar arrangements in the Civil Procedure Rules and that the Government had not seen any evidence to suggest that there was an issue with special measures and their effectiveness in the civil court.
>
> 151.The Minister accepted that providing special measures would be challenging because of the physical layout of some courts and variations in the availability of facilities to pre-record and provide video links—but he said that this was something that the Government was addressing by investing in the court reform programme. The Government's intention was to take those

[143] Published on 14th June 2019

needs into account when constructing new court buildings, or undertaking renovations, so that facilities such as separate waiting areas could be provided.

152.We welcome the proposal that complainants in criminal proceedings for an offence involving behaviour that amounts to domestic abuse will be automatically eligible for special measures.

153.We recommend that this provision be extended to victims of domestic abuse appearing in family and other civil courts. We note the Government's comment that this is already possible under family court rules but, given the persuasive evidence about poor implementation, we recommend that the provision for special measures in the family court's rules and practice directions is put on a statutory basis, and that a single consistent approach is taken across all criminal and civil jurisdictions. This is particularly important given the Government's plans for a reduced but improved court estate, which may provide an additional barrier to participation for vulnerable victims."

134. The Council believes that the aim of rules and best practice within the civil justice system should be to ensure

a) access to justice for the vulnerable
b) that vulnerable parties can properly participate in the case progression, and vulnerable witnesses give best evidence, so as to ensure full and fair consideration of the issues within the litigation

135. It is first useful to briefly consider what measures are *currently*[144] available in the civil justice system when compared to the criminal justice system (the direct comparator referred to in the recommendation) and also the family courts:

Powers/Practice in Criminal Courts	Civil Courts	Family Courts
Specific procedural rules	N	Y
Witness service assistance	N	N
Separate waiting area	N	N
Screening witnesses	Y	Y
Evidence by live link	Y	Y
Evidence given in private	Y	Y
Removal of wigs and gowns	Y	Y
Video recorded evidence in chief	N/A	N/A
Video recorded cross-examination	N	N
Interpreters	Y	Y
Examination through intermediary	Y	Y

[144] Consider the proposals in the draft Domestic Abuse Bill.

Aids to communication	Y	Y
Prohibition of cross-examination by accused	N	N[145]
Restriction on questions about sexual history.	N	N
Reporting restrictions	Y	Y

Additional Powers only available in the family and civil courts

Assessors
Evidence by Deposition
Hearings in private[146]

136. The table above provides support for the view expressed by some Judges that the large majority of assistance and protection which can be provided to vulnerable parties or witnesses in the criminal and family jurisdictions can be achieved using existing (specific) powers within the CPR. However, whilst there was some support for the view expressed by one Designated Civil Judge that Judges have sufficient guidance (and flexibility) under existing rules (and that what was needed was a combination of awareness, sensitivity to needs of vulnerable witnesses, training, discretion for judges and additional resources) the majority of Judges who provided input saw a lacuna in the CPR and the need for specific rules covering vulnerable parties/witnesses either by way of amendment or addition to the overriding objective (CPR 1.1(2)) and /or by way of a new rule with substantially the same content as rule 3A of FPR.

137. Further, analysis of the responses from solicitors revealed a general consensus that the available powers and resources are not being used widely or consistently (and sometimes readily); examples of responses are:

"I cannot comprehend why a vulnerable witness in a civil case should not have the same level of assistance and protection afforded to them as they would in the criminal or family courts and even the court of protection. Unfortunately, I have had a poor experience of the application of special measures in a civil setting. As a Claimant Solicitor trying to support a severely brain injured Claimant (who was actively suicidal as a result of being told the Defendant was able to cross-examine her at Trial), I felt like the entire experience was an uphill battle (with very little support) from start to finish."
And,
There should be a sense of coherence …and not the 'ad hoc' approach currently taken by the civil courts
And,
The judge also refused to order evidence via live link because that was a 'nightmare' for the advocate as the system invariably failed at the critical moment. I gained the impression that the Judge was viewing the need for special measures in an old-fashioned way, rather than as a step the Courts and advocates should take to enable the witness to give their best evidence.

[145] See Draft Bill at paragraphs 59-65 of this report.
[146] There being only a very limited power to having a hearing in private under the CPR.

And,
The needs of vulnerable witnesses appear well understood in family and crime but there is a general reluctance to use the same measures in Civil Procedure and a total lack of understanding amongst judiciary and parties.

Several consultees expressed the view that that a specific rule and guidance concerning vulnerable parties/witnesses could only enhance existing practice.

138. Given the 2010 research[147] carried out on behalf of the Ministry of Justice (see paragraphs 19-23 above), the conclusion of the 2011 the Northern Ireland Law Commission (see paragraphs 24 -26 above), the work of the Children and Vulnerable Witnesses Working Group that led to the rule change in the FPR in 2017, the submissions and evidence to IICSA and the responses provided to the Council from consultees to date, it is the Council's view that consideration should now be given by the Civil Procedure Rule Committee to rule changes either by amendment to the overriding objective and/or the inclusion of a rule and/or PD to provide equivalent structured consideration to that achieved by rule 3A (and Practice Direction 3AA) of the FPR. Consistency of approach across the two jurisdictions is desirable and the alternative of merely relying on use of existing powers without more would risk the civil jurisdiction "lagging behind" both the criminal and family jurisdictions.

139. There are, however, differences between the work undertaken within the jurisdictions and the Council does not believe that complete consistency of the procedural rules is necessary.

140. As basic tenet, unlike the approach under section 17(4) YJCEA (or as proposed in the Domestic Abuse Bill)[148], the Council does not believe that a party or witness should axiomatically be deemed vulnerable, or receive automatic special measures, simply because of the subject matter or nature of the action. Rather the Council believes the proper approach to be as set out by Stewart J:

"...the door must be open as a matter of principle to witnesses (whether they be parties or not) to having the appropriate assistance. Of course, witnesses should not be designated as "vulnerable" merely because of the nature of their claims. Vulnerability requires specific individually based evidence that a person or persons will be prevented from giving proper evidence, for example, because of factors such as fear or lack of intellect/sophistication"[149].

141. However, differences in approach to vulnerable parties or witnesses between the jurisdictions should be limited and justifiable.

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[147] Rosie McLeod, Cassie Philpin, Anna Sweeting, Lucy Joyce and Roger Evans, Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity, Ministry of Justice Research Series (London: Ministry of Justice, July 2010)

[148] See paragraphs 59-65 of this report.

[149] Kimathi & others-v- Foreign and Commonwealth Office [2015] EWHC 3116 (QB) paragraph 60

142. An issue where there is currently potential for increased disparity of treatment of vulnerable witnesses between jurisdictions is cross-examination by the Defendant personally. In criminal courts it is prohibited in relation to sexual offences, or if the witness is a child, and there is a specific discretion in relation to other cases.[150] As set out above within the "Transforming the Response to Domestic Abuse Consultation Response and Draft Bill" the Government has proposed measures in family proceedings to prohibit direct cross-examination of a victim by any party who has been convicted, given a caution or charged with a specified offence or against whom an "on notice" protective injunction has been made. A Judge would also have a power to prevent cross-examination in other cases if either a quality (of evidence) condition or significant distress condition were met. Significantly the Court would be duty bound to consider alternative ways that the party denied the opportunity to cross-examine could put his/her case and if he/she could not appoint a lawyer then, as in the criminal courts[151], the Court could appoint and fund a legal representative for the purpose.

