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### Reforming the adversarial trial for vulnerable witnesses and defendants

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***\*Crim. L.R. 107** It has become fashionable to decry the adversarial system as being incapable of delivering justice in trials involving vulnerable witnesses. Some critics ignore the plight of vulnerable defendants, and downplay the highly significant advances since 2009 in the courts' management of child witnesses. This article evaluates some radical proposals, including excluding counsel from cross-examination; requiring prior approval by a non-judicial figure for every question in cross-examination; and allowing independent legal representation for the complainant, fully participating in the trial. These proposals encounter serious difficulties, especially for equality of arms and effective participation by the defendant. The article sets out an alternative package of more modest proposals to preserve the adversarial mode of trial and protect vulnerable witnesses.*

The "overriding objective" of the Criminal Procedure Rules 2013 (CrimPR) which binds all participants is that "criminal cases be dealt with justly", to be achieved by "dealing with the prosecution and the defence fairly", recognising the defendant's right to a fair trial, whilst respecting the interests of witnesses, victims and jurors.<sup>1</sup> The premise underpinning this article is that a fair trial does not involve abstract balancing between the rights claims of the defendant and the complainant.<sup>2</sup> Measures to protect one do not inevitably detract from the rights of the other in a zero-sum game. The defence and prosecution are entitled to challenge a witness's testimony, but under conditions most conducive to eliciting the truth, in a process predicated upon equality of arms and effective participation. This is entirely consistent with the entitlement of all vulnerable participants, including the defendant, to protection from (further) trauma, in the overriding interests of securing justice.

I eschew the term "victim" as inappropriately prejudging the outcome of the prosecution.<sup>3</sup> The Crown Prosecution Service (CPS) in pre-emptively using "victim" ***\*Crim. L.R. 108*** in its policies on child abuse and sexual assault<sup>4</sup> ill-serves its role as an impartial minister of justice which respects the presumption of innocence.

#### A. Embedding current measures

Examples of allegedly bad practice in the investigation and prosecution of child abuse and sexual assaults abound in the media, and in professional folklore,<sup>5</sup> but it is rare to find publicity given to good practice. Headline cases such as *B*,<sup>6</sup> where a four-year-old was cross-examined at the Old Bailey in an anal rape case, assume mythic proportions. The media attribute disasters befalling traumatised complainants to the manner of the cross-examiner rather than to the unavoidable stress of recalling and publicly recounting searing experiences, or to hearing the verdict.<sup>7</sup> Paradoxically, the inflexible special measures regime in the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) was relaxed by Parliament in 2009 to respect the autonomy of child witnesses in choosing how they should testify,<sup>8</sup> yet the trial judge and the CPS were castigated by a serious case review panel for respecting the insistence of a 48-year-old complainant of historic sexual abuse, Frances Andrade, on testifying without a screen, after she complained that the defendant was smirking.<sup>9</sup> This lopsided publicity means that politicians rush into ill-considered, unbalanced law reform which makes unrealistic demands of practitioners.<sup>10</sup>

Current critiques of the English adversarial system rely upon outdated empirical studies.<sup>11</sup> The last empirical evaluation of the experience of child witnesses reported in 2009.<sup>12</sup> Responding to its findings, there was a powerful push by successive Chief Justices to reform the management of child witnesses before and during the trial, including: ***\*Crim. L.R. 109***

- a series of judgments imposing stringent judicial controls on cross-examination and emphasising judicial responsibility for rigorous case management<sup>13</sup>;
- a new set of Criminal Procedure Rules<sup>14</sup> and Practice Directions<sup>15</sup> stipulating how vulnerable witnesses and defendants must be assisted throughout the proceedings;
- the *Equal Treatment Benchbook 2013*, explaining how to respect and promote rights of all vulnerable persons involved in the criminal justice system (CJS) under the Equality Act 2010 and international instruments;
- the publication in *October 2013 of Guidelines on Prosecuting Cases of Child Sexual Abuse*,<sup>16</sup> by the Director of Public Prosecutions (DPP) intended to cause an "attitude shift" across the CJS to assessing victim credibility<sup>17</sup>;
- the publication of the *2013 Protocol and Good Practice Model: Disclosure of Information in Cases of Alleged Child Abuse and Linked Criminal and Directions Hearings*<sup>18</sup> to remove obstacles to expeditious pre-trial procedures;
- the invaluable toolkits published by the Advocates' Training Council on *The Advocates' Gateway*, providing detailed pragmatic advice<sup>19</sup>;
- the 2014 pilots of pre-trial cross-examination of child witnesses under YJCEA 1999 s.28, with national implementation due to be considered in March 2015<sup>20</sup>; and
- guidance responding to specific concerns, such as ground rules hearing questionnaires for questioning child witnesses, and averting prolonged repetitive cross-examination in multi-handed sexual exploitation cases.<sup>21</sup>

The cumulative impact of these initiatives on the experiences of vulnerable witnesses in the CJS has not been evaluated empirically—and should be.

Notwithstanding these laudable reforms, there is disconcerting evidence that vulnerable witnesses and defendants still fall through cracks in the current protective regime, due to operational failure and organisational culture. **\*Crim. L.R. 110**

In March 2014, in *Abid Muskeen*, a Bradford Crown Court judge ordered that a 15-year-old girl, the subject of a charge of sexual activity of a child under 16, be arrested and detained to ensure that she would testify. She was in care, living in a children's home. She was held for 20 hours in police and court cells before being called to testify. DNA tests had established that the defendant, aged 32, had fathered her aborted foetus when she was 14, so the sole issue was whether he reasonably believed then that she was 16. Still under his influence after eight months of grooming, she was known to be a reluctant witness. The prosecution did not intend to rely on any evidence from her, instead adducing testimony that he had attended her 14th birthday party to prove his knowledge of her age. The defence wished to cross-examine her to elicit confirmation that she had told him she was 16. She had attended court at the appointed time, but after waiting for more than four hours, she left, bored and frustrated, stating that she was no longer willing to testify. The CPS and police informed the trial judge

that her arrest was the only way to ensure that she would attend court again. The judge issued a warrant "in the interests of justice", because the child was an "essential witness" without whom the trial would have collapsed. A catalogue of unexplained breaches of guidance to safeguard child witnesses by the CPS and court officials had created this impasse:

- the case had been listed as a "floater", without a priority listing with a fixed start time<sup>22</sup>;
- the child had been brought to the court at 10.00, notwithstanding that many cases were listed for the same time, and the prosecution had two witnesses to call before her; multiple pieces of guidance state that the child's testimony should be scheduled for the start of the second day to "keep delay to an irreducible minimum"<sup>23</sup> and to avoid deleterious impact on the quality of her testimony due to delay<sup>24</sup>;
- she had not been kept on standby at a remote location with a supporter, to be summoned when the court was ready for her evidence<sup>25</sup>;
- using a remote link for her testimony seems not to have been considered<sup>26</sup>;
- the trial judge had been assigned only at lunchtime that day, so he was unfamiliar with the case, unable to undertake the active case management which should have started with the Plea and Case \**Crim. L.R. 111* Management Hearing (PCMH),<sup>27</sup> and dependent upon the assertions of the CPS and police that there was no alternative;
- as the child had voluntarily attended court, it is mystifying that no attempts were made to persuade her to do so again, with court-appointed counsel to advise her on her legal obligations<sup>28</sup>;
- it is unknown whether keeping her overnight at the children's home was considered;
- the CPS accepted the defence's entitlement to require the prosecution to produce the alleged victim for cross-examination, but in *Burton*, a similar child exploitation prosecution,<sup>29</sup> the Court of Appeal had held that the Crown should not be ordered at the behest of the defendant to produce a reluctant complainant on whose evidence it did not rely, as the defence could call her as a witness: "a criminal trial is not a game"<sup>30</sup>;
- there is no indication that the CPS considered proposing an agreed statement of facts for the jury regarding the sole fact in issue, that she had told the defendant she was 16 (as she eventually testified in the brief cross-examination—whereupon the jury swiftly convicted him).

As Andrew Norfolk stated, "when the victim of a serious sexual crime did not do as she was told, she was treated as a criminal".<sup>31</sup> Whilst an isolated case, the strenuous defence by the CPS and Bradford Crown Court of their dire mishandling of the case, citing competing logistical priorities and blaming the perceived intransigence of a vulnerable victim, was remarkable. Such cases lead critics to conclude that the adversarial system in its treatment of vulnerable witnesses is beyond redemption.

## B. Radical proposals for further reform: an evaluation

### (1) *Excluding advocates from cross-examination*

A proposal apparently gaining traction with the Ministry of Justice (MoJ) is to confiscate from counsel the function of cross-examining a vulnerable witness. Various replacement cross-examiners have been suggested—all, it is assumed, capable of performing a more competent and fair cross-examination than the most highly trained barrister under close judicial supervision. *\*Crim. L.R. 112*

#### Examination by a police interviewer

Some academics critical of adversarial advocacy<sup>32</sup> are enthusiastic about devising a version of the Norwegian system.<sup>33</sup> Within two weeks of a sexual assault complaint, an "aggrieved person" who is under 14 or "mentally retarded or similarly handicapped" is "examined", in the sense of their entire testimony being taken, by "a well-qualified person", usually a police officer.<sup>34</sup> The supervising judge, and the lawyers for the prosecution, defence and aggrieved person, monitor the examination from another room and may propose questions for the interviewer.<sup>35</sup> The statute is silent on whether the suspect is entitled to be present. If a suspect has not yet been identified, a lawyer is nominated to look after the interests of the (hypothetical) defendant.<sup>36</sup> The absence of opportunity for the defence to prepare cross-examination after prosecution disclosure and taking instructions makes the claim that re-interviews are "very rare"<sup>37</sup> a cause for concern.

