

**POINTS EMERGING FROM DISCUSSION Nuffield Foundation seminar 10 June 2010:  
*Questioning young witnesses and incorporating good practice into advocacy training***

The seminar addressed four questions:

**1. Are advocates hindered from putting the defendant's case if they cannot lead the witness?**

*'We've achieved the worst of all possible worlds. The current system is absolutely absurd.'*  
(QC)

Young witnesses' evidence must be tested but this is often not done in a developmentally appropriate way, either because advocates lack knowledge or because cross-examination techniques such as 'tag questions' exploit children's developmental limitations. 'Testing' should not mean 'trickery' and advocates need to come at the problem of questioning children in another way.

The practice of 'putting the case' to the witness and acceptance of interspersing comments in questions dates back to before 1836 when counsel could cross-examine but not address the jury. 'Putting the case' is not required in all common law jurisdictions. The Court of Appeal decision in *Barker* ([2010] EWCA Crim 4, para 42) indicates that this should not happen in detailed cross-examination of a child and can be done in other ways. Often the defence case is simply that the prosecution version of events did not happen so there is little point in putting any alleged detail to a young witness. Unfairness to the accused could be minimised by the judge explaining to the jury and to the defendant that cross-examination of a child/vulnerable witness is conducted in a different way to cross-examination of other witnesses and explain the differences. Advocates attending the Criminal Bar Association (CBA) young witness conference in April expressed concern at the prospect of moving away from 'putting their case'.

**2. Are existing measures sufficient to ensure questioning is developmentally appropriate?**

*'I did intervene quite a lot but it's very difficult. The defence could argue I was interfering.'*  
(Judge)

*'You can only interrupt or send the jury out so many times. If I interrupt four out of seven questions, I can't do it again... [and even if poor practice is brought to the attention of the head of chambers] they come back and do it in exactly the same way. Their role is to get the client off and they will.'* (Judge)

*'The ideal situation is where the defence follow ground rules discussed beforehand, questions are developmentally appropriate and I don't have to say anything at all.'*  
(Intermediary)

Existing provisions to ensure developmentally appropriate questioning are not effective. Pre-trial 'ground rules' discussions of the approach to questioning are rare, intermediaries are

under-used for children who may benefit and judges feel their ability to intervene during cross-examination is necessarily limited. Adherence to good practice cannot easily be coerced (there is no formal basis for complaint to the professional body about cross-examination that flouts guidance on questioning). There was a need for routine advance discussion and agreement between the judge/ magistrates and parties about how the young witness is to be questioned (recommended in *The Equal Treatment Bench Book*, encouraged in Judicial Studies Board training and essential where an intermediary is appointed).

Questioning problems arise where assumptions and generalisations are made about children's communication abilities. Information is needed about the individual child, particularly as many factors impeding communication are hidden and the child may look able or mature but is not. Research shows that at least half of young witnesses across all age groups do not understand some questions at court and the majority of these feel unable to tell the court *that they do not understand the questions*.

### **3. How should developmentally appropriate questioning be addressed in advocacy training?**

*'Barristers don't have the remotest idea about children's development – and judges only have a little.'* (Judge)

*'We have to move to some form of "gold standard" code of questioning.'* (QC)

*'Advocates only learn when they're under threat. There's a need for training across the professions and from juniors to senior silks.'* (Training organisation representative)

*'Until the Bar accept the need for specialisation the situation won't improve.'* (Judge)

*'We won't get this right until defence counsel are ticketed. Some shouldn't be doing it.'* (Judge)

A survey of training organisations conducted for the seminar shows that advocacy training on this subject was uneven, with some organisations doing nothing because it is not required or recommended. Most of what is offered is lecture-based. The most effective advocacy training, that is, 'learning by doing' in small groups in which the delegate performs an exercise and receives trainer feedback, should be used in training on this issue, preferably with a judge presiding. The role of the witness can be taken by an actor or by children in non child-abuse scenarios. However, it was acknowledged this style of training is expensive and time-consuming. In order to help change the culture, good practice should also be demonstrated at conferences (well-received at CBA events) and through DVD material. The CBA plans to develop a DVD in consultation with the NSPCC and others. It was suggested that viewing should be compulsory for those who want to be deemed competent on this subject.

The Advocacy Training Council (ATC) has taken account of the increasing numbers of vulnerable witnesses coming to court and the public expectation that they will be dealt with well, that their evidence will be tested appropriately and that justice will be done. An ATC committee has taken evidence from a range of experts on how best to train barristers to handle vulnerable witnesses and defendants in court and a report is forthcoming. One possible approach is to ring-fence some of the annual requirement of 12 CPD hours for training in respect of vulnerable defendants and witnesses. The ATC committee has invited and initiated proposals for model training programmes including one with a child psychiatrist in partnership with Kingston University. It was noted that training also needed to include those appearing in magistrates' and youth courts.