143. In the civil jurisdiction vulnerability may arise in a very wide range of circumstances and absolute prohibition of cross-examination by a defendant could only be justified within carefully defined and limited categories of case such as those concerning alleged violence (which unlike the family courts would extend beyond domestic violence) or sexual abuse. Significantly in many (although not all) of such cases, which are only a very small percentage of civil cases in which issues of vulnerability may arise, there will already have been criminal or family proceedings (the converse is unlikely to occur). If there was to be an absolute prohibition upon cross-examination of any victim of alleged victim of violence or sexual abuse it would require the court either to have the ability to fund a legal representative or, as is currently possible, to take over the questioning of the witness. At the moment there is no suggestion that funding for a representative would be available in the civil courts (and statutory provision would be required).

144. After careful consideration and taking into account the consultation responses received to date, the Council does not believe that a specific prohibition is justified given the limited number of cases in which it could properly axiomatically apply, the likelihood of prior proceedings, existing powers under CPR 32.1(3)(g) and CPR3.1A and the ability to adopt the procedure set out in PS v BP [2018] EWHC 1987 (Fam) and LXA & BXL-v-Wilcox and Wilcox [2018] EWHC 2256 (QB)[152]. However, the Council does recognise the need for this issue to be adequately addressed within judicial training[153].

145. As for a specific rule setting out a discretion to prevent cross-examination; such as that in section 36 YJCEA[154] or the Domestic Abuse Bill (to prohibit a person from cross-examining

[150] See paragraph 46 of this report.
[151] See paragraph 60 of this report.
[152] See paragraphs 13-17.
[153] See paragraph 164 of this report.
[154] See paragraph 46 of this report.

where it appears to the court that it would diminish the "completeness, coherence and accuracy" of the witness's evidence; the "quality condition", or cause "significant distress" to that witness; the "significant distress condition"), the Council believes that it would not significantly add to the existing power within the civil procedure rules[155]

146. The Council believes that the changes to the CPR to add duties in relation to vulnerable witnesses (as set out below), together with existing powers and enhanced training should be adequate to ensure that vulnerable witnesses are not exposed to distress or the quality of their evidence diminished by questioning being undertaken by a Defendant personally.

147. The Council recognises that this approach would mean that there was is not a wholly consistent approach across the jurisdictions, and also that views will vary on this issue, and invites responses to the consultation questions within this paper.

Civil Procedure Rules

148. It is the Council's view that the civil procedure rules (and any relevant accompanying practice directions) should aim to focus the attention of all civil Judges, parties and advocates upon the issue of vulnerability and provide a structured framework to produce a consistent approach. The rules should be amended to reflect the principle that the requirement to deal with a case justly includes the court and all parties to the proceedings,

a) ensuring that all parties can effectively participate in proceedings;
b) ensuring that all witnesses can give their best evidence;

and specifically, that the court and parties need:

a) to identify any party or witness who is a vulnerable person at the earliest possible stage of proceedings;
b) to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result; including (but not limited to) one or more of a list of specific case management directions (see below)
c) to consider "ground rules" before a vulnerable witness is to give evidence (to determine what directions are necessary in relation to the nature and extent of that evidence, the conduct of the advocates and/or the parties in respect of the evidence of that person, and/or any necessary support in place for that person). As a minimum requirement consideration must be given to;

(aa) allowing a party or witness to participate in hearings and give evidence by live link or other remote access;

[155] CPR 32.1(3)(g) and 3.1A

(bb) providing for a party or witness to participate in proceedings with the assistance of an intermediary
(cc) providing for a party or witness to use a device to help communicate

Case Management

149. The Council recognises the force in the view expressed by some consultees of the need to avoid being overly prescriptive in terms of a list of specific directions to be given and that the wide range of vulnerability means that many issues will require bespoke attention. A general duty to assess vulnerability will ensure that consideration is given to the adoption of appropriate measures whilst preserving flexibility. Thereafter judicial training (and use of ETBB and Advocates Gateway toolkits) should ensure that adequate steps are taken within directions to ensure proper levels of assistance and protection are provided. Some consultees recommended the use of model directions, but given the need to consider vulnerability in every case (i.e. regardless of subject matter or other specific procedural requirements) and to cater for a broad range of issues arising from vulnerability the Council believes that such directions would be very difficult to frame. However, it should be expected that at the earliest suitable opportunity[156] the court should usually consider directions:

a) To enable proper participation in the case management process (e.g. holding the hearing by telephone[157]);
b) To provide an extended time for compliance with any step (such as the production of a witness statement);
c) Requiring familiarity on the part of advocates or parties with the advocates toolkits
d) To ensure that necessary facilities are available at the trial court[158]

150. Returning to IICSA's interim recommendation, some discrete case management issue arises in respect of vulnerable parties/witnesses in some sexual assault/abuse cases.

151. In civil claims based upon historic abuse Claimants (and witnesses) face the prospect of having their evidence tested notwithstanding the fact that the Defendant has already been convicted in a criminal court. This is because section 11of the Civil Evidence Act 1968 provides: "In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence before any court in the United Kingdom…

[156] "It is a Judge's responsibility to ensure that all parties and witnesses are able to give their best evidence. Therefore, particular thought has to be given to the special measures and other steps that can be taken to achieve this. Decisions about how procedures should be adapted should be made as early as possible. Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved" (ETBB)
[157] PD 23A provides that at a telephone conference enabled court interim hearings of less than one hour will be conducted by telephone unless the court otherwise orders, unless all the parties are unrepresented. Because of difficulties is setting up telephone hearings Judges will ordinarily be slow to hold them if one party is unrepresented.
[158] If the court makes a direction for a measure which is not available where the court is sitting, it should consider directing that the court will sit at the nearest or most convenient location where the court sits and the measure is available.

a) He shall be taken to have committed that offence unless the contrary is proved…".

152. As was stated in In RSL v CM [2018] EWHC 2583 (QB):

> Given the wording of section 11 a conviction is not axiomatically conclusive proof of assault or abuse for the purposes of a subsequent civil claim such that the door is always closed for any defence. It is remains open to a defendant to challenge the conviction and to adduce fresh evidence and make fresh arguments. However, the extent to which the Defendant should be permitted to challenge the conviction based only upon repeating the evidence and arguments which had not convinced a jury remains, unsatisfactorily, somewhat unclear on current case law.

153. Given the lack of certainty as to the extent to which a Defendant in a civil claim can seek to "prove the contrary" of the conviction by seeking to re-run the defence used in the criminal trial it is essential that at the case management stage the Court considers whether it is necessary to clarify the basis upon which the convictions are to be challenged and what orders should be made in respect of the evidence to be adduced (bearing in mind the wide power provided by CPR 31.1) ; which may include:

a) Consideration of the extent to which evidence within[159] or transcripts of the criminal trial should form the evidence considered by the court[160];
b) a requirement that the Defendant presents his/her evidence first[161]

154. The matters addressed so far have focussed upon the need to make necessary case management directions in a case which involves a vulnerable party or witness. However, such measures may have limited benefit if the Judge at a hearing or trial cannot adequately ensure that the conduct of proceedings properly caters for and reflects any vulnerability of a person participating in relation to the adducing of evidence. Consideration should be given in every case at a case management hearing, or, if more appropriate, a hearing dedicated to the issues or a pre-trial review, to the need to set out "ground rules" with regard to the giving of evidence by any vulnerable witness (or the challenging of evidence by a vulnerable witness).

155. It is the duty of the court to control questioning of a witness and to ensure compliance with the overriding objective by adducing evidence fairly and effectively. As set out above powers already exists under CPR 32.1 to limit cross-examination and under CPR 3.1A (5)(b) for the Judge to undertake the questioning where one of the parties is unrepresented. Over the last decade there has been a sea-change in the approach to the cross-examination of vulnerable witnesses

[159] Included ABE interviews
[160] See FRP PD 3AA paragraph 5.6
[161] RSL v CM [2018] EWHC 2583 (QB) Per HHJ Cotter Q.C at paragraph 47

in the criminal courts[162]. The Court of Appeal has said: 'It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way around[163].'