To a lawyer from an adversarial system it is incongruous to have all questioning conducted, not by a neutral party, but by a police investigator allied to the prosecution. This intrinsic bias appears not to be offset by superior questioning skills. Myklebust claims that the police interviewers are "highly trained", but his own empirical data disclosed that

"the interviewers and officers knew how interviews should be conducted and were aware of the strengths and weaknesses of different strategies, but did not implement this knowledge when conducting interviews".<sup>38</sup>

Like interviewers the world over, Norwegian police officers used many closed, leading and suggestive questions, and few open questions.<sup>39</sup> These problems are persistent.<sup>40</sup> Myklebust does not state whether the judge or defence counsel felt able to intervene or object. It is difficult to subscribe to the claim of New Zealand researchers that the Norwegian procedure avoids unfairness as it retains the essential two-party nature of adversarial proceedings with a full opportunity for the defence to challenge the evidence.<sup>41</sup>

The Norwegian experience does not inspire confidence in the superior competence of police interviewers over advocates, at least to a degree sufficient to warrant confiscating the defence's right to question witnesses directly. The *\*Crim. L.R. 113* reasons behind the fact that some 2,000 evidential interviews of children per year<sup>42</sup> result in only a handful of prosecutions<sup>43</sup> need investigation if the MoJ continues to favour the Norwegian system.

#### The intermediary as interlocutor

Plotnikoff and Woolfson justifiably fear that pre-trial cross-examination simply moves inappropriate questioning to an earlier stage.<sup>44</sup> They advocate that the intermediary have a widened role, as Judge Pigot envisaged, whereby every question from the advocates would be reworded and relayed to the witness. They contend that the wording of YJCEA 1999 s.29 allows for the entire replacement of the advocate by the intermediary, wherever appropriate—before communication has failed. Spencer goes further: the intermediary could construct and conduct the entire cross-examination from the advocates' notes<sup>45</sup>—in effect, a proxy examiner.

An intermediary, at least as currently conceived, cannot be entrusted with this role. Typically speech and language therapists, they have a limited perspective on the CJS: they are not trained in criminal and evidence law, receive only two days' training in criminal procedure, and do not have an overview of the case through disclosure. They are not trained to develop a line of questioning, but only to evaluate, and if necessary reword, the formulations of others. Their professional culture, rightly, is to accept, and assist the witness to communicate, answers, rather than probing to clarify inconsistencies or to draw out inaccuracies or untruths.<sup>46</sup> In short, intermediaries are not advocates. The Court of Appeal rejected a proposal that a CAF/CASS Family Court Adviser would put the cross-examiner's questions to a child, as involving a significant and highly sensitive shift in professional roles.<sup>47</sup>

### **The trial judge as cross-examiner**

Sir Keir Starmer QC startled many when, immediately after stepping down as DPP, he expressed despair as to whether the CJS could ever respond adequately to victims of personal violence and abuse through what he described as "bolt-ons" to the existing arrangements.<sup>48</sup> Starmer, who chairs a "Victims' Task Force" for the Labour Party, posited that cross-examination of vulnerable witnesses should be taken over by the trial judge.<sup>49</sup>

This is not wholly unknown to English criminal justice: in *Cameron*,<sup>50</sup> when a 14-year-old rape complainant adamantly refused to answer further after 15 minutes \**Crim. L.R. 114* of cross-examination regarding an earlier retraction, the judge put the defence's questions to her, omitting ones characterised as comment or which might "unproductively inflame" her. The Court of Appeal condoned this "acceptable improvisation" due to the child's vulnerability since the alternative was to discharge the jury, with the prospect of a defence submission of abuse of process at a retrial. The jury direction appropriately addressed the "unusual and less satisfactory nature of the procedure as a substitute for the traditional right of the defendant or his advocate to cross-examine prosecution witnesses".<sup>51</sup> Potter LJ dismissed the argument that greater concessions might have been obtained had the questioning been more probing rather than "non-adversarial and non-searching".<sup>52</sup>

*Cameron* illustrates the difficulties of having the court routinely cross-examine witnesses. The judge would act without instructions, apart from what strategy might be gleaned from counsel's notes. Jury directions become difficult because the judge might be seen as too challenging or too lenient with the witness, and instructions might not erase any perception that the court had descended into the arena on one side or the other. One empirical study of inquisitorial systems found that rape complainants considered that the trial judge was hostile to them because he had put the defence questions to them.<sup>53</sup> The prosecution might be prevented from clarifying matters on re-examination, as happened in *Cameron*. Even if counsel were permitted to pose follow-up questions, they might feel conflicted because questions could imply that the judge's questioning was inadequate, as has been the experience in Austria.<sup>54</sup>

### **(2) Accelerating cross-examination (even more)**

Spencer argues that cross-examination of very young or highly vulnerable children should occur at the time of the *Achieving Best Evidence (ABE)* interview, citing the Norwegian model as evidence that it is feasible.<sup>55</sup> It is difficult to see how this could be achieved fairly: the defence will have heard the child's allegations for the first time and would need to take instructions, and usually no charges would have been laid yet, so further cross-examination sessions might become the norm.

### **(3) Requiring prior approval for every question in cross-examination**

Australian academic Annie Cossins provocatively suggests that cross-examination is more properly described as "a procedure for manufacturing false evidence".<sup>56</sup> Her solution,<sup>57</sup> oddly restricted to sexual offences given this starting point, would require that every question in cross-examination of a witness under 18 be first \**Crim. L.R. 115* assessed by a court-appointed intermediary for its comprehensibility by a person of the witness's age and cognitive development. The intermediary would also inform the court as to whether it was an "improper question" (defined as misleading or confusing, annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or expressed in a manner or tone that was belittling, insulting, or otherwise inappropriate, or had no basis other than a stereotype). This system would be hopelessly impractical and cumbersome for live testimony; the flow of the evidence would be so disrupted that it would be very difficult for a jury to

follow, much less the witness herself. It might be feasible during pre-recorded cross-examination under s.28, although the potential for confusion and loss of concentration for the witness would remain. But there is no reason for an intermediary to usurp the function of the court in determining whether a question is "improper" as defined by Cossins.

#### **(4) Two against one? Allowing independent legal representation for the complainant during the trial**

According to the complainant standing in the proceedings, with the right to independent legal representation, has been a recurring proposal to remedy the perceived powerlessness of the CPS to protect her interests. In 2001, Auld LJ rejected Victim Support's submission that complainants be given a formal role in the trial process similar to that of the Continental *partie civile* (as in France) or auxiliary prosecutor (like the German *Nebenkläger*),<sup>58</sup> or any outwardly special position in relation to the prosecutor,<sup>59</sup> observing:

"It is difficult to see how such a scheme would fit our adversarial system, in which there are only two parties and the hearing is a substitute for private vengeance not an expression of it. To put an alleged victim whose account the defendant challenges — as will often be the case — in the ostensibly privileged role of an auxiliary prosecutor would be unfair. Whilst the current concern for the plight of victims in the criminal justice process and the steps taken to right it are thoroughly justified, care must be taken, in particular when there is an issue as to guilt, not to treat him in a way that appears to prejudge the resolution of that issue."<sup>60</sup>

Doak, deprecating the dismissive manner in which Auld LJ and others had discarded complainant representation, argues that since the accused enjoys a human rights guarantee of counsel, equality of arms requires that "victims" be afforded the same protection of their interests.<sup>61</sup> This contention misconceives the principle of equality of arms, even in inquisitorial jurisdictions: it addresses equality as between the prosecution, representing the state, and the defence, not as between the complainant and the defence. **\*Crim. L.R. 116**

Undeterred by the trenchant criticisms of Sir Robin Auld, in 2005 the Labour Government announced its intention to introduce legally-aided representation of complainants in homicide, rape and domestic violence cases, but this was never implemented as originally envisaged.<sup>62</sup> In March 2014, the Ministry of Justice (MoJ) revived the idea of independent legal representation, in its poorly researched, unimaginative *Review of Ways to Reduce Stress of Victims in Trials of Sexual Violence*, invoking this fallacy that there is inequality of arms for "victims", whose interests are not represented by the prosecution.<sup>63</sup> In August 2014 the MoJ announced its intention to implement this *Review*,<sup>64</sup> but it remains unclear whether legal representation for complainants are included.

