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# Speaking when they are spoken to: hearing vulnerable witnesses in care proceedings

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*This article considers who is a ‘vulnerable witness’ and how their evidence is heard in family court care proceedings. It compares practices in care proceedings with criminal cases and questions whether parity with the criminal courts should be the goal of the family justice system. The author concludes that there are a number of steps that the family justice system ought to take to ensure fairness to vulnerable witnesses including putting in place a practical scheme for special measures and reframing the legal test for children giving oral testimony in care proceedings. The Family Justice Board is encouraged to consider not so much parity with the criminal justice system, but the bigger issue of how care proceedings could be redesigned to allow greater participation of children and vulnerable adults.*

## INTRODUCTION

‘People are fragile things, you should know by now,  
Be careful what you put them through  
People are fragile things, you should know by now  
You’ll speak when you are spoken to’  
From the lyrics to ‘Munich’ by Editors

**T**his article considers the position of vulnerable witnesses in care proceedings<sup>1</sup> in particular how their oral testimony is facilitated in the courtroom. The vulnerability, or fragility, of some witnesses in care proceedings is virtually inevitable. Being a parent who is the respondent to a local authority application or being a child who is the subject of the care proceedings would surely put anyone under significant mental and

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\* The author is a barrister and professor of law at Kingston University London. This article began its life as ‘Dear Chris: the future of children’s testimony and hearing the voice of the child’, presented at the Association of Lawyers for Children Conference, Bristol, 15 November 2012. It is dedicated to the late Joanna Hall, barrister. I am very grateful to the two anonymous reviewers as well as Emily Henderson and Ruth Marchant for their helpful and insightful observations on an earlier draft of this piece. The usual caveat applies.

<sup>1</sup> Care proceedings, also known in family law as ‘public law proceedings’, are proceedings brought under Part IV of the Children Act 1989. The applicant is the local authority seeking either a care or supervision order under s 31. Parents with ‘parental responsibility’ and the children who are the subject of proceedings are automatically respondents to the application, ie parties.

emotional strain. There may be other factors such as learning difficulties<sup>2</sup> or age (in the case of the child) which compound this situational vulnerability. Yet the court may need to hear from vulnerable witnesses, indeed the witness may have a strong desire to be heard. Their evidence, if disputed, will ordinarily need to be tested in cross-examination. The family courts appear to be struggling to find their way to a scheme of suitable arrangements for vulnerable witnesses, particularly when they are children. The criminal justice system has gone a considerable way to explore and implement 'special measures' to assist vulnerable witnesses to give evidence. Despite some two decades-worth of path-finding, the treatment of vulnerable witnesses in criminal cases has often been far from ideal and provides no blueprint for family cases. The development of a family justice system strategy for hearing vulnerable witnesses is overdue. The debate about it has had a faltering start, perhaps because it raises fundamental issues about the system and available resources. In the meantime some vulnerable witnesses in family cases are not being properly heard and some are not being heard at all.

### WHO IS A 'VULNERABLE WITNESS' IN THE FAMILY COURTS?

In the family justice system there is no definition of 'vulnerable witness'. The *Oxford Dictionary* defines 'vulnerable' as 'exposed to the possibility of being attacked or harmed, either physically or emotionally' and on that definition perhaps every family court witness is emotionally vulnerable, especially the child or birth parent when the state seeks to 'intrude uninvited into the private sphere'<sup>3</sup> of the family. At a Family Justice Council debate<sup>4</sup> one presenter spoke of a research study profiling the lives of 30 birth mothers who had had a child/ren compulsorily removed. She found there were:

'major issues around their capacity to exercise choice, to be in control of the intimate partner relationships they are in, and long-standing mental health issues, some going back into childhood – obviously domestic violence, relationship conflicts, substance misuse, learning disability – 40 per cent which again is quite high.'<sup>5</sup>

Many, if not all, of these mothers could be considered vulnerable in the general sense of the word. However in this article, in order to set the boundaries of discussion and to compare care proceedings with criminal cases, the term 'vulnerable witness' will be taken to mean those who are under 18 or for whom the quality of their evidence 'is likely to be diminished' by reason of them suffering from 'mental disorder within the meaning of the Mental Health Act 1983' or otherwise have 'a significant impairment of

<sup>2</sup> 'There is evidence which indicates that parents with learning disabilities are often unsupported in their involvement with child protection agencies or courts', P Swift et al, 'What happens when people with learning disabilities need advice about the law?' (University of Bristol, 2013), at p 12. The authors also cited research by Masson et al (2008) which found that '12.5% of parents involved in care proceedings had learning difficulties'.

<sup>3</sup> *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, at para [91].

<sup>4</sup> Family Justice Council, Annual Debate, held on 3 December 2012, Motion for the debate: 'Women who have children removed to care, year after year, are being failed by a system unable to respond to them as vulnerable adults needing support in their own right', <http://www.judiciary.gov.uk/Resources/JCO/Documents/FJC/Podcast/fjc-transcript-6th-annual-debate.pdf> (accessed 19 August 2013).

<sup>5</sup> *Ibid*, from the transcript of the talk by Dr Karen Broadhurst, Senior Lecturer in Social Work and Social Science Lancaster University.

intelligence and social functioning' or a 'physical disability' or 'physical disorder'.<sup>6</sup> It is a somewhat convoluted and clumsy definition, but it is the one applied in criminal cases when 'special measures' (adaptations) for the vulnerable witness are granted under the Youth Justice and Criminal Evidence Act 1999.

## CHILD WITNESSES IN CARE PROCEEDINGS

Prior to the Supreme Court's decision in *Re W (Children) (Abuse: Oral Evidence)*<sup>7</sup> there was a presumption against children being called as witnesses in care proceedings and they rarely were.<sup>8</sup> In 1997 Wilson J, as he then was, said that for a child to give oral evidence in care proceedings was 'outside his personal experience as a trial court judge'.<sup>9</sup> Her Majesty's Courts and Tribunal Service does not keep data on the number of applications for a child to be called as a witness. Applications have probably increased<sup>10</sup> since the Supreme Court's decision though the number of applications granted may be few. Since *Re W* almost certainly it is still rare for children to be called as witnesses in the family courts; they do not usually give oral testimony about the care they have received from their parents in the past<sup>11</sup> or about what they think should happen to them in the future.<sup>12</sup>

In *Re W* a 14-year-old girl had made allegations that her stepfather had seriously sexually abused her and he applied for her to be called so that he could challenge her evidence in cross-examination. The stepfather's right to a fair hearing (Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention on Human Rights)) was engaged as was the entire family's right to respect for a private and family life (Article 8 of the European Convention on Human Rights). The court ruled that striking a fair balance between ensuring a party has an opportunity to challenge the evidence presented by the other side and protecting the child 'may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point'.<sup>13</sup> In December 2011 the Working Party of the Family Justice Council published guidelines<sup>14</sup> (discussed further below) in relation to children giving evidence in family proceedings (the FJC Guidance).

<sup>6</sup> Youth Justice and Criminal Evidence Act 1999, s 16, 'Witnesses eligible for assistance on grounds of age or incapacity'.

<sup>7</sup> [2010] UKSC 12, [2010] 1 FLR 1485.

<sup>8</sup> Reported cases are extremely hard to find though one such is *Re J (Child Giving Evidence)* [2010] EWHC 962 (Fam), [2010] 2 FLR 1080, [2010] Fam Law 915 where a boy, the subject of care proceedings, aged 13 according to the mother or about 17 according to the local authority gave evidence about his mother's abusive behaviour towards him.

<sup>9</sup> In *Re P (Witness Summons)* [1997] 2 FLR 447 as cited in *Re W (Children) (Abuse: Oral Evidence)* [2010] EWCA Civ 57, [2010] 2 FLR 256, at para [22].

<sup>10</sup> See J Mitchell, 'Children giving evidence: the practical implications of *Re W*' [2011] Fam Law 817, at p 817.

<sup>11</sup> This would be evidence relating to the 'threshold' test in s 31 that requires 'significant harm' or a 'likelihood' of significant harm in order for a care order to be made.