156. When dealing with "ground rules" consideration should be given to addressing the following matters:

i. how (and for how long) questioning of witnesses is to be undertaken. This could include an order that a party submit a list of questions in advance of the hearing and that the Judge will conduct questioning. The length of cross-examination should be carefully considered pre-trial [164] and revisited at the outset /during the trial. A Judge should ensure that the duration of questioning is appropriate to the witness's needs and attention span and stop it if the witness becomes seriously distressed. The ETBB sets out that in respect of criminal cases;

"Judges are fully entitled to impose reasonable time limits on cross-examination. They are expected to challenge unrealistic estimates in the plea and case management hearing questionnaire, and to keep duration under review at trial. The judge may direct that some matters be dealt with briefly in just a few questions.

Duration of cross-examination must not exceed what the vulnerable witness can reasonably cope with, taking account of his or her age/ intellectual development, with a total of two hours as the norm and half a court day at the outside. The witness's needs may require questioning to take place over more than one day"

ii. Requiring that anyone who is to undertake questioning has considered the relevant toolkits within the Advocates Gateway; with a warning that it is expected that their guidance will be followed[165]:

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[162] "As far as any restrictions placed on the cross-examination are concerned, the section 28 procedure and the modern regime for cross-examining vulnerable witnesses has led to a sea change in advocacy techniques. Advocates must adapt to the needs of the witness and ask questions in the manner and form approved by the judge, but as this court has stated on several occasions, it does not follow from that fact that a defendant cannot have a fair trial. There are many ways in which the parties can ensure that all relevant material is put before the jury for them to consider by way of admissions and the calling of any other witnesses."; Hallett LJ in R-v-PMH [2018] EWCA Crim 2452

[163] This need not be an inhibition on the power of cross-examination. The Court of Appeal has observed that 'some of the most effective cross-examination is conducted without long and complicated questions being posed in a leading or 'tagged' manner'. (R v Wills [2011] EWCA Crim 1938)

[164] It may be argued that it is difficult to properly assess the nature and extent of necessary challenge to a witness's evidence before exchange of witness statements which will usually occur after a costs and case management hearing. However detailed consideration can always be given to grounds rules within a pre-trial review

[165] Some consultees expressed concern that practitioner training tended to focus on the need to consider the TAG for criminal and (to a lesser degree) family hearings, but not for civil cases.

iii. In cases where there is more than one Defendant, setting out by order or otherwise the expectation that cross-examination should be conducted by one advocate alone, with advocates for a second or third defendant only putting additional relevant points not already put by the first advocate[166].

iv. The timetabling of the trial. The capacity of a vulnerable witness may deteriorate if there is delay so, as is common practice in the criminal courts consideration should be given to a 'clean start' to the evidence of vulnerable witnesses (i.e. evidence to commence at the start of the court session with no delay). This is particularly important if the witness is vulnerable due to their youth.

Conduct of a hearing

157. The matters set out above address the necessary directions before a hearing or trial. However, they will be unlikely to provide adequate assistance or protection for a vulnerable party or witness if the Judge who hears the matter does not adequately cater for vulnerability within his /her conduct of the hearing. It is well established[167] that within what has been described as general "judgecraft[168]" a Judge should always:

a) Use appropriate language with which the person is familiar when explaining matters or giving instructions; "court jargon" and figures of speech should be avoided[169].
b) Prevent questioning that lacks relevance or is repetitive, oppressive or intimidating and not permit cross-examination techniques using complex vocabulary and syntax, and forms of questions which have all been demonstrated to mislead and confuse witnesses, undermining the accuracy and completeness of their evidence[170]. A Judge must also be alert for possible miscommunication and ask the advocate to rephrase (a vulnerable witness may not recognise when difficulties occur or be embarrassed to admit them)

158. The Council does not believe that the elements of case management and conduct of a hearing set out above require to be addressed within the CPR beyond the suggested rule changes. However, they should be re-enforced within dedicated training (see below) and the requirement that every civil Judge is familiar with the content of the ETBB and when required the Advocates Gateway.

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[166] This is an issue that may well be encountered on an increasingly frequent basis following clarification and extension of the scope of vicarious liability, including following cases such as Armes-v-Nottinghamshire County Council [2017] UKSC 60

[167] Within the research set out at paragraphs 19-28 of this report, the content of ETBB, Advocates Gateway and Judicial College Training provided for family Judges and within specific Judicial College modules.

[168] A Judicial College term used within courses.

[169] "effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed" (ETBB)

[170] Questions should, if possible, be in a chronological order and be simple (e.g. no double negatives) and contain only one matter. There should be no compound questions, leading or "tag" questions or repetitive questioning

Directions questionnaires and the online access

159. Initial case management orders are made having regard to the content of the Directions Questionnaires. As set out above there is no specific mention of vulnerability within the Directions questionnaires provided in each of the civil case tracks[171] in the County Court or in High Court claims. The Council believes that the questionnaires should be amended to request (through straightforward and easily understandable questions) information as to the vulnerability or potential vulnerability of a party (which should include an obligation to disclose whether a party know details of the vulnerability of another party) or a witness.

Judicial Training

160. The one issue upon which there was nearly unanimity amongst the Judiciary who provided views to the Civil Justice Council was that there was not enough awareness about the nature and extent of vulnerability of parties/witnesses among the civil judiciary and that additional training was needed particularly as to detecting the wide range of potential issues.

161. In the criminal courts the police, CPS and a publicly funded defence advocate[172] will usually have had significant interaction with the witnesses and/or Defendant so will have had an opportunity to assess if there are vulnerability issues and inform the Court and, if necessary, make an application for assistance[173] or special measures. In public law family cases the Local Authority (and in the vast majority of private law cases involving children, CAFCASS) will have assessed the relevant circumstances and issues of vulnerability and be in a position to alert the court to an issue[174]. However, in many civil cases neither the parties nor any third-party agency will have considered vulnerability placing the burden upon the Judge to detect, then raise/investigate, any potential issues.

162. Further, given the move to increased use of technology to obviate the need for "face to face" meetings, as stated in the 2019 JUSTICE report in the context of video link:[175]

"Of particular concern is the fact that anecdotal evidence suggests that it may be more difficult for representatives to identify court users' vulnerabilities or disabilities via video link"
And,
Due to the issues highlighted above, it is all the more important for judges and magistrates to clearly explain to participants in hearings involving video what will happen at the start of the

[171] Small Claims, fast track and multi-track; see paragraphs 86-88 of this report in relation to OCMC.
[172] A defendant will be entitled to assistance from a duty solicitor at a Magistrates court who can advise and/or represent.
[173] In many larger Magistrates' Court there is assistance from the NHS Liaison Service in relation to any mental health concerns.
[174] In private law cases not involving children there is usually a referral for a Mediation Information and Assessment Meeting; also giving an opportunity of assessment of vulnerability issues by a third party.
[175] Paragraphs 2.77-2.78

hearing and what is happening throughout the course of the proceedings. We know from video enabled remand hearings that the use of video can become routine for magistrates. However, judges and magistrates must bear in mind that both the proceedings, the use of video and the implications of appearing on a link will most likely be unfamiliar to the person on the screen. We are not aware of any specific guidance on running a video link court. As such, we also consider that guidance and training on whether a video hearing is appropriate and how to run a video hearing is necessary for all court professionals…

163. The Council considers that it is necessary that judicial training upon vulnerability includes consideration of detecting and assessing potential vulnerability when a party/witness is communicating with the court "on line", or using the telephone, video or skype.