The authors of the MoJ *Review* asserted that "victims" have independent legal representation in Canada and Ireland, where it "has been shown to be not incompatible with adversarial proceedings", without troubling themselves to provide any authority for that claim.<sup>65</sup>

In fact, the legal representation afforded Irish complainants is limited to applications to adduce sexual history evidence in serious sexual offence prosecutions, not extending to the trial proper.<sup>66</sup> In enacting this single measure, the Irish Government rejected a 1998 recommendation for European-style legal representation for rape complainants, from taking the initial witness statement through to participation in the trial, including intervention in cross-examination of the complainant.<sup>67</sup>

In Canada, complainants do not have a statutory or common law right to intervenor status in a criminal trial, and it will be granted very rarely and on an extremely limited basis.<sup>68</sup> Under the Criminal Code of Canada, whilst witnesses under 18 and the complainant in sex offence prosecutions do have standing (in addition to the prosecutor) to apply for a range of special measures,<sup>69</sup> there is no reference to legal representation, and in practice the Crown, or the trial judge, are expected to take the initiative. Of the Provinces which have enacted (unenforceable) "victims' bills of rights" or other guidance, only British Columbia and Manitoba specifically provide for legal representation of complainants, and then only in third party disclosure applications.<sup>70</sup> This is because the Supreme Court of Canada in *O'Connor* and *Mills* ruled that on defence applications for disclosure of witnesses' medical and therapeutic records, they must be given notice due to their privacy and equality interests in the documents.<sup>71</sup> Wilson observed in 2008 that the reality was that complainants of sexual assault did not have effective access to independent legal representation, and "very very few" took up the opportunity where it was **\*Crim. L.R. 117** afforded them.<sup>72</sup> The Canadian Parliament is currently considering a Victims' Bill of Rights,<sup>73</sup> which would give witnesses in specified sexual offences a

qualified entitlement to counsel in applications for third party disclosure,<sup>74</sup> but not otherwise.<sup>75</sup> Clause 27 stipulates that no victim would be granted status as a party, intervener or observer in any proceedings. There is thus only a flimsy foundation supporting the confident statement of the MoJ that Canadian victims have independent legal representation which does not disrupt the adversarial system.

Proponents of independent legal representation for complainants at trial do not address the inequality of arms which the "two against one" scenario would create for the defence.<sup>76</sup> The German complainant *qua* auxiliary prosecutor has the right to be represented by publicly-funded counsel, to be present during the remand proceedings and the trial—even if she is to be heard as a witness, and to object to a judge or expert witness, question witnesses, contest the permissibility of questions, object to court rulings, tender evidence, make submissions to the court, and appeal against the verdict.<sup>77</sup> In short, the "victim" can do everything the state prosecutor can.<sup>78</sup> These rights are regularly exercised in cases of serious crimes.<sup>79</sup> In France, the complainant under the guise of a civil claimant for compensation (*partie civile*) is entitled at the criminal trial to be represented by an advocate and to question witnesses and experts, speak each time *before* the public prosecutor is given the floor, ask the court to visit the scene of the alleged crime, file documents, and appeal any rulings purportedly affecting his civil interests.<sup>80</sup> According to an Irish comparative study, the status of a legally represented *partie civile* in France and Belgium entails that the complainant cannot be a witness in the criminal trial, her witness statement being included in the prosecution dossier for the court,<sup>81</sup> which to an English lawyer raises issues of compliance with the European Convention on Human Rights (ECHR) art.6(3)(d).

Nor have the proponents of independent legal representation proposed practical, cost-effective ways in which it could be inserted into the adversarial trial.<sup>82</sup> Instead, **\*Crim. L.R. 118** vague assertions are advanced that having their own lawyers would enable "victims" to "*converse* with the system" by telling their own story, emphasising what they regard as the important points, without elaborating on the "very small details" which counsel (mysteriously) regard as important<sup>83</sup>—regardless of their (ir)relevance or (in)admissibility regarding the charges.

In practice, the current responsibilities of the Crown and the trial judge in the English CJS to ensure a fair procedure for all participants would risk displacement, with the complainant's needs assumed to be protected by having legal representation<sup>84</sup> (the Government's original excuse for excluding child and other vulnerable defendants from Special Measure Directions under the YJCEA 1999).<sup>85</sup> The complainant might end up with the worst of both worlds. In Norway, the lawyers for the "aggrieved person" are assigned the role of objecting to irrelevant or improper questioning of their clients, but are criticised for being too hesitant to participate or intervene in the trial; their presence in French, Belgian, Italian and German court rooms does not deter cross-examination perceived as harsh, with the bench remaining passive.<sup>86</sup> Moreover, a comparative study reported that legally represented complainants criticised prosecutors for not being sufficiently proactive in protecting their interests<sup>87</sup>, the interviewees were also dissatisfied with the attitudes of the judges exhibited during the trials.<sup>88</sup>

So it is not just for radical reformers to castigate their opponents on the basis that

"it is not fear of collapse [of the adversarial system] but fear of institutional adjustment that compels most legal professionals to fight against any further incursions into the process by victims".<sup>89</sup>

There are more serious objections to importing flawed systems from abroad. The simple, incontrovertible fact is that it is because the accused is at risk of losing her freedom that she is entitled to a defence lawyer, whereas the complainant is not, and so is not entitled to the same degree of human rights protection. **\*Crim. L.R. 119**<sup>90</sup>

The Scottish Government, having rejected introducing an *amicus curiae* in sexual assault cases in 2002,<sup>91</sup> is currently reconsidering it, in its review of the implications of abolishing the corroboration requirement for each element of the offence.<sup>92</sup> What is now contemplated is not status as an equal party with the prosecutor, but rather a right to make representations on third party disclosure and sexual history applications.<sup>93</sup> A persuasive case can be made for a similarly limited function in English courts for witness representation, as set out in Pt C(6) of this article. A wider role for independent legal counsel for complainants in the criminal adversarial trial proper is perilous on principled, empirical and cost grounds, none of which the MoJ explored in its *Review*.

### **C. Preserving the adversarial mode of trial and protecting witnesses: some modest proposals to achieve both aims**

## (1) "Ticketing" of advocates

Handling vulnerable witnesses and defendants appropriately and effectively is a specialised skill. The desirability of a system of accreditation or "ticketing" of advocates along the lines of the "sex tickets" for Crown Court and district judges, and for barristers instructed by the CPS, was recognised by the Advocacy Training Council in 2011.<sup>94</sup> It was reiterated by Lord Carlile's 2014 inquiry into the operation of the youth courts, which decried the practice of sending inexperienced advocates there to "cut their teeth" by dealing with child defendants<sup>95</sup> (and other child witnesses). Sir Bill Jeffrey's 2014 review of independent criminal advocacy also recommended the ticketing of defence advocates in rape and sexual abuse trials, and suggested it be extended to all other cases involving vulnerable witnesses.<sup>96</sup> The Working Group for Advocacy Training for Sexual Offences and Vulnerable Witnesses/Defendants, chaired by HH Judge Peter Rook QC, is developing training courses at several levels, including a basic course which will eventually become compulsory, to ensure that all advocates have a common grounding in the principles underpinning best practice.<sup>97</sup>

The Criminal Bar Association has previously resisted ticketing because it would limit defendants' choice of representation. But the case for compulsory training is unanswerable. It is required by the Council of Europe's Guidelines on *\*Crim. L.R. 120* Child-Friendly Justice<sup>98</sup> and the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.<sup>99</sup> It protects the interests of defendants who currently may receive inadequate, because unspecialised, representation. A defendant's choice of lawyer is already legally constrained: he can only choose someone with rights of audience in that court, and can have counsel imposed on him for the purpose of cross-examining a child or adult sexual assault complainant if he insists on representing himself.<sup>100</sup> One compromise might be to require that any advocate cross-examining vulnerable witnesses be "ticketed", leaving the defendant free to choose another lawyer for the rest of the trial. If the steep decline in recorded crime<sup>101</sup> continues, it is likely that most advocates, be they barristers or solicitor advocates, would respond to the strong economic incentive to become accredited.

## (2) Safeguarders for child witnesses and defendants

The 2012 joint inspection report for the CPS and Constabulary found that "[o]verall victims and witnesses and particularly those who are young and vulnerable continue to be adversely affected by an absence of real focus on their needs by all agencies in the criminal justice system" with the system "unable to maintain a consistent and acceptable level of care as cases pass through it".<sup>102</sup> Support for vulnerable witnesses is intermittent. The 2013 *Code of Practice for Victims of Crime* assigns responsibility to different agencies according to the stage the case has reached, creating what the MoJ has conceded is "a confusing landscape".<sup>103</sup> Complainants may receive pre-trial support from police officers and, if they are fortunate, Independent Sexual Violence Advisers (ISVAs), but if charges are laid, the Witness Care Unit (WCU) and Victim Support's staff (mostly volunteers) at the Witness Service<sup>104</sup> take over preparation for their court appearance. There is no continuity in assignment of responsibility for communication of information to complainants or their families,<sup>105</sup> risking crossed wires on questions such as pre-trial psychological therapy.<sup>106</sup> The *October 2013 Code of Practice for Victims of Crime* flow diagram does not provide for any follow-up contact after communicating an acquittal verdict.<sup>107</sup> The coroner at the Andrade inquest expressed concern to the DPP that no one was responsible for explaining to her the reason for directed acquittals on *\*Crim. L.R. 121* some counts, and for reassuring her that this did not mean the whole prosecution was doomed to fail. Child witnesses and their carers outside specialised young witness schemes (unfortunately now diminishing in number)<sup>108</sup> have expressed the same bewilderment about lack of ongoing contact and information.<sup>109</sup>

The 2012 Inspectorates report demonstrated how frequently children's rights to have their needs assessed, to be video interviewed, and to have special measures in court, were overlooked due to poor training, inattention and lack of coordination.<sup>110</sup> The appointment of a safeguarder with the sole objective of protecting the child, from the initial *ABE* interview throughout the proceedings, could ensure that the child's welfare remains uppermost in the consideration of all decision-makers, providing continuous expert support from one source. Ideally the safeguarder would be embedded in the Young Witness Advocacy Centre discussed below, but this reform would not be contingent upon the resource-intensive proposal of Victim Support.<sup>111</sup>

The role could be analogous to that of the safeguarder in Scotland's children's hearing system, where the safeguarder has discretion to define her involvement to meet each child's needs.<sup>112</sup> The safeguarder contemplated here could be responsible for pre-trial preparation (apart from that which

must be carried out by the advocate, as recommended below), ensuring timely applications for appropriate special measures, and monitoring the child's well-being during memory refreshment and throughout the trial. The same facility, by parity of logic, must be extended to child defendants. The safeguarder could act as a conduit between parallel family and criminal proceedings. A safeguarder system would also satisfy much of the rationale of campaigners for independent legal representation, who point to the need for more information and ongoing support throughout the criminal process, much as ISVAs are intended to supply, but without the service being restricted to sexual offences.