<sup>12</sup> This would be evidence relating to the 'disposal' or 'welfare' stage of the case when the courts decides what order if any is in the best interests of the child.

<sup>13</sup> *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485, at para [22].

<sup>14</sup> Working Party of the Family Justice Council, *Guidelines in Relation to Children Giving Evidence in Family Proceedings* (FJC, 2011), [http://www.judiciary.gov.uk/Resources/JCO/Documents/FJC/FJC\\_Guidelines\\_%20in\\_relation\\_children\\_%20giving\\_evidence\\_%20in\\_%20family\\_%20proceedings\\_Dec2011.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/FJC/FJC_Guidelines_%20in_relation_children_%20giving_evidence_%20in_%20family_%20proceedings_Dec2011.pdf) (accessed 22 August 2013).

The *Re W* test for when a child can give evidence in the family court was revisited in *Re P-S (Children)*.<sup>15</sup> The case concerned a 15-year-old boy (M). He, along with his younger brother, was the subject of care proceedings. M thought he should return home to his mother's care. He was granted separate representation from the Children's Guardian and appointed his own solicitor. He made written statements to the court but he wanted to give evidence in person to show the strength of his feelings about where he should live. Through his solicitor he made an application to give evidence by live link.<sup>16</sup>

The trial judge thought the mother would be 'unable to resist the temptation for an extreme emotional outburst in his presence which, based on her previous conduct in court, it would be impossible to control'.<sup>17</sup> There is nothing in the Court of Appeal judgment to suggest that the trial judge considered removing the mother from the courtroom for the duration of the child's evidence. In effect the trial judge gave priority to the mother's presence at that point in the care hearing over the child giving direct testimony to the judge. Taking into account the potential detriment to M if the mother had an outburst, the trial judge concluded that 'the additional benefit to the determination of the relevant issues of M giving evidence is significantly outweighed by the very real potential detriment'.<sup>18</sup> The Court of Appeal agreed.

Giving judgment in the Court of Appeal, Sir Alan Ward carefully noted relevant case-law, Article 12 of the United Nations Convention on the Rights of the Child<sup>19</sup> providing the child with the right to express their views and 'the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body',<sup>20</sup> and section 96 of the Children Act 1989 allowing the court to admit a child's evidence as hearsay. Turning to the FJC Guidance, Ward LJ recognised that some of the legal considerations:

'have relevance only to a child giving evidence to support a threshold allegation of whether or not some harm had been done to the child . . . that said, the Guidance is helpful in dealing with the issue of whether the child should give evidence at the disposal stage to the care proceedings when the real question is what the welfare of the child demands.'<sup>21</sup>

Ward LJ concluded that a child has an:

'important but limited right, that is to say, a right to be heard in the proceedings . . . It may be enough that a social worker, i.e. the CAFCASS officer or guardian hears the views of the child and it does not seem essential that it has to be the judge who hears directly from the child. So, whilst the child must be listened to, there is nothing in the Convention which entitles the child to give evidence to the judge. In my judgment a child has no right to give evidence.'<sup>22</sup>

<sup>15</sup> [2013] EWCA Civ 223, [2013] 1 WLR 3831.

<sup>16</sup> Contrast the facts in *Re W* where the intended oral evidence of the child was about alleged serious sexual harm, allegations which were strongly denied by the stepfather.

<sup>17</sup> [2013] EWCA Civ 223, [2013] 1 WLR 3831, at para [11].

<sup>18</sup> *Ibid*, at para [12].

<sup>19</sup> Adopted by the UK in 1989.

<sup>20</sup> [2013] EWCA Civ 223, [2013] 1 WLR 3831, at para [24].

<sup>21</sup> *Ibid*, at para [33].

<sup>22</sup> *Ibid*, at para [36].

The Court of Appeal was satisfied that the trial judge had taken into account relevant matters and had rightly concluded that ‘the harm to [M] far exceeded the benefit to the judge’. The appeal was dismissed. The test, set out in *Re W* and applied in *Re P-S*, is:

‘When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child.’<sup>23</sup>

The test wording undoubtedly reflects the facts of *Re W* which gave rise to an acute tension between hearing the child’s evidence that abuse had happened versus protecting the child from cross-examination on behalf of a stepfather vehemently denying abuse had happened. While the test might give the right result in such a case it arguably does not in cases where giving evidence could be a positive for the child. The test’s second limb asks the court to consider ‘damage’ that may occur and judges would of course need to consider whether giving evidence, including being cross-examined, would be damaging to the child.<sup>24</sup> That word ‘damage’ is not counterbalanced by the words ‘or benefit’. The test does not cover the reality that there will be children who will benefit from giving oral testimony in their care proceedings; it does not invite judges to consider this possibility. The test is unhelpful when the court is considering the future plans for the child because it does not consider the harm it may do to the child’s welfare if he does not give evidence. Not giving evidence may give rise to a child’s sense of injustice; he may feel unfairly excluded by a judge who is however prepared to hear directly from the adults including possibly those who caused him significant harm. When applying the test to very different facts such as those in *Re P-S* (where the past harm was not in dispute) the wording’s bias in the direction of a conclusion of ‘damage’ becomes apparent.

There are 22 legal considerations set out in the FJC Guidance, but not one of them invites the court to consider the potential benefit to the child of knowing that they have ‘had their day in court’ to give their truth about what has happened to them in the past or what should happen to them in the future. Psychological research tells us that having children testify by live TV link ‘predicts reduced distress levels relative to testifying in court’ and showing videotaped statements eliminates stress at trial completely, but what is not clear is the longer term effect of removing children from the process. Even though giving evidence may cause distress in the short term:

‘it may be better in the long-run for them to have had their day in court, so long as that day was not a repeated occurrence and additional safeguards are in place, in

<sup>23</sup> *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485, at para [24].

<sup>24</sup> There is no research specifically with children (or vulnerable adults) about their experiences giving evidence in care cases. Research with parents who have been involved in care proceedings suggest that many find the experience deeply stressful and unpleasant: J Hunt, *Parental Perspectives on the Family Justice System in England and Wales: A review of research* (FJC/Nuffield, 2010). There is research with children in criminal courts in England and Wales but it does not cover the long-term impact on the child. Recent research by J Plotnikoff and R Woolfson, *Measuring Up? Evaluating implementation of government commitments to young witnesses in criminal proceedings* (Nuffield Foundation/NSPCC, 2009) has shown that, although special measures have made the experience better for children, many still find it difficult and stressful. *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485, at para [17].

a manner similar to that observed in adults who often report more positive feelings about the legal system when they feel they were able to participate and the process was fair.<sup>25</sup>

In *Re P-S Ward* LJ commented that ‘no-one has a right to give evidence’, a judge must avoid ‘a parade of witnesses all saying the same thing. An adult would not be allowed to give that evidence any more than a child should be’.<sup>26</sup> These words are not out of kilter with family judges’ case management responsibilities<sup>27</sup> and duties.<sup>28</sup> The judge’s ‘overriding objective’ is to deal with the case justly<sup>29</sup> and this includes a wide discretion over witness testimony. For example, evidence may be received by telephone<sup>30</sup> or evidence may be rendered irrelevant and therefore inadmissible if it goes to an issue that the judge has decided to exclude from consideration.<sup>31</sup> However, in practice judges rarely need to restrict the number of witnesses and are not routinely faced with ‘a parade of witnesses’.<sup>32</sup> The witness list is usually relatively short: the child’s allocated social worker who speaks on behalf of the applicant local authority, medical and expert witness/s if any, carers (usually the parents) from the child’s family and the child’s guardian. It is rare for a judge to allow a child to give evidence, but it is even rarer for a judge *not* to allow a parent the opportunity to give evidence in care proceedings. Though ‘no-one has a right to give evidence’, in practice usually everyone who wants to usually does give evidence apart from the child, so the principle has a hollow ring to it when relied on as an argument for denying a child witness the right to give oral testimony.

