

Improving the Criminal Trial Process for Young Witnesses

The Ann Craft Trust, VOICE UK and Respond are three separate learning disability charities which focus on abuse, crime and protection issues. Our charities regularly advise criminal justice professionals on issues relating to vulnerable victims of crime. For instance, we sit on the vulnerable and intimidated witnesses sub-group of the review of Achieving Best Evidence and on the Intermediaries Project Steering Group.

VOICE UK supports people with learning disabilities and other vulnerable groups who have experienced crime or abuse. We also support their families, carers and professional workers. VOICE UK also trains police forces, including the Metropolitan Police Service. Kathryn Stone OBE, VOICE UK Chief Executive, is also a member of the Government's Victim's Advisory Panel.

The Ann Craft Trust works with staff in the statutory, independent and voluntary sectors to protect people with learning disabilities who may be at risk from abuse. We also provide advice and information to parents and carers who may have concerns about someone they are supporting.

Respond offers a range of services which provide emotional and psychological support to victims and perpetrators of abuse who have learning disabilities. It also provides training and support to professionals and carers working with them.

The Ann Craft Trust, Respond and VOICE UK welcome this opportunity to comment on the Government's proposals for improving the criminal trial process for young witnesses. We are predominately in favour of the Government's proposals. Our answers to the consultation questions are therefore mainly comments on implementation and suggestions for how to improve their effectiveness. These responses are given with particular regard to the needs and wishes of child and young witnesses with learning disabilities.

Q.1 Do you agree that section 28 should be retained and implemented for the cross-examination of the most vulnerable witnesses if this is the only way in which they would be able to give evidence?

Our organisations are in favour of retaining section 28 and implementing it for the most vulnerable witnesses.

Children and young people with learning disabilities may have trouble recalling information and so require assistance if they are to give their fullest possible evidence to a court. Problems with recall increase as the time since the alleged offence increases. Where circumstances mean that a trial may be quite a while in the future, video recording cross-examination or re-examination of a witness under section 28 could ensure a witness gives their best evidence. The consultation paper notes, and we agree, this has the added benefit of removing a particularly vulnerable child or young person from the

difficult experience of testifying directly in a trial. We believe that it is important to give criminal justice professionals the option of using section 28 in situations where they feel it will have value.

The alternative - reduced trial delays together with the widespread use of remote live links - may be time consuming to achieve. The use of section 28 should not be denied whilst such an alternative is pursued.

Q.2 Have we identified all the categories of vulnerable witness for whom this measure would be most beneficial or would you suggest any others?

The categories of witness identified by the Review of Child Evidence should contain children with learning disabilities, autism, limited or no verbal communication and children with mental health needs. However, any list of the categories of most vulnerable witnesses for whom this measure would be most beneficial should be indicative (i.e. guidance) rather than definitive (i.e. a set rule). If this is not made clear, those children and young people who might benefit from the measure, but for some reason do not fall within these categories, might be denied assistance. This is particularly important because it is hard to define categories which adequately reflect the wide variety of characteristics and needs of those who could benefit.

We would like any guidance on who could benefit from this measure to emphasise the importance of focusing on individual circumstances and needs in deciding what assistance is appropriate.

Q.3 (a) If we implemented this proposal, would you envisage any practical difficulties in doing so?

Perceptions, attitudes and assumptions amongst criminal justice professionals represent a difficulty in ensuring the effective implementation of this proposal.

Those children and young witnesses who will benefit from this proposal must be identified when their memories are fresh if this proposal is to be effectively implemented. Unless the police identify at an early stage in the criminal justice process that a witness might benefit from section 28, and cross examination and re-examination are quickly arranged, witnesses may not give the best evidence possible.