This would enable the courts<sup>113</sup> and the United Kingdom to comply with obligations under international children's rights instruments,<sup>114</sup> and specifically the *Council of Europe Guidelines on Child-Friendly Justice* which demand full respect for the rights of all children brought into contact in any capacity with any justice system to information, representation, participation and protection (including psychological well-being).<sup>115</sup> The *UN Model Law on Justice in Matters Involving Child Victims and Witnesses of Crime* provides for a specialised support person to assist children from the earliest stage of the justice process, including advising the child, counsel and the court on the different options for giving evidence and other protective measures during the trial, accompanying the child throughout her **\*Crim. L.R. 122** appearance in court, and providing emotional support after the verdict,<sup>116</sup> whilst art.24(b) of the EU Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime requires that a special representative be appointed for child complainants without family support.

### **(3) Young Witness Advocacy Centres**

Victim Support is currently seeking funding for the establishment of Young Witness Advocacy Centres,<sup>117</sup> where children and young people between 4 and 18 years and their families would have a wraparound support pathway from identification of the crime to the post-trial period. Specialist key workers would operate from a single child-centred hub, alongside multi-agency professionals including the CPS, police, social care, intermediaries and therapists, coordinating individual support plans. The Centres would be equipped with the technology for pre-trial cross-examination, and trial testimony through remote live link. The notable success of the one-stop Norwegian Children's Houses in reducing secondary traumatisation for children makes a powerful case for its translation into the English CJS. Other aspects of the Norwegian system, such as forensic medical examination suites and ongoing family therapy, should be considered.

### **(4) Meaningful preparation of witnesses for cross-examination**

The prevailing view in England is that a witness who gives a spontaneous and unconsidered answer to a question out of the blue is more likely to be telling the whole truth, in the most compelling way—in short, to be giving her best evidence—than one who has had an opportunity beforehand to recollect and reflect on the subject matter of the question. Frances Andrade's family reported that she did not feel prepared for cross-examination, meeting with the prosecutor for 10 minutes before she testified, and contrasted this with the months of preparation they assumed the defendants had received. She did not understand the respective roles of the barristers and had not expected to be asked direct and personal questions in public, nor to have put to her the defence case that she was lying which she interpreted as a personal attack.<sup>118</sup>

Had she been testifying elsewhere in the Commonwealth, she most likely would have been told what to expect, in the course of meaningful preparation for testifying. In contrast to the conventions of the English Bar,<sup>119</sup> it is considered to be intrinsic to the barrister's duty to brief—but not coach—a witness, so that she will have had an opportunity to think about the issues which might be raised and to recall the detail necessary to make an adequate response. A witness who expects to face such questions testifies more coherently, with greater accuracy and detail, is more likely to understand why defence counsel is challenging her account, is better able to maintain composure, and is more likely to feel that she has vindicated herself, whatever the outcome. This is especially so in sexual assault prosecutions where **\*Crim. L.R. 123** the evidence is so intimate and distressing, and the range of questioning such as on previous sexual experience, can be so unexpected, and perceived by complainants as irrelevant, because they had not made any connection between those topics and the testing of their credibility.

In Canada, where an ethos of advocacy far closer to the British than to the American model prevails, an advocate is entitled to discuss "any matter" with a witness until he commences undergoing

cross-examination; initial briefing of one's witness to ensure clarity of testimony through direct and redirect examination is viewed as a counterbalance to the opposing party's entitlement to a fully ranging and uninterrupted cross-examination.<sup>120</sup> Alberta's *Code of Conduct* explains<sup>121</sup>:

"While a lawyer may communicate with a witness during the examination-in-chief or re-examination ... lawyers must also ensure that they do not engage in coaching of witnesses. While a lawyer may legitimately suggest alternative ways of presenting evidence so that it is better understood, it is improper to direct or encourage a witness to misstate or misrepresent the facts. An advocate's role is not to change or distort the evidence, but to assist the witness in bringing forth the evidence in a manner which ensures fair and accurate comprehension by the court and opposing parties."

This applies to the prosecution as well as to the defence, with special emphasis upon briefing in vulnerable witnesses cases.<sup>122</sup>

The Australian Bar Code of Conduct defines coaching as "advising on answers" to questions which might be asked, and provides that that prohibition is not breached by "questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence", provided that the witness is not encouraged to give evidence different from that which she believes to be true.<sup>123</sup> In New Zealand<sup>124</sup> and Hong Kong,<sup>125</sup> advocates are entitled to interview witnesses or prospective witnesses. In Hong Kong, as in England, the prohibition on communicating with any witness is triggered upon the start of the witness's testimony, whereas in Canada, New Zealand and Australia that applies only once cross-examination has commenced.

Why is the English CJS not worried that solicitors<sup>126</sup> (or police officers) will coach their witnesses, but that barristers will? The incongruity is more exposed since barristers can now be accredited to conduct litigation without a solicitor, and so will draft witness statements.<sup>127</sup> There are some signs of the English Bar relenting on its refusal to allow barristers to brief witnesses. The Bar Standards Board Code of Practice provides that **\*Crim. L.R. 124**

"you are entitled and it may often be appropriate to draw to the witness's attention other evidence which appears to conflict with what the witness is saying and you are entitled to indicate that a *court* may find a particular piece of evidence difficult to accept."<sup>128</sup>

The prohibition on rehearsing, practising with or coaching a witness in respect of their evidence remains,<sup>129</sup> as it should.

The meaningful witness preparation advocated here, and practised routinely elsewhere in the Commonwealth, would not contravene this prohibition. It is not enough for a witness support service to tell a witness to listen to a question carefully and to indicate when she does not understand; she needs to know what type of matter might be addressed in that question. Being shown the location of the witness box is far less important to a witness than being shown the location of lurking issues.

### ***(5) Use of admissions to reduce or eliminate cross-examination on ancillary topics***

More consideration might be given at the PCMH as to the use of admissions regarding ancillary matters which would embarrass, distress or confuse the witness, including issues of credibility. On the retrial of the Stafford sexual exploitation prosecution, when a child became distressed in cross-examination regarding an earlier admittedly false allegation against her brother, the trial judge curtailed the questioning and had the details reduced to writing and placed before the jury.<sup>130</sup> Admissions might be used to set out a child's troubled family environment, previous experiences of abuse, school record, history of self-harm, information from local authority records, and the like, and could include evidence from parallel family court proceedings. The practice of giving juries written information which is not the subject of cross-examination is already followed where ground rules have inhibited the defence from exploring particular areas.<sup>131</sup>

### ***(6) Legal representation for witnesses in applications for third party disclosure and cross-examination on previous sexual experience***

Applications for disclosure of health, social services and education records bring a complainant's ECHR art.8 interests into play, especially since the likely reason for disclosure being sought is to impugn her credibility as a witness. In 2006 in Stafford Combined Court the Divisional Court held that

a 14-year-old complainant of sexual abuse should have been allowed to make submissions regarding disclosure of her psychiatric records, as counsel for the NHS Trust could not be expected to protect her art.8 interests, which were distinct from those of the records-holder. May LJ strongly deprecated the judge's decision to summon the child (with a history of self-harm), on short notice and, without representation or support, to put her to the choice of either consenting to disclosure or seeing the trial delayed. *\*Crim. L.R. 125*<sup>132</sup> The new CrimPRs require that notice of a summons to produce a document be given to the person to whom the record relates; the court may invite that person or his or her representative to help the court assess any objections based on rights and duties of confidentiality.<sup>133</sup> However, the complainant's right to notification and the opportunity to object to disclosure under the CrimPR remain dependent upon the record-holder objecting, to trigger issuance of a production summons.<sup>134</sup> The *December 2013 Attorney General's Guidelines* do not require prior consultation with the witness to whom the record pertains,<sup>135</sup> so the prosecutor may be unfamiliar with the arguments the complainant might wish raised to protect her interests under art.8, as an ingredient of the public interest evaluation. Moreover, it may be more appropriate for complainant's counsel than for the prosecutor to contend that the intended purpose by the defence is, in the words of the Supreme Court of Canada, to "'whack the complainant' through the use of stereotypes regarding victims of sexual assault".<sup>136</sup>

I propose that a witness be entitled to notice and to publicly-funded legal advice from the time that the defence submits its request for disclosure to the CPS. This might serve to deter the proverbial "fishing expeditions",<sup>137</sup> and to focus minds on whether an application might be unfair, for example where the child has come to the attention of social services so there are more records to be found, but has had little control over his mode of life and family circumstances.<sup>138</sup> Evidence from Canada indicates that the enactment in 1997 of a rigorous statutory regime governing applications for third party disclosure in sexual assault cases,<sup>139</sup> which directs the court's attention in weighing the interests of justice to the privacy, equality, and fair trial interests in play and the purposes to which the evidence sought might be put at trial, has curbed applications for disclosure of confidential records. A study by Justice Canada published in 2014 of cases from 2003–2010 discovered only 82 reported applications for third party disclosure in sexual offence prosecutions across Canada, with legal representation for the complainant in 56 of 81 cases, or 69 per cent of the total.<sup>140</sup> The available research showed that roughly 30 per cent of the applications were successful in whole or in part.<sup>141</sup> The Senate *\*Crim. L.R. 126* of the Canadian Parliament reported in 2012 that the system seemed to be largely working well, and only required some tweaks to enhance the specificity of some considerations to protect the security of complainants from particularly vulnerable groups.<sup>142</sup> The Senate Committee considered that an Ontario judgment in *Batte*,<sup>143</sup> requiring the accused to point to "case specific evidence or information" to justify the assertion that the record sought was "likely relevant" to an issue at trial, or had potential impeachment value, had had a positive effect in restricting "fishing expeditions".<sup>144</sup> Until the illogical and mis-targeted English rules on third party disclosure are finally replaced,<sup>145</sup> legal representation for the person to whom the records pertain will remind all participants of the real issues at stake.