Damage to child witnesses during the process of giving evidence is of course a real possibility and this possibility of inflicting more harm on a child is no doubt what holds back the judges. The family court must be ‘realistic in evaluating how effective it can be in maximising the advantage while minimising the harm’.<sup>33</sup> Family judges can use their inherent jurisdiction to order special measures, but the absence of family court special measures legislation means that special measures are not always available. In some cases the family courts ‘presumably have to “borrow” a criminal court with [live] link equipment and consider using court funds to pay for the services of an Intermediary’.<sup>34</sup> Local authorities and combined instructing parties including those with legal aid have also funded family court intermediary assistance in the past.<sup>35</sup>

The role and availability of intermediaries illustrates the point. Intermediaries are neither expert witness nor witness supporter. They provide communication guidance

<sup>25</sup> J Quas and M Sumaroka, ‘Consequences of Legal Involvement on Child Victims of Maltreatment’, in M Lamb et al (eds), *Children’s Testimony – A Handbook of Psychological Research and Forensic Practice* (Wiley-Blackwell, 2nd edn, 2011), at p 334.

<sup>26</sup> *Re P-S (Children)* [2013] EWCA Civ 223, [2013] 1 WLR 3831, at para [39].

<sup>27</sup> Sections 11 and 32 of the Children Act 1989 impose duties on all courts hearing applications under the Act to draw up a timetable with a view to disposing of the matter ‘without delay’.

<sup>28</sup> Family Procedure Rules 2010 (SI 2010/2955), r 1.4.

<sup>29</sup> *Ibid*, r 1.1, ‘The overriding objective’.

<sup>30</sup> *Ibid*, r 4.1(3)(e).

<sup>31</sup> *Ibid*, r 4.1(3)(l).

<sup>32</sup> Care proceedings by their very nature limit the witnesses to those with immediate knowledge of the child’s/children’s care.

<sup>33</sup> *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485, at para [28].

<sup>34</sup> A Brammer and P Cooper, ‘Still waiting for a meeting of minds: child witnesses in the criminal and family justice systems’ (2011) 12 *Criminal Law Review* 925.

<sup>35</sup> Email to the author from intermediary R Marchant, 25 April 2013.

and sit alongside the witness in the live link room (or stand next to them if they are giving evidence in court) in order to monitor communication and intervene to assist with communication matters.<sup>36</sup> Intermediaries have a role to play assisting family judges to hear the voice of the child and other vulnerable witnesses,<sup>37</sup> but in practice their assistance in family cases may be hard to come by. In *Re X (A Child: Evidence)*<sup>38</sup> Theis J noted the absence of an intermediary scheme in family cases led to 'real obstacles'.<sup>39</sup> The FJC Guidelines encourage practitioners to consider the use of intermediaries at the 'earliest opportunity',<sup>40</sup> but a November 2011 survey of Ministry of Justice (MoJ) Registered Intermediaries revealed that one intermediary had four pending referrals to act in family cases but all four were 'stuck in funding negotiations'.<sup>41</sup>

In 2007 Smith LJ said that children giving evidence in care proceedings would be 'rare',<sup>42</sup> in 2011 Thorpe LJ commented that the 'guidance that the Supreme Court gives in *Re W* does not turn the world on its head'.<sup>43</sup> They are both correct; the law as it stands requires the court to consider the advantages to the court of hearing the testimony and the potential damage to the child. However, it does not also direct the court to consider the advantages there may be if a child gives oral testimony and the damage there may be to justice if the child does not. In effect the *Re W* test looks in just one direction but does not survey the whole landscape of possible consequences if a child were to give evidence. Unsurprisingly there has been no paradigm shift in the approach to child witnesses in the family courts. *Re W* and *Re P-S* remind us that the court will hear the child in other ways. How effective these alternatives are needs examining.

## OTHER WAYS OF HEARING CHILDREN IN CARE PROCEEDINGS

A child who is the subject of an application for a care order will be a respondent party to those proceedings.<sup>44</sup> Children can express their thoughts and views to adults, including to their social worker,<sup>45</sup> their parents if they are having contact and the Children's Guardian (an officer of the Children and Family Court Advisory and Support Service, Cafcass), who may pass on these views. The guardian's role is to represent the child in order to safeguard their interests.<sup>46</sup> The guardian is expected to explore with the child their wishes and feelings, if they are old enough to express them. Though

<sup>36</sup> Knowing when to intervene is not an exact science. See B O'Mahony, 'Accused of murder: supporting the communication needs of a vulnerable defendant at court and at the police station' (2012) 3(2) *Journal of Learning Disabilities and Offending Behaviour* 77.

<sup>37</sup> P Cooper, 'Child witnesses in family proceedings: should intermediaries be showing us the way?' [2011] *Fam Law* 397, and P Cooper, 'Intermediaries and vulnerable witnesses in family courts: what do we do now?' [2012] *Fam Law* 868.

<sup>38</sup> [2011] EWHC 3401 (Fam), [2012] 2 FLR 456. This decision included discussion on the possible use of an intermediary for a vulnerable teenage witness with Asperger Syndrome who wanted to give evidence.

<sup>39</sup> *Ibid*, at para [42].

<sup>40</sup> Working Party of the Family Justice Council, *Guidelines in Relation to Children Giving Evidence in Family Proceedings* (FJC, 2011), at para 14.

<sup>41</sup> P Cooper, *Tell me what's happening* 3 (City University London, 2012).

<sup>42</sup> *LM (By Her Guardian) v Medway Council, RM and YM* [2007] EWCA Civ 9, [2007] 1 FLR 1698, at para [44].

<sup>43</sup> *Re H (Abuse: Oral Evidence)* [2011] EWCA Civ 741, [2012] 1 FLR 186, at para [8].

<sup>44</sup> Family Procedure Rules 2010 (SI 2010/2955), r 12.3.

<sup>45</sup> They will automatically have an allocated local authority social worker who will be the lead professional witness for the applicant local authority.

<sup>46</sup> Children Act 1989, s 41.

the guardian will not necessarily agree with the child's wishes and feelings, she is expected to pass these on to the court (including in a written report for the final hearing) because the court must have regard to the child's wishes and feelings.<sup>47</sup> The quality of the Cafcass officers' work is said to be in decline while 'more attention needs to be paid to hearing children's voices'.<sup>48</sup> In a research report about child contact disputes between parents Jane Fortin et al concluded 'Cafcass is over-burdened' and 'considerable extra resource' is required if the courts are to properly hear the voice of the child.<sup>49</sup> In a small proportion of cases (*Re P-S* was one such case) where the child 'has sufficient understanding to instruct a solicitor and wishes to do so' and it 'appears to the court that it would be in the child's best interests for him to be represented by a solicitor' the court can order that the child is separately represented by a solicitor.<sup>50</sup>

Where the child's evidence is being passed on by their guardian or their solicitor, it is vital that the adult carefully asks the right questions, properly understands what the child has said and passes it on accurately without anything crucial being lost in editing. Research with children in the criminal sphere tells us that conducting forensic interviews is a specialist skill, training should be based on scientifically-proven methods and training for interviewers should be ongoing.<sup>51</sup> Police officers who carry out interviews with children and vulnerable adults in criminal cases undergo extensive training before being allowed to conduct an 'ABE interview' for evidential purposes. The Home Office ABE guidance manual on interviewing victims and witnesses runs to over 200 pages.<sup>52</sup>

In England and Wales children's disclosures in a police investigation, if there is any such disclosure, are recorded in a videoed ABE interview which, if relevant and deemed of good enough quality, may be accepted in care proceedings as part of the child's evidence about their past care.<sup>53</sup> The ABE interview is not the place for the child to express his or her opinion about plans for their future care.<sup>54</sup> Their route to express their thoughts and feelings on that, if they are old enough to do so, is usually via the guardian or their solicitor if they have separate legal representation. Researchers have observed that '[i]t is suggestive interviewing, especially when repeated, rather than repeated interviewing per se, that needs to be avoided' as the suggestive interviewing

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<sup>47</sup> Ibid, s 1.