Child witnesses are generally more readily identified as VIWs, and benefit from more effective cooperation between criminal justice agencies, than adult VIWs. However, the difficulty is that not all children are recognised at an early stage as in need of particular special measures assistance and / or receive such assistance when giving evidence¹. Home Office research illustrates this –

“The non-identification of child victims of violence as VIW seems to be partly related to their age. Older child victims may not be perceived to be vulnerable either because of their physical appearance or life experiences.”²

“The police decided to video record only a minority of VIWs...It seems that the older the child, the less likely a video interview would take place, especially if the defendant was also a child of a similar age to the victim witness...However, even in cases of ‘younger’ child witnesses the issue

¹ Burton, Mandy, Evans, Roger, Sanders, Andrew, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*, Home Office Online Report 01/06, 2006, pg. 18, 25-28, 32, 36, 39, 40, 51.

² *Ibid.*, pg. 33.

*of parity between the victim and defendant may influence whether the police decide to record an interview for use as evidence-in-chief.”³
“...the CCTV link (and other special measures) is sought and granted in relatively few cases involving children. This is because of a) the (perceived) human rights problem of parity between witness(es) and defendant; and b) assumptions about the capabilities of older children.”⁴*

There is also evidence of reluctance amongst some members of the legal profession to the provision of the current special measures.

“Approximately one-third of respondents also said that either prosecution counsel or the judiciary were resistant to special measures and preferred evidence to be given in the traditional way with the witness receiving no assistance.”⁵

On the basis of this record, serious steps need to be taken if this proposal is to be effectively implemented.

Q.3 (b) If so, do you have any suggestions as to how we could solve the practical problems this proposal presents?

We believe that training for the police and other criminal justice professionals on the needs of young witnesses when giving evidence, and on how special measures can meet these needs, can effectively challenge the issues we describe above. While this sort of training is provided in some localities, a national training programme is needed to ensure such training is given priority and that good practice in assisting witnesses can be widely disseminated.

Q.4 Do you think that a greater focus on developing remote live links to keep witnesses out of the courtroom would be a good use of resources?

Q.5 Given the resource implications, do you think it is more important to develop further live links in courthouses or should the money be spent on developing non-court remote facilities? What are the reasons for your preference?

The development of remote live links to allow witnesses to give their evidence from outside the courtroom would be a good use of resources as they improve witness care and evidence. This is particularly the case if priority is given to developing remote links for courts that can not be adapted to ensure witnesses do not feel intimidated or unsafe. Courts where there is an increased risk of the witness coming into contact with the defendant or their supporters, e.g. where there are no separate entrances well away from the main concourse, are an example of this. It is more important to develop non-court remote facilities to service courts in this position than to develop live links in all courthouses.

Q.6 What are your views on the advantages and disadvantages of witnesses giving evidence by way of a remote live link?

There are clear advantages in allowing witnesses to give evidence in surroundings in which they feel safe and in which their needs can be met. Their evidence is likely to be of higher quality and their

³ Ibid., pg. 40.

⁴ Ibid., pg. 52.

⁵ Burton, Mandy, Evans, Roger, Sanders, Andrew, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*, Home Office Online Report 01/06, 2006, pg. 51.

experience of giving evidence will be more positive. Witnesses with disabilities, particular care needs, certain medical conditions or suffering from emotional trauma are particularly likely to benefit as they may otherwise be unable to give evidence. In addition, remote live links spare witnesses both the risk of encountering defendants and their supporters and the fear associated with this risk. The chances of witness intimidation or witnesses self-censoring in their evidence out of fear are reduced.

Any disadvantages appear to relate to expenditure, resource commitment and organisational burden on the responsible agencies. However, any means to meet the needs of victims and ensure the smooth functioning of justice will incur some costs. We believe that the advantages of remote live links notably outweigh the disadvantages and would be concerned if resource considerations were used as a reason to not provide remote live links where they could help witnesses.

Q.8 Do you think there should be a legal presumption in favour of use where a live link exists and the witness wishes to use it?

We support a legal presumption in favour of the use of a live link where it exists and the witness wishes to use it. Witnesses must be provided with whatever special measures assistance they require to give their best evidence. It is in this way that justice is achieved and witnesses are not traumatised by giving evidence. It therefore seems reasonable to us that there is a legal presumption that such assistance will be provided. If the other side believes that there is very good reason for the witness not to give evidence in the way that they want to, then that should be dealt with by legal argument at the earliest opportunity.