164. The impending introduction of a rule change within the FPR was the trigger for a change in the training provided for the family judiciary by the Judicial College. It is the Council's view that even in the absence of a rule change within the CPR the College should consider enhancing the training of civil judges, both salaried and fee paid, in relation to issues of vulnerability to cover, in greater depth than at present, three core elements:

i. Detecting/assessing vulnerability (including increasing awareness of the presence of court users with mental health conditions and learning disabilities)
ii. Case management when a party or witness is vulnerable
iii. Conduct of hearings (to include direct questioning of witnesses[176] so as to avoid questioning by the defendant) and communicating, engaging and working with court users with mental health conditions and learning disabilities

165. Given the training which has been provided to Judges who have attended family courses one suggestion raised was the restricting of case management of cases concerning sexual abuse/assault to Judges with public law tickets. The vast majority of salaried and fee paid District Judges sit in both the civil and family jurisdictions and will have attended a family course within the last three years[177]. However, such an approach would not address the lack of training of many of the multi-track trial Judges (or indeed Masters) who also hear interim and final hearings in such cases. The Council also believes that the listing complications (with potential for increase delay) would be likely to be greater than the benefit gained. Rather there should be a review of how more focussed training on vulnerability issues can be provided within the civil courses provided for all civil Judges.

[176] See the guidance in PS v BP and paragraph 101 of this report.
[177] Between April 2016 and April 2018, all family court judges received training from the Judicial College on how to address the challenges faced by vulnerable persons in the courts, including those who are victims of domestic abuse

Court facilities and court protocols

166. The HMCTS estate contains a wide variety of court facilities which are used for civil (and family) hearings ranging from modern multi-court combined centres with modern equipment to buildings with a single hearing room. As result court staff and Judges are often restricted in relation to the directions /arrangements that can be made to accommodate the needs of vulnerable witnesses and/or parties[178]. The FPR expressly acknowledge this difficulty, providing:

"If the family court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the family court sits and the measure is available"[179]

167. In his 2017 statement the President of the Family Division stated of reforms to assist vulnerable parties/witnesses:

None of this will work, as it should and must, unless our courts are fitted out with the necessary facilities and have the necessary 'kit'. The simple fact is that they are not and do not and they must be. In too many courts the only available special measure is a screen or curtains round the witness box. What, for example, about the safe waiting rooms for which the APPG has justifiably called? The video links in too many family courts are a disgrace – prone to the link failing[180] and with desperately poor sound and picture quality…

More, much more, needs to be done to bring the Family courts up to an acceptable standard, indeed to match the Facilities and 'kit' available in the Crown Court[181].

168. By way of example of the difficulties currently faced, many consultees referred to the difficulty in getting access to video link facilities for civil cases with priority for such equipment as is available being given to family cases. One Designated Civil Judge reported difficulties in providing any of the basic protections that should be available for vulnerable witnesses; video link facilities, screens or even an appropriate entrance (the relevant court currently using the goods loading bay). Another Judge reported reliability issues in relation to technology used which is patchy.

"Breakdowns of communication between live link (vulnerable witness suite) and courts are too common and highlight the need to maintain such facilities properly".

[178] E.g. Reading Hearing Centre has only two waiting rooms for five hearing rooms.
[179] FPR 3A.8(2)
[180] One District Judge lost an entire day in a complex case as the link kept cutting out. After investigation it was established that the problem was that too many phones were being used in the Court building, and the case had to be moved to a different court.
[181] By way of example Cardiff Civil and Family Justice Centre has just one live link and vulnerable witness suite

169. Since 2016[182] the justice system has experienced a period of huge reform[183]. HMCTS has stated:

"We are working on an ambitious programme of court reform, which aims to bring new technology and modern ways of working to the way justice is administered.

In collaboration with the senior judiciary and the Ministry of Justice, we are investing £1bn to reform our courts and tribunals system.

Our systems and processes have not kept pace with the world around us. We know we can make justice less confusing, easier to navigate and better at responding to the needs of the public. We want every user to feel they have been treated swiftly, fairly and with respect.

We are building a modern system for administering justice which will benefit everyone who uses it. By designing systems around the public who need and use our services, we can create a more effective system for them and generate efficiencies for the taxpayer[184].

170. During the first phase of the reforms, projects included putting new infrastructure into existing court buildings (including more Wi-Fi) and modelling/design work on "the Court of the Future" design guide. The design guide set out that accessibility for the most vulnerable should be extended to civil hearing rooms. It stated**:**

"Model waiting rooms for victims and witnesses have already been established in five criminal courts across the country. These are intended to improve the experience of the criminal justice system for all victims, including victims of domestic abuse. Her Majesty's Courts and Tribunals Service is using these model waiting rooms along with a new design guide and the results of a facilities audit to target further improvements. As an early priority, it is focusing on increasing the number of privacy screens available to allow vulnerable and intimidated victims and witnesses to give evidence without being seen by the defendant or the defendant's family".[185]

171. Work is on-going which includes building 'enabling' services (such as video connections and technology).

172. In a pilot started in March 2019 HMCTS is exploring how video hearings might be used to improve access to justice in civil and family cases and help cases progress faster[186].In a press release of 9th May 2019[187] it was stated of fully video hearings:

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[182] See the UK Government White Paper "Transforming Our Justice System" (September 2016)
[183] The reform programme now comprises more than 50 distinct projects, working across all jurisdictions - in criminal, civil, family and tribunals
[184] Gov UK website "HMCTS reform programme" February 2019
[185] Contrast the number of waiting rooms at Reading Hearing centre; see footnote 178 of this report
[186] See footnote 108 of this report.
[187] HMCTS/MOJ; https://www.gov.uk/government/news/video-hearings-tested-in-domestic-abuse-cases.

"This has been used in six cases so far and feedback from those involved has been positive. Testing will continue in the family and civil courts during the coming months and is being independently evaluated. Justice Minister, Lucy Frazer, said:

We are hearing that, even in the early stages, testing fully video hearings are having a positive effect and ensuring the justice system is supporting people at one of the most difficult times in their lives. I look forward to seeing the evaluation of this work and ensuring we continue to improve access to our courts through new innovations.

173. The stated aim is that through the various aspects of the reforms HMCTS will develop

"citizen-centric, sustainable, and resilient digital services to meet the needs of courts users"[188].

174. As a result, it is the anticipation of the Council that the reform programme will address current shortfalls in video link facilities, remote access and associated technology through the modernisation process and intention to reform. It is also assumed that it is recognised that it will be an essential pre-requisite for the wider use of technology in instead of "face to face" hearings that specific consideration to be given to assessing and catering for the difficulties that vulnerable parties /witnesses may encounter in accessing and using all forms of remote access.[189]

175. Accordingly, no specific recommendations in relation to equipment are made within this report.

176. However, it is important that at all stages of planning consideration is given to vulnerable witnesses and parties. An overarching project within the reforms is "Assisted Digital" which has a dedicated department. From March 2018 to August 2019 testing is being undertaken as to how best to provide help to people using a range of new digital Courts and Tribunal Services[190]. It is the understanding of the Council that, particularly in light of concerns raised[191], the Assisted Digital project is considering all aspects of vulnerability and how a person may be hampered or prevented for engaging through digital means.

177. Although the "Court of the Future" design plan will assist when court buildings are altered (or more rarely) built, it is understood that the reform programme will not have sufficient funds

[188] Per Balaji Anbil, HMCTS Head of Digital Architecture

[189] See Letter from the Justice committee to Lucy Frazer QC MP of 27th February 2018; https://www.parliament.uk/documents/commons-committees/Justice/correspondence/20180227-Letter-Lucy-Frazer-court-tribunal-estate.pdf and 2019 JUSTICE report paragraph 2.73-2.78

[190] This project is in part managed by Good Things Foundation under a contract with HMCTS.

