VULNERABLE WITNESSES AND PARTIES WITHIN CIVIL PROCEEDINGS

CURRENT POSITION AND RECOMMENDATIONS FOR CHANGE

FEBRUARY 2020

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Section 1 - Introduction

1. Access to justice, just procedures and fair hearings are essential elements of our justice system. To ensure the system works properly such elements need to cater for parties and witnesses, who by reason of mental or physical disability/disorder, impairment of intellectual or social functioning, fear or distress, or other reason, are vulnerable such that their ability to participate in proceedings, or to give their best evidence, may be impaired.

2. More than twenty years ago attention became focused on the need to address the issues faced by vulnerable witnesses before the criminal courts[1] and in 1999 the Youth and Criminal Justice Act set out the structure to enable adequate assistance and protection that is not only still in force but used on a daily basis in criminal courts. By 2014/15 the President of the Family Division noted the issues faced by vulnerable witnesses and parties in the family courts and stated that family law was "lagging woefully behind criminal law" and set up a working party.[2] Wider appreciation grew amongst the Judiciary and professional bodies that issues such as the nature and extent of questioning of vulnerable witnesses needed to be evaluated and changes made; including through bespoke training.[3] As Mr Justice Green[4] stated in December 2015;

   "...how the courts treat those who are exposed and weak is a barometer of our moral worth as a society. Many of those we encounter in the criminal and family courts are from troubled backgrounds and have suffered a lifetime of disadvantage, prejudice and abuse."[5]

3. In 2017, following detailed analysis by the working party, the Family Procedure Rules were amended to make specific provision for vulnerable parties and witnesses.

4. Since 1999[6] the Civil Procedure Rules allow the use of many of the methods/forms of assistance and protection for vulnerable parties and witnesses used in the criminal and family courts. However, there is no specific rule in relation to vulnerable witnesses/parties and the existing rules have been

[1] See generally; the Home Office report "Speaking up for Justice: Report of the Inter Departmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System"; Home Office 1998; which contained sections on witness intimidation, vulnerable witnesses, investigative and pre-trial measures, court procedures, court measures, child witnesses, admissibility of evidence and alternative forms of evidence and training.
[2] Vulnerable witnesses and children working group.
[3] E.g. the Advocates Gateway training toolkits which were available in June 2015
[4] Now Lord Justice Green
[5] Addressing Vulnerability in Justice Systems; The Advocate's Gateway (Wildy, Simmons and Hill); Introduction.
[6] The Civil Procedure Rules 1998 (SI 1998/3132) were made on 10 December 1998 and came into force on 26 April 1999.

criticised as being "passive"[7] and inadequate for the purpose of ensuring a sufficiently proactive and consistent approach to enabling the proper participation in civil litigation of those who are, or may become through involvement in the process, vulnerable.

5. Although this report considers issues arising from the vulnerability of parties and witnesses in all types of civil litigation its provenance lies in a specific recommendation of an interim report of The Independent Inquiry into Child Sexual Abuse (IICSA).[8]

6. IICSA ("the Inquiry") was established to examine how the country's institutions handled their duty of care to protect children from sexual abuse. It was set up after investigations in 2012 and 2013 into the Jimmy Savile sexual abuse scandal revealed widespread abuse, including claims of abuse stretching back over decades by prominent media and political figures, and inadequate safeguarding by institutions and organisations responsible for child welfare[9].

7. In her introductory statement,[10] Justice Goddard set out its procedures, timetables and remit. She said that the inquiry;
"provides a unique opportunity to expose past failures of institutions to protect children, to confront those responsible, to uncover systemic failures, to provide support to victims and survivors, in sharing their experiences, and to make recommendations that will help prevent the sexual abuse and exploitation of children in the future."

8. The Inquiry has launched thirteen investigations, into a broad range of institutions, each of which will produce a report that will set out the Inquiry's conclusions on institutional failings and identify practical recommendations for change. Of relevance to this report, the Inquiry has investigated the extent to which existing support services, compensation frameworks and the civil justice system are fit to deliver reparations to victims and survivors of child sexual abuse. Within this broad-based investigation, it was recognised that fair legal processes must be adapted to address the vulnerabilities of witness and parties if victims and survivors of child sexual abuse are to obtain justice.

9. In its Interim Report published in April 2018 the Inquiry Panel recommended

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[7] See generally the chapter " Vulnerable Witnesses and Parties in all civil proceedings – Dignity, respect and the Advocate's Gateway Toolkit 17"; Felicity Gerry Q.C. in Addressing Vulnerability in Justice Systems [Wildy Simmonds and Hill]
[8] Announced by the Home Secretary on 7th July 2014
[9] The inquiry was reconstituted in February 2015 as a statutory inquiry under the Inquiries Act 2005, giving it greatly increased powers to compel sworn testimony and to examine classified information.
[10] The inquiry opened on 9th July 2015

"Special protections for vulnerable witnesses

The Chair and Panel recommend that the Ministry of Justice provides in primary legislation that victims and survivors of child sexual abuse in civil court cases, where they are claiming compensation in relation to the abuse they suffered, are afforded the same protections as vulnerable witnesses in criminal court cases. The Chair and Panel understand that cost is already a barrier to victims and survivors considering a civil claim. In considering how to fund the implementation of this recommendation, the Ministry of Justice must ensure that this barrier is not further increased.
The Chair and Panel recommend that the Civil Procedure Rule Committee amends the Civil Procedure Rules to ensure that judges presiding over cases relating to child sexual abuse consider the use of protections for vulnerable witnesses."

10. The Ministry of Justice asked the Civil Justice Council to consider the issues raised by this recommendation and to compile a report:

"There would seem to be clear room for improvement in the way that claims relating to child sexual abuse cases are managed by parties and the Court. The Ministry of Justice recognises that claims involving child sexual abuse raise particular challenges for both Claimants and Defendants, and that they require careful handling. There is clearly an opportunity for some of the good practice in dealing with vulnerable witnesses and litigants in the criminal and family court to be implemented in the civil litigation context. In this regard the Inquiry has heard that the Civil Justice Council is currently working on recommendations to support all vulnerable claimants and defendants by looking at the support already available in the family and criminal courts and how that can be more effectively applied in the civil courts."[11]

In undertaking this task, the Council was asked to consider vulnerability of parties and/or witnesses in civil actions not just in relation to claims arising from sexual assault/abuse but also more widely i.e. in relation to the wide variety of other types of civil claim.

11. The Council has approached the task by detailed consideration of the nature and extent of assistance that is currently provided in the criminal, family and civil jurisdictions and then, given their different approaches, assessing the extent to which changes are required within civil practice and procedure. It was recognised at the outset that a great deal of work had been carried out within the criminal and family spheres, and by other bodies such as the Advocacy Training Council, and that it was necessary to carefully consider and, if appropriate, build upon such work rather than attempt to

[11] Closing statement of the Ministry of Justice and Criminal Injuries Compensation Authority to the Accountability and Reparations Investigation (paragraph 12)

replicate it.

12. An initial raft of consultation took place with all Designated Civil Judges and High Court Masters. Further, given the specific reference to claims in respect of sexual abuse/assault the Association of Personal Injury Lawyers undertook a survey of its members (50 responses)[12]. A preliminary report was then compiled by His Honour Judge Cotter QC with the assistance of the working party consisting of:

    - Amrita Dhaliwal[13]
    - Mr Justice Pepperall[14]
    - District Judge Byass
    - District Judge Watkins
    - District Judge Gibson[15]
    - His Honour Judge Picton
    - His Honour Judge Lethem[16]
    - Professor Andrew Higgins[17]

13. The consultation report was launched on 3 September 2019[18] with responses to be submitted by 11 October 2019. It contained seven recommendations and posed three questions (see Annexe 1).

14. Thirty-one responses were received. A summary of the responses is at Annexe 3. The Council is very greatly indebted to those who provided responses. The responses, whilst broadly supportive of most of the recommendations in the consultation report, set out some concerns about their nature and extent and also raised a number of issues not covered within the consultation report.

15. After careful consideration of the responses, significant amendments were made to the recommendations in the consultation report (and further recommendations included) and this final report has been complied by His Honour Judge Cotter QC with the assistance of the working party, which has

[12] See Annexe 2 for a list of those who provided information
[13] Head of civil policy; Ministry of Justice
[14] Former member of the Civil Procedure Rule Committee
[15] Member of the Civil Justice Council
[16] Former member of the Civil Procedure Rule Committee
[17] Member of the Civil Justice Council, Professor of Civil Procedure at the University of Oxford, fellow of Mansfield College and general editor of Civil Justice Quarterly.
[18] https://www.judiciary.uk/wp-content/uploads/2019/09/Vulnerable-witnesses-and-parties-consultation-September-2019.pdf

been expanded with the addition of:

- Mrs Justice Lambert[19]
- District Judge Middleton[20].

16. The Council is very grateful for the work of all of the working party members[21] and the secretariat.

[19] In practice Mrs Justice Lambert was Leading Counsel to the Dame Janet Smith Review which was established by the BBC to undertake an independent investigation into alleged misconduct by Jimmy Savile and the relevant culture and practices at the BBC. In 2013 she was appointed by Sir John Goldring as Lead Counsel to the new inquests into the 96 deaths resulting from the Hillsborough Stadium Disaster in April 1989.

[20] Regional costs Judge and editor of "Cook on Costs"; member of the Civil Judicial Engagement Group

[21] The Council is also grateful to Mr Justice Knowles for his guidance and assistance and to Mr Justice Hayden for his input in relation to the Family Court.

Section 2 - The scope of vulnerability in civil cases

17. In the criminal courts, 18% of witnesses attending for cases were recorded by the Crown Prosecution Service as either vulnerable or intimidated in 2015/16.[22] Surprisingly, there is no data as to the number of vulnerable parties or witnesses (or those who perceive themselves as such) who appear before the civil courts across the range of jurisdictions and types of case, or in relation to any steps taken to assist any vulnerable party or witness. However, of some relevance is that 25% of individual Claimants who answered a civil court user survey indicated that they considered they had a physical or mental condition.[23]

18. The very large majority of people who do have dealings with the civil justice system as potentially vulnerable witnesses/parties are not victims and survivors of child sexual abuse. They are also not a homogeneous group. Some people may have mental and/or physical conditions which render them vulnerable and hamper their access to justice; others, as with victims/survivors of abuse, may be vulnerable solely by reason of the subject matter of the proceedings before the court. By way of an obvious example of the latter, many involved in anti-social behaviour cases[24] (particularly concerning the occupation of property) or protection from harassment cases as "the victims", are fearful of reprisal and vulnerable to intimidation (organisations supporting tenants of social housing[25] have long complained of the difficulty in persuading witnesses to attend in cases involving anti-social behaviour).[26] Some Claimants fear, or react adversely to the sight of, the Defendant or other witnesses e.g. in bullying and stress cases such that they cannot adequately participate in a hearing.

19. Vulnerability may be endogenous or arise as a reaction to some step or factor within the litigation process; it may be general or situational, permanent or temporary (or a mixture).

[22] Last year of available data
[23] Civil court user survey 2014/15 l individual claims Table 5.3
[24] See generally "Personal, situational and incidental vulnerabilities to ASB harm [2013] Universities' Police Science Institute; Dr Helen Innes and Professor Martin Innes. Available at https://orca.cf.ac.uk/52681/1/personal-situational-and-incidental-vulnerabilities-to-anti-social-behaviour-harm-a-follow-up-study.pdf
[25] And Victim Support
[26] See generally; A review of Anti-social behaviour: Home office research Study 26; Siobhan Campbell [2002]; p 50 and 63

In 2010 extensive research[27] carried out on behalf of the Ministry of Justice[28]showed that court users, in both criminal and civil proceedings, with mental health conditions and learning disabilities, experienced various particular difficulties when giving evidence in court. Many court users involved in the study found that legal language and terminology were barriers to their understanding of the court process, whilst a number stated that they experienced problems in understanding questions which they were asked in court. The report concluded that this lack of understanding resulted in confusion for the court users which negatively affected their demeanour in court. Those involved in the study reported that difficulties with understanding were improved by awareness of their particular mental health issue or learning disability amongst legal representatives and the Judge, as this allowed the court to take steps to ensure that the proceedings were clearly explained. This approach led to the court user feeling more respected and listened to. However, if this awareness was lacking, court users experienced a sense of exclusion from the proceedings, which the research found to be more acute in civil and family cases. In these cases, court users felt that they were prevented from being able to give evidence. When asked, court users who were living with mental illness or learning disability stated that they would benefit from being able to use special measures when giving evidence in court, particularly if screens or intermediaries were made available to them.

20. It was stated that:

"There are few mechanisms in place to assist in identifying any support needs of court users involved in civil cases. One of the key issues in relation to this is the limited contact between court users, legal representatives and the courts in civil cases."[29]
And
"Although it is possible to apply for special requirements in civil and family courts, this appears to happen very rarely, and few legal practitioners were aware of the possibility."[30]
And
"Special measures (a range of provisions to help vulnerable witnesses give best evidence) are available in criminal courts. These have substantially improved the experience of court users with mental

[27] Rosie McLeod, Cassie Philpin, Anna Sweeting, Lucy Joyce and Roger Evans, Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity, Ministry of Justice Research Series (London: Ministry of Justice, July 2010) Available at https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/court-experience-adults-1.pdf
[28] It was commissioned to explore the assertion made by the mental health charity MIND in 2007 that people with mental health conditions and learning disabilities experience greater difficulties accessing justice than others and possibly also experience greater discrimination and disadvantage.
[29]Ibid. Page 10. See also Page 12; "Heavy reliance on written communication in civil cases reduced the chances of early identification, as there was little direct contact with the court user"
[30]Ibid. Page 25

health conditions, learning disabilities and limited mental capacity. Strong multi-agency working facilitated their provision, but was restricted by poor provision in certain courts and resistance to their use among some Judiciary and barristers. Their extension to civil and family courts is recommended, alongside training to ensure adherence to protocols."

21. It was recommended, on page 31 of the same report, that there should be changes in procedure to:
    a) make available special measures, such as the use of screens and intermediaries, to court users with mental health conditions, learning disabilities and limited mental capacity who are involved in civil and family cases; and
    b) promote the special requirements that can already be applied for in civil and family cases among legal practitioners.

22. Other recommendations directed to the civil courts included:
    a) The setting up of small, multi-disciplinary teams to work with court users with mental health conditions, learning disabilities and limited mental capacity. Team members should have clearly defined lines of communication, and an understanding of the available support mechanisms and roles within these. In civil and family proceedings, these should include representatives from the Citizens' Advice Bureau, court staff and voluntary sector support organisations
    b) More training for the judiciary
       i) to increase their awareness of the presence of court users with mental health conditions, learning disabilities and limited mental capacity.
       ii) on communicating, engaging and working with court users with mental health conditions, learning disabilities and limited mental capacity.
    c) That consideration should be given as to how to ensure that court users with mental health conditions, learning disabilities and limited mental capacity are offered support before arrival at court and after a hearing.
    d) The provision of a case manager for parties with mental health conditions, learning disabilities and limited mental capacity, to provide one point of contact and oversee support.
    e) The production of an equivalent DVD to "Going to Court – A step-by-step guide to being a witness" used for criminal cases on the civil and family court processes and promotion of its availability to court users.
    f) The introduction of the provision of pre-trial visits to users of the civil courts who have mental health conditions, learning disabilities and limited mental capacity, and promotion of its availability.
    g) The provision to those who may be able to make use of it, of a written guide to the process of civil litigation, either in, or with the option of, an "easy read" format.

23. Save to the extent that training provided by the Judicial College now covers vulnerability of parties and witnesses within specific training modules[31], it is regrettably the case that none of these recommendations has yet fully been implemented across all courts/court centres.

24. In 2004 the Vulnerable Witnesses (Scotland) Act provided for special measures in the criminal and civil jurisdictions for children and other vulnerable witnesses. A person who was giving or was to give evidence in or for the purposes of any civil proceedings was to be considered a vulnerable witness if—

a) the person is under the age of 18 on the date of commencement of the proceedings (such a vulnerable witness being referred to in this Part as a "child witness"),

b) where the person is not a child witness, there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—

(i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)), or

(ii) fear or distress in connection with giving evidence in the proceedings, or

c) the person is of such description or is a witness in such proceedings as the Scottish Ministers may by order subject to the affirmative procedure prescribe.]

25. The special measures which could be taken (for the purposes of giving evidence) if a witness in a civil action was vulnerable were:

a) taking of evidence by a commissioner in accordance with section 19,
b) use of a live television link in accordance with section 20,
c) use of screen in accordance with section 21,
d) use of a supporter in accordance with section 22, and
e) such other measures as the Scottish Ministers may, by order made by statutory instrument, prescribe.

26. In 2011 the Northern Ireland Law Commission[32] published a report on vulnerable witnesses in civil proceedings. It followed a Consultation Paper[33] which considered whether there was any merit in introducing the "special measures" then currently used in the criminal courts for witnesses in civil proceedings. The consultation period ran from 1 April 2010 to 30 June 2010. Following the analysis of responses from a wide range of consultees from non-governmental organisations, political parties, local government, non-departmental public bodies and the legal professions, it was clear that

[31] There is no specific module on vulnerability; see paragraph 152 of this document.
[32] NILC 10 (2011) Available at http://www.nilawcommission.gov.uk/report_vw_july_2011.pdf
[33] NILC 4 (2010) Available at http://www.nilawcommission.gov.uk/nilc4__2010__vulnerable_witnesses_consultation_paper.pdf

the view was that there was inadequate protection for witnesses under the current law and practice in Northern Ireland. All but one of the consultees who responded to the consultation paper agreed that special measures should be made available in civil proceedings in Northern Ireland.

27. The Commission concluded:

"Having taken into account the views of consultees, having deliberated on the merits of introducing a scheme of special measures in civil proceedings and having considered the likelihood of the uptake by witnesses of such measures, the Commission has concluded that protection for certain witnesses in civil proceedings will promote access to justice for those witnesses and will offer valuable practical assistance to people who might experience difficulties in giving oral evidence directly in a courtroom setting. The Commission considers that the best method of achieving such a scheme is to implement it on a statutory basis. Not only does this promote a consistent approach in courts across the jurisdiction, it also allows such a scheme to be exposed to the rigours of a transparent and accountable law-making process."[34]

And

"The Commission has concluded, based on consideration of the current law and practice and the views of consultees, that a strong case can be made for creating a statutory regime for the provision of special measures for certain witnesses in civil cases."[35]

28. The Commission based its recommendations upon mirroring the special measures available in the criminal courts in Northern Ireland, Scotland and England and Wales and produced a draft Bill. Sadly, issues of resources and costs and the absence of an executive and the Assembly have conspired to prevent further progress of the proposed reforms.

29. In January 2019 JUSTICE[36] published a report "Understanding Courts".[37] In a chapter on the consistency of support and reasonable adjustments for lay users, it set out the conclusion that:

"Lay users in other types of hearings would also benefit from 'reasonable adjustments.' For example, where a victim of abuse (physical or sexual) is suing their perpetrator (either an individual or institution), in some personal injury and clinical negligence cases, perhaps also by virtue of the physical and/or mental injuries suffered. There are also lay users whose needs and vulnerabilities

[34] http://www.nilawcommission.gov.uk/report_vw_july_2011.pdf Paragraph 1.22
[35] Ibid. Paragraph 2.1
[36] JUSTICE is an all-party reform and human rights charity
[37] The product of a working party chaired by Sir Nicholas Blake. Available at https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf

often require special consideration regardless of whether they are giving evidence in civil, tribunal or criminal proceedings, such as where they suffer from a mental disorder, learning disability or other type of physical disability, which would suggest that they may require a reasonable adjustment whatever the nature of the hearing may be."[38]

and

"we recommend that reasonable adjustments to enable lay users to provide their best evidence should be available in all courts and tribunals where the needs of a fair trial demand it. This includes an obligation to consider whether any party or witness has a particular vulnerability or other need for an adjustment. In order to achieve this, we consider that best practice should generally be consolidated and promoted across different courts and jurisdictions. Bearing in mind that in the majority of small claims and in a substantial proportion of fast track trials at least one party is a LiP, the Civil Procedure Rules should be amended along the lines of the Family Procedure Rules and similarly require that courts have regard to the civil TAG Toolkit. In particular, expert assistance from the Ministry of Justice Registered Intermediary Scheme should be available for all lay users who need it, across all jurisdictions."[39]

30. Research has indicated that whilst there is no recorded data covering the civil courts as to the relevant experiences of those who have been or should have been considered as vulnerable, or even data concerning types of case where there may be a high percentage of parties and/or witnesses who could fall within the definition (e.g. the number of anti-social behaviour injunctions made) it is likely that, there is a significant body of vulnerable court users within civil proceedings who would benefit from assistance/protection.

31. Turning to the specific recommendation within the interim report of the Inquiry in relation to the vulnerability of victims and survivors of sexual abuse/assault, it is necessary to consider the evidence[40] /debate which underpinned it.

32. As part of the Accountability and Reparations Investigation, the Inquiry held a seminar on the civil justice system across November and December 2016 and covered the following wide ranging issues:

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[38] https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf Paragraph 4.14

[39] Ibid. Paragraph 4.16

[40] By the date of publication of the interim report over 1,000 victims and survivors of child sexual abuse had shared their experience with the Inquiry's Truth Project. In light of the Interim recommendation anonymised accounts from victims and survivors have been considered. There are several accounts of poor handling of claims by solicitors, unhappiness with group actions, the amount of awards and limitation defences. Apart from setting out the ordeal of having to give evidence within an adversarial process, there are very few negative comments from those who provided evidence about other aspects of the court procedure/experience in civil cases.

- Access to justice for victims and survivors;[41]
- Limitation of actions, including: limitation as a barrier and a defence in civil litigation; proposals for reform;[42]
- The complexities and cost of civil litigation, including: the nature of the adversarial system; the spectrum of both claimant and defendant approaches to bringing/defending claims; identifying the correct defendant/insurer; disclosure; investigating the claim; legal issues and defences; the use of single or joint experts; early offers of settlement; settlement without admissions; and apologies;
- Compensation, including: proving causation of injury; quantification of damages; provision for treatment; payment options;
- Other types of accountability and reparation, including: acknowledgment of abuse; accountability within the civil justice system; admissions of institutional liability; the value of apologies; face-to-face meetings; learning lessons and preventing recurrence; access to wider support;
- Possible reforms to civil litigation, including: pre-action protocol; guiding principles; duty of candour; ADR; specialist Judges; increased judicial powers and sanctions; support;
- A redress scheme, including: advantages and disadvantages; investigation and assessment process; tariffs; comparative models; funding; legal representation.