Similar observations can be made regarding applications under YJCEA 1999 s.41. The focus of the prosecution and the Court is on identifying the relevance target of the proposed line of questioning previous sexual behaviour, under the gateways constructed by statute and case law.<sup>146</sup> It is relatively unusual for a Crown Court judge to ponder at any length the privacy interests under art.8 of the person whose life is being exposed to such intrusive scrutiny.<sup>147</sup> To date there is no provision in English criminal procedure for according standing to the complainant, the assumption being that the prosecutor can adequately represent her interests. Extrapolating from *Stafford*, this may be doubted, since it is the complainant and not the Crown who is the rights-holder, and their interests can diverge. As noted earlier, the Republic of Ireland complainants in rape and other serious sexual offence cases have a statutory entitlement to be represented by their own counsel in sexual history applications,<sup>148</sup> as do complainants of sexual offences in Wisconsin, West Virginia, and New Hampshire.<sup>149</sup> There is a case for appointing experienced counsel to give independent advice to the complainant, and to represent her views and make submissions on the relevant factors in the application on a more informed basis, unhindered by the constraints on the Crown to be cognisant of the overriding interests of justice.<sup>150</sup> I do not see the need for the elaborate and costly system of independent commissioners to hear disclosure and sexual history applications proposed by Raitt in this journal.<sup>151</sup>

## **(7) Special measures for vulnerable defendants**

Children caught up in the CJS as suspects and accused face far greater challenges than an ordinary

child witness, but successive UK governments have given only **\*Crim. L.R. 127** grudging recognition to this undeniable fact, when forced to do so on ECHR art.6 grounds. All human rights advocates are working under the shadow of the threatened repeal of the Human Rights Act 1998 if the Conservatives are returned to government in the May 2015 general election, and so there is urgency in cementing equality of arms for child suspects and defendants into English and Welsh criminal procedure. Defence advocates should consider citing the UN Convention on the Rights of the Child (UNCRC), the UN Convention on the Rights of Persons with Disabilities, and the *Council of Europe's Guidelines on Child-Friendly Justice* to reinforce arguments under ECHR art.6, to persuade judges to make those entitlements a reality in British courtrooms.

As a starting point, every child at the entry point to the CJS should receive a thorough, structured psychological and psychiatric assessment to identify levels of developmental attainment and mental health problems,<sup>152</sup> and specifically: (a) his fitness to be interviewed, and in what way; (b) his fitness to stand trial; and (c) which if any special measures should be made available to facilitate his effective participation in his trial.

"Appropriate Adults" appointed under the Police and Criminal Evidence Act 1984 Code C should be specially trained in the specific functions demanded by the role, instantiating their responsibility to be robust in protecting the child's right to be treated as a person with dignity and worth (guaranteed by the UNCRC art.40(1)), including access to the forensic medical examiner and to independent legal representation. The child's parents or carers, who are as likely to be intimidated as their offspring by the environment of the police station and by police interrogation, should not be the default Appropriate Adult, as is the case in many police force areas.

The English or Welsh vulnerable defendant, like his Scottish counterpart,<sup>153</sup> must be accorded access to the full panoply of special measures available to prosecution witnesses, to ensure equality of arms with the Crown and the right to effective participation in his trial. This is required not only by ECHR art.6 but also by the UNCRC,<sup>154</sup> and the UN Standard Minimum Rules for the Administration of Juvenile Justice (aka the Beijing Rules).<sup>155</sup> Superadded duties are owed to disabled young defendants to make reasonable adjustments under the Equality Act 2010 s.20, the *Equal Treatment Bench Book 2013*, and under the UN Convention on the Rights of Persons with Disabilities which guarantees effective access to justice for a person with disabilities on an equal basis with others, and requires that in all actions concerning disabled children, their best interests shall be a primary consideration.<sup>156</sup>

This must include access to Registered Intermediaries, to ensure that the intermediary has received appropriate training for the particular needs of that defendant, and is subject to professional accreditation and discipline, as with those **\*Crim. L.R. 128** assisting prosecution witnesses. The Divisional Court's ruling in *OP*<sup>157</sup> in June 2014, overturning the MoJ's decision to exclude defendants from accessing the Register and matching service operated by the Witness Intermediary Service, is welcome. That said, reservation must be expressed regarding the conclusion by Rafferty LJ in *OP* that the most pressing need for a Registered Intermediary is at the "pinch point" when the defendant enters the witness box, and that otherwise a supporter who can provide "reassurance and, interpretation of unfolding events" will usually suffice.<sup>158</sup> If an intermediary is required to enable the child to understand questions (and not merely to formulate his answers) during his testimony, it follows that one is required throughout the trial to explain the testimony of other witnesses, so as to facilitate the child's effective participation in his trial demanded by art.6.<sup>159</sup> The Law Commission is contemplating recommending, as part of its review of fitness to plead, that a defendant be entitled by statute to a Registered Intermediary for as much of the proceedings as is required to ensure a fair trial<sup>160</sup>; this must be right.

There is urgent need for clarity about the accountability and professional roles of intermediaries assisting the defendant, to ensure that judges' and advocates' confidence in their competence and impartiality is not lost. Incidents in some recent cases imply that training must give further emphasis to the limitations on the intermediaries' role. For example they should not second-guess or undercut defence instructions and strategy by deciding that the witness is not fit to plead;<sup>161</sup> they should not take over *ABE* interviews with leading questions on crucial issues which contaminate the witness's testimony<sup>162</sup>; they should not usurp the role of a witness supporter; and they must understand the respective roles and responsibilities of counsel and the trial judge in conducting a trial, including that the intermediary must not pre-empt the court by interrupting proceedings to "enforce" ground rules which do not relate to communication.<sup>163</sup> Above all, it needs to be made clear beyond argument that Registered Intermediaries are subject to the Procedural Guidance Manual and the Code of Ethics and Code of Conduct when assisting the defence; those documents frequently refer to Registered

Intermediaries acting for the defence, but nonetheless their applicability was recently denied by a Registered Intermediary in a trial at the Old Bailey.

## D. Conclusion

I do not contend that all is well with the treatment of child and other vulnerable witnesses in the English and Welsh CJS—far from it. Her Majesty's Inspectorates of the CPS and Constabulary in 2012 deplored the limited progress made since *\*Crim. L.R. 129* their 2009 report,<sup>164</sup> concluding that "[y]oung people are being left to flounder in an imperfect system" with "devastating" effects.<sup>165</sup>

I do contend that the problems are now recognised by the key participants, most importantly by the judiciary and by the Bar, and that there is undeniable determination to override the recalcitrance of some judges and advocates in adjusting to new ways of achieving the goal of a fair trial. The momentum of the current reforms to improve the adversarial trial should not be deflected by veering away from its fundamental features, especially the right of the defendant to contest the complainant's account through cross-examination by his (ticketed) advocate. Pre-trial recorded cross-examination under YJCEA 1999 s.28 has great potential to generate more productive and less traumatic testing of a child's evidence, because the judge can intercept inappropriate questioning as frequently as necessary without being concerned about the impact of the interventions on the jury—both as to their perceptions of the defence and the trial judge, and as to their understanding of the flow of the testimony. Initial and continuing education of advocates and the judiciary in dealing with vulnerable witnesses should be compulsory, thorough, and responsive to emerging knowledge and technology.

As a rolling programme of reform, there is a compelling case for fresh empirical evaluation of research of the current initiatives described in Pt A of this article, derived from a large sample comprising cases of all forms of abuse, including sexual exploitation, trafficking and multi-handed cases, ideally with a significant number of witnesses in each age range. To produce empirically sound results, the study should both observe the trials and then elicit and evaluate the experiences of the child witnesses and defendants involved in them, as well as from judges and advocates.

Above all, vulnerable witnesses and defendants must be treated as individuals with individual characteristics and needs, not as checklists. Every case requires guarding against complacency: ultimately they are protected by the sensitivity and common sense deployed by other participants in the justice system, not by protocols.

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1. Criminal Procedure Rules 2013 (SI 2013/1554) (CrimPR 2013) r.1.1.

2. L. Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] Crim. L.R. 4; L. Hoyano, "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" [2001] Crim. L.R. 948.