[191] See e.g. the JUSTICE report "Preventing Digital Exclusion from Online Justice"; June 2018 and the letter of 27th February 2018 from the Justice Committee to the Parliamentary Under Secretary for Justice (increasing reliance on Impaired mobility: affecting access to the building and to toilets; difficulty moving around the room virtual and online justice). The Civil Justice Council had a presentation from the Assisted Digital Team in 2018.

for wholesale changes to the existing court estate (beyond the addition of new technology). This means that the vast majority of existing buildings/hearing rooms will continue to be used as they currently are i.e. current limitations, such as the lack of separate waiting rooms/facilities, will remain.

178. Some Courts already have protocols in relation to vulnerable witnesses (as recorded in the draft Domestic Abuse Bill)[192] However as their creation arose out of the requirements of the Family Court, civil staff[193] are often unaware of their existence [194]. An example of a current court protocol is at Annexe 1.

179. Given the diverse facilities within the estate[195] the Council believes that individual court centres/courts should (after consultation with the Designated Civil Judge, the Designated Family Judge and those responsible for preparing any protocols in relation to the Family Court) prepare comprehensive operational protocols which should include consideration of the assistance/protections available to all vulnerable parties/witnesses across the civil and family jurisdictions. To take obvious examples of environmental features which need to be considered for each court:

a) Impaired mobility: affecting access to the building or parts of a building and to toilets; difficulty moving around the court or hearing room (these may affect which hearing rooms are suitable in particular cases)
b) The ability to provided separate access/egress from buildings/courts for vulnerable parties/witnesses varies considerably
c) The availability of separate waiting rooms (in an APIL survey 96% of those who responded said that a separate waiting room would assist vulnerable witnesses
d) Layout of the hearing room (e.g. screens[196] are easy to use, relatively inexpensive and their use has a minimal disruptive effect upon court proceedings provided the courtroom is large enough. However, they cannot be used for hearings in some hearing rooms used by District Judges due to layout/size)[197]

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[192] See paragraphs to 59-65 of this report.

[193] The document "Special measures and facilities for vulnerable family court users" [HMCTS] states "every family court is expected to develop a protocol setting out the specific procedures and practicalities for assisting vulnerable court users, adapted to their local circumstances. These will be devised by local operations managers, with input from the Designated Family Judge (p22)"

[194] By way of example working group members sit at Reading and Edmonton where the staff were not aware of any protocol.

[195] Many Crown Courts are better equipped, in terms of video links and separate waiting areas for witnesses than the civil estate. Given the reduction of sitting days in the Crown Court consideration should be given to the potential for use of crown courts for civil and/or family cases which involve vulnerable witnesses/parties. See footnote 178 of this report in relation to Reading Hearing Centre.

[196] HMCTS has recently taken delivery of a further 300 screens.

[197] See the statement within the Court of the Future Design Guide at paragraph 170 of this report. There are other features of the court environment that should be considered e.g. physical discomfort in the room: seating arrangements, temperature, handling of large trial bundles when in the witness box difficulty hearing the judge or advocates due to the size of room or background noise or size

180. The Council also believes that individual court centre protocols should extend beyond consideration of the physical environment. Consideration should be given to the recommendations within the 2010 research paper[198] and the 2019 JUSTICE report; specifically, that courts should:

a) Set up small, multi-disciplinary teams to work with court users with mental health conditions, learning disabilities and limited mental capacity. Team members should have clearly defined lines of communication, and an understanding the available support mechanisms and roles within these. In civil and family proceedings, these should include representatives from the Citizens' Advice Bureau, court staff, PSU and other voluntary sector support organisations
b) Consider how to ensure that court users with mental health conditions, learning disabilities and limited mental capacity are offered support before arrival at court and after a hearing (liaising with any local PSU office)
c) Provide a case manager for case parties with mental health conditions, learning disabilities and limited mental capacity, to provide one point of contact and oversee support
d) Introduce the provision of pre-trial visits to vulnerable users of the civil justice system and promotion of their availability[199].
e) Refer/provide ready means of access[200] to comprehensive guidance (in simple and accessible language) concerning
    i. What to expect at court
    ii. How to gain assistance from court staff

The 2019 Justice report stated:

"We consider that the webpage for each jurisdiction on gov.uk that we propose above, should be followed by a prominently featured, engaging, clear and high quality production video entitled 'What to expect at Court'. It should include court professionals explaining their roles and lead viewers through actual court locations, to give a realistic picture of court processes. This should be produced by HMCTS and cover practical and procedural information. Consideration should be given, based on user testing, to whether it would be possible to have an overview video that applies irrespective of jurisdiction.

[198] See paragraph 22 of this report.
[199] Pre-hearing visits were referred to within the APIL survey as clearly beneficial for vulnerable Claimants. See also the specific recommendation in the 2019 Justice report at Chapter V recommendation 15
[200] See HMCTS "Citizen User Experience Research" [2018] as to the importance of "good information". See also the JUSTICE report at paragraph 2.19 in relation to leaflets available at court; "In some Courts, the number of leaflets is overwhelming, and in others there are none at all. Many leaflets are also out of date, with information that is insufficient in terms of content and substance". Also see the recommendation at paragraph 2.55, "Court and Tribunal staff should be familiar with the information that is on line, in leaflets and on the video screens in order to signpost lay users to this".

The Council endorses this suggestion of the need for this to be produced as a national resource.

ii. the use of Mackenzie Friends/lay representatives
iii. being a witness in a case[201]. The Government has set out that

"Her Majesty's Courts and Tribunals Service and the Ministry of Justice will develop a series of videos to explain the process of giving evidence to court and how special measures might assist".

iv. a list of any local agencies/relevant organisations who may be able to provide advice, assistance and /or representation in relation to the conduct of litigation such as any local pro-bono scheme and the Citizens Advice Bureau[202]

181. In addition to local court protocols it is essential that staff who handle civil cases are given adequate training[203]. In the 2019 paper[204] it was stated in relation to staff that:

In addition, we provide ongoing training to all professionals working within the family justice system. Her Majesty's Courts and Tribunal Service is committed to increasing the awareness and understanding of domestic abuse among all family court staff. At the end of November 2017, a new training programme was rolled out to all court staff focusing on the needs of vulnerable court users, including victims of domestic abuse.

The Council has received evidence that there is currently an unsatisfactory picture in relation to staff training across the civil courts. In many combined court centres family court staff (including ushers who often work in both family and civil courts) have received training; but staff who work solely in the civil section have not[205]. This should be addressed as a matter of urgency.

[201] The 2010 research made a recommendation of the production of an equivalent DVD to "Going to Court – A step-by-step guide to being a witness' used for criminal cases on the civil and family court processes and promote its availability to court users

[202] From April 2019 The Citizen's Advice Bureau is running a pilot scheme in up to 12 Family Courts extending its witness services to provide information, practical and emotional support. The first three courts on the pilot are Wolverhampton, Teesside Combined Courts), Stoke on Trent to be followed by Leicester, Portsmouth, Derby, Norwich, Northampton, Kingston-upon-Hull, Worcester, Swindon and Truro later in 2019. See also the 2019 JUSTICE report paragraph 2.30-2.31

[203] See footnote 89 of this report in relation to The UN Convention on the Rights of People with Disabilities 2006 and the obligation that "States Parties shall promote appropriate training for those working in the field of administration of justice"

[204] See paragraph 27 of this report.

[205] There is an HMCTS training document entitled "Special measures and facilities for vulnerable family court users".

Section 6 - Compensation orders

182. The Council notes that the interim recommendation of IICSA stated that for the victims and survivors of child sexual abuse in civil court cases, cost is a barrier for those who wish to claim compensation in relation to the abuse they suffered and the Ministry of Justice should ensure that this barrier "is not further increased".