33. The Council considers that the majority of these issues are beyond the scope of its remit; which is solely focused upon the vulnerability of witnesses/parties within civil litigation. However, within the seminar there was also discussion[43] of the following relevant issues:

- The need for specialist Judges[44] (but with a concern that they may become "burnt out" if regularly working on child abuse cases);
- The need for better training, particularly for District Judges who conduct case management and interim hearings;[45]
- The need for model directions;

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[41] "A key issue explored at the seminar was access to justice. The Inquiry was told that the number of solicitors with expertise and experience of handling child sexual abuse claims is limited. It was also raised that some solicitors would not take on claims funded through legal aid due to the administrative complexity involved"; Interim Report.
[42] The Limitation Act 1980 was identified as an obstacle to accessing justice as some victims and survivors of child sexual abuse are prevented from making a civil claim because too much time has elapsed since the abuse took place. This is an important issue that the Inquiry [IICSA] will consider further, particularly as other jurisdictions, including Scotland, have legislated to exclude limitation considerations from child sexual abuse claims"; Interim Report. Such issue is, however, beyond the scope of this report.
[43] Accountability and Reparations Investigation - Transcript of Inquiry Seminar Wednesday 30 November 2016. Available at https://www.iicsa.org.uk/key-documents/921/view/iicsa301116.pdf
[44] Ibid. See transcript p117; per Mr Greenwood
[45] Ibid. See transcript p126; per Mr Garsden

- That there should be more use of ground rules hearings.

34. It appears that the matters raised at the seminar taken with first hand reports from victims/survivors provided the foundation for the statement within the preliminary report that:

    "The Inquiry has also consistently heard that the civil litigation system is inherently adversarial. Victims and survivors are being asked to provide evidence on the abuse they suffered in an often challenging setting – for example, they can be cross-examined by an unrepresented perpetrator. This is in contrast to a criminal court, where the Youth Justice and Criminal Evidence Act 1999 sets out a range of measures designed to help vulnerable witnesses provide their evidence in court (such as providing pre-recorded evidence).
    There is no equivalent legislation in relation to civil courts and the Inquiry considers that victims and survivors of child sexual abuse in civil courts deserve the same protections. As a result, the Inquiry recommend that this is addressed."

35. After the consultation paper was launched the Inquiry produced its report "Accountability and Reparations".[46] The Inquiry noted that the Civil Justice Council was considering the issue of vulnerability.

[46] Published on 19th September 2019; https://www.iicsa.org.uk/key-documents/14231/view/accountability-reparations-report-19-sep-2019.pdf

Section 3 - The nature and extent of assistance that is currently provided

36. It is necessary to consider the measures currently in place in the criminal, family and civil jurisdictions. This report will not consider the (varying) practice and procedure within the various types of tribunal which are, by their nature, less formal and with rules designed with self-representation in mind.

Vulnerability and the criminal courts

37. As set out above the criminal jurisdiction was the first to address the need to provide assistance and protection for vulnerable witnesses and is the comparator referred to within the Inquiry's recommendation.

38. Before analysing the protection afforded to vulnerable witnesses in criminal cases it is necessary by way of brief overview to recognise some fundamental differences in practice and procedure between criminal and civil (and family) cases.

39. An overarching and fundamental difference is that the criminal justice system is focused upon ensuring that vulnerable witnesses can give best evidence. As regards the conduct of the prosecution of a case there is, ordinarily, no wider need to consider the ability of vulnerable "parties",[47] or others, to participate. Further, as regards vulnerable defendants, legal aid is usually available so they are represented. Whilst the Criminal Procedure Rules and the Criminal Practice Directions[48] have been amended to introduce a new term "vulnerable people"[49] criminal courts will ordinarily only be concerned with the vulnerability of witnesses or defendants.

40. Criminal cases are heard either in the Magistrates' Court by a lay panel (with a legal advisor) or District Judge or in a Crown Court by Judge and jury. The layout of the court is usually different to the vast majority of civil and family courts (e.g. with a dock/secure facilities) and there is generally a greater air of formality than in civil and family courts. A jury trial necessarily means an additional 13/14 people[50] in the courtroom. Witnesses have in the past been the subject of lengthy and sometimes hostile cross-examination. Save when only sentence is in issue,[51] the factfinding body; either jury or magistrate(s) is not provided with the statement of the complainant and such evidence has

[47] Ignoring issues arising from the right to commence a private prosecution.
[48] Criminal Practice Directions 2015 consolidated
[49] See Criminal Procedure Rule 3.11(c)(iv) and (v) and Criminal Practice Direction I General Matters 3D.1-3
[50] Jury together with ushers/jury bailiffs
[51] Disputes as to fact (basis of plea) when guilt is admitted are determined by a Judge or Magistrates i.e. without a jury.

to be given, firstly "in chief" and then under cross-examination. In the civil and family courts evidence in chief is provided to the Court in statement form, which is read in advance and the witness does not usually have to repeat it; merely confirm that the content of the statement true (as a result the practice of providing pre-recorded evidence for vulnerable witnesses would ordinarily be of little additional assistance to a witness in a civil/family case).

41. Whilst it can properly be said that generally speaking a criminal court will often be a more intimidating environment for a vulnerable witness than a civil or family court, steps have been taken to ameliorate the potential adverse impact upon proper participation and the quality of his/her evidence. Apart from the special measures (which will be considered in detail) usually there will be assistance from a member of the Witness Service[52] and court staff have received dedicated training with regard to vulnerable witnesses. There are protocols/practices in place in relation to witness familiarisation and separate waiting areas. All Judges who hear cases alleging sexual assault or abuse have received dedicated training**.** As will be considered in due course there is a sharp contrast with the determination of such cases in the civil courts where special measures are rarely used, neither staff nor Judges have had any dedicated training for sexual abuse/assault cases, there is no Witness Service (save assistance from Support Through Court (previously the Personal Support Unit)[53] in some court centres) and suitable and dedicated facilities for witnesses are often not as readily available (if available at all).

42. Turning to the detail of the range of measures designed to help vulnerable witnesses provide best evidence in criminal court the starting point, as identified in the Interim Report, is The Youth Justice and Criminal Evidence Act 1999 ("YJCEA").

43. There are a range of "special measures" in Chapter 1 of the YJCEA and some other specific prohibitions. Sections 16 and 17 set out the grounds of eligibility[54].

44. Section 16 caters for witnesses eligible for assistance on grounds of age or incapacity as follows:

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[52] The Witness Service provides free and independent support for both prosecution and defence witnesses in every criminal court in England and Wales. Trained volunteers provide practical information about the process, as well as emotional support to help witnesses feel more confident when giving evidence.
[53] Support Though Court is a charity which provides comfort, support and guidance before, during and after court for those engaged in civil and family litigation. It began in the Royal Courts of Justice but now has a presence in 18 regional courts.
[54] Anti-social Behaviour, Crime and Policing Act 2014 applies section 16 -33 of the 1999 Act to anti-social behaviour injunctions in the civil courts. Available at http://www.legislation.gov.uk/ukpga/1999/23/contents

(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—
(a) if under the age of 17 at the time of the hearing; or
(b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).

(2) The circumstances falling within this subsection are—
(a) that the witness—
(i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or
(ii) otherwise has a significant impairment of intelligence and social functioning;
(b) that the witness has a physical disability or is suffering from a physical disorder.

(3) In subsection (1)(a) "the time of the hearing", in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.

(5) In this Chapter references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose, "coherence" refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

45. Section 17 covers witnesses eligible for assistance on grounds of fear or distress about testifying as follows:

(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) In determining whether a witness falls within subsection (1) the court must take into account, in particular—
(a) the nature and alleged circumstances of the offence to which the proceedings relate;
(b) the age of the witness;
(c) such of the following matters as appear to the court to be relevant, namely—
(i) the social and cultural background and ethnic origins of the witness,

(ii) the domestic and employment circumstances of the witness, and
(iii) any religious beliefs or political opinions of the witness;
(d) any behaviour towards the witness on the part of—
(i) the accused,
(ii) members of the family or associates of the accused, or
(iii) any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining that question the court must in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection.

46. Where the court determines[55] that the witness is eligible for assistance by virtue of section 16 or 17 of the Youth Justice and Criminal Evidence Act 1999, the court must then consider a special measures direction. Section 19 sets out that the Court shall:

(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and
(b) if so—
(i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
(ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.
(iii) In determining for the purposes of this Chapter whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular—
(a) any views expressed by the witness; and
(b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

47. Section 21 of the Youth Justice and Criminal Evidence Act 1999 sets out special provisions relating to

[55] Either upon application or of its own motion.

child witnesses in relation to sexual offences, kidnapping, assaults etc. The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements;[56]

(a) it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and
(b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24.

48. The special measures available to the court are set out at sections 23 – 30 and are:

(a) Screening a witness[57] from the accused while giving evidence (section 23)
(b) Allowing the witness to give evidence by live link[58] (section 24)
(c) Allowing evidence to be given in private[59] (section 25[60])
(d) Requiring the removal of wigs[61] and gowns (section 26)
(e) Pre-recorded evidence in chief (section 27)

[56] Subject to the need for special protection by virtue of subsection (1)(b)(i), subsection (4)(c) provides that the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).
[57] or "other arrangement" to prevent the witness from seeing the accused
[58] "live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom (or other place where the proceedings are being held), is able to see and hear, and to be seen and heard by, persons in the Courtroom. Section 51 of the Criminal Justice Act 2003 enables the court to allow witnesses (other than the defendant) in the United Kingdom to give evidence by live link if the court is satisfied that giving evidence in this way is in the interests of the efficient or effective administration of justice. The witness does not have to be a special "category" of witness (for instance vulnerable or intimidated as defined by the YJCEA). Live links can be particularly helpful for witnesses with health/mobility issues who do not qualify for live links under the "special measures" provisions of the YJCEA
[59] The persons who may be excluded do not include (a)the accused, (b) legal representatives acting in the proceedings, or (c)any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness
[60] Section 25(4) sets out that a special measures direction may only provide for the exclusion of persons under this section where—(a)the proceedings relate to a sexual offence; or (b)it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.
[61] Judges do not wear wigs when hearing civil or family cases

(f) Pre-recorded cross-examination or re-examination[62] (section 28[63])

(g) Requiring the examination of witness through an intermediary[64] (section 29)

(h) Providing aids to communication[65] (section 30)

49. Chapter II of the Youth Justice and Criminal Evidence Act 1999 provides protection for witnesses from cross-examination by accused in person.[66] Section 34 provides a general prohibition in relation to sexual offences;

No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant, either—
(a) in connection with that offence, or

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[62] Such a recording must be made in the presence of such persons as Criminal Procedure Rules or the direction may provide and in the absence of the accused, but in circumstances in which— (a)the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made, and (b)the accused is able to see and hear any such examination and to communicate with any legal representative acting for him.

[63] It is important to note that subsection (7) provides that nothing in section 28 shall be read as applying in relation to any cross-examination of the witness by the accused in person (in a case where the accused is to be able to conduct any such cross-examination). In 2018 the Ministry of Justice commenced a six-month pilot at three Crown Courts in relation to the pre-recorded cross-examination of child witnesses pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999. In R v PMH [2018] EWCA Crim 245the Court of Appeal provided guidance regarding best practice for trial judges and advocates. Ordinarily a timetable is set at the pre-trial preparation hearing for the proposed questions to be asked in the pre-recorded cross-examination to be submitted. Thereafter a ground rules hearing takes place and following the rulings a hearing takes place at which the witness is cross-examined. See generally R-v-Hampson [2018] EWCA Crim

[64] Examination of the witness (however and wherever conducted) through an interpreter or other person approved by the court for the purposes of this section ("an intermediary") .The function of an intermediary is to communicate—(a)to the witness, questions put to the witness, and (b)to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question. A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by Criminal Procedure Rules, that he will faithfully perform his function as intermediary. Section 1 of the Perjury Act 1911 (perjury) shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding. The Equal Treatment Bench Book provides that assessment by an intermediary should be considered if the person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority. Studies suggest that the majority of young witnesses, across all ages, fall into one or other or both categories (Chapter 2, Paragraph 97, Equal Treatment Bench Book 2018). For an overview of the law see R-v-Biddle [2019]EWCA 86 (Crim)

[65] A special measures direction may provide for the witness, while giving evidence (whether by testimony in court or otherwise), to be provided with such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has or suffers from.

[66] The Ministry of Justice (MoJ) introduced reforms to legal aid under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 with the aim of reducing spending on legal aid, directing funding at those cases that need it most and promoting alternatives to litigation. As part of this reform package, since January 2014, any defendant whose disposable annual income is £37,500 or more is no longer eligible for criminal legal aid at the Crown Court. This has led to a rise in the number of self-representing Defendants

(b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.

50. Section 35 provides a similar prohibition in relation to child complainants and other child witnesses and section 36 provides the Court with a power[67] when neither section 34 nor 35 operates to prevent an accused in any criminal proceedings from cross-examining (or further cross-examining) a witness in person—
(1) If it appears to the court—
(a) that the quality of evidence given by the witness on cross-examination—
(i) is likely to be diminished if the cross-examination (or further cross-examination) is conducted by the accused in person, and
(ii) would be likely to be improved if a direction were given under this section, and
(b) that it would not be contrary to the interests of justice to give such a direction

(2) In determining whether subsection (2)(a) applies in the case of a witness the court must have regard, in particular, to:
(a) any views expressed by the witness as to whether or not the witness is content to be cross-examined by the accused in person;
(b) the nature of the questions likely to be asked, having regard to the issues in the proceedings and the defence case advanced so far (if any);
(c) any behaviour on the part of the accused at any stage of the proceedings, both generally and in relation to the witness;
(d) any relationship (of whatever nature) between the witness and the accused;
(e) whether any person (other than the accused) is or has at any time been charged in the proceedings with a sexual offence or an offence to which section 35 applies, and (if so) whether section 34 or 35 operates or would have operated to prevent that person from cross-examining the witness in person;

51. Section 38 of the Youth Justice and Criminal Evidence Act 1999 provides for defence representation for purposes of cross-examination where an accused is prevented from cross-examining a witness in person by virtue of section 34, 35 or 36. The court must invite the accused to arrange for a legal representative to act for him for the purpose of cross-examining the witness, and if the accused has notified the court that no legal representative is to act for him for the purpose of cross-examining the witness, the court must consider whether it is necessary in the interests of justice for the witness to

[67]Exercisable after application or upon the court acting of its own motion

be cross-examined by a legal representative appointed to represent the interests of the accused.[68]

52. The Ministry of Justice publishes statistics which show the proportion of defendants dealt with in the Crown Court known to have had legal representation. In 2018 7.7% of Defendants were unrepresented at their first hearing (the figure was 7% in 2015 and 4.9% in 2010). Given this small (although significant) percentage, and that the issue will only arise in limited circumstances, in practice the need for the Court to appoint a representative is very rare. Before the compilation of the 2019 report "Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspectives"[69] the authors conducted in-depth interviews with 21 practitioners (15 Crown Court judges and 6 CPS Crown Court prosecutors), of the perceived effects of unrepresented defendants in Crown Courts on practitioners and court processes. Whilst the report expressly stated that the exploratory nature of the project meant that the findings were indicative and should not be considered to be a comprehensive assessment of all relevant issues; no reference was made to any difficulties posed by sections 34-38. Significantly, reference was made to Judicial control of questioning:

    "Most interviewees expressed concern about the perceived effect of unrepresented defendants upon witnesses. The most common reason for concern was cross-examination and how unrepresented defendants might behave while conducting it. Interviewees gave examples of defendants being aggressive, rude and asking unnecessary questions. The common perception of these interviewees was that this led to an unpleasant cross-examination experience for witnesses. Some judicial interviewees described how they had to control unrepresented defendant's behaviour in these situations, and tread the line between allowing the defendant to put forward their case and preventing harm to witnesses".

53. The Council believes that orders under section 38 are likely to have been made in a small number of cases (meaning that there has been limited financial impact upon the costs of public funding). However, this does not mean that unrepresented Defendants in the Crown Court have been allowed to personally conduct oppressive or distressing questioning of witnesses. Rather Judges have to control such questioning when an order under section 36 is not thought appropriate. When necessary the Council understands that finding an advocate to undertake questioning would be unlikely to prove difficult, given the limited scope of the task (i.e. it is a closely defined and not potentially bound up

[68] If the court decides that it is necessary in the interests of justice for the witness to be so cross-examined, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the accused. A person so appointed shall not be responsible to the accused. Section 40 caters for funding of such representation.
[69] Ministry of Justice Analytical Series; Joe Thomson and Jane Becker (2019). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810051/unrepresented-defendants.pdf

with giving advice) and that the rate of remuneration would not be out of line with that given for other publicly funded criminal work.

54. Section 41 of the Youth Justice and Criminal Evidence Act 1999 provides protection for complainants in proceedings for sexual offences through restriction on evidence or questions about complainant's sexual history.

55. Chapter IV of the Youth Justice and Criminal Evidence Act 1999 concerns reporting restrictions with section 45 providing a power to restrict reporting of criminal proceedings involving persons under 18 and section 46 power to restrict reports about certain adult witnesses in criminal proceedings.

56. Since 2013 the criminal procedure rules have also provided for "ground rules hearings". In any case with a witness who is vulnerable or who has a communication need, it is usual practice to discuss and establish how to enable the witness to give their best evidence by agreeing ground rules in advance. In a case in which an intermediary has been appointed, such a hearing is essential.[70] There is also detailed guidance provided in respect of the treatment of vulnerable witnesses and the measures that should be adopted to accommodate them in Part V of the Criminal Practice Direction.

57. As a result of the combined package of measures set out above there is a comprehensive approach to facilitating the participation of vulnerable witnesses in the criminal justice system.

58. Recent changes to the Criminal Procedure Rules and Criminal Practice Direction I General Matters 3D.1-3 have widened the Court's powers (and guidance) beyond consideration of witnesses alone. Rule 3.11(c) provides that in order to manage the trial or an appeal, the Court:

"(c) may require a party to identify
(iv) what arrangements are desirable to facilitate the giving of evidence by a witness
(v) what arrangements are desirable to facilitate the participation of any other person, including the Defendant"

59. The Practice Direction "Crim PD1 General Matters 3D" is headed "Vulnerable people in the courts" and provides guidance on facilitating the participation of witnesses and defendants.

[70] Ground rules hearings are also required when cross-examination is to be recorded under section 28 of the Youth Justice and Criminal Evidence Act 1999 and a list of proposed questions are submitted in advance. http://www.legislation.gov.uk/ukpga/1999/23/part/II

Vulnerability and the family courts

60. The family courts regularly deal with allegations of sexual assault/abuse, particularly within public law cases, and also other vulnerable witnesses/parties such as the victims of domestic abuse. Although the Inquiry's interim recommendation referred to "the protections" available within the criminal justice system the most obvious comparator in terms of protection and assistance afforded for vulnerable witnesses and parties (and specifically victims and survivors of child sexual abuse) engaged in civil court cases is the family courts. Although there are major differences in practice between family and civil cases (the former is ordinarily held in private and with anonymity orders in place and in public law cases parties will ordinarily have representation), there is obvious practical sense to this comparison. At District Judge level many Judges deal with civil and family cases and, apart from in London,[71] cases before Circuit and High Court Judges are usually heard in the same buildings, if not courtrooms, as civil cases.

61. It is only relatively recently that the family courts have recognised and then acted upon what was perceived to be a failure to appropriately assist vulnerable parties/witnesses.

62. In 2014, the President of the Family Court stated that the family justice system lagged behind the criminal justice system in the practices and procedures available to support vulnerable parties and witnesses and announced the setting up of a Children and Vulnerable Witnesses Working Group.[72] The President pointed out that processes which were tolerated in the Family Court were prohibited by statute in the Crown Court.[73] He also noted that:

> "We must be cautious before we rush forward to reinvent the wheel. A vast amount of thought has gone into crafting the arrangements now in place in the criminal courts...We need to consider the extent to which this excellent work can be adapted for use in the Family Division and the Family Court."

[71] In the Royal Courts of Justice, the Queen's Bench Division (civil) courts and family courts are in separate buildings.
[72] "there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system. This includes the inadequacy of our procedures for taking evidence from alleged victims, a matter to which Roderic Wood J drew attention as long ago as 2006: H v L and R [2006] EWHC 3099 (Fam), [2007] 2 FLR162.; per Munby LJ ;12th 'View from the President's Chambers, published in June 2014, [2014]Fam Law 978, 981.
[73] See observations of HHJ Wildblood QC in Re B (A Child) (Private law fact Finding –unrepresented father), D v K [2014] EWHC 700 (Fam), para 6(ii),

63. In November 2017 the Family Procedure Rules were amended to include specific provisions in relation to vulnerable witnesses[74] (rule 3A and Practice Direction 3AA; see paragraph 77 of this document).

64. However, unlike the YJCEA,[75] the new rules still did not address the issue of the cross-examination of witnesses by respondents/defendants. In 2017 the President of the Family Division pointed out that an alleged perpetrator could still cross-examine an alleged victim in person; something which, in relation to rape or other sexual offences, would be prohibited in a criminal court. In May 2015 in Re K and H (Children) [2015] EWCA Civ 543, [2015] 1WLR the Court of Appeal held that the Family Court did not have the power to order that the Court Service provide funding for legal representation outside the legal aid scheme for an unrepresented party to cross-examine a child in family proceedings. The court had to respect the boundaries drawn by Parliament for public funding of legal representation and suggested possible case management orders[76] to deal with cross-examination and suggested that consideration be given to a statutory provision enabling payment out of central funds.