<sup>48</sup> Submission by Nagalro to the All Party Parliamentary Group (APPG) on Child Protection, Sept 2012, at paras 37 and 46, <http://www.nagalro.com/system/site/uploads/content/docs/Responses/Nagalro%20Submission%20APPG%20FJ%20reforms%20-%20final%20120924.pdf>.

<sup>49</sup> J Fortin, J Hunt and L Scanlan, *Taking a Longer View of Contact: The perspectives of young adults who experienced parental separation in their youth* (Nuffield Foundation, 2012), <http://www.sussex.ac.uk/law/research/centreforresponsibilities/takingalongerviewofcontact>.

<sup>50</sup> Children Act 1989, s 41(4).

<sup>51</sup> H Stewart, C Katz and D La Rooy, 'Training Forensic Interviewers', in M Lamb et al (eds), *Children's Testimony – A Handbook of Psychological Research and Forensic Practice* (Wiley-Blackwell, 2nd edn, 2011), at p 199.

<sup>52</sup> Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings Guidance on Interviewing Victims and Witnesses, and Guidance on using Special Measures* (MoJ, 2011).

<sup>53</sup> The quality varies; in *Re A (Fact-Finding Hearing: Judge Meeting with Child)* [2012] EWCA Civ 185, [2012] 2 FLR 369, at para [12], it was described by the judge as 'lamentable' and by the Court of Appeal as 'depressingly low quality'. In some cases the judge in the care proceedings will not admit it as evidence when the quality of the questioning is too poor.

<sup>54</sup> Of course sometimes a child may do this anyway in the ABE interview, but unless it is relevant material it will be edited out for the purposes of the criminal case and may be lost for good on the 'cutting room floor'.

can adversely affect the quality of the child's reporting.<sup>55</sup> Reviews of research studies have shown that under some conditions repeated interviewing of children can be beneficial, 'how and when children are interviewed is more important than how many times they are interviewed'.<sup>56</sup> The author is not aware of any research evaluating guardians' and solicitors' forensic interviewing skills or communication techniques with children. There is no family justice equivalent of the ABE interview guidance. There is no video recording system for the child's interview so there is no independent scrutiny of what was said and how it was said.

Sometimes a child will meet the family judge in person but when they do the judges' guidance is clear; it is not to give evidence to the judge (though this distinction may be meaningless to some children). Is it because the court wants the child to feel part of the process or is it because the court wants to feel that it has let the child be part of the process? In *Re A*<sup>57</sup> in the face of 'resolute opposition' the father's application for any of the children to give evidence in the care proceedings was not pursued.<sup>58</sup> Later the eldest child, a boy aged 10, wished to see the judge and he was brought by the guardian to meet him in 'the well of the court'. At this stage the judge had heard all the evidence but judgment was reserved. Appeals were brought on the basis of the record of the meeting with the boy and the paragraphs of the judgment which recorded the meeting. The appeal was dismissed because the meeting did not 'undermine the integrity of the trial process'.<sup>59</sup> Thorpe LJ noted that the 'Guidelines for Judges Meeting Children subject to Family Proceedings' issued by the FJC in April 2010 are 'only guidelines' but 'there are obvious risks, as this case well illustrates, and a judge in similar circumstances in the future needs to be aware of those risks and needs to be careful to avoid the contamination of the proceedings'.<sup>60</sup> In *Re P-S Ward* LJ said:

'Judges must, in my judgment, be very cautious when they see children in the absence of the other parties . . . Circumstances will vary infinitely and there can be no hard and fast rules but judges must be alive to the possibility that the adults who have been excluded from the meeting may feel that injustice has been done to them. As in all these cases, sensitivity is a vital attribute for the family judge.'

The case of *Re C (A Child)*<sup>61</sup> sets no precedent but is nevertheless an interesting example of practice. In a dispute between the parents as to C's religious upbringing, a county court judge heard the views of the child via a written report from a Cafcass officer and then communicated his decision to the child via a letter. The judge did not meet the child. Appended to the judgment is a clear and thoughtful letter explaining his decision. The judgment states that 'C is not to be shown a copy of this judgment'<sup>62</sup> though for a time it was available on BAILII, albeit with the standard warning notice in red regarding distribution on the basis of anonymity. One hopes that the power of the

<sup>55</sup> J Quas and M Sumaroka, 'Consequences of Legal Involvement on Child Victims of Maltreatment', in M Lamb et al (eds), *Children's Testimony – A Handbook of Psychological Research and Forensic Practice* (Wiley-Blackwell, 2nd edn, 2011), at p 340.

<sup>56</sup> T Myklebust, 'The Position in Norway', in J R Spencer and M E Lamb (eds), *Children and Cross-Examination Time to Change the Rules?* (Hart Publishing, 2012), at p 166.

<sup>57</sup> *Re A (Fact-Finding Hearing: Judge Meeting with Child)* [2012] EWCA Civ 185, [2012] 2 FLR 369.

<sup>58</sup> *Ibid*, per Thorpe J at para [5].

<sup>59</sup> *Ibid*, per Rymer J at para [64].

<sup>60</sup> *Ibid*, per Thorpe J at para [57].

<sup>61</sup> [2012] EW Misc 15 (CC).

<sup>62</sup> *Ibid*, at para [67].

internet did not defeat the judge's intention that C did not see the judgment. However, with a little creative thinking and of course resources and confidentiality issues to be overcome, computer technology could surely be harnessed to help judges feel that they have brought children into the process and to help children feel part of the process.

## HEARING VULNERABLE ADULTS IN CARE PROCEEDINGS

A parent with parental responsibility<sup>63</sup> is automatically a party to care proceedings and the parent who is a party is entitled to public funding for legal representation. The represented parent will usually make and submit at least one written witness statement. If giving evidence the parent will be called to the witness box to confirm their written statement/s and to be cross-examined. At a final hearing if a parent has accepted their past care was not good enough,<sup>64</sup> and all other testimony supports placing the child permanently with adopters, the parent facing the prospect of 'losing' their child still has what amounts to a right<sup>65</sup> to tell the judge that she wants to keep her child. Most people, including most judges, would find it morally repugnant for a parent in these circumstances to be denied the opportunity to say in evidence what they wanted to say. This would surely hold true even if the parent were 15 years old and legally still a child herself.

Some parents are vulnerable (because they are under 18 or they have a disability or disorder) and require special measures (adjustments in court) to give their best evidence. There is no research data available to indicate how often applications for family court special measures are made or how often they are implemented. There is no family justice system special measures legislation to assist a judge. A 2010 Practice Direction says that the court will 'identify any special measures such as the need for access for the disabled or provision for vulnerable witnesses'.<sup>66</sup> The court attempted to do this in *Re M (A Child)*.<sup>67</sup> The father was of 'limited capacity'<sup>68</sup> and a report recommended a number of things to support him giving evidence including 'an advocate or intermediary in order to help him to negotiate and understand the court processes and proceedings'.<sup>69</sup>

On the day he was due to give evidence there was neither a screen, a video-link (the judge pointed out that her court did not have one) nor an intermediary for the father. His counsel applied for an adjournment but the judge decided to press on. The father did testify but with what Thorpe LJ later described as 'an unsatisfactory makeshift' arrangement; the guardian took on the additional role of intermediary though he had no qualifications or experience in that role and was trying to be the guardian at the same time. The Court of Appeal noted the pressure that the judge would have been under to avoid adjourning and months of delay but:

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<sup>63</sup> A parent without parental responsibility should also be served with notice of the proceedings and may apply for full party status, see generally r 12.8 of the Family Procedure Rules 2010 (SI 2010/2955) and Practice Direction 12C – *Service of application in certain proceedings relating to children*.

<sup>64</sup> That is, the Children Act 1989 s 31 'threshold' for making a care order has been conceded.

<sup>65</sup> Notwithstanding what Ward LJ said in *Re P-S* about no one having the right to give evidence.

<sup>66</sup> Practice Direction 12A – *Public law proceedings guide to case management* (April 2010), at para 15.3(7).

<sup>67</sup> [2012] EWCA Civ 1905 (unreported) 21 November 2012.