3. Unless there is incontrovertible evidence of physical harm inflicted by another person.

4. For example, *CPS, Guidelines on Prosecuting Cases of Child Sexual Abuse (October 2013)*; *CPS, "Sexual Offences in Child Abuse by Young Offenders", Guidance on Youth Offenders (undated)*; *Ministry of Justice, Code of Practice for Victims of Crime (October 2013)*. M. Brienen and E. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: the Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure (Nijmegen: Wolf Legal Productions, 2000)* claim tendentiously that the terminology "alleged victim" "adds insult to injury" by instituting a "presumption of falsehood of the victim" complementary to the presumption of innocence, with the consequence that harsh cross-examination is allowed (pp.285–286, 1122).

5. G. Davis, L. Hoyano, C. Keenan et al., *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions (HMSO, August 1999)*, pp. xi, 61, 67.

6. *B [2010] EWCA Crim 4; [2011] Crim. L.R. 233.*
7. For example, a rape complainant's suicide after being informed of the accused's acquittal after two trials was immediately attributed by the Greater Manchester Police and Crime Commissioner and by the Chief Constable to the treatment of witnesses ("*Rochdale rape allegations death: Tracy Selvey dies in fall from car park roof after man is cleared of sexual attack*", *The Independent*, February 4, 2014; "*Police chief calls for rape cases rethink after woman's death*", *The Guardian*, February 4, 2014).
8. Coroners and Justice Act 2009, inserting s.21(4)(ba), (4C); L. Hoyano, "Coroners and Justice Act 2009 —(3) Special Measures Directions Take Two: Entrenching Unequal Access to Justice?" [2010] Crim. L.R. 345, 351–353.
9. *H. Brown, Surrey County Council: Safeguarding Adults Board, The Death of Mrs A: Serious Case Review (April 2014), pp.47–51.*
10. This worldwide phenomenon is a theme of L. Hoyano and C. Keenan, *Child Abuse Law and Policy across Boundaries* (Oxford: Oxford University Press, 2010).
11. For example, J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publishing, 2008), pp.52–53, relies upon empirical studies between 1991 and 2004, including studies from the US and elsewhere with different advocacy styles, to criticise the "secondary victimisation" inflicted by the English adversarial system.
12. J. Plotnikoff and R. Woolfson, *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (NSPCC, July 2009); their follow-up report did not conduct further interviews with child witnesses: J. Plotnikoff and R. Woolfson, *NSPCC and Nuffield Foundation, Young Witnesses in Criminal Proceedings: a progress report on Measuring up? (2009) (June 2011).*
13. *B [2010] EWCA Crim 4; [2011] Crim. L.R. 233; W [2010] EWCA Crim 1926; Wills [2011] EWCA Crim 1938; [2012] 1 Cr. App. R. 2 (p.16); E [2012] EWCA Crim 563; [2011] Crim. L.R. 233*; discussed in E. Henderson, "All the Proper Protections—the Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses" [2014] Crim. L.R. 91. *JA [2013] EWCA 1308* at [73] reminded cross-examiners that they need not "turn over every stone". The case management rules, and the duty of the trial judge to control questioning whilst allowing counsel to test the evidence, were reiterated in *Lubemba [2014] EWCA Crim 2064.*
14. CrimPR 2013 Pts 1, 3, 29 and 31.
15. Criminal Practice Directions 2013 CPD IA, I 3D, I 3E and I I 3G, Part, analysed in D. Ormerod (ed), *Blackstone's Criminal Practice 2015, 25th edn* (Oxford: Oxford University Press, 2014), Ch.D14 (L. Hoyano).
16. *Director of Public Prosecutions, Guidelines on Prosecuting Cases of Child Sexual Abuse* (Crown Prosecution Service, October 2013), available on the CPS website.
17. Sir Keir Starmer QC, "Human Rights, Victims and the Prosecution of Crime in the 21st-Century" [2014] Crim. L.R. 777, 782.
18. Available on the CPS website.
19. Available on the Advocacy Training Council website, endorsed as best practice by CPD 3S.5–3D.7, and commended to trial judges by Hallett LJ in *Lubemba [2014] EWCA Crim 2064* at [40].
20. *Ministry of Justice, Transforming the Criminal Justice System: Strategy and Action Plan — Implementation Update* (July 2014), p.13.
21. For example, CPD I 3E.5, and the (as yet unpublished) case management checklist by Joyce Plotnikoff and HH Judge Peter Rook QC.
22. Contrary to the *Equal Treatment Bench Book 2013, Child and Vulnerable Witnesses Guidance, para.22; Judicial College's Young Witness Bench Checklist 2012* (<http://www.judiciary.gov.uk/publications/jc-bench-checklist-young-wit-cases/> [Accessed November 20, 2014]); *Achieving Best Evidence* (2011 edn), para.4.83; *Advocates' Gateway Toolkit 1a, Case Management in Young and Other Vulnerable Witness Cases* (October 21, 2013), para.1.2.
23. See *B [2010] EWCA Crim 4* at [50]; [2011] Crim. L.R. 233 per Lord Judge CJ.
24. PCMH Questionnaire section 18A; *Equal Treatment Bench Book 2013, Child and Vulnerable Witnesses Guidance, paras 26, 27; Advocates' Gateway Toolkit 1a, Case Management in Young and Other Vulnerable Witness Cases, para.1.5.*
25. *Judicial College's Young Witness Bench Checklist 2012; CPS Legal Guidance, Safeguarding Children as Victims and Witnesses, "Waiting Time".*
26. Recommended by the *Judicial College's Young Witness Bench Checklist 2012* and by Lord Judge as the norm for young witnesses: *Rt Hon The Lord Judge, "Half a Century of Change: the Evidence of Child Victims", Toulmin Lecture in Law and Psychiatry, March 20, 2013.* The MoJ is exploring increased use of remote live link for witnesses: *Ministry of*

- Justice, Transforming the Criminal Justice System (July 2014), pp.12 and 17.*
27. Required by the CrimPR Pt 3, CPD I 3D, and CPD V.
  28. As HH Judge Rook did in the Oxford child sexual exploitation trial in 2013, resulting in the witness agreeing to testify.
  29. *Burton [2011] EWCA Crim 1990; (2011) 175 J.P. 385; [2011] Crim. L.R. 956.*
  30. *Burton [2011] EWCA Crim 1990 at [15]-[17]; (2011) 175 J.P. 385; [2011] Crim. L.R. 956.*
  31. A. Norfolk, "Justice lets down a 15-year-old sex victim", *The Times*, March 5, 2014.
  32. P. Bowden, T. Henning and D. Plater, "Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: an Impossible Triangulation?" (2014) 37 *Melbourne U. L. Rev.* 539; K. Hanna, E. Davies, E. Henderson et al., *Child Witnesses in the New Zealand Criminal Courts: a Review of Practice and Implications for Policy (Institute of Public Policy, AUT University, 2010), pp.5, 10–11, 159–164.*
  33. Described by T. Myklebust, "The Position in Norway" in J.R. Spencer and M.E. Lamb (eds), *Children and Cross-Examination: Time to Change the Rules? (Oxford: Hart Publishing, 2012), Ch.8.*
  34. Criminal Procedure Act (Norway) s.239.
  35. Criminal Procedure Act (Norway) s.239.
  36. Myklebust, "The Position in Norway" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules? (2012), p.157.*
  37. Myklebust, "The Position in Norway" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules? (2012), p.158.*
  38. Myklebust, "The Position in Norway" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules? (2012), p.169.* British judges and prosecutors continue to criticise the quality of ABE interviews, with many basic evidential errors: *HM's Inspectorates of CPS and Constabulary, Joint Inspection Report on the Experience of Young Victims and Witnesses in the Criminal Justice System (February 2012), pp.22–23.*
  39. Myklebust, "The Position in Norway" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules? (2012), p.66.*
  40. C. Thoresen, K. Lonnum, A. Melinder et al., "Theory and Practice and Interviewing Young Children: a Study of Norwegian Police Interviews 1985-2002" (2006) 12 *Psychology, Crime & Law.*
  41. K. Hanna and et al., *Child Witnesses in New Zealand Criminal Courts, pp.163–164.*
  42. Myklebust, "The Position in Norway" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules? (2012), p.149, fig.2.*
  43. Information provided to the author by Aud Aamodt, Oslo Children's House (interviewed March 23, 2012).
  44. J. Plotnikoff and R. Woolfson, "Kicking and Screaming: The Slow Road to Best Evidence" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules? (2012), p.40.*
  45. J.R. Spencer, "Conclusions" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules? (2012), p.190.*
  46. *MoJ Better Trials Unit, Office for Criminal Justice Reform, Ministry of Justice, Registered Intermediary Procedural Guidance Manual (February 2011), pp.10, 17.* ABE interviewers often do not do this despite their training: *HM's Inspectorates of CPS and Constabulary, Joint Inspection on Young Victims and Witnesses 2012, p.21.*
  47. *Re B (Child Evidence) [2014] EWCA Civ 1015; [2014] Fam. Law 1386 at [36]–[37].*
  48. Sir Keir Starmer QC, "Britain's criminal justice system fails the vulnerable. We need a Victims' Law", *The Guardian*, February 3, 2014.
  49. Sir Keir Starmer QC, "A Voice for Victims: their rights will only be taken seriously if, as the Labour Party plans, they are enshrined in law", *The Guardian*, April 7, 2014.
  50. *Cameron [2001] EWCA Crim 562.*
  51. *Cameron [2001] EWCA Crim 562 at [19]–[23], [31]–[32]; [2001] Crim. L.R. 587.*
  52. *Cameron [2001] EWCA Crim 562 at [26]; [2001] Crim. L.R. 587.* The procedure in Cameron was endorsed again in *S [2014] EWCA Crim 1730.*
  53. I. Backik, C. Maunsell and S. Gogan, *The Legal Process and Victims of Rape: a Comparative Analysis of the Laws and*

*Legal Procedures Relating to Rape, and Their Impact upon Victims of Rape, in the 15 Member States of the European Union (September 1998)*, p. 14.