Q.10 We would welcome your views on recording cross-examination and re-examination over live link for use in subsequent appeals to the Crown Court or re-trials, and also recording the examination where the evidence-in-chief was not video or digitally recorded.

Q.11 In the light of the likely high costs:

(a) Do you consider that it would be practical to select cases in advance for recording during the trial where video or digital recording would benefit the young witness in the event of an appeal or a re-trial?

(b) If so, what criteria would you suggest should be applied in deciding which cases to video or digitally record?

Q.12 What practical difficulties would you envisage if we implemented this provision? Do you have any suggestions as to how we could solve the practical problems this measures presents?

We consider that it could be useful for cross-examination and re-examination to be recorded for use in appeals and re-trials. Such recording would mean that witnesses would only have to go through the process of giving evidence once, so limiting the anxiety and distress that can be associated with giving evidence. This would be of particular value for victims, who might find giving evidence is like re-living their experience of crime.

It would also allow those victims who have been denied pre-trial therapy because of concern that it will affect their evidence, to begin this therapy earlier. This is likely to have benefits for their wellbeing.

While there will obviously be costs involved in such recording, this will be somewhat offset by limiting to one trial the cost of supporting a witness.

There may also be occasions where a witness would need to be re-examined despite the existence of recordings, for instance, where further examination of the witness is needed or the nature of the

original examination was itself an issue in the appeal. However, as this will not happen in many cases, we do not believe that the possibility of it happening negates the value of recording.

We are unconvinced that it would be practical to select cases in advance for recording during the trial. While there will be some cases where a legal professional could reasonably predict an appeal, there will be others where they could not. We doubt criteria could be devised that would not occasionally prevent the recording of evidence in cases which later went to appeal or were re-tried.

Witnesses should be given a choice as to whether they give live evidence in appeals or whether a recording is used. Our organisations would not wish a witness who felt their recorded evidence was not the best they could give to be unable to give their evidence again. A witness who feels that nerves during the original trial meant they did not do their best will feel cheated of justice if they are prevented from giving their evidence again.

Q.13 Should a young witness be allowed the choice of giving their evidence in the courtroom as opposed to from a live-link room?

Our organisations are in favour of allowing young people to choose how they give evidence and suggest that courts only override the wishes of a young witness about how they give evidence in exceptional circumstances.

Young people may have a good understanding of what they need in order to give their best evidence. Allowing young people to exercise choice in how they give evidence will increase their confidence, reduce their anxiety and increase their feeling of being an active participant in the trial process. This is likely to lead to better evidence and increased witness confidence in the criminal justice system.

Conversely, young witnesses who are asked for their view on whether they will give evidence in a courtroom or from a live-link room, and then find that a court has overridden their views, may feel alienated and lose confidence in the criminal justice system. Where a court decides that it is in the interests of justice that a young witness' views are overridden, a court should provide this witness with an explanation.

We also agree with the Review Group that young people must be given the information and support necessary to allow them to take an informed, independent position on how they give evidence. Measures such as court familiarisation visits and meeting with counsel could greatly assist young people in deciding how they want to give their evidence. This support will have to be tailored to the particular needs of young people, including taking into account such things as learning disabilities. The court should ensure that the young witness has received the support necessary to make an informed decision. They should also be presented with information and options during their preparation for the trial. If their wishes are only known when they arrive at court to give evidence, it may be impractical for the court to make arrangements to fulfil these wishes.

Q.14 What factors would the court need to take into consideration when making its decision to ensure that this will not result in a diminution of the quality of the young witness' evidence?

Our organisations suggest that courts should begin by considering what steps they can take (including the provision of special measures in the courtroom) to increase the quality of a young witness' evidence and fulfil their wishes about how they give evidence. Intermediaries, for instance, are particularly valuable in ensuring that young witnesses can give their best evidence in a courtroom if this is what they choose.

We advise against courts starting their consideration of this issue by examining how the characteristics of a young witness will lead to a diminution of the quality of their evidence. Such an approach inevitably focuses on problems rather than solutions and may cause courts to lean towards overriding the views of young witnesses.