<sup>68</sup> *Ibid*, at para [3].

<sup>69</sup> *Ibid*, at para [7].

‘that general duty [to avoid delay and achieve targets] cannot in any circumstance override the duty to ensure that any litigant in her court receives a fair trial and is guaranteed what support is necessary to compensate for disability.’<sup>70</sup>

The father’s appeal was granted with Thorpe LJ concluding:

‘Whilst it is never attractive to order a retrial of any fact finding investigation, I conclude that we have no alternative, and that is the consequence of finding a breach of Article 6 [ECHR] rights [to a fair hearing].’

At a retrial the father was assisted in giving evidence by special measures including an intermediary.

The human rights of a vulnerable adult witness were in issue in *Re A (Sexual Abuse: Disclosure)*.<sup>71</sup> The Supreme Court considered whether or not the identity of a vulnerable witness (X) should be disclosed to the father in an attempt to resolve a welfare issue concerning his daughter. Counsel for X argued unsuccessfully that to disclose her identity would violate her right not to suffer inhuman or degrading treatment (Article 3 of the European Convention on Human Rights). The Supreme Court set out in theory what adaptations could be made to avoid confrontational cross-examination and distress to the vulnerable witness:

‘There are many ways in which [X’s] evidence could be received without recourse to the normal method of courtroom confrontation . . . If she is too unwell to cope with oral questioning, the court may have to do its best with her recorded allegations, perhaps supplemented with written questions put to her in circumstances approved by [her doctor]. On the other hand, oral questioning could be arranged in ways which did not involve face to face confrontation . . . The court’s only concern in family proceedings is to get at the truth. The object of the procedure is to enable witnesses to give their evidence in the way which best enables the court to assess its reliability. It is certainly not to compound any abuse which may have been suffered.’<sup>72</sup>

Calling a witness in these circumstances did not amount to an Article 3 violation however the decision in *R (B) v Director of Public Prosecutions*<sup>73</sup> lends support to the argument that in certain circumstances *not* calling a witness, for example, a child who wants to be called to give evidence about the harm they have suffered, could amount to a breach of their Article 3 rights. *R (B)* concerned an erroneous decision by trial

<sup>70</sup> Ibid, at para [21].

<sup>71</sup> [2012] UKSC 60, [2013] 1 FLR 948: the extremely vulnerable young female witness did eventually have to cope with oral questioning. She subsequently gave evidence at a fact finding hearing over the TV link assisted by an intermediary with considerable experience of criminal and family cases, at para [5]. The live link had to be interrupted at one point because the father, who was supposed to only look ahead, turned round and looked at the screen to see the witness. At para [31]. See *Re A (A Child) (Vulnerable Witness) (Fact Finding)* [2013] EWHC 2124 (Fam), [2014] 1 FLR 146.

<sup>72</sup> Ibid, at para [36].

<sup>73</sup> [2009] EWHC 106 (Admin), [2009] WLR 2072, at para [70]: ‘In this case FB suffered a serious assault. The decision to terminate the prosecution on the eve of the trial, on the ground that it was not thought that FB could be put before the jury as a credible witness, was to add insult to injury. It was a humiliation for him and understandably caused him to feel that he was being treated as a second class citizen. Looking at the proceedings as a whole, far from them serving the State’s positive obligation to provide protection against serious assaults through the criminal justice system, the nature and manner of their abandonment increased the victim’s sense of vulnerability and of being beyond the protection of the law. It was not reasonably defensible and I conclude that there was a violation of his rights under Article 3’.

counsel to offer no evidence based on a 'misreading' of a doctor's report about FB's mental condition or 'an unfounded stereotyping of FB as someone who was not to be regarded as credible on any matter because of his history of mental problems'.<sup>74</sup>

## LESSONS FROM THE CRIMINAL COURTS' APPROACH TO VULNERABLE WITNESSES

The principle of orality in criminal cases ensures that witnesses whose evidence is in dispute are usually required to give evidence in person. Hearsay can be admitted under certain provisions such as the Criminal Justice Act 2003,<sup>75</sup> but this is the exception rather than the rule.<sup>76</sup> Vulnerable witness legislation<sup>77</sup> enabling recordings of ABE interviews to stand as evidence in chief (an exception to the rule against hearsay) and the widespread use of live-link for cross-examination can be traced back to the Pigot Report of 1989.<sup>78</sup> Subsequent legislation has been described as 'a stripped down version of a far more radical system' initially proposed by the Pigot Report.<sup>79</sup> The Youth Justice and Criminal Evidence Act 1999 provides 'special measures' for eligible<sup>80</sup> vulnerable witnesses: screening the witness from the accused (section 23), evidence given by live-link (section 24), evidence given in private (section 25), removal of wigs and gowns while the witness gives evidence (section 26), video recorded evidence in chief (section 27), video recorded cross-examination and re-examination (section 28), evidence given through an intermediary (section 29) and the use of aids to communications (section 30).<sup>81</sup> Section 102 of the Coroners and Justice Act 2009 now also provides for a supporter to accompany the witness while giving evidence in the live link room.

Pre-recording all of cross-examination and re-examination has not yet been brought into force.<sup>82</sup> The Pigot Report said pre-recording should happen outside the courtroom in informal surroundings and the recording would, in due course, be played to the jury. Spencer says that if pre-recorded cross-examination and re-examination is brought in, it is likely to 'ameliorate some of the current problems [for child witnesses], but not solve them all'.<sup>83</sup> The long-awaited introduction of pre-recorded cross-examination, which has been and still is opposed by some members of the criminal bar, came back on the government's agenda<sup>84</sup> following a media outcry<sup>85</sup> about the manner of cross-examination of some vulnerable witnesses. In June 2013 the MoJ announced

<sup>74</sup> Ibid, at para [55].

<sup>75</sup> Section 116.

<sup>76</sup> A recent example is *R v Claridge* [2013] EWCA Crim 203 (unreported).

<sup>77</sup> Primarily now found in the Youth Justice and Criminal Evidence Act 1999.

<sup>78</sup> Judge Thomas Pigot QC, *Report of the Advisory Group on Video Evidence* (HMSO, 1989).

<sup>79</sup> M Hall, 'Giving evidence at aged 4: just means to just ends?' [2009] Fam Law 608, at p 608.

<sup>80</sup> Section 16 witnesses are eligible for ss 23–30 special measures if they are under 18 at the time of the hearing or the quality of if their evidence is likely to be diminished by reason of a mental disorder or a significant impairment of their social functioning or if they have a physical disability or physical disorder. Section 17 witnesses are eligible for the special measures in ss 23–28 assistance on the grounds of fear or distress.

<sup>81</sup> See Part 2, Chapter 1 of the Youth Justice and Criminal Evidence Act 1999.

<sup>82</sup> Section 28 of the Youth Justice and Criminal Evidence Act 1999 allows for pre-recorded cross-examination and re-examination.

<sup>83</sup> J R Spencer and M E Lamb (eds), *Children and Cross-Examination Time to Change the Rules?* (Hart Publishing, 2012), at p 173.