65. The Master of the Rolls, Lord Dyson stated:

> "For those of us who have been schooled in an adversarial system, questioning by a judge of a key witness on controversial and centrally important issues may cause unease. I have already referred to the "profound unease" expressed by Roderic Wood J in *H v L and R* at the thought of a judge having to question a witness in the family jurisdiction. He said that it should not be regarded as impossible, but should be done only in "exceptional circumstances". I have set out at paragraph 22 of this document what Sir James Munby said on the subject in *Q v Q.* Sir James was, however, careful to say no more than that questioning by a judge where the issues are "grave and forensically challenging" may not be sufficient to ensure compliance with the Convention…"
>
> I have no doubt that questioning by a judge of a witness in any circumstances *can* be a difficult task. It always calls for sensitive handling. But as Lord Bingham CJ said in *R v Brown (Milton)* (1998) 2 Cr App R 364:
>
> "Without either descending into the arena on behalf of the defence or, generally speaking, putting

[74] The Family Procedure (Amendment No 3) Rules 2017
[75] See paragraphs 39-51 of this document
[76] Suggested case management directions were (a) a direction that the order that the child should give oral evidence was conditional on the father cross-examining her through a legal representative; (b) the child should be questioned by the Judge; (c) The child should be questioned by the Judge's clerk (following the reorganisation of the Family Court, the justices' clerks, who are legally qualified, are now available to assist the court in any part of the Family Court and not only when Magistrates are hearing cases), (d) a guardian should be appointed to conduct proceedings on behalf of the other two children

any sort of positive case on behalf of the defence, this is a difficult tight-rope for the trial judge to walk. However, he must do his best according to the circumstances of the particular case."

The fact that this was said in the context of criminal proceedings does not detract from its relevance in the present context.
And
"In a simple straightforward case, questioning by the judge is likely to be the preferred option and it should present no difficulties. The judge will know what the unrepresented party's case is. It may be helpful for the judge to ask him or her to prepare written questions for the court to consider in advance. Sometimes, unexpected answers may be given to the judge. These may require the judge to ask the unrepresented party to comment on the unexpected answers and to suggest supplementary questions for the judge's consideration."

But significantly he added this caveat:

"I acknowledge that there may be cases where the position is different. I have in mind, for example, a case where the oral evidence which needs to be tested by questioning is complicated. It may be complex medical or other expert evidence. Or it may be complex and/or confused factual evidence, say, from a vulnerable witness. It may be that in such cases, none of the options to which I have referred can make up for the absence of a legal representative able to conduct the cross-examination. If this occurs, it may mean that the lack of legal representation results in the proceedings not being conducted in compliance with article 6 or 8 of the Convention. This is the concern expressed by Sir James Munby at para 76 in *Q v Q.* In order to avoid the risk of a breach of the Convention, consideration should be given to the enactment of a statutory provision for (i) the appointment of a legal representative to conduct the cross-examination and (ii) the payment out of central funds of such sums as appear to be reasonably necessary to cover the cost of the legal representative, i.e. a provision in
civil proceedings analogous to section 38(4) of the Youth Justice and Criminal Evidence Act 1999 and section 19(3)(e) of the Prosecution of Offenders Act 1985."

66. Subsequently in October 2017, Practice Direction 12J of the Family Court rules (which covers fact finding hearings in private law contact disputes), was revised and now states[77] that the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved and that:

[77] Paragraph 28. Available at https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12j

"The Judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case".

67. Importantly, the scale of self-representation in family cases is very different to that in criminal cases. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 removed most private family cases from the scope of legal aid after April 2013. In the first quarter of 2011 both parties were represented in 50% of private law children cases but that had halved to 26% in the first quarter of 2014. HMCTS Figures for the first six months of 2019 reveal that in 27,111 private law family cases in 56.57% of cases the applicant was unrepresented and in 78.46% the respondent was unrepresented. The practical reality is that Judges face family hearings in which parties are unrepresented on a very regular basis. Often such hearings contain allegations of violence, threats, abuse or control/coercion and it is necessary for the Judge to control or take over questioning or elements of the questioning.

68. In January 2019 the Government set out its commitment to reform the law in relation to domestic abuse in the paper; "Transforming the Response to Domestic Abuse Consultation Response and Draft Bill". It set out the proposals to significantly enhance the assistance and protection afforded to victims in domestic abuse cases in the criminal and family courts,[78] stating that:

"We recognise that family court proceedings can be incredibly difficult for victims, and over the past year we have taken several steps to improve the family court process for vulnerable people in the family justice system."[79]

69. The draft Domestic Abuse Bill put forward proposals for legislative changes to provide:

[78] One of the four aims set out in the Bill is to "transform the justice process – to prioritise victim safety in the criminal and family courts, and review the perpetrator journey from identification to rehabilitation". The civil justice system was not considered in detail. However, in relation to the proposed new domestic abuse protection order which would be available in the criminal and family courts the draft Bill also states at section 27 (7) "The county court may make a domestic abuse protection order against a Person ("P") in any relevant proceedings to which both P and the person for whose protection the order would be made are parties" and at subsection (8). In subsection (7) "relevant proceedings" means proceedings of a description specified in regulations made by the Secretary of State. It is unclear what proceedings are proposed to be covered. A court when imposing an order will have the power to impose positive requirements; see section 31 of the draft Bill and also will have to deal with any breach of the order; see section 36.

[79] Paragraph 3.3.1 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772247/Transforming_the_response_to_domestic_abuse_-_consultation_response_and_draft_bill_-print.pdf

a) for automatic eligibility for special measures in domestic abuse cases, removing the burden on the victim to prove they are in fear or distress (with the Judge making the final decision on which special measures will be appropriate in each case); and[80]

b) measures to prohibit direct cross-examination of a victim by their abuser.[81] By an amendment to the Matrimonial and Family Proceedings Act 1914 a party "convicted, given a caution or charged" with a specified offence or against whom an "on notice" protective injunction has been made will not be allowed to cross- examine a victim or alleged victim in any family proceedings. The court would also have a power to prevent cross-examination in other cases if either a quality (of evidence) condition or significant distress condition were met. Significantly the Court would be duty bound to consider alternative ways that the party denied the opportunity to cross-examine could put his case and if he/she could not appoint a lawyer the Court could appoint a legal representative for the purpose.[82]

70. It is the view of many that the proposals, including that in defined circumstances within proceedings in the family court a Judge will have the power to appoint (and fund) a legal representative to conduct cross-examination is a very welcome and significant change and goes a long way[83] towards meeting the concerns expressed by the Court in Re K and H (Children). However, the Parliamentary Committee was concerned at the potential for inconsistency in application because too many victims of domestic abuse would be protected only at the discretion of the court. The Committee recommend that the mandatory ban is extended so that it applies where there are other forms of evidence of domestic abuse, as in the legal aid regime threshold.

71. As shall be considered in due course the Council is of the view that, given the fact that the majority of applicants and respondents are unrepresented in private law family cases (because they are ineligible for legal aid and cannot afford representation), the mandatory ban (and discretionary power)

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[80] See draft Bill section 44 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf

[81] The Paper stated "Although we only asked about cross-examination in the criminal courts, your responses to this question overwhelmingly focused on family proceedings. You were unanimous on the need to give family courts the power to stop unrepresented perpetrators of abuse directly cross-examining their victims. This was also a key issue raised with us through stakeholder events".

[82] The Lord Chancellor would have the power to provide that the costs be met through central funds

[83] The Law Society informed the Parliamentary Committee that, whilst the cross-examination measures in the Bill were very welcome, there were problems with their implementation. It suggested judicial practice on prohibiting cross-examination might be inconsistent and that this would require "adequate training and education for the judiciary, in order to avoid relying on gendered or stereotyped interpretations of the party's behaviour in determining whether cross-examination will indeed cause stress". The Law Society said that the ban should apply to cross-examination in all circumstances where there was a history of domestic abuse. It also questioned whether advocates appointed by the court would have the capacity to prepare a witness statement for the victim. The Law Society also recommended that the prohibition should extend to cover questioning of witnesses called by the alleged abusive party themselves: for example, where they called a child of the relationship to give evidence. Paragraph 164. Available at https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/207507.htm

will mean that the court is likely to be regularly faced with either taking over the questioning of one or more parties or appointing one or more legally qualified representatives. The Council note the concerns expressed, in particular by Judges, as to how the appointment of a qualified legal representative "by the court", will work in practice. How is the Court to choose a representative? Further and importantly, the rates of remuneration must be sufficient to mean that a sufficient number of practitioners are willing to undertake the work to avoid difficulties with appointment and delay. Also careful thought will have to be given (including by the professional bodies) as to the scope of the retainer/role of the representative and the extent of the duty (if any) to advise on issues arising from the cross-examination.

72. It is also recorded at page 55 of the Domestic Abuse paper that all family courts have been asked to draw up local protocols setting out their operational procedures for dealing with vulnerable court users and that:

"Her Majesty's Courts and Tribunals Service and the Ministry of Justice will develop a series of videos to explain the process of giving evidence to court and how special measures might assist."

73. As regards training it is stated:

"In addition, we provide ongoing training to all professionals working within the family justice system. Her Majesty's Courts and Tribunal Service is committed to increasing the awareness and understanding of domestic abuse among all family court staff. At the end of November 2017, a new training programme was rolled out to all court staff focusing on the needs of vulnerable court users, including victims of domestic abuse.
The Judicial College also ensures that awareness and understanding of domestic abuse are addressed on an ongoing basis as part of the College's regular training for family judges and magistrates. Between April 2016 and April 2018, all family court judges received training from the Judicial College on how to address the challenges faced by vulnerable persons in the courts, including those who are victims of domestic abuse."[84]

74. The paper also contained a commitment to improve the court environment, albeit with a focus on the criminal courts. It was set out that there will be a move to new waiting areas designed to ensure victim safety and a new court design guide focusing on accessibility for the most vulnerable**.** It stated:

[84]See page 66. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf

"Model waiting rooms for victims and witnesses have already been established in five criminal courts across the country. These are intended to improve the experience of the criminal justice system for all victims, including victims of domestic abuse. Her Majesty's Courts and Tribunals Service is using these model waiting rooms along with a new design guide and the results of a facilities audit to target further improvements. As an early priority, it is focusing on increasing the number of privacy screens available to allow vulnerable and intimidated victims and witnesses to give evidence without being seen by the defendant or the defendant's family."[85]

75. Whilst obviously providing significant advancement in the provision of assistance and protection of a category of vulnerable witnesses these changes, unless extended into the civil jurisdiction, will further accentuate the gap between the level of protection afforded to vulnerable parties/witnesses the criminal and family courts and that available in the civil justice system.

76. Unlike the Civil Procedure Rules, the Family Procedure Rules (FPR)[86] now make specific provision for vulnerable witnesses within PART 3A FPR and Practice Direction 3AA. As set out in this document Practice Direction 12J which deals with domestic abuse[87] also sets out requirements in relation to vulnerability[88] (including that a fact-finding hearing may be inquisitorial).[89]

77. Part 3A provides under the rubric "Vulnerable persons: participation in proceedings and giving evidence" as follows.[90]

Interpretation

3A.1**.**

In this Part— "child" means a person under the age of 18 years whether or not the child is the subject of the proceedings, except that—

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[85]Ibid. See page 55. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf

[86] The Family Procedure Rules are a single set of rules governing the practice and procedure in family proceedings in the High Court, County Court and Magistrates' courts.

[87] "domestic abuse" is defined as "including any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment";

[88] See e.g. paragraphs 10 and 19(j) Available at https://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu

[89] Ibid. See paragraph 28

[90] See also Part 1 (Overriding Objective) and Part 4 (General Case Management Powers);

(a) in adoption proceedings, it also includes a person who is the subject of proceedings and has attained the age of 18 years before the proceedings are concluded; and
(b) in proceedings brought under Article 11 of the Council Regulation (), the 1980 Hague Convention () or the European Convention (), it means a person under the age of 16 years who is the subject of proceedings;
"intermediary" means a person whose function is to—
(a) communicate questions put to a witness or party;
(b) communicate to any person asking such questions the answers given by the witness or party in reply to them; and
(c) explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions;
"live link" means a live television link or other arrangement whereby a witness or party, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the judge, legal representatives acting in the proceedings and other persons appointed to assist a witness or party; "mental disorder" has the meaning given in section 1 of the Mental Health Act 1983();

"participation direction" means—
(a) a general case management direction made for the purpose of assisting a witness or party to give evidence or participate in proceedings; or
(b) a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8; and
references to "quality of evidence" are to its quality in terms of completeness, coherence and accuracy; and for this purpose, "coherence" refers to a witness's or a party's ability in giving evidence to give answers which address the questions put to the witness or the party and which can be understood both individually and collectively.

Application of provisions in this Part
3A.2.

(1) Rule 3A.4 does not apply to a party who is a child.
(2) Rules 3A.3 to 3A.5 do not apply to a party who is a protected party.

Court's duty to consider vulnerability of a party or witness
3A.3.

(1) When considering the vulnerability of a party or witness as mentioned in rule 3A.4 or 3A.5, the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule

3A.7. (2) Practice Direction 3AA gives guidance about vulnerability.

Court's duty to consider how a party can participate in the proceedings
3A.4.

(1) The court must consider whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making such participation directions, the court must consider any views expressed by the party about participating in the proceedings.

Court's duty to consider how a party or a witness can give evidence
3A.5**.**

(1) The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence.

Protected parties
3A.6.

(1) The court must consider whether it is necessary to make one or more participation directions to assist—
(a) the protected party participating in proceedings; or
(b) the protected party giving evidence.

(2) Before making such participation directions, the court must consider any views expressed by the protected party's litigation friend about the protected party's participation in the proceedings or that party giving evidence. (Part 15 contains rules about representation of a protected party. Practice Direction 15B contains provisions about the ability of a protected party to give evidence.)

What the court must have regard to
3A.7.

When deciding whether to make one or more participation directions the court must have regard in particular to—
(a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—
(i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or
(ii) any members of the family of the party or witness;
(b) whether the party or witness—
(i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;
(ii) has a physical disability or suffers from a physical disorder; or
(iii) is undergoing medical treatment;
(c) the nature and extent of the information before the court;
(d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;
(e) whether a matter is contentious;
(f) the age, maturity and understanding of the party or witness;
(g) the social and cultural background and ethnic origins of the party or witness;
(h) the domestic circumstances and religious beliefs of the party or witness;

(i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G (6) of the 1984 Act[91];
(j) any characteristic of the party or witness which is relevant to the participation direction which may be made;
(k) whether any measure is available to the court;
(l) the costs of any available measure; and
(m) any other matter set out in Practice Direction 3AA.

Measures
3A.8.

(1) The measures referred to in this Part are those which

[91] Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to— (a)ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and (b)put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper ; section 31 G (6) Matrimonial and Family Proceedings Act 1984 Available at http://www.legislation.gov.uk/ukpga/1984/42

(a) prevent a party or witness from seeing another party or witness;
(b) allow a party or witness to participate in hearings and give evidence by live link;
(c) provide for a party or witness to use a device to help communicate;
(d) provide for a party or witness to participate in proceedings with the assistance of an intermediary;
(e) provide for a party or witness to be questioned in court with the assistance of an intermediary; or
(f) do anything else which is set out in Practice Direction 3AA.

(2) If the family court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the family court sits and the measure is available

(3) If the High Court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the High Court sits and the measure is available.

(4) Nothing in these rules gives the court power to direct that public funding must be available to provide a measure.

(5) If a direction for a measure is considered by the court to be necessary but the measure is not available to the court, the court must set out in its order the reasons why the measure is not available.

3A.9.

(1) The court's duties under rules 3A.3 to 3A.6 apply as soon as possible after the start of proceedings and continue until the resolution of the proceedings.
(2) The court must set out its reasons on the court order for—

(a) making, varying or revoking directions referred to in this Part; or
(b) deciding not to make, vary or revoke directions referred to in this Part, in proceedings that involve a vulnerable person or protected party.

Application for directions under this Part
3A.10.

(1) An application for directions under this Part may be made on the application form initiating the proceedings or during the proceedings by any person filing an application notice.
(2) The application form or application notice must contain the matters set out in Practice Direction 3AA.
(3) Subject to paragraph (2), the Part 18 procedure applies to an application for directions made during the proceedings.
(4) This rule is subject to any direction of the court.

Procedure where the court makes directions of its own initiative
3A.11.
Where the court proposes to make a participation direction of its own initiative the procedure set out in rule 4.3(2) to (6) applies.
Functions of officers of the Service and Welsh family proceedings officers
3A.12
Nothing in this Part gives the court power to direct that an officer of the Service or a Welsh family proceedings officer should perform any function beyond the functions conferred upon such officers by any other enactment.

78. The rule is supplemented by Practice direction 3AA which provides

1. Preamble and interpretation
1.2 This Practice Direction sets out the procedure and practice to be followed to achieve a fair hearing by providing for appropriate measures to be put in place to ensure that the participation of parties and the quality of the evidence of the parties and other witnesses is not diminished by reason of their vulnerability.
1.3 It is the duty of the court (under rules 1.1(2); 1.2 & 1.4 and Part 3A FPR) and of all parties to the proceedings (rule 1.3 FPR) to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings.
1.4 All parties and their representatives are required to work with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings.
1.5 In applying the provisions of Part 3A FPR and the provisions of this Practice Direction, the court and the parties must also have regard to all other relevant rules and Practice Directions and in particular those referred to in the Annex to this Practice Direction.

2. Factors to which the court has to have regard when considering the vulnerability of a party or witness mentioned: rule 3A.3(1) FPR

2.1 Rule 3A.3 FPR makes clear that when considering the vulnerability of a party or witness for the purposes of rule 3A.4 FPR (the court's duty to consider how a vulnerable party other than a child can participate in the proceedings) or rule 3A.5 FPR (the court's duty to consider how a vulnerable party or witness can give evidence), the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7 FPR. Where rule 3A.7(d) refers to questions of abuse, this includes any concerns arising in relation to any of the following-

a) domestic abuse, within the meaning given in Practice Direction 12J;
b) sexual abuse;
c) physical and emotional abuse;
d) racial and/or cultural abuse or discrimination;
e) forced marriage or so called "honour based violence";
f) female genital or other physical mutilation;
g) abuse or discrimination based on gender or sexual orientation; and
h) human trafficking.

3. Guidance about vulnerability: rule 3A.3(2) FPR

3.1 Rule 3A.3 FPR requires the court to have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7 FPR when considering the vulnerability of a party or witness other than a protected party. The court should require the assistance of relevant parties in the case when considering whether these factors or any of them may mean that the participation of any party or witness in the case is likely to be diminished by reason of vulnerability. When addressing this question, the court should consider the ability of the party or witness to-

a) understand the proceedings, and their role in them, when in court;
b) put their views to the court;
c) instruct their representative(s) before, during and after the hearing; and
d) attend the hearing without significant distress.

4. Participation directions: participation other than by way of giving evidence

4.1 This section of the Practice Direction applies where a court has concluded that a party's participation in proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability, including cases where a party might be participating in proceedings by way of asking questions of a witness.

4.2 The court will consider whether it is necessary to make one or more participation directions, as required by rule 3A.4. The court may make such directions for the measures specified in rule 3A.8. In addition, the court may use its general case management powers as it considers appropriate to facilitate the party's participation. For example, the court may decide to make directions in relation to matters such as the structure and the timing of the hearing, the formality of language to be used

in the court and whether (if facilities allow for it) the parties should be enabled to enter the court building through different routes and use different waiting areas.

5. Participation directions: the giving of evidence by a vulnerable party, vulnerable witness or protected party

5.1 This section of the Practice Direction applies where a court has concluded that a vulnerable party, vulnerable witness or protected party should give evidence. In reaching its conclusion as to whether a child should give evidence to the court, the court must apply the guidance from relevant caselaw and the guidance of the Family Justice Council in relation to children giving evidence in family proceedings.

Ground rules hearings

5.2 When the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence there shall be a "ground rules hearing" prior to any hearing at which evidence is to be heard, at which any necessary participation directions will be given-

a) as to the conduct of the advocates and the parties in respect of the evidence of that person, including the need to address the matters referred to in paragraphs 5.3 to 5.7, and

b) to put any necessary support in place for that person.

The ground rules hearing does not need to be a separate hearing to any other hearing in the proceedings.

5.3 If the court decides that a vulnerable party, vulnerable witness or protected party should give evidence to the court, consideration should be given to the form of such evidence, for example whether it should be oral or other physical evidence, such as through sign language or another form of direct physical communication.

5.4 The court must consider the best way in which the person should give evidence, including considering whether the person's oral evidence should be given at a point before the hearing, recorded and, if the court so directs, transcribed, or given at the hearing with, if appropriate, participation directions being made.

5.5 In all cases in which it is proposed that a vulnerable party, vulnerable witness or protected party is to be cross-examined (whether before or during a hearing) the court must consider whether to make participation directions, including prescribing the manner in which the person is to be cross-examined. The court must consider whether to direct that-

a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court;

b) questions or topics to be put in cross-examination should be agreed prior to the hearing;

c) questions to be put in cross-examination should be put by one legal representative or advocate

alone, or, if appropriate, by the judge; and
d) the taking of evidence should be managed in any other way.
5.6 The court must also consider whether a vulnerable party, vulnerable witness or protected party has previously-
a) given evidence, and been cross-examined, in criminal proceedings and whether that evidence and cross-examination has been pre-recorded (see sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999); or
b) given an interview which was recorded but not used in previous criminal or family proceedings.
If so, and if any such recordings are available, the court should consider their being used in the family proceedings.
5.7 All advocates (including those who are litigants in person) are expected to be familiar with and to use the techniques employed by the toolkits and approach of the Advocacy Training Council. The toolkits are available at www.theadvocatesgateway.org/toolkits. Further guidance for advocates is available from the Ministry of Justice at http://www.justice.gov.uk/guidance.htm.

6. Matters to be included in an application form for directions: rule 3A.10(2) FPR
6.1 An application for directions under Part 3A FPR should contain the following information, as applicable:
a) why the party or witness would benefit from assistance;
b) the measure or measures that would be likely to maximise as far as practicable the quality of that evidence;
c) why the measure or measures sought would be likely to improve the person's ability to participate in the proceedings; and
d) why the measure or measures sought would be likely to improve the quality of the person's evidence.