183. It is not necessarily the case that victims and survivors of child sexual abuse need to make a civil claim to obtain compensation, or at the least an initial award. Apart from award under the Criminal Injuries Compensation Scheme[206] a victim or survivor of a sexual offence in respect of which there has been a conviction can receive compensation from the criminal court without facing any financial barrier associated with bringing civil claims.

184. The Ministry of Justice stated in its closing submission to IICSA:

> ".. one area which, on the evidence before the Inquiry [IICSA], clearly requires careful attention is the lack of Criminal Compensation Orders (CCOs) being made by the Courts. The Inquiry is aware of the legislative framework and the obligation on the court to consider the making of such orders. It is also aware of the statistics, confirmed by the evidence of the police and victims/survivors, which indicates that the power to make a CCO is infrequently exercised.
>
> It seems to the Ministry of Justice that there is clearly a training issue here, which needs to be grappled with by the bodies concerned. The Lord Chief Justice, who has responsibility for training the judiciary, will no doubt wish to consider how judicial awareness of the applicable legislation might be improved, as will the professional bodies responsible for the training of solicitors and barristers whose job it is to ensure that the Court is fully informed of its powers and obligations when it comes to sentencing. The CPS and police will also have a role to play in this regard. A key theme which has emerged from the victim and survivor evidence has been the value attached to the making of such an order even if it does not ultimately lead to much money actually being recovered, and that is something that all those involved will wish to take into account when it comes to considering whether a CCO should be made."[207]

185. The statistics do indeed support the view that compensation orders are rarely made. According to figures from the Ministry of Justice obtained by Andrew Griffiths MP only 26 awards were made to victims of child sexual abuse in 2017 although 6,861 defendants were

[206] IICSA recommended that the Ministry of Justice revise Criminal Injuries Compensation Authority (CICA) rules; but this is beyond the scope of this paper;

[207] It is interesting to note that the "Code of Practice for Victims of Crime" published by the Ministry of Justice in October 2015 pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004 makes no reference to the courts power to award compensation or to the need for those who are service providers to consider making an application. This appears to be a surprising omission.

convicted relevant offences. Of the 26 compensation orders eight were for £100 or less.[208]

186. Section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 provides a power to impose a compensation order against a convicted person (in addition to dealing with him in any other way) requiring him/her to:

"to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence[209]"

187. A court must consider making a compensation order in any case where it is empowered to do so and, importantly, must provide reasons if it decides not to do so.

188. As for the amount of compensation, it should be

".. of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor"[210].
The amount of loss must be agreed or proved by evidence, as opposed to inference or guesswork.[211] Currently the approach of most Judges is that the process of making an order should not be complex or protracted and a court should decline to make an order unless it is based on relatively simple propositions which have been agreed or are easy to resolve. When the amount of loss or damage is disputed there may be a need to hear evidence but the court should hesitate before undertaking a complicated investigation[212].

189. In determining whether to make a compensation order against any person, and in determining the amount to be paid by any person under such an order, the Court shall have regard to his means so far as they appear or are known to the court. If the order may require the sale of the matrimonial home the court is required to take into account the consequence of making such an order[213]. If the order cannot be paid immediately the court must have regard as to how long it might take for the order to be satisfied; the longer the period the less likely it is that the order will be justified. Where the court considers that the offender has insufficient means to pay both an appropriate fine and appropriate compensation, compensation shall take precedence.

190. As for the effect of compensation order on subsequent award of damages in civil proceedings, section 134 provides:

[208] Figures set out in the introduction of the Compensation Orders (Child Sexual Abuse) Bill 2017-19 ; a Private Members' Bill on Tuesday 26 March 2019 by Andrew Griffiths MP under the Ten Minute Rule.
[209] S130 (1)(a) of Powers of Criminal Courts (Sentencing) Act 2000
[210] Subsection (4)
[211] Amey [1982] 4 Cr App R (S) 410
[212] Kneeshaw (19740 58 Cr App R 439; Hyde v Emery (1984) 6 Cr App R (S) 206.
[213] Parkinson [2015] EWCA Crim 1448

(2) The damages in the civil proceedings shall be assessed without regard to the order . . ., but the plaintiff may only recover an amount equal to the aggregate of the following-
(a) any amount by which they exceed the compensation; and
(b) a sum equal to any portion of the compensation which he fails to recover

191. The Magistrates Court has powers in relation to the enforcement of a compensation order, including an ability, to discharge the order or reduce the amount which remains to be paid if the injury, loss or damage in respect of which the compensation order was made has been held in civil proceedings to be less than it was taken to be for the purposes of making a compensation order[214].

192. As powers exist to award compensation it is necessary to consider why so they are so rarely used. After a limited investigation of the issue (given the scope of this report) the Council understands that there are a number of reasons. Some Judges have referred to the failure of the prosecution to adduce evidence of the nature and extent usually required within a subsequent civil claim; particularly medical evidence as to causation of psychiatric conditions[215]. Others have referred to difficulty presented by a contested or lengthy hearing at the conclusion of a trial given that guilt and/or causation of injury may not be accepted by the Defendant. Reference has been made to the difficulty in assessing and awarding compensation other than in a very conservative or nominal sum (which may be seen as "offensive")[216]. Concern was expressed about placing a money value on the impact of being a victim of crime as the victim may struggle to understand the disconnect between the harm they have suffered and the available means of the offender (this not being a limiting factor when awarding damages in a civil claim). Many offenders receive sentences of immediate imprisonment with the consequent impact on their capacity to satisfy any compensation order (and/or upon the determination of issues in relation to a potential order). There was limited recognition that Judges may not always adequately set out their reasons for not awarding compensation (and that such reasons would help victims better understand the difficulties faced).

193. Addressing matters from a civil perspective (and therefore not without hesitation), the Council believes that current practices/issues in relation to compensation orders should be considered by the Judicial College in light of the potential need to revise and augment current training for criminal Judges. Given this belief the Council makes only some limited observations.

194. Reasons should always be given why a compensation order is not appropriate. The explanation may be of considerable assistance within a subsequent civil action (e.g. in indicating that no adverse inference should be drawn from the lack of an award against the victim's credibility on the extent of injury/damage suffered).

195. In respect of causation although a Judge would have to consider the fact that (whilst abuse

[214] See section 133 (1) and (3) of Powers of Criminal Courts (Sentencing) Act 2000
[215] This is an issue which should be considered by the Crown Prosecution Service.
[216] See generally article in the Sunday Times 16th June 2019; Catherine Wheeler.

may have been proved or admitted) the extent/causation of any medical condition is uncertain on the verdict(s) and/or or disputed and/or there may be issues as to the appropriate quantum this should not mean that no award is made if there is clearly an element of identifiable personal injury, loss or damage resulting from conduct which has been proved or admitted[217]. If there are areas of doubt then a conservative approach should be taken, but otherwise an appropriate award should be made. Again, giving reasons will assist in indicating why a subsequent civil case may result in a very much greater sum being awarded.

196. Many sexual offences are assaults and elements of injury and loss can be established without specific medical evidence upon causation; for example, a judge may make a factual finding that a victim has suffered severe psychological harm:

"The judicial assessment may in some cases be assisted by expert evidence from a psychologist or psychiatrist. However, we reject the submission that it is always essential for the sentencer to consider expert evidence before deciding whether a victim has suffered severe psychological harm. On the contrary, the judge may make such an assessment, and will usually be able to make such an assessment, without needing to obtain expert evidence". [218]

197. As for quantum of an award the Criminal Injuries Compensation scheme 2012 tariff awards and Judicial College Guidelines provide an appropriate framework.