<sup>84</sup> For instance see the speech of the Attorney General, The Rt Honourable Dominic Grieve QC MP, 26 April 2013, Parliament Chamber, Inner Temple at the launch of [theadvocatesgateway.org](http://theadvocatesgateway.org).

the government's plan to pilot pre-trial cross-examination for vulnerable and intimidated witnesses 'by the end of the year' in three crown courts.<sup>86</sup> Hall noted that 'the opposition of the Criminal Bar Association highlights the important point that reforms will achieve little without associated changes in the occupational cultures of criminal practitioners'.<sup>87</sup>

Criminal court judges will sometimes use their inherent jurisdiction to go beyond the special measures described in the legislation. For instance screens have been used so that the vulnerable witness cannot be seen on live link by the defendant<sup>88</sup> and in another recent crown court case cross-examination took place not over the live link but entirely in the live link room.<sup>89</sup> The judge in court could still monitor and intervene via live link. Case-law as opposed to legislation has also put a detailed focus on the way in which advocates put their questions to vulnerable witnesses. In *R v B*<sup>90</sup> a 4-year-old girl gave evidence of sexual abuse which had taken place when she was 2. She was cross-examined by defence counsel over live link at the Old Bailey. The judgment contains landmark guidance about the approach to cross-examination of a child witness:

'Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources.'<sup>91</sup>

In *R v W and M*<sup>92</sup> the trial involved two 10-year-old boys on trial at the Old Bailey for the rape of an 8-year-old girl, and the Court of Appeal laid down further guidance on questioning of child witnesses, 'It is generally recognised that particularly with child witnesses short and untagged questions are best at eliciting the evidence'.<sup>93</sup> In *R v E*,<sup>94</sup> where the child witness/victim was aged 5, the judge directed that the traditional form of cross-examination would not occur and would be restricted to asking necessary questions. A number of children as young as 4 have given evidence as victims in criminal trials and this 'includes a number of children who were three when

<sup>85</sup> See for instance A Norfolk, 'Abuse trial that shamed the British legal system' (2013) *The Times*, 23 May, <http://www.thetimes.co.uk/tto/law/article3772541.ece> (accessed 30 June 2013) and E Rantzen, 'Stop child abuse victims being tormented in court' (2013) *Daily Mail*, 30 May, <http://www.dailymail.co.uk/news/article-2333009/Esther-Rantzen-Stop-child-abuse-victims-tormented-court.html#ixzz2XcbDvdG9> (accessed 30 June 2013).

<sup>86</sup> 'The pilots will run for 6 months followed by an assessment period after which we will consider how best to take this measure forward', written Ministerial Statement dated 13 June 2013 on pre-trial cross-examination.

<sup>87</sup> M Hall, 'Giving evidence at aged 4: just means to just ends?' [2009] *Fam Law* 608, at p 609.

<sup>88</sup> It is not a special measure under the Youth Justice and Criminal Evidence Act 1999 but for case-law supporting the court's inherent power to order this, see *R v Smellie* (1919) 14 Cr App R 128.

<sup>89</sup> Email to the author from registered intermediary R Marchant, July 2012.

<sup>90</sup> [2010] EWCA Crim 4 (unreported) 21 January 2010.

<sup>91</sup> *Ibid*, at para [42].

<sup>92</sup> [2010] EWCA Crim 1926 (unreported) 27 July 2010.

<sup>93</sup> *Ibid*, at para [30].

<sup>94</sup> [2011] EWCA Crim 3028, [2012] Crim LR 563.

the police interviews were undertaken, some of whom were giving evidence about events that happened when they were two'.<sup>95</sup>

The Court of Appeal Criminal Division recognises that questioning a vulnerable witnesses 'requires not only training, flexibility and sensitivity, but also time and patience'.<sup>96</sup> In *R v F* it 'was not that [the vulnerable witness] had failed the competency test, but rather the way the test had been conducted had failed [the vulnerable witness]'.<sup>97</sup> The judgment sent a key message to criminal advocates about preparation: 'The shortcomings of this process seem to us to owe much to a lack of preparation and a lack of ability to respond flexibly to the difficulties which arose'.<sup>98</sup>

The Criminal Procedure Rules 2005 introduced the court's overriding objective of ensuring that criminal cases are dealt with justly.<sup>99</sup> The interests of witnesses are among the factors that the judge should take into account.<sup>100</sup> In addition, since 2010 'ground rules' for questioning the vulnerable witness 'must be discussed between the court, the advocates and the intermediary before the witness gives evidence'.<sup>101</sup> Victims in criminal cases have entitlements under the Code of Practice for Victims of Crime introduced in 2006.<sup>102</sup> The 2013 revised Code includes enhanced entitlements for children and adults in the 'priority category' which includes vulnerable adults. Witness familiarisation<sup>103</sup> is an entitlement for all victims under the Victims' Code and is provided for free by the Witness Service in criminal cases for victims and witnesses. There is 'lab research' to support the good sense of witness preparation for adults.<sup>104</sup> The latest version of ABE,<sup>105</sup> Annex K encourages the use of non-evidential role-play for child witnesses. It is of real importance because research with young witnesses across the age groups showed that around half who recognised they had a problem do not tell the court.<sup>106</sup> *Raising the Bar*, a 2011 report by the Advocacy Training Council<sup>107</sup>

<sup>95</sup> R Marchant, 'How young is too young? The evidence of children under five in the English criminal justice system' [2013] *Child Abuse Review*, www.wileyonlinelibrary.com, DOI: 10.1002/car.2273. See also C Wigin, 'Child Q England's youngest witness' [2012] *Counsel*, July 24.

<sup>96</sup> *R v F* [2013] EWCA Crim 424, [2013] 1 WLR 2143, at para [26].

<sup>97</sup> P Cooper, 'Witness competency hearings: a test of competence' (2012) (2) *Criminal Bar Quarterly* 5. See also E Laws, 'Incompetent competency hearings' (2014) April *Counsel* 28.

<sup>98</sup> *R v F* [2013] EWCA Crim 424, [2013] 1 WLR 2143, at para [27].

<sup>99</sup> Criminal Procedure Rules 2012 (SI 2012/1726), Part 1, r 1.1(1).

<sup>100</sup> *Ibid*, Part 1, r 1.1(2)(d).

<sup>101</sup> *Ibid*, r 29.10 and the Application for a Special Measures Direction Form, at Part F, and now the Criminal Practice Directions [2013] EWCA Crim 1631 require there to be a Ground Rules Hearings in any case with a vulnerable witness or vulnerable defendant, even if there is no intermediary.

<sup>102</sup> In December 2013 the MoJ published a revised Code of Practice for Victims of Crime. Its statutory footing is in ss 32–34 of the Domestic Violence Crime and Victims Act 2004. A revised version of the Witness Charter was also published by the MoJ in December 2013. Unlike the Victims' Code, it is not legally binding.

<sup>103</sup> *R v Momodou and Limani* [2005] EWCA Crim 177, [2005] 1 WLR 3442, Judge LJ drew the distinction between witness preparation which is permissible and witness coaching which is not; the court stated that the witness's evidence must be their 'own uncontaminated evidence' and records of the procedure must be kept.

<sup>104</sup> J M Wheatcroft and L E Ellison, 'Evidence in court: adult witness familiarisation and cross-examination, style effects on witness accuracy' (2012) 30 *Behavioural Sciences and the Law* 821.

<sup>105</sup> Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings Guidance on Interviewing Victims and Witnesses, and Guidance on using Special Measures* (MoJ, 2011).

<sup>106</sup> J Plotnikoff and R Woolfson, *Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (NSPCC/Nuffield Foundation, 2009), at p 111.

<sup>107</sup> The Advocacy Training Council is the body responsible for overseeing standards of advocacy training for the Bar of England and Wales.

said that all advocates should be 'issued with "toolkits" setting out common problems encountered when examining vulnerable witnesses and defendants, together with suggested solutions'. Toolkits and other guidance on best practice with vulnerable witnesses and defendants in criminal cases are now available online.<sup>108</sup> Using them is optional but, after a long wait, perhaps compulsory training of advocates in cross-examining vulnerable witnesses is finally becoming a realistic prospect. The Bar Council is encouraging the creation of a 'required' training programme.<sup>109</sup>

In 2012 Hallett LJ gave a talk entitled 'The judiciary perspective on the child witness' in which she said 'Why isn't the family justice system emulating the criminal justice system?'. Perhaps shortage of funding has something to do with it, or the fact that adaptations for vulnerable witnesses in the criminal justice system are still work in progress. The latter could be regarded by those who run the family justice system as a reason to adopt a 'wait and see' approach. Despite numerous marked and significant changes the consensus among the many researchers and commentators is that for child witnesses the criminal justice system is still not 'measuring up'.<sup>110</sup> Henderson says there are still 'major problems', the two most significant being delays before trial and the 'language and techniques of cross-examination'.<sup>111</sup> She concludes that the 'answer lies in an examination of what it is about cross-examination that is so crucial to a fair trial' and 'it might be possible to envisage a process for testing witnesses within an accusatorial trial which did not rely upon lawyers to act as examiner'.<sup>112</sup> In Denmark, for example, the police interview of a child is collaborative; in that legal professionals can direct an interviewer through an ear piece to ask certain questions of the child.<sup>113</sup> In Austria the judge plays 'a dominant and active' role and prosecuting and defence lawyers can only question the witness secondarily.<sup>114</sup> Scotland's 'Children's Hearings' are also worthy of note; children have been able to attend hearings for over 40 years.<sup>115</sup> Hearings are for 'children who need help in their lives for various reasons. This could be because a child's parents are having difficulty looking after them, the child is not attending school, is at risk of being harmed or where they have committed a crime'.<sup>116</sup> Children as well as their parents must normally attend the hearings, which are actually meetings in private venues.<sup>117</sup> Decisions are 'made about them in an

<sup>108</sup> See [theadvocatesgateway.org](http://theadvocatesgateway.org) (accessed 19 August 2013).