The majority of the examples given in the consultation paper appear reasonable, although we are unclear what “level of development” means when “maturity” is already one of the factors listed. The phrase suggests reference to mental capacity or learning disabilities and it would be more appropriate and accurate if those terms were used instead. We also suggest that mental health needs be added as a factor.

We are concerned that this list of factors for consideration may be interpreted by courts as a list of reasons why a young witness’ views on how they give evidence can be overridden. It is an unfortunate fact that people with learning disabilities are sometimes incorrectly assumed to lack the capacity to make decisions and to have valid preferences. This problem is particularly acute for young people with learning disabilities. We support the inclusion of learning disabilities on the list of factors because we believe it is important that courts consider what special measures can assist a young witness with learning disabilities. However, courts must be mindful that young people with learning disabilities are able to give good quality evidence when they receive the right support.

As a further point, there is a small danger that a young person may change their mind about giving evidence in a courtroom after a court has decided to allow this. This may occur prior to a trial or while giving evidence if the young person finds the experience more difficult than they imagined. A possible solution to this problem would be to allow young witnesses to change their choice of how they give evidence at any point in the process. Although there would be costs and delay in adopting this approach, we believe (a) that it would be unlikely to occur if the young person was suitably supported in making their original decision and (b) that these would be small prices to pay to ensure young witnesses can give their best evidence.

Q.15 (a) Should there be a presumption that where a young witness does give evidence in court they do so with a screen around the witness box?

(b) If so, what factors should the court consider when making this decision to ensure that the quality of the young witness’ evidence will not be reduced?

There should be a presumption that young witnesses giving evidence in court do so with a screen around the witness box. This will help the witness know that the use of screens is usual in courts and so reduce anxiety.

We believe that a screen around the witness box is unlikely to reduce the quality of a young witness’ evidence and so the primary factor which the court should consider is the opinion of the young witness as to whether they want to make use of this special measure.

Q.16 Do you agree that the distinction between children in need of special protection and other young witnesses should be removed and that special measures should be applied for based on the assessed need of the individual witness?

Our organisations agree that the distinction between children in need of special protection and other young witnesses should be removed. We support special measures provision based on the assessed needs of the witness.

However, adopting this approach does not mean that the nature of the alleged offence should not be considered when assessing the needs of individual witnesses. The victim of a sexual offence,

violence, kidnap or neglect (those categories set out in the Youth Justice and Criminal Evidence Act 1999 as grounds for being a child witness in need of special protection) is likely to be particularly traumatised and be very much in need of assistance.

Q.17 Do you agree that there should be a rebuttable presumption that any young witness in any trial should give their evidence by live link?

We believe that there should be a presumption that any young witness in any trial should give their evidence by live link. This avoids confusion and is an appropriate starting point for special measures. From this point the wishes of young witnesses can be considered and consideration given to using special measures other than live link if appropriate. Crucially, if a young witness would prefer to give their evidence in court, then we believe that they should be supported to do so except where it is in the interests of justice to require them to give evidence via live link.

Please see our answer to questions 13 and 14 for more detailed statements of our views in this area.

Q.18 Do you agree that there should be a presumption that all child witnesses should give their evidence in private, with appropriate support, in all criminal courts unless they do not wish to do so?

We believe that criminal courts should hear evidence from a child witness in private if it is in the interests of the witness and justice to do so, e.g. because there is a risk of witness intimidation or the vulnerability of the witness means it will help them give their best evidence. However, a presumption of the sort proposed would mean that evidence was heard in private unless there was a good reason for hearing evidence in open court. We are concerned that this may undermine the principle of open justice.

Open justice is vital for public confidence in the criminal justice system and for public understanding of the application of justice. Only when it is absolutely necessary, and in situations that further justice, should courts temporarily suspend this principle by hearing evidence in private. We believe that young witnesses' needs can be met through courts existing powers and courts should be encouraged to use these powers as necessary.

Q.19 Do you agree that where young witnesses testify in cases where their visual image is not known to the defendant it should be possible, with the agreement of the court, to restrict their image from the defendant where there is fear of reprisal or intimidation?