79. So, there is now a comprehensive framework for the consideration of the impact of vulnerability within any family law proceedings. The rules and practice directions have reflected and built upon the criminal provisions in the 1999 Act and seek to ensure that the family court no longer "lags behind" the criminal courts in terms of the protection/assistance provided to vulnerable witnesses.

80. In its response to the Council's consultation paper, The Family Justice Council[92] stated that:

[92] The Family Justice Council is an advisory non-departmental public body sponsored by the Judicial Office and provides independent expert advice on the family justice system to the government, principally through the Family Justice Board.

"There is as yet only limited understanding as to how FPR Part 3A and Practice Direction 3AA are operating in practice. However, the Family Justice Council's domestic abuse working group has been made aware of anecdotal evidence of the patchy and inconsistent implementation of these provisions. In order to implement them more effectively there would appear to be a need for:

- Improvements to the court estate in relation to the availability of facilities such as separate entrances, separate waiting rooms, screens and video links
- greater proactivity and coordination on the part of the courts to identify and respond to parties' vulnerability, especially where litigants in person
- more detailed guidance on dedicated training for judges, practitioners and court staff on matters such as identifying vulnerability - including those made vulnerable because of their engagement with the court - considering which measures and what kind of participation directions may be appropriate, conducting a ground rules hearing and other strategies available to protect vulnerable witnesses."

81. In the Council's view these three areas of concern and suggested steps apply equally to the civil jurisdiction and highlight the need for a co-ordinated approach to be taken across both the family and civil jurisdictions (given that much of the work of the two jurisdictions will be undertaken by the same Judges, in the same buildings and courtrooms).

Vulnerability and the civil courts

82. There are no specific provisions dealing with vulnerable parties or witnesses within the Civil Procedure Rules.[93]

83. The only provision which specifically affords protection to a vulnerable party or witness in civil proceedings is section 16 Anti-social Behaviour, Crime and Policing Act 2014 which applies section 16 - 33 of the 1999 Act to anti-social behaviour injunctions in the civil courts

16 Special measures for witnesses

[93] In Scotland children or adult witnesses whose evidence may be diminished in quality because of mental distress or they are suffering fear or distress in civil proceedings in Scotland are eligible special measures; see the Vulnerable Witnesses (Scotland) Act 2004. The 2004 Act abolishes any test for competence for all witnesses in civil proceedings. This effectively has the result that any witness can give evidence without his competence first being ascertained: the weight or significance of that evidence then has to be assessed by the judge.

(1) Chapter 1 of Part 2 of the Youth Justice and Criminal Evidence Act 1999 (special measures directions in the case of vulnerable and intimidated witnesses) applies to proceedings under this Part as it applies to criminal proceedings, but with—

(a) the omission of the provisions of that Act mentioned in subsection (2) (which make provision appropriate only in the context of criminal proceedings), and
(b) any other necessary modifications.
The sections in the 1999 Act in relation to the prohibitions on cross-examination do not apply by virtue of this section

84. There is a requirement (as in the Family Procedure Rules) for a litigation friend in proceedings by or against children or protected parties; a protected party being a party, or an intended party, who lacks capacity to conduct the proceedings. [94] However many vulnerable parties will have capacity[95].

85. Further, save in respect of possession claims involving social landlords, there are no express requirements in any pre-action protocols that impose on a party the requirement to consider any form of vulnerability of an opposing party or witness (or to notify the court). The pre-action protocol for possession claims by social landlords[96] requires that:

1.6 ……
(a) If the landlord is aware that the tenant has difficulty in reading or understanding information given, the landlord should take reasonable steps to ensure that the tenant understands any information given. The landlord should be able to demonstrate that reasonable steps have been taken to ensure that the information has been appropriately communicated in ways that the tenant can understand.
(b) If the landlord is aware that the tenant is under 18 or is particularly vulnerable, the landlord should consider at an early stage–
i. whether or not the tenant has the mental capacity to defend possession proceedings and, if not, make an application for the appointment of a litigation friend in accordance with CPR 21;
ii. whether or not any issues arise under Equality Act 2010; and
iii. in the case of a local authority landlord, whether or not there is a need for a community care assessment in accordance with National Health Service and Community Care Act 1990.

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[94] CPR 21.2Available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part21
[95] See generally Wookey v Wookey [1991] 2 FLR 319
[96] This protocol is presently under review by the Civil Procedure Rule Committee (sub-committee chaired by HHJ Lethem)

86. The lack of a general requirement upon parties to consider if an opposing party (or witness) is vulnerable, before or after the commencement of civil litigation, and the increasing number of litigants in person, act synergistically and heighten the need for the Judiciary to be alert to the possibility that a party or witness may be vulnerable.

87. In the event that a party or witness is identified as vulnerable there are a number of steps which provide protection and assistance that can be taken within existing practice and procedure and a number of rules which provide relevant powers and guidance. The starting point is the overriding objective.

The overriding objective

88. The touchstone within the civil procedure rules is the overriding objective to deal with cases justly[97] and at proportionate cost which includes, so far as is practicable, "ensuring that the parties are on an equal footing"[98]; which includes addressing disability issues and facilitating equivalent access to justice. Article 13(1) of the UN Convention on the Rights of People with Disabilities 2006 sets out that:

"Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."[99]

89. As Stewart J stated in Kimathi & others -v- Foreign and Commonwealth Office;[100]

"58. The Defendants point out that neither the CPR or statute prescribes special procedures for the handling of vulnerable witnesses, there being no civil equivalent of the Youth and Criminal Evidence Act 1999. They point out that the civil courts serve a very different purpose to the criminal courts. Of course, that is right. Further they say that litigants initiate civil compensation claims voluntarily

[97] "Accommodating a vulnerable person's needs (as required by case law, the Equality Act 2010, the European Convention on Human Rights, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Persons with Disabilities) requires the court or tribunal to adopt a flexible approach in order to deal with cases justly" (ETTB)
[98] CPR 1.1(2)(a)
[99] Article 13(2) states, "In order to help to ensure effective access to justice for persons with disabilities, parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."
[100] [2015] EWHC 3116 (QB)

and in the expectation that their evidence will be tested by cross-examination at trial notwithstanding their personal disabilities. They say that the court should be wary of importing automatic protection into the civil courts and that in this case, particularly where to do so would undermine rather than advance the objective of achieving justice for the parties.

59. There is some force in what the Defendants say but in my judgment, it is limited. A vulnerable litigant should not face a choice of initiating a claim and necessarily facing "exposure to the full forensic process" or being, in effect, barred from bringing their claim. The courts exist so as to provide access to justice not to prevent access to justice. If providing special measures does undermine the object of achieving justice for the parties then the court will so decide.

60. I return to the overriding objective. The Court must deal with every case "justly and at proportionate cost". One of the important factors is ensuring that the parties are on an equal footing so far is practicable, therefore the door must be open as a matter of principle to witnesses (whether they be parties or not) to having the appropriate assistance."

90. Whilst the overriding objective in its current form can be said to cover the need to ensure "an equal footing" in respect of participation and where appropriate the giving of best evidence, the Council believes that there is force in the views expressed by many consultees and in many responses to the consultation document that the rule needs to be more explicit.

91. The Court must seek to give effect to the overriding objective when it exercises any power given to it by the rules or interprets any rule and must further the overriding objective by actively managing cases. Also, importantly, the parties are required to help the court to further the overriding objective.[101]

92. CPR 3 is important as it provides wide and flexible powers of case management,[102] which can be used to make tailored directions to provide necessary assistance to those who are vulnerable.

93. However, as a number of responses to the Council have stated, there is no current set method to elicit information about vulnerability/potential vulnerability and much depends upon a Judge detecting an issue on the paperwork/online submission or at a hearing.

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[101] CPR 1.3

[102] Including the power to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective"; CPR3.1(2)(m)

Court documents/forms and online procedures

94. There is no requirement (or ability) to raise vulnerability when commencing proceedings or acknowledging the service of proceedings or responding to proceedings (which in part explains the difficulty in obtaining data).[103]

95. Most civil cases proceed upon one of three tracks (usually as a result of the amount of money at stake); small claims, fast track and the multi- track. The breakdown of allocated claims between the tracks is as follows;

    Number of claims allocated to track in 2018, by the type of track, England and Wales[104]

Type of Track	Number of Allocations	Proportion of Allocations
Small claim	91,610	52%
Fast track	70,440	40%
Multi track	13,525	8%
Total	175,575	100%

96. For each track, after the pleadings have been received, the parties are requested to fill in directions questionnaires before a Judge considers giving any directions. Save for a question about the need for an interpreter there is no reference to the need for any form of assistance for a vulnerable or potentially vulnerable party or witness in the questionnaire for the small claims track.[105] Likewise for the fast track and multi-track (which have the same directions questionnaire[106]) there is no specific reference to the need for any form of assistance for a vulnerable person.[107]

97. As a consequence of the lack of a request for information in the documents used for the first engagement with the court process or the direction questionnaires, a case may progress to a hearing or the making of directions (even if just in relation to the setting up of a case management hearing)

[103] A request is made on the face of a claim form for an indication whether the claim includes "any issues under the Human Rights Act 1998?"
[104] Source; Civil Justice Statistics Quarterly, October to December 2018
[105] Form N180
[106] Form N181
[107] There is a question as to whether the case needs to be heard at a particular centre and a box for "any other information you consider will help the Judge to manage the claim".

with the Judge unaware of a potential issue of vulnerability.

98. The tracks have different procedural rules. In the small claims track the court may, if all parties agree, deal with the claim without a hearing.[108] If either side requests a hearing then CPR 27.8 provides the court with a great deal of flexibility as to how it proceeds:

(1) The court may adopt any method of proceeding at a hearing that it considers to be fair.
(2) Hearings will be informal.
(3) The strict rules of evidence do not apply.
(4) The court need not take evidence on oath.
(5) The court may limit cross-examination.

99. In contrast fast track[109] and multi-track[110] trials usually follow a far more formal and set procedure.

100. The court reform programme has at its heart a move away from a paper-based to an electronic system. Through the Money Claims Online portal ("MCOL") it is now possible to commence a claim online provided that the claim is for a fixed amount of money not over £100,000 (so not a claim for compensation for an accident, injury or abuse). MCOL cannot be used by a person eligible for legal aid or help with fees.[111]

101. PD51R and 51S set out the procedure for a pilot to test an online claims process, called "Online Civil Money Claims" ['OCMC']. Claimants who could otherwise make their claim through the main Money Claim Online system may use the pilot to make their claim, if their claim is suitable for the pilot. The pilot is to run from 7th August 2017 to 30th November 2021. The pilot applies in the County Court. Sub-paragraph (3) sets out the conditions that need to be met for a claim to be suitable for the pilot. In order to be eligible, the claim must be:

(a) a Part 7 claim for a specified amount of money not exceeding £10,000 including interest;
(b) the claimant will not be getting help with bringing the claim from a "legal representative" (as defined);
(c) the claim is not for personal injury;
(d) there is only one claimant making the claim, and the claimant informs the court that there is only one defendant;

[108] CPR 27.10; the direction questionnaire asks the parties if they wish to proceed to a paper determination.
[109] See CPR 28
[110] See CPR 29
[111] Practice direction (PD) 7E specifically deals with MCOL and PD 51R

(e) the claimant believes that the defendant will not be getting help with defending the claim from a "legal representative" (as defined);

102. While these online procedures do not specifically request information in relation to potential vulnerability (and there is no requirement on a litigant to inform the court if there is a concern that the other party may have difficulty using an online system), a new question has been introduced into the 'Hearing Requirements' questions (which replace the Directions Questionnaire). The question asks, 'do you require any support for the hearing?' and could potentially identify vulnerable witnesses although it is drawn in very general terms.[112]

103. If the court is alerted to vulnerability there are a number of orders which can be made or steps taken to facilitate the progression or defending of a clam or the giving of evidence by a vulnerable party including:

i. Orders in relation to the nature and extent of evidence (including the extent of questioning)
ii. Allowing evidence by deposition
iii. Use of video link
iv. Assistance to litigants in person (and questioning on their behalf)
v. Use of an interpreter
vi. Use of an intermediary
vii. Appointment of an assessor
viii. Conduct all or part of a hearings in private
ix. Imposing reporting restrictions
x. Use of technology and other forms of assistance

104. These are now taken in turn and in more detail.

Evidence

105. In civil cases CPR 32.1[113] gives to the Court a broad power to control evidence;

Power of court to control evidence
32.1
(1) The court may control the evidence by giving directions as to –

[112] The questions in relation to hearing requirements are under review.
[113] Which applies to each of the three tracks;

(a) the issues on which it requires evidence;
(b) the nature of the evidence which it requires to decide those issues; and
(c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The court may limit cross-examination.

As a result, the court can limit the issues to be determined upon evidence and the nature and extent of any cross-examination (so the power is potentially much wider than the protection afforded in the criminal courts by section 41). However, in the absence of mandatory direction the existence of a power does not necessarily mean that it is usually the case that consideration is given to its exercise; or the basis upon which it may be exercised. Consultees reported a failure to adequately address the extent or method of giving of evidence by vulnerable witnesses (e.g. if any available special measures were appropriate or how cross-examination would proceed if there was an unrepresented Defendant).

Depositions

106. CPR 34.8 permits the evidence of a witness to be taken by way of a deposition. This is, however, a very rarely used power.

107. As for the pre-recording of evidence in chief this is possible given CPR 32.1(c), but (unlike the position in the criminal jurisdiction) given that the witnesses statement should stand as witnesses' evidence i.e. without the need to give it orally, the hearing ordinarily being solely concerned with challenge to that evidence; it is difficult to envisage circumstances when it would be of assistance.

Video link

108. CPR 32.3. states that:
"The court may allow a witness to give evidence through a video link or by other means."[114]

[114] Guidance on the use of video conferencing in the civil courts is set out in Annex 3 to Practice Direction 32 Available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32#annex3 See also Chancery Guide, Ch.21,

CPR PD 32 paragraph 29 states:
"Guidance on the use of video conferencing in the civil courts is set out at Annex 3 to this practice direction.

A list of the sites which are available for video conferencing can be found on Her Majesty's Courts and Tribunals Service website."

109. Paragraph 2 of the Annex 3 (which gives detailed practical guidance) states:

"A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but also as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation. In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it."

110. There has been a widely expressed view that, to date, the lack of sufficient suitable equipment, and the reference to achieving an overall cost saving, have resulted in a reluctance to order the use of video link in civil cases unless it is considered truly unavoidable (usually because a witness is geographically distant/overseas); and that as a result often the threshold for use has been set too high by the Judiciary. However, as a result of the reform programme there is now a drive to explore the greater use of video link and "fully-video" hearings[115] have taken place as part of a pilot.[116]

Litigants in person

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para.21.100 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/827377/chancery-guide-eng.pdf , Queen's Bench Guide, Ch.2, para.2.9.6 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/760087/the-queens-bench-guide-20180906.pdf , Admiralty and Commercial Courts Guide, Section H3 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672422/The_Commercial_Court_Guide_new_10th_Edition_07.09.17.pdf and Technology and Construction Court Guide, Section 4, para.4.6 Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819807/technology-and-construction-court-guide.pdf

[115] With fully video hearings, all parties appear by video.

[116] See "Video hearings tested in domestic abuse cases": Press release; HMCTS/MOJ; 9th May 2019 in relation to a pilot at Manchester Civil Justice Centre (reference to six domestic injunction cases already having used this procedure). The release states "Fully-video hearings are being tested in a small number of cases involving civil or family law at Manchester and Birmingham Civil Justice Centres. In civil law, one type of case involved is set-aside judgements. In family law, we are testing first-direction appointments. Those involved need to be legally represented. Two law firms are involved in the testing in Manchester, all of which is done using their own equipment; no special kit is needed." Available at https://www.gov.uk/government/news/video-hearings-tested-in-domestic-abuse-cases

111. There are specific rules with regard to unrepresented parties, which may be relevant when a party is vulnerable or wishes to ask questions of a vulnerable witness. CPR 3.1.A states:

(1) This rule applies in any proceedings where at least one party is unrepresented.

(2) When the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented.

……

(4) The court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective.

(5) At any hearing where the court is taking evidence this may include—

(a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and

(b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper.

112. One of the consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is that public funding in civil and family cases (other than public law cases) is now available in only exceptional circumstances and/or means tested. As set out above in respect of private law family cases, there has been a significant increase in the number of litigants in person in recent years, and this trend is likely to continue[117]. Litigants in England and Wales have the right to conduct litigation and address the court personally. In most tribunals, litigants can freely choose to be helped or represented by non-lawyers, but the position is different in civil courts (and family proceedings), where a litigant requires permission from the court to receive assistance or be represented by a person without rights of audience[118]. Such a person might, for example, be a friend, member of the family,

[117] The numbers of litigants seeking assistance from Support Through Court (formerly the PSU) has increased dramatically as a result; see generally paragraph 288 of this document.

[118] Guidance as to the circumstances in which permitting a McKenzie friend in civil and family proceedings will be appropriate, and related advice, can be found in the 'Practice Guidance (McKenzie Friends: Civil and Family Courts)' issued by the Master of the Rolls and the President of the Family Division on 12 July 2010. This Practice Guidance states, "Litigants have the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation." So, there is a general presumption of a right to assistance.

or charity worker, whether or not they are described as a McKenzie Friend.[119]

113. As with the Family Court, the civil courts have to deal with the difficulties presented by unrepresented Defendants seeking to cross-examine parties/witnesses. It is clear that what a civil or family court cannot currently do is require by order that the Court service is to provide funding for representation/for the purpose of questioning of a witness. As the Master of the Rolls stated in Re K & H when referring to Section 19 of the Prosecution of Offenders Act 1985 which now provides for a power to pay the fees or costs of a legal representative[120] appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999:

"This provision is clear as to its scope and application. There is no corresponding provision in section 31G(6) of the 1985 Act or anywhere else in relation to *civil* proceedings. Section 19(3)(e) is an example of the kind of provision expressly authorising payment of public funds which Lord Bridge had in mind in the passage that I have cited from *Holden & Co.* A yet further point is the fact that section 19(1) of LASPO provides that regulations may provide that a court in *criminal* proceedings may determine whether an individual qualifies for legal representation at public expense. There is no corresponding provision in relation to *civil* proceedings."

36. Thus Parliament has not given the court the same power in relation to legal representation in civil proceedings as it has given in relation to criminal proceedings. Section 3 of the HRA cannot be invoked to make the provision that Parliament has not made.

37. For these reasons, I consider that section 1 of the 2003 Act does not give the court the power to require the Lord Chancellor to incur public expenditure in payment for legal representation in civil and family proceedings. The provision of legal services cannot be described as coming within the scope of the duty to ensure that there is an efficient and effective system to support the carrying on of the business of a court.

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[119] See generally the Equal Treatment Bench Book. "In a climate where legal aid is virtually unobtainable in certain cases and lawyers may not be affordable, the McKenzie friend and lay representatives make a significant contribution to access to justice. The Judge has to identify those situations where such support is beneficial and distinguish circumstances where it should not be allowed." Available at https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf

[120] The Court did not accept that interpreters or intermediaries were "representatives" within the meaning of section 42, still less that they provide the services of a legal representative, so relevant costs could be met by the Court Service; see paragraph 39

114. As set out above[121] in the paper; "Transforming the Response to Domestic Abuse Consultation Response and Draft Bill" the Government proposed measures to prohibit direct cross-examination of a victim by a person charged, cautioned or convicted of their abuse (and vice versa) and provide a discretion to prevent it in other circumstances. Further, if there is a prohibition in any case the Court would be duty bound to consider alternative ways that the party denied the opportunity to cross-examine could put his/her case. If he/she could not appoint a lawyer the Court could appoint a legal representative for the purpose.[122]

115. It was not proposed in the paper that either the restrictions upon cross-examination or the ability to appoint a legal representative to undertake questioning would be extended to civil proceedings. As the Draft Domestic Abuse Bill also contained a right to make an application for a domestic abuse protection order in the civil courts (as well as the family courts):

(7) The county court may make a domestic abuse protection order against a person ("P") in any relevant proceedings to which both P and the person for whose protection the order would be made are parties.

(8) In subsection (7) "relevant proceedings" means proceedings of a description specified in regulations made by the Secretary of State.

The resulting imbalance in the jurisdictions as regards the obtaining of such orders and any related hearings, would be anomalous and clearly unsatisfactory.

116. As set out in detail below[123] it was the view of the Parliamentary Joint committee that a single consistent approach should be taken across all criminal and civil jurisdictions.

117. Currently, although civil Judges are understandably wary of "putting a case" to a witness, in some circumstances it may be the only proper way to proceed given the vulnerability of, or difficulties faced by, the witness or the party who would otherwise have to conduct the questioning. Although expressed as specific to the family courts, in which the procedure is investigative,[124] in PS v BP [2018] EWHC 1987 (Fam), Hayden J recently made observations, in the absence of definitive guidance, upon the correct approach where a self-represented alleged perpetrator wanted to cross-examine their accuser directly. He stated that once it became clear to the court that it was required to

[121] See paragraphs 68 -74 of this document.
[122] The Lord Chancellor would have the power to provide that the costs be met through central funds.
[123] See paragraphs196-202 of this document
[124] In the overarching framework of Children Act proceedings, the central philosophy is investigative.

hear a case "put" to a key factual witness, and where the allegations were serious and intimate, a "ground rules hearing" would always be necessary. The ground rules hearing should, in most cases, be conducted prior to the hearing of the factual dispute and judicial continuity between the ground rules hearing and the substantive hearing was essential. The investigative process in the courtroom, however painful, had to ensure fairness to both sides and there was no presumption that the accused would automatically be barred from cross-examining the accuser in every case: The Judge had to consider whether the accuser's evidence was likely to be diminished if cross-examination was conducted by the accused, and whether it was likely to be improved if a prohibition on direct cross-examination was imposed. If the court decided that cross-examination would not be permitted by the accused and there was no other available advocate to undertake it, it should require questions to be reduced to writing; and submitted to the judge for consideration. In most cases it would be helpful if "grounds of cross-examination" were identified under specific headings. Further, a Judge should never feel constrained to put every question the lay party sought to ask: he/she had to evaluate its relevance and also proportionality. Cross-examination was inherently dynamic, the Judge inevitably had to craft and hone questions that responded to the answers given and it might be perfectly possible, without compromising fairness to either side, for the judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate. This guidance was approved and applied in a civil hearing concerning historic sexual abuse by HHJ Robinson; LXA & BXL -v-Wilcox and Wilcox [2018] EWHC 2256 (QB).[125]

Interpreters

118. The court allows the use of interpreters at hearings when necessary.[126] Current HMCTS guidance provides that an interpreter will normally be available only during the hearing. They might be able to take part in legal discussions before or after the hearing if the judge permits.