198. As for the means of an offender to pay an order the Court is not limited to income or immediately accessible savings. An equitable interest in the property is a relevant consideration when assessing means and the fact that the order may require the defendant to sell property or re-mortgage it is no bar to the making of an appropriate order, although that may affect the length of time to pay.[219] Such assets would be likely to be the subject of enforcement of any subsequent civil award.

199. The Council sees force in the comments made by the Ministry in its submissions that there may be a "training issue" for criminal Judges and also a need for the Crown Prosecution Service

[217] The standard of proof in civil cases is on the balance of probabilities and not the more onerous criminal standard.
[218] R-v-Chall and others [2019] EWCA Crim 865; "The judge must act on evidence. But a judge will usually be able to make a proper assessment of the extent of psychological harm on the basis of factual evidence as to the actual effect of the crime on the victim. Such evidence may be given during the course of the trial, and the demeanour of the victim when giving evidence may be an important factor in the judge's assessment. The relevant evidence will, however, often come, and may exclusively come, from the VPS. The court is not prevented from acting on it merely because it comes from a VPS."
[219] See R v Martindale [2014] EWCA Crim 1232 and R-v- McIntosh [2019] EWCA Crim 231. In McIntosh The Appellant who was ordered to pay £36,577.08 towards the costs of the prosecution argued that the Court took insufficient account of the appellant's means to pay when making the order that it did. If he used all his disposable weekly income, which is put at £220, that would take him 150 weeks to pay off. Even using half, she points out, would take 6 years and his income is likely to be affected in any event by reason of the disqualification order. The Court held that the short answer to the appellant's argument in relation to his means to pay lies in his equitable interest in his property of £255,000 in a domestic property although it did allow a further 6 months "to sell the property or re-mortgage it, whatever is appropriate".

to consider its current practices and training. Certainly, an increase in compensation awards may significantly reduce the need for subsequent civil actions.

Section 7 - Recommendations

200. In light of the matters covered by this preliminary report the Council proposes to make seven recommendations.

Recommendation 1; Rule changes

201. The Civil Procedure Rule Committee should consider amending the current procedure rules (and any relevant accompanying practice directions) to focus the attention of all civil Judges, parties and advocates upon the issue of vulnerability. The rules should be amended to reflect the principle that the requirement to deal with a case justly includes the court and all parties to the proceedings:

i. ensuring that all parties can effectively participate in proceedings;
ii. ensuring that all witnesses can give their best evidence;

and specifically, that the court and parties need:

a) to identify any party or witness who is a vulnerable person at the earliest possible stage of proceedings;
b) to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result;
c) to consider "ground rules" before a vulnerable witness is to give evidence (to determine what directions are necessary in relation to the nature and extent of that evidence, the conduct of the advocates and/or the parties in respect of the evidence of that person, and/or any necessary support in place for that person).

Recommendation 2; Directions Questionnaires and online access

202. Directions Questionnaires should be amended to request information as to the vulnerability or potential vulnerability of a party (which should an obligation to disclose know details of the vulnerability of another party) or a witness. Consideration of the wording for the questionnaire will need to be considered with care and settled upon following consultation with relevant bodies.

203. Any online portal/access which dispenses with directions questionnaires should ensure a request is made for such information.

Recommendation 3; Training for civil Judges

204. The Judicial College should consider enhancing the training of civil judges, both salaried and fee paid, in relation to issues of vulnerability to cover, in greater depth than at present, three core elements:

i. Detecting/assessing vulnerability
ii. Case management when a party or witness is vulnerable
iii. Conduct of hearings (to include direct questioning of witnesses[220])

Recommendation 4; Intermediaries

205. HMCTS should review and produce guidance in relation to the use and funding of intermediaries in civil cases.

Recommendation 5; Court protocols and Guidance

206. HMCTS should ensure that individual court centres/courts should (after consultation with the Designated Civil Judge and Designated Family Judge) prepare comprehensive operational protocols which should include consideration of the assistance/protections that can be given to vulnerable parties/witnesses given available facilities in both civil and family cases

Recommendation 6; Staff training

207. As a matter of urgency HMCTS should ensure all staff who handle civil cases are given adequate training with regard to identifying, communicating with and assisting vulnerable court users.

Recommendation 7; Compensation orders

208. The Judicial College should consider the need for guidance /training/re-enforcement of training as to applications for and the making of/refusal to make compensation orders in cases of sexual assault/abuse. The Crown Prosecution Service should also consider its current practices and training in relation to seeking compensation orders.

[220] See paragraphs 97-102, 146 and 164 of this report.

Section 8 - Consultation Questions

209. Question 1.

Are there issues in relation to vulnerable parties /witnesses in the civil courts which that have not been covered/adequately covered within this preliminary report? If so please give relevant details.

210. Question 2.

Do you agree with the proposed recommendations set out at section 7? If not why not?

211. Question 3.

Do you believe that there should be further or alternative recommendations? If so please set out relevant details

Section 9 - How to respond

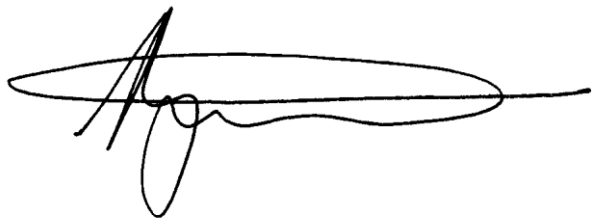
212. Responses should be sent by 23:59 on Friday 11 October 2019:

By email: vulnerableparties-CJC-consultation@judiciary.uk

By post:
Civil Justice Council
E205, Royal Courts of Justice
Strand
London
WC2A 2LL

213. If you are responding in writing, please make it clear which questions you are responding to. You should also indicate whether you are replying as an individual or submitting an official response on behalf of an organisation and include:
- your full name,
- your position (if applicable),
- the name of organisation (if applicable),
- an address (including post-code),
- an email address, and
- a contact telephone number

214. The Civil Justice Council will publish a list of respondents on their website, as well as a summary of responses.



His Honour Judge Cotter Q. C.
Civil Justice Council
June 2019

Annexe 1

BRISTOL CIVIL AND FAMILY JUSTICE CENTRE VULNERABLE WITNESS PROTOCOL

FEBRUARY 2018 (AMENDED MAY 2019)

OFFICIAL

Introduction

Ensuring the safety and participation of vulnerable persons at court goes to the core of our role as a family court. This protocol sets out the procedures Bristol Civil and Family Justice Centre has in place to ensure that vulnerable court users receive appropriate support and protection at all points in the court process.

The protocol takes account of Part 3A of the Family Procedure Rules 2010 and Practice Direction 3AA on vulnerable persons in family proceedings, which both came into force on 27 November 2017. These require the judge in each case to consider if (a) a party's participation in proceedings is likely to be diminished by reason of vulnerability and/or (b) the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability, and in either case whether it is therefore necessary to make a "participation direction", for example because there is a need for a particular measure (such as protective screen or video link).

Court staff will take appropriate action to arrange any measures ordered by a judge in proceedings. Staff will also consider, even before the first hearing takes place, whether steps are required to protect a court user elsewhere in the court building, beyond the courtroom.

Facilities

- We have 19 courtrooms.
- Entrance into the court is via the main entrance. There are separate entrances into the court building via the staff entrance and via the car park for secure accommodation hearings.
- There are 31 waiting rooms, located on the 1st, 2nd 3rd and 4th floors which may be reserved by asking an usher.
- There is a children's waiting room and a separate vulnerable witness suite on the 4th floor.
- The Personal Support Unit (PSU) has an office at the court and is located on the ground floor within the public counters area.
- There are 2 fixed video link facilities in courts 16 and 17. The remaining courts have provision for a mobile video link to be used, with the exception of courts 10 and 11. Please ask an usher for a machine to be present in court or its operation.