<sup>109</sup> See <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2013/july/bar-council-encourages-creation-of-a-required-training-programme-for-cross-examination-of-vulnerable-witnesses/> (accessed 19 August 2013).

<sup>110</sup> J Plotnikoff and R Woolfson, *Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (NSPCC/Nuffield Foundation, 2009).

<sup>111</sup> E Henderson, 'Alternative Routes: Other Accusatorial Jurisdictions on the Slow Road to Best Evidence', in J R Spencer and M E Lamb (eds), *Children and Cross-Examination Time to Change the Rules?* (Hart Publishing, 2012), at p 73.

<sup>112</sup> *Ibid.*

<sup>113</sup> J Quas and M Sumaroka, 'Consequences of Legal Involvement on Child Victims of Maltreatment', in M Lamb et al (eds), *Children's Testimony – A Handbook of Psychological Research and Forensic Practice* (Wiley-Blackwell, 2011), at p 339.

<sup>114</sup> V Murschetz, 'Child Witnesses in Austria', in J R Spencer and M E Lamb, *Children and Cross-Examination Time to Change the Rules?* (Hart Publishing, 2012), at p 136.

<sup>115</sup> The system was established by the Social Work (Scotland) Act 1968 following *The Kilbrandon Report* (HMSO, 1964).

<sup>116</sup> See <http://www.victimsupportsco.org.uk/page/youthcrime/childrenshearings.cfm> (accessed 19 August 2013).

<sup>117</sup> *Ibid.*

atmosphere conducive to their participation'<sup>118</sup> and there is provision for the use of live link for the vulnerable.<sup>119</sup> However when matters are in dispute the Scottish system still relies on adversarial cross-examination conducted by a lawyer.

The solution to the problem in the family courts is very unlikely to be a wholesale import of the special measures from the criminal justice system. The criminal justice system's role is to 'balance the rights of the accused with the desire to ascertain the truth',<sup>120</sup> but as the case-law demonstrates sometimes the vulnerable witness is pinched between two competing aims. Criminal judges are conscious that they must remain impartial 'umpires' and should not descend into the arena as the prosecution seeks to prove its case and the defence uses cross-examination to undermine prosecution witnesses. The occupational culture of criminal court judges inevitably has a bearing on the regime of special measures. In contrast in care proceedings it is the best interests of the child that are of paramount importance to the judges and as a result the role of the family judge is multi-dimensional; they are 'adjudicator and umpire, scrutiniser and administrator'<sup>121</sup> rolled into one. Family judges descending into the family court arena to facilitate a search for what is best for the child is often the very thing that makes them most effective.

Any special measures introduced into the family courts ought to support the judge-led nature of family justice rather than shift the balance of power towards adversarial-by-nature cross-examiners. While the purpose of the family court hearing is different and some courtrooms sometimes can appear informal,<sup>122</sup> the traditional evidence testing method is still cross-examination. It is in some ways remarkable that the family courts are further away from having advocates specially trained in cross-examination of vulnerable witnesses than the criminal courts are. Consideration could be given to intermediaries operating in a new, different way; they could be briefed by counsel and then pose the questions.<sup>123</sup> Pre-recording of all the evidence of the vulnerable witness should also be explored. This need not take place in the courtroom and if necessary it could be conducted via an intermediary. Live link combined with pre-recording is unlikely to be enough to facilitate the evidence of vulnerable witnesses since the questions may still be poorly framed and/or intimidating. The best way forward for the family courts needs debating and needs debating soon.

## **IS PARITY WITH THE CRIMINAL COURTS REALLY THE RIGHT WAY FORWARD?**

One the one hand there is a desire to make suitable adjustments so that vulnerable witnesses can be properly cross-examined however on the other there is growing scientific evidence to suggest that cross-examination is not the way to obtain reliable accounts from witness, particularly children. In an excellent paper reviewing the

<sup>118</sup> W Simmonds, 'Are we there yet?' (2007) *Association of Lawyers for Children Newsletter*, October.

<sup>119</sup> Vulnerable witness provisions in the Children's Hearings (Scotland) Act 2011.

<sup>120</sup> N Bala, A Evans and E Bala, 'Hearing the voices of children in Canada's criminal justice system: recognising capacity and facilitating testimony' [2010] CFLQ 21.

<sup>121</sup> J Eekelaar and M Maclean, *Family Justice the Work of Family Judges in Uncertain Times* (Hart Publishing, 2013), at chapter 5, 'Judging', which describes the authors' and Darbyshire's empirical, strikingly similar observations of family court judges.

<sup>122</sup> No wigs or gowns are worn and some rooms are set up in boardroom style with modern furnishings.

<sup>123</sup> For an exploration of different intermediary models see E Davies, K Hanna, E Henderson and L Hand, *Questioning Child Witnesses – Exploring the benefits and risks of intermediary models* (Institute of Public Policy, AUT University, 2011).

research on child witness cross-examination, Rachel Zajac et al concluded that 'cross-examination is unlikely to be the truth finding technique that many believe it to be' and the:

'legislature and judiciary also need to be open to alternative means of gathering and testing children's evidence . . . What empirical research has yet to tell us is how proposed alternative methods of testing children's evidence fare with regard to establishing the truth.'

An opportunity presents itself for the family courts. With regard to new ways of hearing and testing the evidence from vulnerable witnesses the options are open.

A FJC held a conference at Dartington in 2011<sup>124</sup> recommended:<sup>125</sup>

'(7) That following the decision of the Supreme Court in *Re W* removing the presumption against children giving evidence, child witnesses in all family cases should be provided with no less a level of support and protection than that which is afforded to children giving evidence in the criminal justice system, including the use of intermediaries, the provision of which will require legal reform and primary legislation.'

Less than 2 months later the Norgrove *Family Justice Review* said that:

'Children and young people should be given age appropriate information to explain what is happening when they are involved in cases. They should as early as possible be supported to make their views known and older children should be offered a menu of options, to lay out the ways in which they could – if they wish – do this ...'<sup>126</sup>

and '[m]ore should be done to allow children to have a voice in proceedings'.<sup>127</sup>

The government responded<sup>128</sup> to Norgrove by echoing that: 'Children deserve to be heard, feel that they have been listened to and understand what is happening throughout' and:

'[w]e expect the new [Family Justice] Board will look quickly to find ways to support and involve children and young people, will develop age-appropriate information so children have a clear understanding of what might happen to them and will provide children with a range of ways in which they can feed in.'<sup>129</sup>

<sup>124</sup> Selected conference papers and the recommendations in full including the author's paper, 'Hearing the Voice of the Child in Family Cases: Are we Barking up the Tree?', at pp 23–31, in Thorpe LJ and Tyzack (eds), *Dear David: A Memo to the Norgrove Committee from the Dartington Conference* (Jordan Publishing Ltd, 2011).

<sup>125</sup> Following the plenary session on 2 October 2011.

<sup>126</sup> Family Justice Review Final Report, November 2011, recommendation 9, 'The child's voice' in the Executive Summary.

<sup>127</sup> *Ibid*, at para 2.14, p 45.

