

Vulnerable witnesses and children: final report signals the beginning of changes

Professor Penny Cooper, Co-founder and Chair, The Advocate's Gateway, Visiting Senior Research Fellow, Institute for Criminal Policy Reform



Penny is a professor of law and former practising barrister. She researches and publishes on the effective participation of vulnerable witnesses and parties. Penny co-founded and leads the widely acclaimed website 'The Advocate's

Gateway'. She devised the 'ground rules approach' now incorporated into the Criminal Procedure (Amendment) Rules 2015.

The *Report of the Vulnerable Witnesses and Children Working Group* headed by Hayden J and Russell J was published in February 2015 with no great fuss or fanfare. However, if its recommendations are adopted there will be substantial changes in family courts. I cannot claim to be an objective bystander; I was a member of the working group. These are my own personal views on some of the key changes on the horizon, who they will affect and what the end result might look like.

For children

'A fresh approach to the evidence of children and young people . . . is long overdue'. The report's touchstone on this issue is the criminal justice system. Developments over the last decade in the criminal courts have left the family courts lagging a long way behind. Children and young people do not feel that they are being properly heard in family proceedings. The report concludes that there 'is a need for the evidence of children and young people to be put before the family courts as it would be in criminal cases'. The report cites the pilot project in Kingston upon Thames, Leeds and

Liverpool Crown Courts where the evidence of some children (and some vulnerable adults) has been completely pre-recorded in advance. The working group will prepare a further report on reform and modernisation in the evidence of children and young people.

Inevitably, the family courts will take cues from the criminal justice system but can devise its own particular way of doing things. For example, pre-recorded cross-examination in criminal cases requires the child or vulnerable adult to go to the court building but in family cases pre-recording could be done at another venue. In the criminal courts cross-examination is carried out by defence advocates but in family cases there may be merit in using a neutral third party trained in interviewing children.

Five and a half years ago the Supreme Court removed the presumption against children giving evidence in family proceedings and supplied a new legal test (*Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485). Recently in *Re R* [2015] EWCA Civ 167 the Court of Appeal applied that test and concluded, on the facts of that case, that the child should 'give oral evidence subject to her continued desire to do so, and with agreement between the parties as to appropriate special measures being put in place, in order to minimise the inevitable toll such an experience will take upon [her]'. One of the matters taken into account was the possible long-term harm to the child if she had been 'denied the opportunity to have her evidence properly weighed in the determination by a court of matters of the utmost importance to her'. The working group and the Court of Appeal are moving in the same direction.

Both at a policy level and in individual cases, family and criminal practitioners need to keep talking to each other. Evidence obtained for criminal cases should be capable of being used in the family courts and vice versa. Children should not be put through repeated questioning on the same or similar events for different sets of proceedings.

For parties

Children, because they are under 18, are automatically regarded as vulnerable and eligible for measures which will enable them to give their best evidence but when is an adult 'vulnerable' and thus eligible? This working group has produced draft rules with criteria similar to those used in the criminal courts but the draft rules are in fact, thankfully, less complex than the comparable legislation in crime.

The rules, if implemented, will mean that a party or witness 'must be considered entitled to assistance' on the grounds of age (under 18), incapacity, fear or distress. The court can take into account any relevant matter such as religious circumstances or the medical treatment that a person is undergoing. The rules will provide a clear framework but are not restrictive; the judge retains a wide discretion in relation to who is eligible and what measures should be put in place for a fair trial. Flexibility is key.

For judges

If the report's recommendations are implemented there will be plenty of changes for judges. The 'overriding objective' will continue to be dealing with cases 'justly' but it will also include a responsibility to 'make provision for vulnerable parties and witnesses and children to assist them in improving the quality of their evidence and to participate fully in the proceedings'. It will be for the parties' representatives to identify for the judge 'at the outset of the proceedings' what assistance a party or witness is likely to be entitled to. Even where there is no application the court will need to 'act on its own initiative'.

There will also be a new Practice Direction for family judges about when and how to meet children plus training on seeing children (in the way that many criminal judges already meet child witnesses) 'without eliciting evidence from them'. Judges may also find themselves meeting groups of school children as part of the court 'open days' recommendation. Though not specifically mentioned in the report, one wonders how technology and social media might play a bigger part in increasing external engagement.

For advocates

In due course all advocates will need to comply with new procedure rules and practice directions. Support from The Advocacy Training Council (ATC) will be available in the form of The Advocate's Gateway website. It now includes bespoke materials for family advocates.

Criminal advocates taking on certain cases with vulnerable witness will need to be specially trained by March 2017. The working group thinks 'eventually there will be a similar requirement [for training] in the family court'. The ATC is working closely with the President's 'Advocates Training Working Group' chaired by Newton J and there is close collaboration between the family and criminal judges.

Intermediaries

Special measures listed in the draft rules include the use of intermediaries. Practitioners will already be aware that the path to engaging intermediaries in family cases is far from smooth. Finding them and funding them is often a problem.

The report states that it is 'difficult to understand any argument that would suggest that intermediaries (like translators or interpreters) should not be present when necessary for the purposes of meeting professionals, particularly legal representatives out of court and during the preparation of the vulnerable party's case. The position of funding, which is dealt with on an ad hoc basis, is unsatisfactory.' The report's conclusion on intermediaries is

unequivocal: 'If access to justice for vulnerable parties is not to be denied it is a matter which requires urgent review and clarification'. Indeed it is.

It is a shame (putting it mildly) that, in contrast to the position for witnesses in criminal cases, there is no registration or training requirement for intermediaries in family cases. In practice this means there is no agreed procedural guidance, code of ethics or code of conduct for family court intermediaries. There is no overarching regulatory or quality assurance framework and there is no single register to search to find a suitably qualified intermediary for a witness or party.

I expect that, fully realised, the demand for intermediaries in family cases will be substantial. Many parties are vulnerable and the report envisages more children giving direct testimony in future. Policy makers should note that a decade after the intermediary scheme was introduced in criminal cases, demand is still growing. Currently there is an acute shortage of intermediaries for witnesses in criminal cases.

A question mark also hangs over the use of intermediaries for vulnerable litigants in person. Anecdotal reports suggest that some intermediaries have begun to decline requests for their services in order to avoid taking on a role with a blurred line between

facilitating communication with the vulnerable party (their proper function) and advising what is happening in the proceedings (not part of their function). Research on the use of intermediaries in family cases and careful resource planning is overdue.

Resources

Probably the training of advocates and judges will occur thanks to a large helping of pro bono work on the part of advocates and judges. Some changes will only happen when funded: recording of evidence, effective use of intermediaries, live links and screens in particular. This is far too important to be left to 'ad hoc' arrangements or not happen at all.

Nearly a decade ago in a family case in the High Court Macur J (as she then was) recognised the need to shield a vulnerable petitioner as she gave evidence. Screening was achieved 'by means of a large umbrella'. The family court has been modernised in some areas, but special measures are still ad hoc and it is too soon to say we no longer need the large umbrella. The working group has produced a final report but the changes are only just beginning.

The final Report of the Vulnerable Witnesses and Children Working Group is published in full in April [2015] Fam Law 443 together with Appendix III – the proposed amendments to the Family Procedure Rules.