119. A party/witness will always be given an interpreter if they are deaf[127] or have difficulty hearing. If a party has difficulty with English he/she will be provided with an interpreter if the case involves possession of property or land or committal. As for other types of case a party might still be able to get

[125] See paragraphs 13-17.
[126] There is provision in the CPR for people who are unable to read or sign statements of truth; CPR 22 PD 3A (1) of the Practice Direction. Available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part22/pd_part22#3A.1
[127] Since 2005 British Sign Language has been an officially recognised language and is the main language of the deaf community in the UK. There is a specific Advocates Gateway toolkit No 11 “Planning to question someone who is deaf”

an interpreter if he/she

- cannot afford to pay for an interpreter[128]
- does not qualify for legal aid
- "does not have a friend or family member who the judge says can act as your interpreter" (it is acknowledged that this would require permission from the Judge).

Intermediaries

120. In the criminal courts, intermediaries fulfil a number of roles depending of the degree of vulnerability.

"Registered Intermediaries are provided through the Ministry of Justice Witness Intermediary Scheme, which typically helps around 500 victims and witnesses every month. This scheme allows police officers and crown prosecutors to access high quality professional support when needed."[129]

121. Usually the intermediary prepares a report for the Court making recommendations as to the format and style of questions to be put to a competent[130] witness, and how and from where the evidence should be given. In some cases, the intermediary will attend the hearing and communicate or assist in the communication of questions to, and answers from, the witness.

122. As is stated in respect of intermediaries the Equal Treatment Bench Book (ETBB):[131]

"Their use should be considered by parties at an early stage so that assessments do not delay proceedings. Any resulting applications should be made in good time. Intermediaries are not always

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[128] If a party requires and pays for an interpreter (or for translation services) the costs incurred are ordinarily recoverable as a disbursement, subject to the wording of any applicable fixed costs regime; see Aldred-v-Chan [2019] EWCA Civ1780

[129] See "Ministry of Justice Witness Intermediary Scheme"; https://www.gov.uk/guidance/ministry-of-justice-witness-intermediary-scheme. The National Crime Agency manage the scheme on behalf of the Ministry of Justice. Registered intermediaries are approved by the Ministry of Justice and are arranged and paid for by individual customers (typically police forces and the Crown Prosecution Service).

[130] The test of a witness's competence is different from a test of his/her capacity. In R v Hayes [1977] 1 WLR 238 (CA) the Court concluded that the key ingredients for competence were that the witness would understand the solemnity of the occasion and the responsibility to tell the truth; if so, that witness could be sworn to give evidence. Different considerations may apply to the evidence of children in proceedings under the Children Act 1989 or to any witness in criminal proceedings; see section 53 of the Youth Justice and Criminal Evidence Act 1999 and R v B [2010] EWCA Crim 4

[131] Para 2-4 Available at https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf

available, and the court may need to consider how best to adapt its procedure and language to ensure effective participation with the assistance of other tools. Although the decision whether to use an intermediary is ultimately the judge's, it is important to remember that the extent of communication difficulties can sometimes be hidden, and that despite best intentions, advocates do not necessarily have the required expertise either to diagnose difficulty, or to adapt their questioning."

123. Currently, registered intermediaries are recruited and trained by the Ministry of Justice. As observed by David Wurtzel[132] in his response to the Council's interim recommendation No 4 in the consultation paper:
"(the recommendation) does not directly deal with the question of where the intermediaries are to come from. If it is to be the pool of those recruited by the Ministry of Justice then there will not be enough to go around. Such training as they receive in legal matters refers only to the criminal courts."

124. The Criminal Practice Direction recognises that the pool of intermediaries is not as deep as it should be: [133]
"…in light of the scarcity of intermediaries, the appropriateness of assessment must be decided with care to ensure their availability for those witnesses and defendants who are most in need. The decision should be made on an individual basis, in the context of the circumstances of the case."

125. Although there is no direct reference to the use of intermediaries in the CPR,[134] their use has been permitted in the civil courts (see e.g. Connor (a protected party by his wife and litigation friend) -v-Castle Cement & others [2016] EWHC 300.[135] However, as several of those who responded to the Council's request for information stated, the appointment of an intermediary is rare and greater awareness of this option is needed. In part restricted use of intermediaries to date may be because confusion remains in relation to the funding and also due to the lack of approved providers. One Designated Civil Judge gave the example of a trial with a vulnerable autistic

[132] From 2003-2015 Mr Wurtzel co-devised and delivered the training for new registered intermediaries and co-wrote the Registered Intermediary Procedural Guidance Manual.
[133] Paragraph 3F.5 Available at https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-practice-directions-I-general-matters-2015.pdf
[134] In A County Council -v- AB & others [2016] EWCOP 41, HHJ Rogers held that The Court of Protection was governed by civil rules of procedure and evidence, albeit that specific Court of Protection Rules had been made. Using r.95(e) of the Court of Protection Rules, which is very similar in content to CPR 32.1, the Court might admit the via a skilled intermediary.
[135] A claimant who lacked capacity and who also had communication difficulties was allowed to be assisted by a registered intermediary whilst giving evidence via video link. The intermediary prepared a report and although there was no formal ground rules hearing Counsel confirmed that they understood the need to formulate questions in accordance with the Intermediary's guidance. However, when attempted no questioning proved possible.

Claimant witness who needed an intermediary while giving evidence but there was no funding. It took time for HMCTS to agree to fund the intermediary as part of reasonable adjustments under the Equality Act.[136]

126. In a response to the consultation paper the Judges sitting at Central London County Court[137] stated that the availability for intermediaries in the civil courts would be extremely helpful stating:

> "Currently, they are almost never used because of a lack of funding. HMCTS has no budget for this",

but that a number of practical issues would need to be addressed within guidance including:

(a) How will an intermediary be selected and appointed if a party is unrepresented?
(b) How will the intermediary be funded?
(c) How will assessments be arranged[138]
(d) What of the potential disclosure (including to the other party) of confidential information used for the assessment?
(e) What of short hearings?

127. The current position regarding the use of intermediaries in the civil courts is unacceptable and lags far behind criminal justice system, with its scheme of registered intermediaries and, to a lesser, but significant, extent the Family Court where the use (and funding) of intermediaries is specifically covered within training documents,[139] including suggested intermediary companies.

128. The Council believes that the Ministry of Justice and HMCTS needs to jointly review the availability and use of intermediaries in the Civil Courts as a matter of urgency.[140] There is a clear need to recruit and train intermediaries for the civil and family courts. Also, guidance is needed for all court users (and Judges) in relation to the availability, use and funding of intermediaries in civil courts (taking into account the practical issues raised at paragraph 126 of this document).

Assessors

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[136] The costs of an intermediary obtained by or on behalf of a party would ordinarily fall to be considered as costs within the proceedings; so subject to the rules of costs recovery for the type of proceedings or track in question.
[137] The largest civil only court in England and Wales; sitting 27 Courts a day.
[138] Intermediaries usually assess a vulnerable person and compile a report for the Court
[139] "Special measures and facilities for vulnerable family court users" (HMCTS internal training document) and "guidance to court staff on intermediaries in family proceedings".
[140] See also the recommendation in the 2019 JUSTICE report; paragraph 4.16 Available at https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf

129. There is a power to sit with an assessor in civil cases; section 63 of County Courts Act 1984 states:

> 63 Assessors.
> (1) In any proceedings in the county court a judge of the court may, if he thinks fit, summon to his assistance, in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with a judge of the court and act as assessors.

> Section 70 of the Senior Courts Act 1981 states:
> 70 Assessors and scientific advisers.
> (1) In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance.

130. Rule 35.15 of the CPR states:

> (1) This rule applies where the court appoints one or more persons under section 70 of the Senior Courts Act 1981[1] or section 63 of the County Courts Act 1984[2] as an assessor.
>
> (2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.
>
> (3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –
> (a) prepare a report for the court on any matter at issue in the proceedings; and
> (b) attend the whole or any part of the trial to advise the court on any such matter.
>
> (4) If an assessor prepares a report for the court before the trial has begun –
> (a) the court will send a copy to each of the parties; and
> (b) the parties may use it at trial.
> (5) The remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings.[141]

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[141] As to further guidance: a letter from the Government Equalities Office to the president of the employment tribunals (E & W) in October 2010 sets out the government's position on the maintenance of lists of assessors; and following Cary v Commissioner of Police for the Metropolis [2014] EWCA Civ 987, a revised guidance on lay assessors was issued by HM Courts &

131. Section 114(7) of The Equality Act 2010 sets out that in proceedings in England and Wales on a claim within subsection (1),[142] the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so.

132. Consultees have indicated that assessors have been appointed in a number of housing cases where the tenant has a disability and Equality Act issues have been raised (either through preparation of a report or assisting the judge at trial).

Hearings in private

133. Unlike the position in certain areas of family law, most notably public law hearings,[143] CPR 39.2 sets out that the general rule is that hearings in civil cases are to be held in public and that:

"The court shall take reasonable steps to ensure that all hearings are of an open and public character, save when a hearing is held in private."[144]

134. CPR 39.2 (3) provides that a hearing, or any part of it, may be held in private in certain prescribed circumstances, including if:
(a) publicity would defeat the object of the hearing;
..
(d) a private hearing is necessary to protect the interests of any child or protected party;
..
(g) the court considers this to be necessary, in the interests of justice.

135. Whilst there can be little doubt that the fact that a hearing is in public may produce an additional level of stress/distress for some vulnerable parties/witnesses there was no suggestion within the responses to the Council of those who have provided views to date that the general rule should be

Tribunals Service (HMCTS) on 12 November 2015. The list is mainly of Tribunal lay members. A list of judicial fees, last updated on 1 April 2017, provides for an assessor's remuneration for attendance at hearings.

[142] This refers to the County Court jurisdiction to hear claims under the Act alleging a contravention of Part 3 (services and public functions); (b)a contravention of Part 4 (premises); (c)a contravention of Part 6 (education); (d)a contravention of Part 7 (associations); (e)a contravention of section 108, 111 or 112 that relates to Part 3, 4, 6 or 7.

[143] In private law family cases the presumption is that cases concerning children will be heard in private; see FPR 17.6(3) and 7.16

[144] CPR 39.2 (2A)

relaxed (and one response that argued that it was essential that the principle of open justice should not be eroded).[145]

136. As for restrictions upon reporting proceedings, CPR 39.2 (4) provides that the court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness. This power is frequently used in relation to litigation involving children and protected parties who may receive compensation.[146]

Use of technology and other assistance

137. HMCTS can provide documents online or in paper form in enlarged font. On occasions as part of reasonable adjustments the use of live note has been funded by HMCTS for a hearing. If helpful, figures and models are often used (many Judges have toy cars available so a witness can use them to describe an accident).

Overview

138. As set out within the consultation report it was the view of the majority of Designated Civil Judges and Masters who responded to the Council's request for views upon the issue of vulnerable parties/witnesses in the civil courts, that there are currently extensive powers within the CPR which, if properly used, could be used to ensure full and proper participation. However, there was also recognition for the need for an overarching reference within the rules to vulnerability, increased judicial training and the provision of adequate resources (such as live link facilities).

139. The consultation paper also highlighted concern that whilst Judges may be able to deal with obvious issues,[147] and/or issues raised by the parties, there was widespread failure to detect and assess

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[145] Response of the News Media Association.

[146] See generally AXMX-v-Dartford & Gravesham NHS Trust [2015] EWCA Civ 96 in which the court gave guidance on anonymity orders in regard to applications by children for approval of settlements for personal injury damages. Unless it was judged unnecessary, an order should normally be made without the need for a formal application, prohibiting publication of the names and addresses of the claimant, the immediate family and the litigation friend, but the press had a legitimate interest in the proceedings and should have the chance to make submissions before the order was made.

[147] "Where possible, judges should ensure that information is obtained in advance of a hearing about any disability or medical or other circumstance affecting a person so that individual needs can be accommodated, e.g. access to interpreters, signers, large print, audio tape …. more frequent breaks and special measures for vulnerable witnesses can and should be considered. Very often the steps that will be required will be obvious and may require little more than pragmatic alterations to

less obvious vulnerability and to adequately address the relevant issues of likely trial management sufficiently in advance of the hearing.[148]

140. A consistent theme within the responses to the consultation paper was the need for focused training for all civil Judges on vulnerability. During the seminar the Inquiry heard the view from one practitioner that in relation to civil claims based on sexual abuse/assault that:

"there are so few cases that actually end up at trial that I think it is not the (trial) Judges that need the training but the District Judges, who routinely deal with interlocutory applications... I think there is a need for specialist District Judges to be allocated."[149]

141. Another and linked theme running through several responses was the need for representatives acting in civil cases to have training upon the identification of those who are or may be vulnerable and assistance with ensuring their equal participation and the giving of best evidence. A view expressed was that (as elsewhere) the civil jurisdiction was "lagging behind" the criminal and family jurisdictions.

142. In light of these comments it is necessary to consider the relevant information, guidance and training available to civil Judges and the legal professionals who appear before them.

normal procedures" (ETBB). Available at https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf

[148] Docketing of cases is still not the norm in multi-track and High Court cases, and very often case management and interim hearings will not be carried out by the trial Judge.

[149] The IICSA Accountability and Reparations Investigation-Transcript of Inquiry Seminar; Day 2; 30th November 2016

Section 4 - Sources of information, guidance and/or training

143. There are two main sources of guidance and assistance available to both the civil judiciary and representatives in relation to vulnerable parties/witnesses; the ETBB and the Advocates Gateway and toolkits. The Judicial also has training through the Judicial College.[150]

The Equal Treatment Bench Book

144. The ETBB,[151] which is publicly available, provides comprehensive guidance to the Judiciary[152] aimed at helping make the court experience more accessible for all parties and witnesses.[153] The stated goal of the ETBB is to increase awareness and understanding of the different circumstances of people appearing in courts and tribunals. It helps enable effective communication and suggests steps which should increase participation by all parties. It sets out comprehensive and practical guidance.

145. At the outset of the chapter on Children, Young People and Vulnerable Adults it is recognised that the civil courts have no set procedural regime to ensure that proper assistance is provided to vulnerable parties/witnesses, so the focus is on the criminal jurisdiction;

Who is covered by this chapter?

Witnesses and parties may be 'vulnerable' in court as a result of various factors, and reasonable adjustments need to be made. Although touching on the wider powers to make adjustments, this chapter focuses on the statutory regime in criminal cases for taking 'special measures' for 'vulnerable' witnesses. Those are defined as witnesses who are under 18, have a disability, or where various other factors apply. Family courts have increasingly adopted the regime of 'special measures', and certain other courts and tribunals have derived ideas and guidance to adopt within their own general procedures.

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[150] There is also a system of LIP liaison Judges for all courts. Such Judges can assist other Judges with sourcing relevant guidance.

[151] Updated in September 2019. Available at https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-edition-September-2019-revision.pdf

[152] The Guide to Judicial Conduct sets out six core judicial 'values' which include ensuring equality of treatment. The Guide also includes the Equality and Diversity Policy for the Judiciary.

[153] Contents include chapters concerning litigants in person and lay representatives; young people and vulnerable adults; physical disability and mental disability

146. The ETBB gives detailed guidance covering physical and mental disability[154] of parties and witnesses. It is 'important advice which every Judge and every Justice of the Peace is under a duty to take into account when hearing a case involving people with one disability or another'.[155] The ETBB is clearly an essential tool for a civil Judge. However, it still requires a Judge to recognise that an issue may arise (or has arisen) in the case which needs to be addressed, something which some responses to the consultation report suggest can only properly be achieved after appropriate training. By way of example mental disability is common[156] and often not visible or visible only in some contexts.[157]

The Advocates Gateway

147. Since 2015 The Advocates Gateway (TAG) has provided free access to practical, evidence-based guidance on vulnerable witnesses and defendants. It was founded in 2012 and is an independent body run by a volunteer management committee chaired by Professor Penny Cooper. TAG's main aims are to promote the maintenance of the highest ethical and professional standards in the questioning of people who are vulnerable in justice settings and to provide practitioners with evidence-based guidance and support in the form of toolkits. TAG's toolkits have been widely endorsed by senior judges and by professional bodies and as set out above there is now direct reference to them in the Criminal Practice Direction[158] and the Family Procedure Rules.

148. The overarching aim is described as follows:

The Advocate's Gateway toolkits aim to support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process. The handling and questioning of vulnerable witnesses and defendants is a specialist skill (Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court, 2011).[159] Advocates must ensure that they are suitably trained

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[154] Mental disability is a broad concept which includes: mental ill health e.g. depression, anxiety, personality disorder; learning disabilities as well as developmental disorders/neuro-diverse conditions such as autism and 'specific learning difficulties' such as dyslexia and brain damage.

[155] See (R (on the application of King) v Isleworth Crown Court [2001] All ER (D) 48 (Jan)) per Lord Justice Brooke at paragraph 43.

[156] 1 in 4 people experience a diagnosable mental health condition in any given year; (ETBB)

[157] Notably in the context of the interim recommendation of the Inquiry mental ill health issues are common amongst those who have been subject to sexual abuse.

[158] See Criminal Practice Direction 2015; Part V Evidence; Annex for section 28 ground rules hearings at the Crown Court when dealing with witnesses under s.16 YJCEA 1999; paragraph 6

[159] A report prepared by The Advocacy Training Council ("ATC") (the body responsible for overseeing standards of advocacy training for the Bar of England & Wales) which was the first major research project in England & Wales "specifically directed to considering the training barristers need to develop the right skills and understanding in how to interview, examine and

and that they adhere to their professional conduct rules. These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.

149. In R-v-Biddle [2019] EWCA 86 9 Crim), a case concerning the use of an intermediary, the Vice President of the Court of Appeal Lady Justice Hallett stressed the importance of training for advocates and the need for Judicial oversight, stating:
"Since delivering this judgment extempore the Court has learned that there may still be some advocates appearing in cases involving vulnerable witnesses who have not undergone training. We hope that is not the case. If it is, we suggest that judges conducting pre-trial and ground rules hearings check with the advocates instructed that they have undergone the necessary training."

150. Of particular relevance for civil cases are the following Toolkits:
a) Toolkit 5: "Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)"
b) Toolkit 10: "Identifying vulnerability in witnesses and parties and making adjustments"
c) Toolkit 12: "General principles when questioning witnesses and defendants with mental disorder"
d) Toolkit 17: "Vulnerable witnesses and parties in the Civil Courts"
e) Toolkit 18: "Working with traumatised witnesses, defendants and parties".

151. The responses of several consultees referred to the civil Judges' lack of familiarity with these toolkits which are an extremely valuable aid for Judges and practitioners and which should be consulted before any hearing involving a vulnerable or potentially vulnerable party or witness. The Council believes that guidance and training for all civil Judges should underline their importance.

Judicial training

152. There is no specific civil training module/course run by the Judicial College solely concerning vulnerability issues for parties or witnesses. Whilst some differing aspects of vulnerability are considered within specific modules[160] e.g. capacity, delivering justice, housing and social issues; choice of

cross-examine those in our Court system - whether witness, victim or defendant – who are most vulnerable by reason particularly of their young age, learning difficulties, or state of mental health". The ATC set up a Working Group on vulnerable witness and defendant handling in June 2009 "following a number of striking cases that emphasised the urgent need to ensure that all advocates, in whatever field, were equipped to handle and question vulnerable people in Court, in a manner which was appropriate, sensitive and effective".

[160] It is also considered within the seminar "The Business of Judging".

courses is optional (indeed the is no requirement to attend civil courses as opposed to family or other courses) and a Judge may attend an annual training seminar and not consider any issues relating to vulnerability.

153. When amendments to incorporate Rule 3A and PD3AA of the Family Procedure Rules were being proposed, the Judicial College incorporated specific training on vulnerability within the family courses and this training has now been in place for over two years.

154. Concern was raised within several responses to the consultation report that there was no mandatory training for civil Judges (or on available civil courses) specifically concerning vulnerability.

Section 5 - Are additional measures needed within the civil jurisdiction?

155. It is helpful to directly compare the measures currently[161] available in the civil justice system with those available within the criminal justice system (the direct comparator referred to in the recommendation) and also the family courts;

Powers/Practice in Criminal Courts	Civil Courts	Family Courts
Specific procedural rules	N	Y
Witness service assistance	N	N
Separate waiting area	N	N
Screening witnesses	Y	Y
Evidence by live link	Y	Y
Evidence given in private	Y	Y
Removal of wigs and gowns	Y	Y
Video recorded evidence in chief	Y[162]	Y[163]
Video recorded cross-examination	N	N
Interpreters	Y	Y
Examination through intermediary	Y	Y
Aids to communication	Y	Y
Prohibition of cross-examination by accused	N	N[164]
Restriction on questions about sexual history.	N	N
Reporting restrictions	Y	Y
Additional Powers only available in the family and civil courts		
Assessors		
Evidence by Deposition		
Hearings in private[165]		

156.This analysis provides support for the view expressed by some Judges in the consultation exercise

[161] C.f. the proposals in the draft Domestic Abuse Bill Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf

[162] The rules would permit it; but it is difficult to envisage circumstances when it would be necessary.

[163] Consultees have referred to some rare occasions when this has been used; including from a parent with acute mental vulnerability.

[164] See Draft Bill at paragraphs 68-69 of this document.

[165] There being only a very limited power to having a hearing in private under the CPR.

that the large majority of the forms of assistance and protection which can be provided to vulnerable parties or witnesses in the criminal and family jurisdictions can also be achieved using existing (specific) powers within the CPR**.**

157. However, the majority of those who provided input into the consultation report recognised that the Court's powers to address vulnerability were not being used frequently or widely enough, or consistently. Examples of comments were:

"I cannot comprehend why a vulnerable witness in a civil case should not have the same level of assistance and protection afforded to them as they would in the criminal or family courts and even the court of protection. Unfortunately, I have had a poor experience of the application of special measures in a civil setting. As a Claimant Solicitor trying to support a severely brain injured Claimant (who was actively suicidal as a result of being told the Defendant was able to cross-examine her at Trial), I felt like the entire experience was an uphill battle (with very little support) from start to finish."