- We have 12 mobile screens which can be used as protective screens, whether as a partition in the courtroom or to be placed around the witness stand. Please ask an usher for these to be provided.
- Separate toilets are available on each floor, including the vulnerable witness suite.
- The court has secure car parking spaces in the staff car park. Secure accommodation car parking spaces are to be requested via the Support Services Manager.
- Our security has the ability to adjust the public lifts so they open onto the secure area.

Our job is to ensure that witnesses, and indeed any of our other customers, feel that they have experienced a justice system which is **just**, **accessible** and **proportionate**. They'll feel this because:

- they were able to present their evidence well
- they were treated with respect
- and they understood what was happening when it mattered

Witnesses tell us they need to:

- feel safe and comfortable
- be kept fully informed
- feel their time is valued and
- Feel their contribution is appreciated.

What vulnerable witnesses can ask of us?

- To be given information about the court process.
- To be given information about the court and its location.
- To be given information/signposted to the support services available at the court such e.g. PSU
- To be offered the opportunity to visit the court before the hearing in conjunction with PSU.
- To be provided with a safe environment.
- To be provided with a separate waiting room by arrangement.
- To have special measures put into effect. Examples may include being able to give evidence by video link or from behind a screen if an application is granted by a Judge.

- Parties in cases can only be provided with an interpreter or with an intermediary if ordered by a Judge. This service is more often used in Family and Tribunal cases

Our responsibilities for vulnerable witness support at court

- Ensure that if a member of HMCTS staff is asked by the Judge or Magistrate to accompany a child into the video link room on their own, the relevant member of staff has been cleared by the Disclosure and Barring Service (DBS) or alternative arrangements are put in place.
- As a matter of course, all our ushers will have Enhanced DBS clearance.

Pre-court attendance

- The listing team will enter details of any vulnerable witnesses' requirements in the RAF diary (Reasonable Adjustment diary) and notify Court Support team to cross-reference on the Judge's list.
- Court support will inform the court clerk and ushers of any arrangements made.
- If there are any safety or security issues, the listing officer should alert the relevant Delivery Manager who will decide whether to invoke the red dot policy.
- The listing team will confirm the arrangements put in place to the witness or their legal representative or support worker following a red dot meeting.
- The court support team will arrange a pre-court visit after being informed by the listing team and in consultation with the ushers' manager, who will make an usher available to conduct the visit at a suitable time.
- If a judge has ordered video link or protective screens, we will carry out checks in advance of the hearing to make sure the equipment is working and available. If protective screens are to be used, we will consider how best to ensure the vulnerable court user enters and leaves the courtroom without being seen by the other party/parties.

Pre-court visit

The pre-court visit should include information on the following:

- Where witnesses should go when attending court (has a separate entrance previously been agreed / or required?)
- Front-desk security procedures and security at court
- Location of the Personal Support Unit and their contact details
- Tour of the building, including entrances, the courtroom, waiting area and separate waiting rooms, (vulnerable witness suite and video link if applicable)
- What will happen when the witness is called to give evidence.

- Where appropriate, provide an opportunity for the witness to stand in the witness box and speak from there.
- Oath/Affirmation taking procedures – you may be able to ascertain the preference of the witness at this meeting. Note this in the RAF diary if ascertained.
- Who will be present in court, where they will sit, and what their roles will be.
- Provide enough details on what special measures will entail that are relevant to the witness. For example, allow them to see the screens.
- If using video link, let the witness see the link in operation and use it (research has highlighted that for witnesses using the video link, particularly young witnesses, experience of using the link in advance of the hearing is highly beneficial)
- Explain to vulnerable that when they give evidence via video link the parties in the case will see their face on the screen in court. In some cases, the Judge may agree that they do not have to be seen.
- Inform the witness that we will try to keep witness waiting times to a minimum but advise them to bring a book, magazine or iPad etc. since delays are sometimes inevitable.
- The Security Team must be informed of any changes in arrangements when the vulnerable witness is at court i.e. moving to a different hearing floor or changing waiting room arrangements
- General court facilities e.g. toilets, refreshments
- Car parking arrangements to be discussed, only if it's a secure accommodation
- Arriving early to avoid meeting parties on the case
- Provide follow up details for any questions following the visit
- You should also check to see if there are any reasonable adjustments that need to be made for victims and witnesses with disabilities and explain how they will be provided on the day. For example, if hearing enhancement facilities are required, alert the ushers who will ensure that these are tested with the witness to make sure they meet their needs.
- Explain the parameters of confidentiality; specifically advise the witness that if they tell you something that may put them or others at risk, you would have to disclose this to your manager. Explain to the witness that they cannot discuss any of the evidence with you, if they do you will have to stop the support as it may jeopardise the case as it could be seen as coaching the witness.

Arriving at court

- If a witness has asked to use a separate entrance/exit, we should confirm the time of arrival. An usher should be assigned to meet the witness at the entrance. A security guard must always accompany the usher as all witnesses must be searched on entry to the building.
- In exceptional circumstances a space can be made available in our car park. The same arrangements regarding searches apply when meeting the witness.
- The usher will then escort the witness to the allocated waiting room. This will often be the secure vulnerable witness suite on the 4th floor.
- The usher should remain in the witness area ready to provide support, if practical, in operating the video link equipment where required, inform the witness about taking the oath, and keeping the witness informed about progress of the case they are involved in.
- If the witness is a child, the usher will stay in the witness area ready to provide support, operation of the video link equipment where required, inform the witness about taking the oath, and keeping the witness informed about progress of the case they are involved in.
- The witness may be accompanied by a legal representative, support worker, friend or family member. Should it be a family member, they must not be involved in the present case.
- Ensure that the witness is aware of evacuation procedures

The hearing

- The court clerk or usher on reception will ensure where possible that waiting time is minimised and that the witness is kept informed of progress of the case he/she is involved in at regular intervals.
- The usher will be available to support the witness, assist them in taking the oath and liaise between the witness and the court as necessary.
- Judges may stagger entry into the courtroom in order to avoid the parties and/or witnesses meeting prior to commencement of the hearing.
- If a protective screen is being used, the court should be set up prior to the parties/ witnesses entering. The screen can be used to partition the room or to shield the witness stand, so that the judge can see the vulnerable individual but the other party/ witness cannot.

Leaving Court

- Judges may stagger the exit of parties or witnesses, with one leaving some minutes after the first.

- The usher and security shall escort the witness out of the building through a separate exit if necessary.

Subsequent hearings

- Following the hearing we will consider any issues arising and any changes required for future attendance at court. Listings will update the court diary for all subsequent hearings unless notified that the additional assistance/special measures are no longer required.

Raising awareness of our vulnerable court user protocol

- This protocol is included in the new staff induction training, alongside the HMCTS training package on vulnerable court users.
- We will make new or visiting judges aware of the procedures we have in place for vulnerable court users.
- We will inform key partner agencies, including Cafcass and police, of the process by which they can make us aware of any risk of harm to an individual.

Complaints process

- Complaints can be made in person, by email or telephone or letter

Annexe 2

Those who provided detailed submissions/contributions

HHJ Brian Rawlinson – DCJ for Staffs & West Mercia
HHJ Sarah Richardson – DCJ for the Humber Courts
HHJ Nigel Godsmark QC – DCJ for Nottinghamshire, Derbyshire and Lincolnshire
HHJ Alison Hampton – DCJ for Leicester and Northampton
HHJ Allan Gore QC – DCJ for Devon and Cornwall
HHJ Robert Harrison – DCJ for Wales
The High Court QB Masters
The Association of Personal Injury Lawyers (50 responses)[221]
Leigh Day Solicitors

[221] The Council is very grateful for the assistance provided by John McGlade; APIL Policy Research Officer