Our organisations agree that this should be possible.

Q.20 Do you agree that young witnesses suffering fear and distress at the defendant watching them giving their evidence should be able to, with the agreement of the court, have their image concealed when giving their evidence by live link, or have a screen to prevent them being seen by the defendant, if giving evidence from the witness box?

Our organisations agree that this should be possible.

Q.21 What practical difficulties would you envisage if we implemented these proposals? Do you have any suggestions as to how we could solve the problems presented by these proposals?

We are not aware of any practical difficulties in implementing this proposal.

Q.22 Can you suggest any other measures that would assist these vulnerable defendants to participate more effectively in the trial process?

Our organisations support the additional procedures to support vulnerable defendants suggested by the Review Group. We have no other suggestions we wish to add.

Q.23 Do you agree that young witnesses should qualify for special measures if aged under 18?

Yes.

Q.24 Do you agree that for all young witnesses, regardless of when they are scheduled to give evidence, trials should begin in the afternoon to allow young witnesses' testimony to be either:

- at the start of the second day when they will be fresh and with the minimum of waiting or
- at the start of the day for those young witnesses scheduled to give evidence later in the trial?

We agree with this proposal.

Q.26 Do you think that there should be established accredited panels of practitioners to ensure that those questioning young witnesses have successfully completed specific training?

Our organisations believe it is important for justice and the well being of young witnesses that practitioners are aware of how to appropriately cross-examine young people. In particular, we believe that practitioners need to understand how to question young witnesses with disabilities and how assistance can help these witnesses give their best evidence.

For these reasons, we are in favour of the establishment of accredited panels of practitioners and urge that the process of accreditation ensure understanding of the needs of particularly vulnerable young witnesses.

Q.27 How could the court ensure that inappropriate cross-examination does not take place? Would this process be best facilitated by the judge or bench discussing the ground rules with the advocates in advance?

Greater use of intermediaries can ensure that inappropriate cross-examination does not take place.

The report which an intermediary prepares for the court sets out what cross-examination would be inappropriate as well as providing other valuable information on how to help a vulnerable or

intimidated witness give their best evidence. The judge or bench is able to use this report as the basis for ground rules of cross-examination which can be discussed with the advocates in advance. Should the advocates stray from these ground rules, both the judge and intermediary are able to intervene to remind them of the form of appropriate cross-examination.

Q.28 Do you think that training for magistrates who try cases involving young witnesses in the adult court should reinforced guidance in *Achieving Best Evidence, A Case for Balance* and *A Case for Special Measures*?

Following on from our answer to question 26, we believe that it is vitally important that training for magistrates reinforces this guidance.

Q.29 Do you agree that the prosecution and defence should consider using intermediaries more widely for young witnesses as they provide a useful assessment of the young witness' ability to understand questions put during cross-examination?

Following from our answer to question 27, we wholeheartedly support the wider use of intermediaries. All of the feedback from the pilot schemes (including the Ministry of Justice research *The Go-Between; Evaluation of Intermediary Pathfinder Projects*) has shown that intermediaries are invaluable for improving witnesses experience of giving evidence and in helping them to give their best evidence.

We believe that it is important to note that intermediaries can be used for any child witness, not just those who have difficulties with communication and understanding due to their age or other factors.

Q.30 Should the OCJR evaluate the witness profiling scheme in Liverpool to assess its potential application for all witnesses including children?

We are in favour of an evaluation of the Liverpool witness profiling scheme.

This evaluation should consider how wider use of the Liverpool model would sit along side the statutory assistance provided by intermediaries.

Q.31 Are you aware of any other similar schemes for young witnesses which could also be evaluated?

Our organisations are not aware of other schemes.

Q.32 Do you think that the current guidance on pre-trial therapy for children is effective? Would you suggest any changes?

The current guidance is generally well-written, but we fear that it has not been promoted enough to ensure it is implemented. Poor knowledge and understanding of the guidance amongst legal professionals means that pre-trial therapy is all too often viewed as a form of preparing a witness to give evidence and so is opposed by them. We fear that young witnesses who could benefit from pre-trial therapy (particularly those with learning disabilities) are being denied this therapy. The VOICE UK helpline regularly advises on cases where a victim has been denied pre-trial therapy by social services because a police officer has told a social worker that it is not allowed. This situation could be avoided through effective promotion of the guidance and training of legal professionals.