And

"There should be a sense of coherence …and not the 'ad hoc' approach currently taken by the civil courts."

And

"The judge also refused to order evidence via live link because that was a 'nightmare' for the advocate as the system invariably failed at the critical moment. I gained the impression that the Judge was viewing the need for special measures in an old-fashioned way, rather than as a step the Courts and advocates should take to enable the witness to give their best evidence."

And

"The needs of vulnerable witnesses appear well understood in family and crime but there is a general reluctance to use the same measures in Civil Procedure and a total lack of understanding amongst judiciary and parties."

The need for changes to the Civil Procedure Rules

158. All the responses to the consultation paper which commented on the proposals with regard to rule changes recognised the lacuna in the CPR and the need for specific rules covering vulnerable parties/witnesses either by way of amendment or addition to the overriding objective (CPR 1.1(2)) and/or by way of a new rule with substantially the same content as rule 3A of FPR.

159. In its 2019 report "Understanding Courts", JUSTICE stated:[166]

> "The overriding objective of each of the rules involves dealing with cases "justly," which is then defined in a way that is relevant to each jurisdiction but includes principles of fairness, expedition and placing parties on an equal footing. However, the Tribunal Rules specifically include "ensuring, so far as practicable that the parties are able to participate fully in the proceedings"[167]. The Working Party considers that there should be an expressly stated overriding objective across all jurisdictions that professionals should have as a primary consideration the effective participation of lay users. In other words, that the professionals adapt proceedings to ensure lay users comprehend the process. Stating this at the outset of the rules may assist with ensuring that the rules themselves are simple and simply expressed –for the benefit of lay users."
>
> And made the recommendation:
> "There should be an expressly stated overriding objective − across all jurisdictions −that professionals should have as a primary consideration the effective participation of lay users. In other words, that the professionals adapt proceedings to ensure lay users comprehend the process."

160. Writing in the Civil Justice Quarterly, Professor Grainne McKeever sets out the significance of participation in legal proceedings, stating that it,

> "is a basic facet of access to justice. It is a fundamental element of the right under Article 6 of ECHR to effective participation as the means of accessing the right to a fair trial"[168]
>
> "Further Fairness in legal process demands that the affected citizen is able to participate effectively: to be adequately informed about critical choices, to trust that a neutral arbiter will enable their engagement and hear their voice, and therefore to be able to exert influence on the outcome of the proceedings. Such participation is not merely concerned with litigant satisfaction but with legal legitimacy"[169]

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[166] Paragraph 2.15 Available at https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf
[167] Rule 2(2)(c) of The Tribunal Procedure (Upper Tribunal) Rules 2008 and equivalent in other tribunal procedure rules.
[168] "Comparing Courts and Tribunals through the lens of legal participation" Professor Grainne McKeever [2020] Civil Justice Quarterly.
[169] Ibid p 15

161. The Tribunal system has for some time reflected the need to focus upon participation as the empowerment for court users to "prepare and present" their cases effectively [170] . The Tribunal Procedure (Upper Tribunal) Procedure Rules 2008[171] set out:

Overriding objective and parties' obligation to co-operate with the Upper Tribunal

2.— (1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
Recent changes to the Criminal Procedure Rules Rule 3.11(c) provide that in order to manage the trial or an appeal, the Court

"(c) may require a party to identify…
(v) what arrangements are desirable to facilitate the participation of any other person, including the Defendant

162. Given the 2010 research[172] carried out on behalf of the Ministry of Justice (see paragraphs 19-23 of this document), the conclusion of the 2011 the Northern Ireland Law Commission (see paragraphs 26–29 of this document), the work of the Children and Vulnerable Witnesses Working Group that led to the rule change in the Family Procedure Rules in 2017, the submissions and evidence to the Inquiry, the report of JUSTICE and the responses provided to the Council's consultation report, it is the Council's view that consideration should now be given by the Civil Procedure Rule Committee to a rule change by amendment to the overriding objective to make specific reference to ensuring full participation by all parties and the giving/obtaining of best evidence.

163. The aim should be to provide equivalent consideration to vulnerability issues that achieved by rule

[170] See Sir A. Leggatt, "Tribunals for Users: one system, one service" (London TSO, 2001) para 1.11. See also "a ladder for legal participation for Tribunal users"; Professor Grainne McKeever; Public Law 2013.
[171] See also the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, Rule 2(c)
[172] Rosie McLeod, Cassie Philpin, Anna Sweeting, Lucy Joyce and Roger Evans, Court Experience of adults with mental health conditions, learning disabilities and limited mental capacity, Ministry of Justice Research Series (London: Ministry of Justice, July 2010) Available at https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/court-experience-adults-1.pdf

3A (and Practice Direction 3AA) of the Family Procedure Rules. Any differences in approach to vulnerable parties or witnesses between the jurisdictions should be limited and justifiable and merely relying on use of existing powers without more would risk the civil jurisdiction "lagging behind". In its report on the Draft Domestic Abuse Bill the Parliamentary Joint Committee[173] welcomed the strengthening of the provision of special measures in criminal courts and noted that the Family Court had introduced a new set of rules (Family Procedure Rules, Part 3A) regarding vulnerable people, and a new practice direction about domestic abuse in cases about children (Practice Direction 12J) with the result that arrangements were similar to those in the criminal courts. The Committee then stated:

"In the civil courts, there is little specific provision. The court has an overriding objective to deal with cases fairly and to manage cases actively. The court can control how evidence is put before the court, and can allow witnesses to give evidence by "video link or other means". But, as the Inns of Court College of Advocacy pointed out in 2015:
there is no focused practice direction in civil proceedings on the issue of vulnerability, no accepted procedure for advocates, representatives or judges to identify vulnerable people in civil proceedings, no specific special measures and no requirements on judges to manage cases in relation to vulnerable witnesses or parties, including where the case involves litigants in person.
Women's Aid pressed for "equal access to special measures for victims across the family, criminal and civil courts", a call echoed by Dame Vera Baird QC.
150.The Minister told us that special measures were already available in both family and civil proceedings. He said Practice Direction 3AA places a duty on the court to consider whether a party's application in the proceedings is likely to be diminished by reason of vulnerability, including if they are a victim of domestic abuse, and to consider whether any in-court protections are needed, which can then be ordered by the judge. He added that there were similar arrangements in the Civil Procedure Rules and that the Government had not seen any evidence to suggest that there was an issue with special measures and their effectiveness in the civil court.
151.The Minister accepted that providing special measures would be challenging because of the physical layout of some courts and variations in the availability of facilities to pre-record and provide video links—but he said that this was something that the Government was addressing by investing in the court reform programme. The Government's intention was to take those needs into account when constructing new court buildings, or undertaking renovations, so that facilities such as separate waiting areas could be provided.
152.We welcome the proposal that complainants in criminal proceedings for an offence involving behaviour that amounts to domestic abuse will be automatically eligible for special measures.

[173] Published on 14th June 2019 Available at https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/207507.htm

153.We recommend that this provision be extended to victims of domestic abuse appearing in family and other civil courts. We note the Government's comment that this is already possible under family court rules but, given the persuasive evidence about poor implementation, we recommend that the provision for special measures in the family court's rules and practice directions is put on a statutory basis, and that a single consistent approach is taken across all criminal and civil jurisdictions. This is particularly important given the Government's plans for a reduced but improved court estate, which may provide an additional barrier to participation for vulnerable victims."

164.The Council believes that the aim of the rules and best practice within the civil justice system should be to ensure that all parties can fully and equally participate in progression of a case and, any witness should be able to give their best evidence. Only through achieving these aims will there be adequate access to justice and full and fair consideration of the issues within any litigation. Those who are vulnerable face may challenges to their participation and the giving of evidence which should be addressed to the greatest extent reasonably practicable. When considering how this goal is to be achieved an obvious starting point is how vulnerability is to be identified.

Should there be a definition of vulnerability?

165. If there is to be amendment to the overriding objective (and other rules) to ensure the effective participation, and best evidence, of those who are vulnerable, should vulnerability be defined?

166.There is no consistent definition of vulnerability used within with the criminal and family jurisdictions for all purposes.[174]

167. As set out in detail above,[175] in the criminal jurisdiction sections 16 and 17 of the 1999 Act provide for the special measures that are to be provided to assist witnesses in certain prescribed circumstances; specifically:

a) if they are under 17 or
b) if "the quality their evidence is likely to be diminished" by mental disorder, significant impairment of intelligence and social functioning, physical disability or disorder or fear or distress

[174] See generally Identifying and Accommodating Vulnerable People in Court; HHJ Drew QC and Lynda Gibbs; Archbold Review Issue 10 December 2019; "With reference to vulnerable witnesses and vulnerable defendants, the terminology used by the Court of Appeal, in the Crim PR and Crim PD, is inconsistent and inevitably leads to confusion. As a result, Judges and practitioners struggle to determine who is "vulnerable" and therefore what their duties towards them are. As a consequence, some of society's most vulnerable people, including children, victims and defendants, are being failed by the court process. In order to remedy this, there is a clear and obvious need for clarity of language and of approach"
[175] See paragraphs 44-46 of this document.

(determination of which must take into account the nature and alleged circumstances of the relevant of fence and the age of the witness and, if relevant, the social and cultural background and ethnic origins, the domestic and employment circumstances or any religious beliefs or political opinions of the witness and any behaviour towards the witness on the part of the accused, his/her family or associates or any other person likely to be an accused or a witness); or

c) if they are a complainant in respect of a sexual offence

168. The Practice Direction Crim PD1 General Matters 3D is headed "Vulnerable people in the courts" and provides guidance on facilitating the participation of witnesses and defendants. It sets out that apart from those eligible for special measures "...many other people giving evidence in a criminal case, whether as a witness or defendant, may require assistance: the Court is required to take "every reasonable step" to encourage and facilitate the participation of any person..."[176] but no further definition, or guidance as to when a person should be considered vulnerable, is provided.

169. The recently revised Family Procedure Rules at Rule 3A.3 FPR focus on participation and achieving best evidence and set out requirements that the court consider whether a party's participation in the proceedings or the quality of evidence given by a party or witness is "likely to be diminished by reason of vulnerability". When considering the vulnerability of a party or witness the court must have regard in particular to the matters set out in paragraphs (a) to (j) and (m) of rule 3A.7:

i. the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of— any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or any members of the family of the party or witness;
ii. if the witness of party suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning; has a physical disability or suffers from a physical disorder; or is undergoing medical treatment;
iii. the nature and extent of the information before the court;
iv. the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;
v. whether a matter is contentious;
vi. the age, maturity and understanding of the party or witness;
vii. the social and cultural background and ethnic origins of the party or witness;
viii. the domestic circumstances and religious beliefs of the party or witness;

[176] Crim PD 3D.2

ix. any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act;[177]
x. any characteristic of the party or witness which is relevant to the participation direction which may be made;
xi. any other matter set out in Practice Direction 3AA.

The Practice Direction adds that addressing the question of whether a party's participation or quality of evidence may be diminished by vulnerability the court should consider the ability of the party or witness to:
a) understand the proceedings, and their role in them, when in court;
b) put their views to the court;
c) instruct their representative(s) before, during and after the hearing; and
d) attend the hearing without significant distress.

170. Definitions of vulnerability do exist, such as in to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Schedule 1 paragraph 3(5) which provides:

""vulnerable adult" means a person aged 18 or over whose ability to protect himself or herself from abuse is significantly impaired through physical or mental disability or illness, through old age or otherwise.
however, such definitions must be taken in its context. Paragraph 3(5) concerns abuse that took place at a time when an individual was a child or vulnerable adult and is not appropriate to cover wider vulnerability within the civil litigation process."

171. JUSTICE's Working Party Report on Prosecuting Sexual Offences (10th June 2019) recommended (recommendation No 13) that there should be a universal definition for the term vulnerable, noting:[178]

"The term "vulnerable" is the source of endless misunderstandings, confusion and inconsistency of approach. It has an ordinary everyday meaning which is not necessarily the same as the legal definition. It is interpreted both narrowly and broadly depending upon who is using the term and in what context".

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[177] Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to— (a)ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and (b)put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper; section 31 G (6) Matrimonial and Family Proceedings Act 1984
[178] Paragraph 4.11 Available at https://justice.org.uk/wp-content/uploads/2019/06/Prosecuting-Sexual-Offences-Report.pdf

172. However, when compiling the consultation report the Council recognised the force of what is set out within The Advocates Gateway toolkit 10; "Identifying vulnerability in witnesses and parties and making adjustments" Toolkit [20th March 2017]

"Vulnerability does not fit neatly into a single definition. While vulnerabilities for special measures (due to age, incapacity or fear or distress) are defined in statute, all vulnerabilities for both the witness and the defendant should be recognised, and suitable steps taken to ensure the person's needs are met. According to Lord Reed, in Osborn v Parole Board [2013] UKSC 61: '[Justice]is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions.' (para 68) And fairness 'depends on the circumstances' and it is 'impossible to lay down rules of universal application' (para 80)".

173. JUSTICE recommended[179] a definition[180] that:

"A 'vulnerable person', is any child, young person or adult, including a defendant, who may not be able to participate effectively at court if reasonable steps are not taken to adapt the court process to their specific needs."

It was argued that its adoption would provide a consistency of approach throughout the criminal jurisdiction by reducing the chances of significant vulnerabilities being overlooked.[181] There would be substantial dividends in respect of the trials of sexual offences in that it would greatly enhance the chances that vulnerable witnesses and defendants are properly protected by appropriate adjustments during the court process.

174. Given the difficulty with framing a definition which is sufficiently broad and flexible to cover all potential forms of vulnerability[182] within the civil process, the Council did not propose a definition

[179] See paragraph 4.23 Available at https://justice.org.uk/wp-content/uploads/2019/06/Prosecuting-Sexual-Offences-Report.pdf

[180] Proposed by HH Judge Simon Drew QC and Lynda Gibb ; see "Identifying and Accommodating Vulnerable People in Court": Archbold Review Issue 10 December 2019.

[181] However, a difficulty with this definition is its circularity; a person is vulnerable if they have a reasonable need which needs to be taken into account because they are vulnerable.

[182] Any definition would have to recognise that vulnerability is a different (and wider) concept than mental or physical disability. As stated by Dr Jaime Lindsey in her response to the consultation paper; "the routine assumption that vulnerability is caused by disability can be problematic …there are real concerns among disability scholars and activists about the use of the term "vulnerable"

within the consultation report. Rather the suggested approach was that the word when used within any rule should have its ordinary meaning with a recognition that the overriding objective should require all concerned in the civil jurisdiction to consider all its forms and to ensure that all parties can effectively participate in proceedings and can give their best evidence (mirroring the essential requirements within the Family Procedure Rules).

175. Several responses to the consultation report raised concern about the lack of a definition of vulnerability. Having carefully considered these responses the Council recognises that the most significant drawback of a failure to define vulnerability within the Civil Procedure Rules or at least to provide guidance and/or a set of relevant factors (such as those set out within the Family Procedure Rules) is that without one parties and witnesses may not appreciate that a court would consider them vulnerable and could provide assistance.

176. The Council also accepts that clarification, and additional detail, in respect of any amendment to the overriding objective (to reflect the need to ensure the ability of all parties/witnesses to participate in proceedings and the giving of best evidence) is necessary to ensure that litigants and representatives understand that the threshold for particular types of action or intervention by the Court due to vulnerability cannot be set too low. "Support through Court" (formerly the PSU) stated in response to the consultation paper:

"we believe all litigants in person are vulnerable, simply through having to navigate a system designed for professional lawyers… Most of our clients are intimidated by their own lack of knowledge, the unfamiliar language, the confusing system and the perceived risks associated with court proceedings, which all add up to a significant detriment in their ability to represent themselves effectively, when coping with health issues or other vulnerabilities, the experience can be extremely daunting."

177. The Court can and should provide all reasonable assistance where appropriate to litigants in person. There is a specific duty set out within CPR 3.1A (2) when the court is exercising any powers of case management to have regard to the fact that at least one party is unrepresented. Further, CPR3.1A sets outs that:

(1) The court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective.

(2) At any hearing where the court is taking evidence this may include—
(a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and

(b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper.

However, the Council does not believe that all litigants in person can axiomatically be entitled to measures designed to assist those who are vulnerable, even if they consider themselves as such, solely by reason of the fact of self-representation. Rather, some, but not all, litigants in person are vulnerable and should receive assistance. This does not mean that the Council believes that the support provided to litigants in person is adequate or that further improvements e.g. to the complexity of the rules or the language used are not necessary. Indeed, the Council continues each year to strive for improvements in the civil justice system to enable greater access to justice for litigants in person.[183] Rather the focus of this report is the need for changes in philosophy and practice within the civil justice system so as to provide greater assistance to those who are vulnerable other than solely by reason of self-representation.

178. Having carefully re-considered the issue and the responses the Council believes that the best approach remains amendment of the overriding objective, but with an accompanying practice direction to provide additional information and clarity, including through the provision of a list of factors that require consideration when considering if a party or witness needs assistance by reason of vulnerability and if so what steps can be taken or measures put in place (but recognising the risk with any list of factors, of exclusion of something which adversely affects participation or the giving of best evidence).

Automatic qualification as vulnerable

179. Several responses to the consultation paper disagreed with the view that the question of whether witnesses are likely to be vulnerable as a result of domestic abuse or sexual violence and should be eligible for protection or special measures, including the prohibition on cross examination in person, should be decided on a case-by-case basis. The Equality and Human Rights Commission (EHRC) stated that reliance on judicial discretion alone can cause "particular problems in cases where domestic abuse or sexual violence is an issue".

And that

[183] In 2019 the Council held the 8th Civil Justice Council National Forum on access to justice for those without mean. This annual event seeks to bring together all relevant bodies engaged in assisting those without means for legal representation and to identify and share best practice and drive through an agenda of improved access to justice.

"(A) recent MOJ study[184] in relation to the family courts, which included interviews with Judges, found *highly inconsistent application of judicial discretion* both with respect to cross-examination in person of a vulnerable witness by the alleged abuser and with respect to special measures."

The EHRC was of the view that reliance upon training alone to ensure judicial awareness is unlikely to be sufficient.

180. As set out below, the Council recommends that the protections contained within the Domestic Abuse Bill should be extended to cover civil cases. This addresses the concerns as to cross-examination expressed by the EHRC and others who responded to the consultation paper raising concerns about questioning of victims/survivors of abuse. However as basic tenet, given that the change proposed by the Council is to the overriding objective and covering all aspects of litigation, (unlike the approach under section 17(4) YJCEA or as proposed in the Domestic Abuse Bill),[185] the Council does not believe that a party or witness should axiomatically be deemed vulnerable for all purposes simply because of the subject matter or nature of the action. The subject matter of the dispute must be a factor to be considered when taken against the particular issue or step under consideration.

Amending the overriding objective

181. As set out above, it is the Council's view that the overriding objective should be amended so as to focus the attention of all civil Judges, parties and advocates upon the issue of vulnerability and provide a structured framework to produce a consistent approach to application of all of the civil procedure rules and practice directions.

182. The Council recognises that the precise wording will be a matter for the Civil Procedure Rules Committee,[186] but suggests that a suitable amendment could be as follows

1.1

....

Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing *and can fully participate in proceedings*;

(b) saving expense;

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[184] Corbett, N.E and Summerfield, A. (2017) *Alleged perpetrators of abuse as litigants in person in private family law.* Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF

[185] See paragraph 69 of this document.

[186] Which already has a sub-committee tasked with considering the recommendations of the JUSTICE report "Understanding Courts".

(c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.
(g) *ensuring that witnesses can give their best evidence*

183. The Council also believes that a practice direction is required to explain the intent behind the wording of the overriding objective and to give some guidance as to its practical application.

A new practice direction

184. It is suggested that a new practice direction should directly address vulnerability in a way that gives assistance to litigants in person and representatives in the identification of circumstances in which a court may consider a party or witness to be vulnerable and some of the steps/measures which can be taken to give assistance.

185. As with any proposed rule change the content of a new practice direction would be a matter for the Civil Procedure Rules Committee. However, the Civil Justice Council suggests that a new practice direction should address the following matters:

(a) The overriding objective requires that, in order to deal with a case justly, the court should ensure, so far as practicable, that the parties are on an equal footing and can fully participate in proceedings and give their best evidence. The parties are required to help the court to further the overriding objective at all stages of civil proceedings.
(b) Vulnerability of a party or witness may impede participation and also diminish the quality of evidence and the court should take all practicable measures to address these issues in every case.
(c) A person should be considered as vulnerable when a factor, which could be personal or situational, permanent or temporary, may adversely impact upon their participation in proceedings[187] or the giving of evidence.
(d) Factors which cause may vulnerability include (but are not limited to)

[187] As with the Family Procedure Rules, the Council do not believe that the CPR should create automatic vulnerability (although other rules may have a mandatory effect upon the conduct of the proceedings).

i. Age, maturity or lack of understanding;
ii. Communication or language difficulties (including literacy);
iii. Physical disability or disorder;
iv. Mental disorder or significant impairment of intelligence or social functioning (including learning difficulties);
v. The subject matter of, or facts relevant to, the case or the relationship with a party or witness (examples being sexual assault[188], domestic violence or intimidation (actual or perceived));
vi. Social or domestic circumstances, cultural background or ethnic origins.

(e) When considering whether a factor may adversely impact upon their participation in proceedings and/or give evidence the court should consider the ability of the party or witness to-
i. understand the proceedings, and their role in them;
ii. put their views or evidence to the court;
iii. respond to or comply with any request of the court (including as to the provision of information);
iv. instruct their representative/s before, during and after the hearing; and
v. attend any hearing.