<sup>128</sup> *The Government Response to the Family Justice Review: A system with children and families at its heart* (TSO, 2012), at para 25, p 10.

<sup>129</sup> *Ibid*, at para 30, p 11.

In July 2012 the government announced David Norgrove as the Chair of the new Family Justice Board and in January 2013 it produced its action plan.<sup>130</sup> One of the objectives of the board is 'to oversee the delivery of particular [Family Justice Review] recommendations e.g. . . . the "voice of the child" as specified by Government'.<sup>131</sup> It is early days for the board and it has had urgent priorities related to the Children and Families Bill such as the proposed introduction of a '26 time limit in public law cases' and 'strengthening controls on of the use of experts'.<sup>132</sup> the Ryder Review<sup>133</sup> has set out a plan for modernising the family justice system and it briefly addresses 'the voice of the child',<sup>134</sup> stating that '[c]onsideration should always be given to how the voice of the child is to be heard in family proceedings' and stating a commitment to the recognising a child's right to have their opinions taken into account.<sup>135</sup> The Dartington Conference recommendation for primary legislation to create special measures parity has seemingly been watered down by successive reviews and responses and the debate seems to have all but petered out. The question remains for the Family Justice Board: how should the voice of the child be heard? The board would do well to consider the issue of vulnerable adults at the same time and explore more than just a replica of special measures in the criminal justice system.

## CONCLUSION

In an imaginary leader board of vulnerable witness entitlements, vulnerable witnesses in the criminal courts come out top, followed by vulnerable adults in care proceedings and then children in care proceedings trailing a long way behind. In criminal cases, child victims as young as 2 can give evidence at interview, and many 4 year olds have given evidence at trial assisted by court familiarisation, pre-recorded evidence in chief, a witness supporter, an intermediary, and live link. Though it has long been recognised that the family court is no place for adversarial game-playing<sup>136</sup> the family court still utilises adversarial cross-examination to test a witness's evidence and has not come up with a package of special measures for vulnerable witnesses.

Children in care proceedings can be categorised as vulnerable witnesses by virtue of their age. Their past experiences may make them particularly vulnerable. Judges in care proceedings, who seek to find the best outcome for children who have been neglected and abused, understandably want to protect those children from further harm. However it is possible that for some of these children not allowing them to be witnesses will cause them harm. Their evidence may not be effectively elicited or relayed and of course cannot be clarified or tested directly with them. If they are not heard in person they may feel 'second class' to the other parties. It may also make it harder for them to accept the decision and the authority of the court. This could affect

<sup>130</sup> *Family Justice Board action plan to improve the performance of the family justice system*, January 2013 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/141755/FJB-action-plan-web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/141755/FJB-action-plan-web.pdf) (accessed 19 August 2013).

<sup>131</sup> *Ibid.*, at Annex A: Family Justice Board – terms of reference, p 22, 4 (vi).

<sup>132</sup> *Ibid.*, at p 10.

<sup>133</sup> Ryder J, *Judicial Proposals for the Modernisation of Family Justice* (TSO, 2012).

<sup>134</sup> *Ibid.*, at p 15.

<sup>135</sup> See Art 12 of the United Nations Convention on the Rights of the Child 1989 which, in 1991, the UK agreed to be bound by.

<sup>136</sup> *Oxfordshire County Council v M* [1994] 1 FLR 175. Sir Stephen Brown P endorsed the words of the trial judge: 'The game of adversarial litigation has no point when one is trying to deal with fragile and vulnerable people like small children. Every other consideration must come second to the need to reach the right conclusion if possible'.

the child's sense of autonomy and self-respect and may compound past neglect and abuse. Child witnesses in care proceedings are rare. For 'the world to turn on its head' or at least for there to be a paradigm shift the test in *Re W* would need reframing so that, simply, the advantages are weighed against the disadvantages. References to advantages to determine the truth versus the damage that may be done to the welfare of the child introduce an unnecessary bias towards a conclusion that the child should not give evidence.

Reframing the test is not enough. The issue of whether children who are parties to care proceedings are being afforded sufficient autonomy is worthy of a wider debate.<sup>137</sup> This is particularly so when one considers teenagers who by contrast, if sufficiently mature, can lawfully obtain contraception or even a termination of pregnancy without their parents being informed.<sup>138</sup> The President of the Family Division in *Re G (Education: Religious Upbringing)*<sup>139</sup> said:

'The concept of welfare is, no doubt, the same today as it was in 1925, but conceptions of that concept . . . have changed and continue to change. A child's welfare is to be judged today by the standards of reasonable men and women in 2012, not by the standards of their parents in 1970, and having regard to the ever changing nature of our world: changes in our understanding of the natural world, technological changes, changes in social standards and, perhaps most important of all, changes in social attitudes.'<sup>140</sup>

Would the reasonable men and women in today's society think that teenagers should be denied a chance to give evidence to a family judge? Is current practice in care proceedings compliant with the overriding objective to deal with cases 'fairly'? Is it 'proportionate' to hear children's views through a third party when the 'importance' of the decision could hardly be any greater for them? Does current practice really put children on an 'equal footing' with the other parties?<sup>141</sup>

It is likely that many adult witnesses who face the permanent removal of their children can be categorised as vulnerable on account of a disability affecting their ability to communicate as witnesses. A great deal of family court practice would need to change in order to afford vulnerable witnesses (vulnerable adults and those under 18) in care proceedings the sort of assistance they can get in a criminal case. There would need to be guidance and specialist training for those questioning the vulnerable. There would need to be pre-recording of evidential interviews, pre-court familiarisation, court supporters, registered intermediaries and special measures (such as live link and screens). By the time the family justice system puts these in place (if it ever does) the criminal justice system might have moved on. The Lord Chief Justice said

<sup>137</sup> For a discussion on the theory and a focus on children's autonomy interests see J Herring, R Probert and S Gilmore, *Great Debates in Family Law* (Palgrave Macmillan, 2012), chapter 3, 'Children's Rights'.

<sup>138</sup> See *Gillick v West Norfolk and Wisbech Health Authority* [1986] 1 AC 112, [1986] 1 FLR 224, and *R (Axon) v Secretary of State for Health* [2006] EWHC 37 (Admin), [2006] 2 WLR 1130, [2006] 2 FLR 206, respectively.

<sup>139</sup> [2012] EWCA Civ 1233, [2013] 1 FLR 677.

<sup>140</sup> *Ibid*, at para [33].

<sup>141</sup> All these words in inverted commas are references to 'The overriding objective' in the Family Procedure Rules 2010.

extra-judicially in relation to child victims' evidence in the criminal courts: 'During the last 25 years there have been remarkable changes . . . we must confidently expect this revolution to continue'.<sup>142</sup>

We do not know how many witnesses in care proceedings are currently identified or treated as vulnerable. We do not have a clear definition of who they might be. We know that there would probably be many. Each vulnerable adult and child must be considered as the individual they are before decisions to call them are taken yet resources do not support special measures and in the case of a child, there is also a legal test which is stacked against them. Applications regarding how to hear a vulnerable witness in care proceedings will continue. The witness and their family's Article 6 and Article 8 rights will probably be engaged, and on occasion the witness's Article 3 and Article 14 (non-discrimination) rights as well. Arrangements will be made case by case on an ad hoc basis. The Family Justice Board ought not to consider mere parity but instead a leap frog move to go beyond the criminal system, finding a way to allow vulnerable witnesses to have their evidence gathered reliably and tested in a way that is not harmful:

'One possibility is an early video'd cross examination as proposed by Pigot. Another is cross-examination via video link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in continental Europe and used to be much more common than it is now in the courts of this country.'<sup>143</sup>

The Supreme Court has already made these suggestions. Unless the Family Justice Board takes up the issue the likelihood is that children and vulnerable adults in the family courts will continue to receive a second class service.

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<sup>142</sup> Lord Judge LCJ, 'Half a century of change: the evidence of child victims', speech given at the Toulmin Lecture in Law and Psychiatry, Wednesday 20 March 2013, King's College London.

<sup>143</sup> *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485, at para [28].