54. V. Murschetz, "Child Witnesses in Austria" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (2012), p. 136
55. J.R. Spencer, "Conclusions" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (2012), pp. 177–178, 194 and fn.73.
56. A. Cossins, "Cross-Examining the Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (2012), p. 102
57. Cossins, "Cross-Examining the Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context" in Spencer and Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (2012), pp. 108–111.
58. The complainant, or the family of a murder victim, may assume this role in trials of sex offences, criminal defamation, assault, kidnapping or homicide: Brienen and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: the Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure (2000)*, p.362.
59. Sir Robin Auld, *Review of the Criminal Courts of England and Wales (September 2001)*, Ch.11, paras 69–75.
60. Harris [2005] EWCA Crim 1980; [2006] 1 Cr. App. R. 5 (p.55) at [74].
61. J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008), p. 143.
62. "Victims' advocates plan for murder and rape cases", *The Guardian*, April 26, 2005.
63. Ministry of Justice, *Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence (March 2014)*.
64. Ministry of Justice, *Transforming the Criminal Justice System (2014)*, pp.22–23.
65. Ministry of Justice, *Ways to Reduce Distress of Victims (2014)*, fn.30.
66. Sex Offenders Act 2001 s.34, amending the Criminal Law (Rape) Act 1981 s.4A.
67. I. Backik, C. Maunsell and S. Gogan, *Legal Process and Victims of Rape (Dublin: Rape Crisis Centre, 1998)*, Recommendations 2.1–2.3, 2.7 and 3.12.
68. Bernardo (1995) 38 CR (4th) 229, 236–237 (Ont Gen Div) (parents accorded standing to object to films of their daughters' sexual abuse and murders being visible to the public gallery).
69. Criminal Code of Canada ss.486.1ff.
70. Not restricted to sexual assault charges: Victims of Crime Act (RSBC 1996) c.478 s.3; The Victims' Rights and Consequential Amendments Act (SM 1998) c.44 s.4(2).
71. O'Connor [1995] 4 SCR 411; see also Mills [1999] 3 SCR 668, approving the constitutionality of Criminal Code of Canada s.278.3 (restricted to sexual assault prosecutions). The common law O'Connor procedure applies to third party disclosure in all other prosecutions.
72. L. Wilson, "Victims of Sexual Assault: Who Represents Them in Criminal Proceedings?", *Law Society of Upper Canada 11th Colloquium on the Legal Profession, October 24, 2008*, pp.12, 20, confirming earlier analyses of take-up of legal representation: A.N. Young, *Department of Justice Canada, The Role of the Victim in the Criminal Process: a Literature Review 1989 to 1999 (August 2001)*, p.29. See also Hon Robert W. Runciman Chair, *Statutory Review of the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Final Report (Standing Senate Committee on Legal and Constitutional Affairs, December 2012)*, pp.27–28, 32.
73. Bill C-32, An Act to Enact the Canadian Victims Bill of Rights.
74. By amendment to the Criminal Code of Canada to insert s.278.4(2.1).
75. Bill C-32, s.20(a).
76. For example, J. Temkin, *Rape and the Legal Process (Oxford: Oxford University Press, 2002)*, pp.302–303; Backik, Maunsell and Gogan, *Legal Process and Victims of Rape (1998)*.
77. Brienen and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: the Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure (2000)*, p.364.
78. Backik, Maunsell and Gogan, *Legal Process and Victims of Rape (1998)*, p.237.
79. Brienen and Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: the Implementation of*

- Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure (2000)*, p.364.
80. *Brienen and Hoegen, Victims of Crime in 22 European Criminal Justice Systems: the Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure (2000)*, p.321.
81. *Brienen and Hoegen, Victims of Crime in 22 European Criminal Justice Systems: the Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure (2000)*, pp.53, 13.
82. For example, Temkin proposes that the "victim's lawyer should be entitled to object to improper defence questions put to her in cross-examination, because prosecutors cannot be relied upon to do this as they 'prosecute faithfully'", and then argues enigmatically that this arrangement would "leave the prosecution to prosecute" (*J. Temkin, Rape and the Legal Process (2002)*, pp.303–304). *Backik, Maunsell and Gogan, Legal Process and Victims of Rape (1998)*, p.237 make the same recommendation without considering the impact on the prosecutor's role. Research commissioned by the New Zealand Government concluded that the procedural difficulties of independent legal representation, including the impact on fairness to the accused, were "insurmountable within an adversarial process": *E. McDonald and Y. Tinsley (eds), From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand (Wellington: Victoria University Press, 2011)*, pp.207–208.
83. *J. Shapland and M. Hall, "Victims at Court: Necessary Accessories or Principal Players at Centre Stage?" in A. Bottoms and J. Roberts (eds), Hearing the Victim: Adversarial Justice, Crime Victims and the State (Willan, 2010)*, pp.172, 174 (emphasis in original).
84. *J. Spencer, The Victim and the Prosecutor' in A. Bottoms and J. Roberts (eds), Hearing the Victim: Adversarial Justice, Crime Victims and the State (Willan, 2010)*, pp.156–157.
85. *Hoyano and Keenan, Child Abuse Law and Policy across Boundaries (2010)*, p.672.
86. *Brienen and Hoegen, Victims of Crime in 22 European Criminal Justice Systems: the Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure (2000)*, pp.380 (Germany), 536–538 (Italy), 738–740 (Norway); *Backik, Maunsell and Gogan, Legal Process and Victims of Rape (1998)*, pp.125–127, 157.
87. *Backik, Maunsell and Gogan, Legal Process and Victims of Rape (1998)*, p.17.
88. *Backik, Maunsell and Gogan, Legal Process and Victims of Rape (1998)*, pp.131–132.
89. *Young, Department of Justice Canada, The Role of the Victim in the Criminal Process: a Literature Review 1989 to 1999*, p.38, also p.65.
90. *Remarked by Hon Robert W. Runciman (Chair), Production of Records in Sexual Offence Proceedings*, p.10.
91. See *Scottish Executive, Vital Voices: Helping Vulnerable Witnesses Give Evidence: a consultation paper (May 2002)*; provision for independent legal representation did not appear in the Vulnerable Witnesses (Scotland) Act 2004.
92. *J. Chalmers, F. Leverick and A. Shaw (eds), Post-Corroborator Safeguards Review: Report of the Academic Expert Group (August 2014)*.
93. *Chalmers, Leverick and Shaw (eds), Post-Corroborator Safeguards Review: Report of the Academic Expert Group* p.186.
94. *Advocacy Training Council, Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court (March 2011)*, para.1.3.
95. *Lord Carlisle of Berriew QC, Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (June 2014)*, pp.30–38.
96. *Sir Bill Jeffrey, Independent Criminal Advocacy, Recommendation 6 and para.4.11*.
97. Information provided by HH Judge Peter Rook QC on July 17, 2014. The President of the Family Division, Munby P, has set up a Children and Vulnerable Witnesses Working Group to consider the management of child witnesses following the abolition of the presumption against children testifying in family proceedings: *Re W (Children) (Family Proceedings: Evidence) [2010] UKSC 12; [2010] 1 W.L.R. 701; [2010] H.R.L.R. 22; Family Justice Council Working Party, Guidelines in Relation to Children Giving Evidence in Family Proceedings (Family Justice Council, December 2011)*.
98. Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (November 17, 2010, edited May 31, 2011), Guideline IV.A.14, 15.
99. UN Economic and Social Council, Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary (Resolution 2005/20, E/2005/INF/2/Add. July 1, 2005), Model Law art.8 (including specific training on questioning of child witnesses).