(f) The Court, with the assistance of the parties, should try and identify vulnerability of parties or witnesses at the earliest possible stage of proceedings and to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result;

(g) The court should consider "ground rules" before a vulnerable witness is to give evidence (to determine what directions are necessary in relation to the nature and extent of that evidence, the conduct of the advocates and/or the parties in respect of the evidence of that person, and/or any necessary support to be put in place for that person).[189]

Case Management

186. The Council recognised in the consultation report the force in the view expressed by some consultees of the need to avoid being overly prescriptive in terms of a list of specific directions to be given at any stage in the various forms of civil proceedings. The wide range of vulnerability issues means that bespoke attention will usually be required. An overriding requirement to address the impact of vulnerability upon participation and the giving of evidence should ensure that consideration is given to the adoption of appropriate measures whilst preserving flexibility. Thereafter judicial training (and reference to the ETBB and Advocates Gateway toolkits) should ensure that adequate steps are taken within directions to ensure proper levels of assistance and protection are provided.

[188] By section 17 (4) CYPA the complainant in respect of a sexual offence is automatically deemed vulnerable.
[189] See generally paragraph 193-195 of this document.

187. Some consultees recommended the use of model directions, but given the need to consider vulnerability in every case (i.e. regardless of subject matter or other specific procedural requirements) and to cater for a broad range of issues arising from vulnerability the Council believes that such directions would be very difficult to frame. However, it should be expected that at the earliest suitable opportunity[190] the court will usually consider directions:

i. To deal with any practical issues affecting participation in the case management process (e.g. by holding the hearing by telephone,[191] or in due course by video hearing);
ii. To provide an extended time for compliance with any step (such as the production of a witness statement);
iii. Requiring familiarity on the part of advocates or parties with the advocates toolkits;
iv. To ensure that necessary facilities are available at the trial court.[192]

188. Returning to the Inquiry's interim recommendation, some discrete case management issues arise in respect of vulnerable parties/witnesses in some sexual assault/abuse cases.

Sexual or other assault/abuse cases

189. In civil claims based upon assaults or historic abuse Claimants (and witnesses) face the prospect of having their evidence tested notwithstanding the fact that the Defendant has already been convicted in a criminal court. This is because section 11of the Civil Evidence Act 1968 provides:

"In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence before any court in the United Kingdom…

He shall be taken to have committed that offence unless the contrary is proved."

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[190] "It is a Judge's responsibility to ensure that all parties and witnesses are able to give their best evidence. Therefore, particular thought has to be given to the special measures and other steps that can be taken to achieve this. Decisions about how procedures should be adapted should be made as early as possible. Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved" (ETBB)

[191] PD 23A provides that at a telephone conference enabled court interim hearings of less than one hour will be conducted by telephone unless the court otherwise orders, unless all the parties are unrepresented. Because of difficulties is setting up telephone hearings Judges have to date been slow to hold them if one party is unrepresented. The Council understands that in seeking to ensure greater access through digital and means other than attended hearings HMCTS reform programme will address this issue.

[192] If the court makes a direction for a measure which is not available where the court is sitting, it should consider directing that the court will sit at the nearest or most convenient location where the court sits and the measure is available.

190. As was stated in RSL v CM[193]

"Given the wording of section 11 a conviction is not axiomatically conclusive proof of assault or abuse for the purposes of a subsequent civil claim such that the door is always closed for any defence. It remains open to a defendant to challenge the conviction and to adduce fresh evidence and make fresh arguments. However, the extent to which the Defendant should be permitted to challenge the conviction based only upon repeating the evidence and arguments which had not convinced a jury remains, unsatisfactorily, somewhat unclear on current case law."

191. Given the lack of certainty as to the extent to which a Defendant in a civil claim can seek to "prove the contrary" of the conviction by seeking to re-run the defence used in the criminal trial it is essential that at the case management stage the Court considers whether it is necessary to clarify the basis upon which the convictions are to be challenged and what orders should be made in respect of the evidence to be adduced (bearing in mind the wide power provided by CPR 32.1); which may include:

(a) Consideration of the extent to which evidence within[194] or transcripts of the criminal trial should form the evidence considered by the court;[195]
(b) a requirement that the Defendant presents his/her evidence first[196]

Ground rules for oral evidence

192. Interim case management directions must "lay the groundwork" for the Judge at a hearing or trial so that he/she can ensure, as far as practicable, that all witnesses give best evidence in that its quality is not diminished by vulnerability.

193. Consideration should be given in every case when case management directions are given, whether at an attended hearing (being either a general case management hearing or one specifically listed to consider the issue) or in the absence of the parties, to the need to set out "ground rules" with regard to the giving of evidence by any vulnerable witness (or the challenging of evidence by a vulnerable witness). If, contrary to this principle, ground rules have not been considered during case man-

[193] [2018] EWHC 2583 (QB); per HHJ Cotter QC
[194] Including Achieving Best Evidence interviews Further information available at https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf
[195] See FRP PD 3AA paragraph 5.6
[196] RSL v CM [2018] EWHC 2583 (QB) Per HHJ Cotter QC at paragraph 47

agement then they must be considered at the outset of any hearing in which a potentially vulnerable individual is to give evidence.

194. It is the duty of the court to control questioning of a witness and to ensure compliance with the overriding objective by adducing evidence fairly and effectively. As set out above powers already exist under CPR 32.1 to limit cross-examination and under CPR 3.1A (5)(b) for the Judge to undertake the questioning where one of the parties is unrepresented. Over the last decade there has been a sea change in the approach to the cross-examination of vulnerable witnesses in the criminal courts.[197] The Court of Appeal has said "It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way around."[198]

195. When dealing with "ground rules" consideration should be given to addressing the following matters:

i. how (and for how long) questioning of witnesses is to be undertaken. This could include an order that a party submit a list of questions in advance of the hearing and that the Judge will conduct questioning. The likely length of cross-examination should be carefully considered pre-trial [199] and revisited at the outset/during the trial. A Judge should ensure that the duration of questioning is appropriate to the witness's needs and attention span and stop it if the witness becomes seriously distressed. The ETBB sets out that in respect of criminal cases:

"Judges are fully entitled to impose reasonable time limits on cross-examination. They are expected to challenge unrealistic estimates in the plea and case management hearing questionnaire, and to keep duration under review at trial. The judge may direct that some matters be dealt with briefly in just a few questions.

Duration of cross-examination must not exceed what the vulnerable witness can reasonably cope with, taking account of his or her age/intellectual development, with a total of two hours as the

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[197] "As far as any restrictions placed on the cross-examination are concerned, the section 28 procedure and the modern regime for cross-examining vulnerable witnesses has led to a sea change in advocacy techniques. Advocates must adapt to the needs of the witness and ask questions in the manner and form approved by the judge, but as this court has stated on several occasions, it does not follow from that fact that a defendant cannot have a fair trial. There are many ways in which the parties can ensure that all relevant material is put before the jury for them to consider by way of admissions and the calling of any other witnesses."; Hallett LJ in R-v-PMH [2018] EWCA Crim 2452

[198] This need not be an inhibition on the power of cross-examination. The Court of Appeal has observed that 'some of the most effective cross-examination is conducted without long and complicated questions being posed in a leading or 'tagged' manner'. (R v Wills [2011] EWCA Crim 1938)

[199] It may be argued that it is difficult to properly assess the nature and extent of necessary challenge to a witness's evidence before exchange of witness statements which will usually occur after a costs and case management hearing. However detailed consideration can always be given to grounds rules within a pre-trial review.

norm and half a court day at the outside. The witness's needs may require questioning to take place over more than one day"

ii. Requiring that anyone who is to undertake questioning has considered the relevant toolkits within the Advocates Gateway; with a warning that it is expected that their guidance will be followed;[200]

iii. In cases where there is more than one Defendant, setting out by order or otherwise the expectation that cross-examination should be conducted by one advocate alone, with advocates for a second or third defendant only putting additional relevant points not already put by the first advocate.[201]

iv. The timetabling of the trial. The capacity of a vulnerable witness may deteriorate if there is delay so, as is common practice in the criminal courts, consideration should be given to a 'clean start' to the evidence of vulnerable witnesses (i.e. evidence to commence at the start of the court session with no delay). This is particularly important if the witness is vulnerable due to their youth.

Prohibiting cross-examination by a self-representing party

196. In criminal courts a Defendant is prevented from cross-examining the complainant if the charges are in respect of sexual offences, modern slavery offences, child cruelty, kidnapping, false imprisonment or assault, or the complainant is a child (or a child witness). There is a specific discretion in relation to other cases if the Judge decides that the quality of evidence given by the witness on cross-examination is likely to be diminished if the cross-examination (or further cross-examination) is conducted by the accused in person.[202]

197. Currently there are no equivalent provisions within either the family or civil jurisdictions. As set out at paragraph 117 of this document, when considered necessary, Judges in both jurisdictions have taken over questioning on behalf of the defendants to avoid direct cross-examination.

198. It was stated within the report "Transforming the Response to Domestic Abuse Consultation Response and Draft Bill" that:
"… your responses overwhelmingly called for sufficient protections to be introduced into the family courts. We recognise the importance of introducing new powers into the family court system to

[200] Some consultees expressed concern that practitioner training tended to focus on the need to consider the TAG for criminal and (to a lesser degree) family hearings, but not for civil cases.
[201] This is an issue that may well be encountered on an increasingly frequent basis following clarification and extension of the scope of vicarious liability, including following cases such as Armes-v-Nottinghamshire County Council [2017] UKSC 60
[202] See paragraph 50 of this document.

prohibit direct cross-examination of a victim by their abuser, and the consultation document reiterated our commitment to legislate on this. We have therefore included these measures in the draft Domestic Abuse Bill."[203]

199. The Government has proposed measures in family proceedings to prohibit direct cross-examination of a victim by any party who has been convicted, given a caution or charged with a specified offence or against whom an "on notice" protective injunction[204] has been made, and, significantly, vice versa. The Draft Bill states:

31R Prohibition of cross-examination in person: victims of offences

(1) In family proceedings, no party to the proceedings who has been convicted of or given a caution for, or is charged with, a specified offence[205] may cross-examine in person a witness who is the victim, or alleged victim, of that offence.
(2) In family proceedings, no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been convicted of or given a caution for, or is charged with, that offence.

200. A Judge would also have a power to prevent cross-examination in other cases if either a quality (of evidence) condition (which directly reflects the equivalent provision in 1999 Act) or a significant distress condition[206] were met. Significantly, the Court would be duty bound to consider alternative ways that the party denied the opportunity to cross-examine could put his/her case and if he/she could not appoint a lawyer then, as in the criminal courts,[207] the Court could appoint and fund a legal representative for the purpose. The Draft Bill states:

(1) The court must consider whether (ignoring this section) there is a satisfactory alternative means—(a) for the witness to be cross-examined in the proceedings, or (b) of obtaining evidence that the witness might have given under cross-examination in the proceedings.

[203] No changes to the existing criminal provisions were thought necessary.
[204] "protective injunction" means an order, injunction or interdict specified, or of a description specified, in regulations made by the Lord Chancellor.
[205] "specified offence" means an offence which is specified, or of a description specified, in regulations made by the Lord Chancellor. As yet there is no suggested definition, but all forms of assault/abuse are highly likely to be covered.
[206] The "significant distress condition" is met if—(a) the cross-examination (or continued cross-examination) of the witness by the party in person would be likely to cause significant distress to the witness or the party, and (b)that distress is likely to be more significant than would be the case if the witness were cross-examined other than by the party in person
[207] See paragraph 51 of this document.

(2) If the court decides that there is not, the court must—(a) invite the party to the proceedings to arrange for a qualified legal representative to act for the party for the purpose of cross-examining the witness, and (b) require the party to the proceedings to notify the court, by the end of a period specified by the court, of whether a qualified legal representative is to act for the party for that purpose.

(3) Subsection (5) applies if, by the end of the period specified under subsection (3)(b), either—(a) the party has notified the court that no qualified legal representative is to act for the party for the purpose of cross-examining the witness, or (b) no notification has been received by the court and it appears to the court that no qualified legal representative is to act for the party for the purpose of cross-examining the witness.

(4) The court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party.

(5) If the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party.

201. As regard the appointment of a qualified legal representative the Draft Bill sets out:

(1) The Lord Chancellor may by regulations make provision for the payment out of central funds of sums in respect of—(a) fees or costs properly incurred by a qualified legal representative appointed under section 31V, and (b) expenses properly incurred in providing such a person with evidence or other material in connection with the appointment

(2) The regulations may provide for the amounts to be determined by the Lord Chancellor or such other person as the regulations may specify.

(3) The regulations may provide for the amounts paid to be calculated in accordance with— (a) a rate or scale specified in the regulations, or(b) other provision made by or under the regulations.

202. As set out above the parliamentary joint committee recommended the extension of these provisions to civil cases.

203. After consultation and detailed consideration, the Council did not recommend the extension of the proposals within the Draft Domestic Abuse Bill to civil cases in its consultation report. The preliminary view expressed was that given the range of civil work, the limited number of civil cases in which a prohibition would axiomatically apply, likely difficulties in and with appointment of suitably qualified representatives, the likelihood of prior proceedings, the existing powers under CPR

32.1(3)(g) and CPR3.1A and the ability to adopt the procedure set out in PS v BP (Fam)[208] and LXA & BXL -v-Wilcox and Wilcox[209] an extension was not necessary. The Council believed that, if necessary, questioning could be undertaken by Judges and recognised the need for this issue to be adequately addressed within judicial training.[210]

204. This view has been criticised in several responses, including on the basis that it would be wrong to provide a lesser level of protection for vulnerable witnesses in the civil jurisdiction than in the family courts and also that in the absence of mandatory provisions there would be inconsistency of Judicial approach. In light of the responses the Council re-considered the issue.

205. The Council remains concerned by six issues all of which relate to the practical challenges of implementing an automatic ban on cross-examination in civil proceedings, including the funding of remedial measures needed to ensure the conduct of proceedings remains fair to all parties, such as the provision of legal representation where a ban would operate.

206. First, that the prohibition arises by reason of the prior conduct of a party and not the subject matter of the dispute. The civil jurisdiction is much wider in the range of causes of action and types of case (and amount of money in issue) than either the criminal or family jurisdictions. By way of examples, if two parties had been involved in a business partnership or a boundary dispute or were landlord and tenant and one had been cautioned, charged or convicted of common assault of the other then in any subsequent proceedings relating to division of the assets, line of the boundary or the tenancy, cross-examination by and of, that party would axiomatically be prevented.

207. Secondly, a large number of litigants in the civil jurisdiction are self-representing. In the small claims track no legal costs are recoverable and one of the consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is that public funding in any form of civil case is now unavailable, save in exceptional circumstances. This would mean that in the majority of cases with a prior charge, caution or conviction the Judge would be likely to be faced with either taking over the questioning of one or more parties or (if funding is provided) appointing one or more legally qualified representatives, as the parties will be unlikely to be in a financial position to arrange for a qualified legal representative to act for them.

208. Thirdly, rates of remuneration would need to be sufficient to mean that an adequate number of

[208] [2018] EWHC 1987; see paragraph 117 of this document
[209] [2018] EWHC 2256 (QB)
[210] See paragraph 163 of this document.

civil practitioners would be willing to undertake the work to avoid difficulties with appointment and consequential delay.

209. Fourthly, there is uncertainty as to how it is proposed the appointment of a qualified legal representative "by the court", would work in practice in civil cases. Whilst such appointments do occur in the criminal jurisdiction, they are rare and the introduction within family (and if extended civil) proceedings is likely to give rise to a number of issues. Examples of matters which will require further and detailed consideration are:

(a) How will the court will choose an advocate for appointment? Will there be a list, and if so what will be the criteria for inclusion?
(b) What of differing types (and complexity) of cases and the differing levels of experience of advocates?
(c) What if either party is unsatisfied with the appointment (and will there be any right to involvement in or challenge to the appointment)?
(d) What will be the scope of the duties/retainer, and the consequential professional duty of care owed by the appointed advocate to the person upon whose behalf the questions are to be asked? Given the nature of cross-examination it is difficult to see how the role could be limited to simply asking the questions posed in advance by the relevant party.[211]

210. Fifthly given that in some claims (and many small claims), the costs of appointing representatives will not be proportionate to the sums in issue, Judges will feel themselves effectively driven to undertake questioning of both parties (even if the overriding objective is amended as suggested above), this will potentially lead to Judges adopting an inquisitorial role.

211. Sixthly, there is a risk of satellite litigation arising out of the conduct, performance and/or advice given (or not given) by an advocate appointed to undertake questioning.

212. However, despite these concerns, the Council recognises the force in the argument that if the Domestic Abuse Bill is enacted there will be an unacceptable (and in respect of certain types of case/hearing, anomalous) discrepancy between the protection afforded to some vulnerable parties/witnesses in the family court and civil courts.

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[211] It will be difficult, in practice, for the appointed advocate to ignore obvious and fundamental legal points which impact upon the questioning to be undertaken, but which the litigant in person has not identified. There is also the issue of the duty to the Court; the advocate must avoid "knowingly or recklessly" misleading the Court. Care must be taken to ensure that advocates do not face tension between this duty and the limited extent of a retainer meaning that they have not undertaken a thorough analysis of the issues in the case.

213. There is much to be said for the principle that if mandatory protection is necessary in the family courts it is equally necessary in the civil courts.[212] However, the two jurisdictions are very different as regards the types of cases; with the civil jurisdiction having a much wider range. It is the Council's view that if the Domestic Abuse Bill is enacted, the provisions extending in relation to cross-examination should be extended to the civil jurisdiction but with the difference that the rule should provide:

Cross-examination in person: victims of offences

In any civil proceedings, *unless the Court orders otherwise*

(1) no party to the proceedings who has been convicted of or given a caution for, or is charged with, a specified offence[213] may cross-examine in person a witness who is the victim, or alleged victim, of that offence.
(2) no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been convicted of or given a caution for, or is charged with, that offence.

214. The Council believes that the creation of a presumption is sufficient to cater for the types of case which underpin the Draft Domestic Abuse Bill, and that a residual discretion is necessary and adequate given the breadth of the civil jurisdiction and range of potential circumstances.

215. The other associated provisions in the Draft Bill should be put in force without any amendment save that the requirement should be:

The court must consider whether it is necessary having regard to the overriding objective[214] for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party.

216. The Council believes that it is essential that an ability to appoint a representative is provided within the legislation with the costs to be borne by central funds, unless the Judge orders otherwise, and

[212] The Draft Bill provides for a new and direct overlap of jurisdiction in relation to "Domestic abuse protection orders"; see sections 24 and 27(7) i.e. they can be made in either family or civil courts
[213] "specified offence" means an offence which is specified, or of a description specified, in regulations made by the Lord Chancellor.
[214] Provided it is amended as suggested in this document.

also that funding levels are at such a level that the Court will be able to appoint representatives with undue difficulty (or delay).

Conduct of a hearing

217. The matters set out above address the necessary directions before a hearing or trial. However, they will be unlikely to provide adequate assistance or protection for a vulnerable party or witness if the Judge who hears the matter or any advocate undertaking questioning do not adequately cater for vulnerability within their conduct of the hearing or any questioning of a witness.

218. It is well established[215] that within what has been described as general "judgecraft"[216] a Judge should always:

(a) Use appropriate language with which the person is familiar when explaining matters or giving instructions; "court jargon" and figures of speech should be avoided.[217]
(b) Prevent questioning that lacks relevance or is repetitive, oppressive or intimidating and not permit cross-examination techniques using complex vocabulary and syntax, and forms of questions which have all been demonstrated to mislead and confuse witnesses, undermining the accuracy and completeness of their evidence[218]. A Judge must also be alert for possible miscommunication and ask the advocate to rephrase (a vulnerable witness may not recognise when difficulties occur or be embarrassed to admit them).

219. The Council does not believe that the elements of case management and conduct of a hearing set out above require to be addressed within the CPR beyond the suggested rule changes. However, they should be re-enforced within dedicated training (see below paragraphs 276-284 of this document) and the requirement that every civil Judge is familiar with the content of the ETBB and, when required, the Advocates Gateway.

Legal representatives

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[215] Within the research set out at paragraphs 19-28 of this document, the content of ETBB, Advocates Gateway and Judicial College Training provided for family Judges and within specific Judicial College modules.
[216] A Judicial College term used within courses
[217] "effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed" (ETBB)
[218] Questions should, if possible, be in a chronological order and be simple (e.g. no double negatives) and contain only one matter. There should be no compound questions, leading or "tag" questions or repetitive questioning.

220. As for professional representatives it is the Council's view that all relevant regulatory and training bodies should consider the adequacy of, and requirements upon members to undertake, available training in relation to vulnerability, and in particular the questioning of vulnerable witnesses.

221. Despite the breadth of the civil jurisdiction, the Council believes that the Court can expect all advocates who may undertake questioning of vulnerable witnesses to have had some training or, at the least, to be familiar with the Advocates Gateway and toolkits.

Costs issues

222. Several of the responses to the consultation from, and on behalf of, legal professionals made the point that an increased focus on identifying and addressing the vulnerability of parties/witnesses will require an increased investment of time and resources, and as a result will increase the cost of the conduct and progression of the litigation. Further that specific measures taken in light of vulnerability may lead to parties incurring additional expense.

223. Proportionality of costs is enshrined in the overriding objective and is fundamental to the civil court process. It is directly linked to the expectation of work to be undertaken. In both his Final Report and his Supplementary Report on fixed recoverable costs, Sir Rupert Jackson clearly identified the need to link proportionate costs with proportionate directions, accepting the necessity to tailor the work demanded of a party to the proportionate costs.

"First, case management and costs management go hand in hand. It does not make sense for the court to manage a case without regard to the costs which it is ordering the parties to incur."[219]

and

"Applying a fixed recoverable costs (FRC) regime to suitable cases will reduce the overall costs of litigation, by encouraging efficient working, together with streamlining and limiting the amount of work that needs to be done."[220]

224. Whilst, as some consultees and responses to the consultation report comment, all involved in the civil court process ought already to have been astute to the needs of vulnerable parties/witnesses, as this report recognises more could and should be done. One consequence of this may indeed be, as some responses suggest, that increased work is required of legal representatives and litigants

[219] Review of Civil Litigation Costs: Final Report, December 2009, Ch.40 para.7.1.
[220] Review of Civil Litigation Costs*:* Supplemental Report July 2017, Ch.7 para.1.3

may be put to increased expense/loss where issues of vulnerability arise and require specific measures to be taken.