There is a need for a “gold standard” checklist or code on questioning young witnesses, endorsed by the Ministry of Justice, Council of Circuit Judges etc. to raise consciousness (the *Good Practice Guidance on questioning children*, endorsed by several key groups, is a start in this process).

Advice on how children should be questioned is now incorporated into Judicial Studies Board courses. A DVD demonstrating use of an intermediary and good and poor questioning practice has recently been developed for the Serious Sex Offences course. It was recognised that some judges do not follow recommended good practice in managing young witness cases and that more could be done.

There was support for ‘ticketing’ advocates in order to raise standards. However, it was pointed out that many solicitors and barristers start their career dealing with young witnesses and defendants in the youth court. They may struggle to question appropriately but ticketing could rule them out from this level of work. At the other end of the scale, in rape cases the CPS has a system for ticketing advocates for the prosecution but there is no equivalent for the defence. The Joint Advocacy Group and ATC are considering the question of ticketing.

#### **4. Are there alternatives to the current system?**

In 1989, the Pigot Committee recommended that courts should have discretion to order that children’s evidence be taken at a preliminary hearing and, in exceptional cases, that advocates’ questions be relayed through a specialist child examiner who enjoys the child’s confidence. Section 28 of the Youth Justice and Criminal Evidence Act 1999 (which has not been implemented) allows for pre-trial cross-examination, but without the provision for a child examiner. Pre-trial delay causes problems for all involved, especially the child and there was still a need to take children’s evidence at an early hearing. This would be Article 6 compliant. Disclosure could be managed and expedited to accommodate this process, and a second, later, cross-examination could be allowed if necessary. Cross-examination must still be developmentally appropriate and could be done through an expert.

The judiciary and Bar in Western Australia have given strong support to their experience with taking children’s evidence at pre-trial hearings since the 1990s. This has greatly speeded up the process and made trials more efficient. Children giving evidence at the trial inevitably prolongs the length of the trial. If children are required to give evidence in family cases in light of *Re W* ([2010 UKSC 12]), alternative approaches were seen as desirable; it was suggested this was also relevant to concurrent criminal and family proceedings.

Professors John Spencer (law) and Michael Lamb (psychology) are organising an international conference in Cambridge on 14-15 April 2011. This will hear from other jurisdictions which take children’s evidence before trial. Some of these use a specialist child examiner.

#### *Key points*

- *Questioning must be developmentally appropriate to the young witness. It may therefore be inappropriate to put the defence case to the child in cross-examination. This should be dealt with in a different way, as set out in the Barker decision. Guidance for advocates is needed.*
- *In light of Barker, clarification is needed as to the judge’s role in explaining this modified approach to the defendant and the jury.*
- *Information about children’s development and communication skills should be sought by the party calling them, and requested by the judge/ magistrates if not supplied. The court has discretion to appoint an intermediary even if no application is made*

*(‘Achieving Best Evidence’ says that intermediary assessment should be considered where the child is unlikely to recognise a problematic question or tell someone in authority that they have not understood).*

- *Routine advance discussion and agreement between the judge/ magistrates and parties on the way a young witness is to be questioned should be encouraged.*
- *Intermediaries may suggest alternative approaches to leading questions where these risk producing unreliable answers from the witness in question. Judicial guidance would assist in developing greater consistency of approach in responding to such suggestions.*
- *Consideration should be given to developing a complaints procedure to professional bodies about developmentally inappropriate questioning where this persists following judicial intervention. (This could be linked to the introduction of authoritative guidance developmentally appropriate questioning - see below.)*
- *Greater consistency of approach by advocacy training providers is needed. It is anticipated that this will be addressed by the forthcoming report of the Advocacy Training Council. The scope and target audience of Kingston University’s training module (a commercial package?), developed on behalf of the ATC, is as yet unclear. If ATC recommendations focus on the Bar, measures addressed to other parts of the profession will be needed.*
- *A checklist or code on questioning young and other vulnerable people at court should be developed, suitably endorsed and widely distributed for use in training and to inform ground rules discussions at court.*

*The seminar discussion should be brought to the attention of:*

- *the Joint Advocacy Group, in relation to its development of profession-wide quality assurance standards (based on expecting advocates to deal ‘appropriately with vulnerable witnesses’) and its consideration of ticketing. Research findings from ‘Measuring Up?’ about the extent of difficulties experienced by young witnesses should also be sent.*
- *the Ministry of Justice, for consideration of:*
  - *implementation of ‘full Pigot’, i.e. the Pigot Committee recommendations that courts have discretion to order that children’s evidence be taken at a preliminary hearing and, in exceptional cases, that advocates’ questions be relayed through a specialist child examiner*
  - *a statutory provision incorporating the current position on developmentally appropriate questioning, similar to section 85(1), New Zealand Evidence Act 2006 ‘Unacceptable questions’: the judge may disallow, or direct that a witness is not obliged to answer, any question that the judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.*
- *those drafting Council of Europe guidelines on Child-Friendly Justice.*