100. YJCEA 1999 s.38.
101. The Crime Survey for England and Wales reports that over 2003–2013 recorded crime fell by 38%, and since 1995 fell by 60%, to the lowest level since the Survey began in 1981, resulting in an oversupply of criminal advocates competing for less work in all courts: *Sir Bill Jeffrey, Independent Criminal Advocacy (May 2014), paras 1.3, 1.11, 6.1–6.4.*
102. *HM's Inspectorates of CPS and Constabulary, Joint Inspection on Young Victims and Witnesses 2012, p.56.*
103. *Ministry of Justice, Transforming the Criminal Justice System (2014), pp.11–12.*
104. On average 1,200 young people per month are supported by Witness Services, (14,300 children April 2012–March 2013); only some 3,000 children received a specialised young witness service (statistics from *Victim Support, Children and Young People's Programme: Young Witness Service (2014)*).
105. *D.H. Reeves and P. Dunn, "The Status of Crime Victims and Witnesses in the Twenty-First Century" in Bottoms and Roberts (eds), Hearing the Victim: Adversarial Justice, Crime Victims and the State (2010), pp.50–52.*
106. *HM's Inspectorates of CPS and Constabulary, Joint Inspection on Young Victims and Witnesses 2012, p.10 finding 9, pp.24–25.*
107. *Ministry of Justice, Code of Practice for Victims of Crime (2013) p.6.*
108. The NSPCC has closed its young witness schemes; those remaining are operated by Victim Support with perilous funding, and have not been incorporated into the WCU network. There is no ring-fenced money for young witnesses in the Witness Service commissioning framework (personal communication from *Amanda Naylor, Senior Manager — Children and Young People, Victim Support, August 8, 2014*).
109. *J. Plotnikoff and R. Woolfson, Evaluation of Young Witness Support, Examining the Impact of Witnesses and the Criminal Justice System (June 2007), p.22, Table 2.2.*
110. *HM's Inspectorates of CPS and Constabulary, Joint Inspection on Young Victims and Witnesses 2012, pp.8–11, 18–21.*
111. *Victim Support, Young Witness Service (2014).*
112. *K.M. Norrie, Children's Hearings in Scotland, 3rd edn (London: Sweet & Maxwell, 2013), pp.28–33.*
113. *Judicial College, Equal Treatment Bench Book 2013, Children and Young Persons.*
114. UNCRC arts 3, 19, 34; UN Economic and Social Council, Guidelines for Action on Children in the Criminal Justice System (resolution 1997/30 of 21 July 1997) (1997) (especially cl.45, 51(b) and 51(c)).
115. Council of Europe, Guidelines on Child-Friendly Justice, Guidelines I.2, I.3, III.B.2c and III.C.1.
116. *UN Economic and Social Council, Justice Involving Child Victims and Witnesses, Ch.I(e), arts 17, 25 and 31.*
117. *Victim Support, Young Witness Service (2014).*
118. *Evidence of Levine Andrade at the inquest, Manchester Evening News, July 7, 2014; "Violin teacher Frances Andrade 'let down by court system'", BBC News Online, February 9, 2013; Drew Dean, "The Death of Frances Andrade and the Search for Justice for Survivors" A/O Advocates Blog, February 15, 2013.*
119. *Bar Standards Board, Bar Standards Board Handbook (January 2014).*
120. *Federation of Law Societies of Canada, Model Code of Professional Conduct (December 12, 2012), r.5.4-2, Commentary, para.3.*
121. *Law Society of Alberta Code of Conduct, r.4.04, Commentary.*
122. See also *Ontario Crown Policy Manual on Witnesses (Attorney General, March 21, 2005).*
123. Australian Bar Association, Barristers' Conduct Rules (February 1, 2010), rr.68–69.
124. Lawyers and Conveyancers Act (Lawyers: Rules of Conduct and Client Care) Rules 2008 (New Zealand) r.13.10.4.
125. *Hong Kong Bar Association, Code of Conduct (2013) r.142(b) and Circular No.85/95.*
126. The Solicitors Regulation Authority Code of Conduct 2011 merely states: a solicitor shall not "[attempt] to influence a witness, when taking a statement from that witness, with regard to the contents of their statement" (cl.IB(5.10)).
127. *Bar Standards Board Handbook (January 2014), r.rC9.*
128. *Bar Standards Board Handbook (January 2014), Guidance Note gC7 (emphasis in original).*

129. *Bar Standards Board Handbook (January 2014), Guidance Note rC9.*
130. *Ali [2014] EWCA Crim 140* at [15].
131. Ground Rules Hearings Toolkit 1c, section 3 (Advocate's Gateway).
132. *R. (on the application of B) v Stafford Combined Court [2006] EWHC 1645 (Admin); [2007] 1 W.L.R. 1524.*
133. CrimPR r.28.5 –28.7.
134. *HC Inspectorate, HM Crown Prosecution Service Inspectorate, Disclosure of Medical Records and Counselling Notes: A review of CPS compliance with rules and guidance in relation to disclosure of complainants' medical records and counselling notes in rape and sexual offence cases (July 2013), paras 3.2, 3.4* found that if such material was listed as non-sensitive by the police and a prosecutor concluded that it was disclosable under the CPIA, no effort was made to contact the complainant before disclosure to the defence.
135. *Attorney General's Guidelines on Disclosure for Investigators, Prosecutors and Defence Practitioners (December 2013), paras 56–58.*
136. *Mills [1999] 3 SCR 668* at [90] (McLachlin and Iacobucci JJ).
137. In the revealing interviews with judges and barristers by *J. Temkin and B. Krahé, Sexual Assault and the Justice Gap: a Question of Attitude (Oxford: Hart Publishin, 2008), pp.151–158* it was conceded that orders authorising fishing expeditions into the history of child complainants with troubled histories are frequently made.
138. Deployed by *Lord Williams of Mostyn (Chair), Childhood Matters: the Report of the National Commission of Inquiry into the Prevention of Child Abuse (London: HMSO, 1996), p.125.*
139. After the SCC judgment in *O'Connor [1995] 4 SCR 411*; the constitutionality of s.278.3 (which did not completely copy the common law procedure in *O'Connor*) was upheld in *Mills [1999] 3 SCR 668*. *Quesnelle 2014 SCC 46* applied the restrictive s.278.1 regime to police occurrence reports involving the complainant in unrelated investigations.
140. *S. McDonald, S. Pashang and A. Ndegwa, Justice Canada, Third Party Records: the Case Law from 2003–2010 (April 11, 2014)* (<http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd7-rr7/p5.html> [Accessed November 20, 2014]. Their search of reported and unreported databases would not have found all disclosure applications, since CCC s.278.9(1) provides for a publication ban unless the judge otherwise orders, having regard to the interests of justice and the right of privacy of the person to whom the records relate. However, these statistics are roughly consistent with those reported by different Provinces for public funding of lawyers for complainants.
141. *Hon Robert W. Runciman (Chair), Production of Records in Sexual Offence Proceedings (2012), p.31.*
142. *Runciman (Chair), Production of Records in Sexual Offence Proceedings (2012), p.14.*
143. *Batte (2000) 49 OR (3d) 321* at 74–75.
144. *Runciman (Chair), Production of Records in Sexual Offence Proceedings (2012), p.21.*
145. *Hoyano and Keenan, Child Abuse Law and Policy across Boundaries (2010), pp.559–568, Iv-Ivi; Doski [2011] EWCA Crim 987; [2011] Crim. L.R. 712* (commentary by Hoyano); *JP v Crown Prosecution Service [2010] EWCA Crim 2438, [2011] Crim. L.R. 502* (commentary by Hoyano).
146. Attorney General's Guidelines on Disclosure for Investigators, Prosecutors and Defence Practitioners, para.34.
147. *Hoyano and Keenan, Child Abuse Law and Policy across Boundaries (2010), p.594.*
148. Criminal Law (Rape) Act 1981 s.4A(1).
149. According to *Doak, Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties (2008), pp.141–143.*
150. This is not to suggest that prosecutors in England and Wales are oblivious to the complainant's dignity and privacy in opposing sexual history applications, as Raitt contends is the case in Scotland: F.E. Raitt, "Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings" [2013] Crim. L.R. 729, 737.
151. Raitt, "Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings" [2013] Crim. L.R. 729, 748–749.
152. The author is developing such an assessment framework with Dr Eileen Vizard (child psychiatrist) and Dr Eamon McCrory (child psychologist).
153. Vulnerable Witnesses (Scotland) Act 2004 s.271F. The only special measure withheld from Scottish vulnerable defendants is the screen, but it is submitted that this should be permitted where a defendant is reluctant to testify in the view of co-defendants.

- [154.](#) UNCRC art.40(2)(b)(iv). For elaboration, see *UN Committee on the Rights of the Child, United Nations, Children's Rights in Juvenile Justice: General Comment No. 10 (2007), para.46.*
- [155.](#) United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules") (November 29, 1985), art.14.
- [156.](#) UN Convention on the Rights of Persons with Disabilities arts 13 and 7(2).
- [157.](#) *R. (on the application of OP) v Secretary of State for Justice [2014] EWHC 1944 (Admin) at [46]–[47]; (2014) 178 J.P. 377; [2015] Crim. L.R. 78.* The MoJ has applied for leave to appeal.
- [158.](#) *OP [2014] EWHC 1944 (Admin) at [34], [36] and [41]–[42]; (2014) 178 J.P. 377; [2015] Crim. L.R. 78.*
- [159.](#) *T v United Kingdom (1999) 30 E.H.R.R. 121; [2000] Crim. L.R. 187; UN Committee on the Rights of the Child, Children's Rights in Juvenile Justice: General Comment No.10 (2007), para.63.*
- [160.](#) *Law Commission of England and Wales, Law Commission of England and Wales, Unfitness to Plead: an Issues Paper (May 2, 2014), Pt 3.*
- [161.](#) As in *Davison and Hopkinson Unreported July 12, 2013, Leeds Crown Court*, fitness to plead ruling midway through a retrial by Sir Andrew Smith.
- [162.](#) As described by D. Wurtzel "The Youngest Witness in a Murder Trial" [2014] Crim. L.R. 891.
- [163.](#) As in *P*, tried at the Old Bailey in the spring of 2014.
- [164.](#) *HM Inspectorates of the CPS Constabulary and Court Administration, Report of the Joint Thematic Review of Victim and Witness Experiences in the Criminal Justice System (May 2009).*
- [165.](#) *HM's Inspectorates of CPS and Constabulary, Joint Inspection on Young Victims and Witnesses 2012, p.1.*