Q.33 Do you agree that all areas should develop pre-trial therapy protocols?

The issue to be addressed is the implementation of the guidance. Local protocols which make professionals aware of the guidance and set out how it will be implemented locally could be of value.

Q.34 Which body / organisation is best placed to monitor the implementation and effective use of these protocols? Why?

While we believe that the CPS, in conjunction with ACPO, should take responsibility for ensuring that pre-trial therapy is provided in line with ABE and guidance, there may also be a role for external oversight from organisations overseeing the therapy profession. The following organisations may be able to take on such a role:

- British Association of Counselling and Psychotherapy
- UK Council of Psychotherapists
- British Psychoanalytic Confederation
- British Psychological Society

Q.35 Do you agree with the Review Group's recommendation that the Government should legislate to make a supporter in the live-link room a special measure?

We agree with the Review Group's recommendation as it would help to ensure a consistent approach to the provision of supporters and help to meet the needs of witnesses.

Q.36 What safeguards would be needed to ensure that the trial is fair but that the young witness is provided with proper emotional support?

Providing proper emotional support to young witnesses is likely to increase the quality of their evidence and so may lead to fairer trials. Fair trials are highly unlikely to be jeopardised providing support is given according to set standards and procedures by appropriately trained individuals.

Q.37 Who should be permitted to act as a young witness supporter in the live-link room?

Trained Witness Service workers are well placed to provide this sort of support.

Q.38 What, if any, further safeguards do you think are necessary to ensure that the integrity of the evidence is not open to question?

We have nothing to add.

Q.39 How can we ensure that processes are put in place to ensure that young witnesses can watch their video, or see their written statement, in advance of the trial?

The use of national guidelines, supported by training, would help establish these processes and make them a normal part of the trial process. The judge or magistrates need to take responsibility for

ensuring that young witnesses are able to review their evidence and ask questions on the first day of the trial to ensure this has happened.

Q.42 (a) Do you consider that any of the proposals in this consultation document could or would have a differential impact upon any equality target group(s) or any other group(s)?

(b) If so, what are the reasons for your view and what do you suggest that the Government could do to address these concerns?

There are many ways in which the proposals in the consultation document will have a beneficial impact on people with learning disabilities. We therefore believe that the Government is selling itself short with the single line in the equality impact assessment which considers disability. We hope that the Government will clearly note in the equality impact assessment how children and young people with learning disabilities have particular needs and that these proposals will help to see these needs met. In particular, that children and young people with learning disabilities may have trouble recalling information, are more susceptible to leading questions, have greater difficulty understanding certain types of questions and have specific communication needs. This increases the likelihood that they will become distressed or traumatised through the process of giving evidence. The proposals in relation to live links and recording examination are therefore likely to have a differentially positive impact on this group and increase the chance of their receiving justice. This will assist the criminal justice system in meeting its obligations under the Disability Equality Duty.

However, we advise care in relation to the implementation of some of these proposals and recommend appropriate guidance to ensure that they do benefit child and young witnesses with learning disabilities. There is a misconception amongst some criminal justice professionals that children and young people with learning disabilities lack the capacity to make decisions about how they give their evidence. As we described in our answer to question 14, this leads to a danger that courts will override child and young witnesses with learning disabilities' choices about how they give evidence. We ask the Government to recognise this danger in the equality impact assessment as well to ensure that implementation of these proposals emphasises the capacity of many children and young witnesses with learning disabilities.

In addition, we suggest that the equality impact assessment should note the beneficial impact on child defendants with learning disabilities of the implementation of recommendation 12 of the Review Group.

We trust that these comments and suggestions have been helpful. Please feel free to contact our Policy and Campaigns Officer, Robin Van den Hende, (020 7874 5486 or robin.vandenhende@respond.org.uk) if we can be of further assistance.

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