225. As the consequences of measures taken in respect of vulnerability being over and above that anticipated when the 2013 reforms were drafted and introduced (including the various fixed costs regimes) and when Sir Rupert Jackson considered an extension to fixed recoverable costs, the Council believes that it is necessary for consideration be given to the costs implications for those involved in litigation. The Council fully recognises that the Ministry of Justice will have to consider these costs implications against the wider context of recoverable costs generally and that if amendments to the current regime are to be made, that the Civil Procedure Rule Committee will take the decisions about the nature and extent of any necessary rule changes. However, it is appropriate for the Council to set out its broad views and outline recommendations.

Recoverable costs

226. Currently civil cases, if they proceed to allocation (i.e. are not compromised before this stage), ordinarily proceed under the small claims track[221] (where costs other than certain identified costs are not recoverable),[222] or procedures covered by fixed, scale costs or capped costs, or are subject to proportionality considerations.[223]

227. Parties are either self-representing or represented. For litigants in person, where and to the extent that non-fixed costs are recoverable,[224] an assessment takes place which can incorporate consideration of the costs consequences of any measure taken as a result of vulnerability. Accordingly, it is necessary to focus on current rules as to recovery of the costs of representation and specifically:

(a) Costs arising under CPR 45 Section I;
(b) Scale costs under Sections IV at CPR r.45;
(c) Fixed recoverable costs schemes at Sections II, III, IIIA and VI of CPR 45;
(d) Claims subject to proportionality assessments.

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[221] This track covers claims up to £10,000. The civil money online claims service is currently available for claims under £10,000

[222] See CPR 27.14.

[223] See CPR 44.3 and 44.4

[224] See CPR 46.5 and in particular subsection (4) which provides that the amount of costs to be allowed to the litigant in person for any item of work claimed will be –(a) where the litigant can prove financial loss, the amount that the litigant can prove to have been lost for time reasonably spent on doing the work; or (b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in Practice Direction 46; both subject to a cap (CPR 46.5(2).

228. The Civil Liability Bill finally received Royal Assent and completed the Parliamentary process on the 20th December 2018 becoming the Civil Liability Act 2018. It contains significant reforms which will require changes to the civil procedure rules and relevant protocols. The small claims limit will increase from £1000 to £5000 for personal injury claims for drivers and passengers injured in road traffic accidents[225] and £2,000 for employers' liability and public liability claims. The Council recognises that the Ministry of Justice and the Civil Procedure Rule Committee will in due course be addressing the implementation of these changes, but can only consider the current rules. Given these impending changes this report will do so only briefly in respect of the regimes which will be affected.

Costs arising under CPR 45 Section I

229. CPR 45.1 provides the amounts which, unless the court orders otherwise, are to be allowed in respect of legal representatives' charges where judgment in default or on admission (of whole or part of the claim) or summary judgment is obtained or an order is made to strike out a defence or there are costs on entry of judgment in a claim for the recovery of money or goods). Given there is already provision for the court to depart from the fixed costs as the court can order "otherwise" there is no need for amendment to the provisions

Scale costs under CPR 45 Sections IV

230. These are the scale costs for claims in the intellectual property enterprise court. There is a provision at CPR r.45.32 to exceed the scale costs if there is unreasonable behaviour; but not otherwise. A wider discretion is required to cover increased costs caused by measures necessary to address vulnerability.

Fixed recoverable costs schemes at Sections II, III, IIIA and VI of CPR 45

231. Two of the primary functions of a fixed costs regime are:

- to provide certainty and transparency of outcome at the commencement of process, so that parties can make informed decisions on the pursuit or defence of a claim
- to avoid the often disproportionate 'costs of the costs' process by removal of the need for assessments at the conclusion

Importantly, fixed costs regimes are not attempts to quantify the costs of an individual case. The

[225] The figure is £1000 for "vulnerable road users" such as cyclists and pedestrians

regimes function on a 'swings and roundabouts' basis and it is recognised that in some cases the fixed costs 'over reward' and in others they 'under reward'. The Council recognises that these fundamental elements must be taken into account when consideration is given to any change to a fixed costs regime. Any change to the rules should not provide a route to undermine them. However, the Council believes that consideration should be given to whether there should be some flexibility to reflect the costs/expense implications of necessary, specific and identifiable measures or steps taken in light of vulnerability i.e. any departure to a regime could be linked to a specific measure/step.

232. In respect of cases falling within Sections II and IIIA (claims which no longer continue under the RTA or EL/PL pre-action protocols and claims to which the pre-action for the resolution of package claims applies), CPR 45.13 and CPR r.45.29J respectively, provide that if a court considers that there are exceptional circumstances making it appropriate to do so, it will consider a claim for an amount of costs which is greater than the fixed costs referred to in CPR 45.11 or CPR 45.29B to 45.29H. However, there is no similar provision in Section III (pre-action protocols for low value personal injury claims in road traffic accidents, employers' liability and public liability,[226] or in respect of fast track trial costs (the only permitted increase being an additional amount in respect of improper behaviour under CPR 45.39(8)).

233. The Council believes that the Ministry of Justice should consider whether there should be a provision within every fixed or scale costs regime for a discretion to consider a claim for an amount of costs which is greater than the fixed recoverable costs to cater for the consequences of specific, identified measures which have been necessary to cater for vulnerability.

Capped costs under Section VII at CPR r.45, Section VI at CPR r.46, CPR 47.15 and the pilot under CPR r.51W

234. CPR 45.41 covers costs which are to be recoverable between the parties in Aarhus Convention claims.[227] The Aarhus scheme is restrictive rather than permissive and CPR r.45.44 already makes

[226] Paragraph 4.3 (8) of the Protocol states that it does not apply to a claim - "for damages in relation to harm, abuse or neglect of or by children or vulnerable adults." For this purpose vulnerable adult has the restricted definition within Legal Aid, Sentencing and Punishment of Offenders Act 2012 Sch.1 Pt 1 para.3(5) ; "a person aged 18 or over whose ability to protect himself or herself from abuse is significantly impaired through physical or mental disability or illness, through old age or otherwise". In Scott-v-Ministry of Justice [Lawtel; 5th December 2019] Deputy Costs Master Friston held that in order to bring a claim within the vulnerable adult exception, the context in which the claim was being brought had to sensibly support such a conclusion, and the putative vulnerability needed to be in some way relevant to the claim

[227] "Aarhus Convention claim" means a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention")

provision for consideration of the circumstances of the parties.

235. The statutory costs capping scheme in judicial review claims set out at section VI of CPR r.46 implements sections 88- 90 of the 2015 Criminal Justice and Courts Act 2015. Section 89 provides a broad discretion so the Council does not believe any amendment is necessary.

236. The capped costs scheme at CPR r.47.15 is predominantly a paper process and the Council does not envisage vulnerability issues arising.

237. CPR 51W covers a pilot[228] of a voluntary scheme, the aim of which is to improve access to the Business and Property Courts. Given its limited nature no amendment is proposed.

Proportionality assessments

238. There is an overarching issue as to whether proportionality considerations should play any part when dealing with measures necessary to assist vulnerable parties/witnesses.

239. The Court of Appeal considered "unavoidable costs" without which the litigation could not progress in West v Stockport NHS Foundation Trust [2019] EWCA Civ 1220:

"This last point raises the wider issue as to whether, when considering proportionality, the judge needs to have regard to every item of cost, or whether there are some costs which ought to be removed from that part of the assessment. We consider that, when the judge comes to consider proportionality, there are some elements of costs which should be left out of account. The exceptions are those items of cost which are fixed and unavoidable, or which have an irreducible minimum,

[228] The Pilot will last for two years from 14th January 2019 -31st January 2021. It covers cases up to a value of £250,000 and up to two days (and excluding certain features) and is proceeding at the London Circuit Commercial Court, the Circuit Commercial Court at Leeds and Manchester; the Technology and Construction Court ("TCC") at Leeds and Manchester and the Chancery Division in the District Registries at Leeds and Manchester

without which the litigation could not have been progressed.[229] Court fees are perhaps the best example."[230]

240. The Council believes that some measures could be considered as an unavoidable cost (examples being an intermediary[231] or an assessor). However, in most cases, and for most measures, additional costs will be woven into overall costs to an extent which will make it difficult to leave them "out of account".

241. So how should the Court approach such costs?

242. The approach of the court in West would arguably allow the additional costs associated with vulnerability to be considered under CPR r.44.4(1) which states:

> The court will have regard to all the circumstances in deciding whether costs were –
> (a) if it is assessing costs on the standard basis –
> (i) proportionately and reasonably incurred; or
> (ii) proportionate and reasonable in amount (my emphasis).

However, this leaves uncertainty and prevents adequate costs management.

243. Subject to the views of the Ministry of Justice (which should be obtained given overarching considerations as to the recovery of costs in civil litigation generally) the Council believes that the Civil Procedure Rule Committee should consider amending the definition of proportionality within CPR r.44.3(5) to include reference to costs referable to steps necessarily taken in light of vulnerability. This would allow the Court to manage costs within proportionality constraints, whether by costs management,[232] in those cases to which this discipline applies, or by retrospective assessment in the remainder of cases.

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[229] c.f. the decision of the Court of Appeal in Court of Appeal in Aldred v Cham [2019] EWCA Civ 1780, that the fact the claimant was a child was not a 'particular feature of the case', but rather a characteristic of the claimant. Coulson LJ commented: at paragraph 35; *The fact that, in a particular case, a claimant is a child, or someone who cannot speak English, or who requires an intermediary, is nothing whatever to do with the dispute itself. Age, linguistic ability and mental wellbeing are all characteristics of the claimant regardless of the dispute. They are not generated by or linked in any way to the dispute itself and cannot therefore be said to be a particular feature of that dispute*". This comment should be seen against the limits of the specific fixed costs provision in issue.

[230] Paragraphs 81 and 82

[231] If subject to costs shifting and the costs not covered by the Court.

[232] There would be no need for any amendments to the costs management rules or forms. Parties alleging an extra cost as a result of an identified vulnerability may explain the additional cost, linked to the specific measure sought within any phase in the assumptions box in Precedent H.

244. This would mean that the court retained control of the determination of the suitable measure, by selecting that which is the reasonable and proportionate one (which may not be the adjustment chosen by the party, nor at the cost suggested by the party). It also means that parties and their representatives will need to address any vulnerability at an early stage as the court is unlikely to permit variations to a budget under CPR PD 3E 7.6, if the alleged significant development is something that the party/representative ought to know about at the time of directions/costs management. This will assist in efficient case management, effective use of court time and provide early transparency of the costs to the parties to enable them to make informed decisions about pursuing/resisting a claim. The reverse side of this flexibility within the costs management regime is that if particular vulnerabilities only come to light late in the day, these may be addressed by applications to vary.

245. Although the detail is a matter for the Civil Procedure Rule Committee the Council would suggest an addition to the definition of proportionality at CPR r.44.3(5)(f) as follows:

"any additional work generated or expense incurred due to the vulnerability of any party or any witness"

246. So, in conclusion as regards costs provisions, the Council recommends consideration of:

(a) Amendment of the definition of proportionality in CPR r.44.3(5) to include additional work/expense generated by the fact of vulnerability of parties/witnesses.
(b) Amendment within the rules to provide discretionary increases in fixed, scale and capped costs regimes where vulnerability has required a specific measure to be taken causing additional work/expense.

Mediation

247. The Courts will always encourage alternative forms of dispute resolution to litigation through to contested hearings. Lord Briggs[233] described the HMCTS' mediation service in his interim report[234] as follows:

[233] Formerly Lord Justice Briggs
[234] December 2015 Available at https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf

"If the claim is a small claim (under £10,000) and both parties so request by ticking boxes on the DQ[235] the case is remitted to the free Small Claims Mediation Service at the Bulk Centre. The small staff team try to book the case for a one-hour telephone mediation by an HMCTS employee (usually working by telephone from home). All that the mediator has are the names and telephone details of the parties, and the essential details of the claim recorded on Caseman. Nonetheless the small national team of only 14 mediators (former court back office managers) achieve a remarkable current success rate in settling 70% of the cases referred to them. Unfortunately, despite conducting up to five of these simple mediations a day, there are only enough mediators to service about 35 to 40% of the national demand."

248. In his final report,[236] he noted the further restrictions upon the availability of the court-based service and noted how the national mediation helpline and out of hours mediation services funded by HMCTS had ceased to be an option for litigants, stating:

"Since there is a general consensus (which I share) that it is usually better for parties to civil litigation to be empowered to settle their own disputes, than to have them determined in court, I consider that, both within and beyond the confines of the proposed Online Court, steps ought actively to be taken to re-establish or replace those now discontinued services on a much broader basis than is currently represented by the Small Claims Mediation service."

249. It was his recommendation that HMCTS:

"Re-establish a court-based out of hours private mediation service in County Court hearing centres prepared to participate, along the lines of the service which existed prior to the establishment and then termination of the National Mediation Helpline."

250. The reform programme seeks to place increasing focus upon alternative dispute resolution and in particular mediation. There is a pilot in which parties have to opt-out rather than the current position of opting in by ticking the box on the DQ for the HMCTS telephone mediation in relation to claims under £300.[237] Further there are mediation pilots[238] in relation to the use of independent meditation provision at court premises (the return to a form of the discontinued service referred to

[235] Directions questionnaire.
[236] Paragraph 2.26 https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf
[237] Additional mediators have been recruited.
[238] The pilots are at courts at Exeter, Manchester and Central London.

by Lord Briggs). So, there is a drive to increase the availability and use of mediation services.

251. In the Civil Justice Council report "ADR and Civil Justice,"[239] it was recognised that there were three distinct but related core challenges:

(a) The awareness of ADR, both in the general public and in the professions and on the Bench;
(b) The availability of ADR, both in terms of funding and logistics and in terms of quality and regulation of the professionals involved;
(c) The encouragement of ADR by the Government and Courts.

and the report stated:
"We think that progress can only be achieved if an ADR strategy is devised to cope with all three challenges."

252. There was a recommendation that the Court should:

"promote the use of ADR techniques to the extent that they would sanction those who did not agree to take reasonable steps toward settlement and reasonable steps towards the use of ADR. The Parties would always be free to settle or not and the Court would never sanction a failure to do so."

253. Further the report recommended that:

- The small claims mediation scheme should be fully resourced so that it can fulfil its potential.
- The CMC[240] should consider the accreditation of cheaper more proportionate forms of mediation such as 3-hour telephone mediations
- The CMC should look carefully at emulating the regulatory approach of the FMC;[241]
- We emphasise the crucial role of the case officer under the online court system and the importance of appropriate recruitment and training;[242]
- Steps should be taken to promote standards for Online Dispute Resolution as a necessary step towards its further promotion and acceptance.

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[239] Published in November 2018 Available at https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf
[240] Civil Mediation Council
[241] Family Mediation Council
[242] In his report Lord Briggs envisaged a case officer reviewing the E-file and one of his functions to be either to guide the parties towards an appropriate form of ADR/ODR or to conduct some form of ADR himself

And

Court documents, protocols, guidance material for litigants and case management should all express a presumption that ADR should be attempted at an appropriate stage on the route through to trial.

254. There was also a recommendation that a Judicial/ADR Liaison Committee be set up:

"We think that ADR Professionals and Judges need to talk on a regular basis. Stakeholders need a forum in which the role of ADR in a rapidly changing civil justice landscape can be monitored and supported on an informed basis. The need for this kind of forum is demonstrated by the way this Working Group is being consulted on a continuing basis by stakeholders over a number of current initiatives, including the new personal injury jurisdiction in the small claims court."

255. In relation to quality assurance and regulation of third parties providing mediation:

"We do not raise the thorny issue of regulation as an abstract concern. We have throughout our work both at home and abroad seen that judges and civil justice systems are not prepared to encourage, still less coerce, their users into a particular ADR process unless they have confidence that the ADR will be provided to a consistent standard. Compulsion and anything coming close to compulsion will only ever be accompanied by a regulated (or sometimes court-rostered) group of neutrals. Thus, where compulsory ADR is required by the Court rules, as in MIAM[243] meetings in family litigation, the regulation of the providers of that service is noticeably strong. (Revealingly there is stricter regulation of those conducting family MIAMs (compulsory) than of those conducting family mediations themselves (voluntary).) For example, we would not expect a government–sponsored "Alternatives" website to include links to ADR providers unless they are the subject of some form of accreditation."

256. It is the Council's view that unless mediators either employed by HMCTS or within any list of recommended bodies used for third party provision of mediation services are able to recognise vulnerability and take appropriate steps to address it there is a risk that vulnerable parties may be encouraged to enter into a process in which they will not be properly or fully able to participate. It is the Council's view that any mediator employed or recommended by HMCTS (e.g. placed on a list of approved or recognised mediators) must have appropriate training.

257. The Council believes that the recently formed Judicial/ADR Liaison Committee should consider (and

[243] Mediation, information and assessment meetings

advise upon) the issue of vulnerability of parties.

The reform programme

258. The reform programme was launched in September 2016 in a joint statement from The Lord Chancellor, Lord Chief Justice, and the Senior President of Tribunals on their shared vision for the future of HMCTS.[244] It is the biggest programme to modernise a court system ever attempted anywhere. It has been stated by HMCTS[245] that:

"We are working on an ambitious programme of court reform, which aims to bring new technology and modern ways of working to the way justice is administered. In collaboration with the senior judiciary and the Ministry of Justice, we are investing £1bn to reform our courts and tribunals system. Our systems and processes have not kept pace with the world around us. We know we can make justice less confusing, easier to navigate and better at responding to the needs of the public. We want every user to feel they have been treated swiftly, fairly and with respect. We are building a modern system for administering justice which will benefit everyone who uses it. By designing systems around the public who need and use our services, we can create a more effective system for them and generate efficiencies for the taxpayer."

And

"Our vision for reform is to "modernise and upgrade the justice system so that it works even better for everyone, from judges and legal professionals, to witnesses, litigants, and the vulnerable victims of crime."

This means a civil, family and tribunal justice system which provides a seamless end to end journey for users, is sensitive to their needs, and enables them to start their case and set out their dispute as simply as possible. Users will be able to opt to resolve simple disputes online with the support of a mediation service, and if that is not appropriate, progress it under the case management of judges to resolve the dispute online, or at a hearing they can attend by video, or in person in a court or tribunal room. We will introduce the kind of digital working in civil and family courts, and in tribunals, that legal professionals and others have become used to in the criminal courts."

259. The National Audit Office report of May 2018: *Early progress in transforming courts and tribunals* found that HMCTS faced "a daunting challenge in delivering the scale of technological and cultural

[244] HM Courts and Tribunals Service (HMCTS) is an Executive Agency of the Ministry of Justice and responsible for administration of courts and tribunals. It reports to the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals through an independently chaired Board. In 2018–19, HMCTS employed around 16,100 full-time equivalent staff (of which 2,000 are contractors), operated 341 courts and tribunal centres that heard 4.4 million cases and spent £1.9 billion.

[245] https://www.gov.uk/guidance/the-hmcts-reform-programme

change necessary to modernise the administration of justice, and achieve the savings required." HMCTS had responded to early concerns by extending the delivery timetable from four years to six, but in the view of the National Audit Office was still under significant pressures and there was a real risk that "the full ambition of the change portfolio will prove to be undeliverable in the time available." The Audit Office highlighted the management of the system-wide consequences of change as a fundamental area of risk. In March 2019, the programme's completion date was put back by a further year to 2023.[246]

260. The Public Accounts Committee (PAC) concluded in July 2018 that it had little confidence in successful delivery of the transformation programme, and raised concerns that HMCTS had not adequately considered the impact of the reforms on access to justice for vulnerable people or on the wider justice system. The Committee stated:

"The pressure to deliver quickly and make savings is limiting HMCTS's ability to consult meaningfully with stakeholders and risks it driving forward changes before it fully understands the impact on users and the justice system more widely."

And

"Although HMCTS assured us that it is testing digital services, like online forms, with users, this does not amount to a proper evaluation of the wider impacts of the changes in the real world. We are concerned that HMCTS told us a great deal about processes and products and not enough about how the changes might affect people. Moving services online without assessing the impact could have serious implications for users of the justice system. We share concerns raised by legal professionals and in written submissions that, without sufficient access to legal advice, people could make uninformed and inappropriate decisions about how to plead, and that the roll-out of virtual hearings could introduce bias and lead to unfair outcomes."

And

"Although representatives from the legal profession told us that they welcomed the use of video hearings for administrative issues to progress cases, they were less supportive of the widespread use of the technology for sensitive hearings. They were particularly concerned about how the changes would affect the ability of vulnerable people to participate in hearings, particularly those with mental health problems, learning difficulties, with English as a second language, and those without legal representation. The Law Society asserted that "face-to-face engagement delivers understanding and communication that is lost when you deal with video-links" and that it was not satisfied that alternative means of dealing with cases would properly protect fairness in the system.

[246] By March 2023, HMCTS expects that 2.4 million cases per year will be dealt with outside physical courtrooms, it will employ 5,000 fewer staff. HMCTS expects to save £265 million a year from these changes, which will come from lower administration and judicial costs, fewer physical hearings and running a smaller court estate.

Appearing in court online rather than in person could increase the risk of unconscious bias, where pre-existing attitudes or stereotypes can affect the way that people understand others, the way that they act, or the decisions that they make without them being conscious of it. Transform Justice told us that some research suggests that appearing via video can make it more difficult for defendants to participate effectively in court and can also impact on the likelihood of a conviction with research indicating that individuals that appear by video link being more likely to receive a prison sentence or be deported than those appearing in person."

261. The PAC's concerns about access to justice were a factor in the Justice Committee's decision to launch its own inquiry on 10 January 2019, focusing on the effects of the reforms on people's access to justice. It stated within its report:[247]

"HMCTS clearly has some way to go in reassuring stakeholders that barriers to accessing digital justice are being addressed. Witnesses commented on low rates of internet usage[248] and poor digital skills, as well as literacy barriers and other disadvantages faced by particular groups."

The Committee then set out:[249]

"Other evidence suggested that statistics such as these did not present a sufficiently detailed picture of how individual users may fare in using new digital court and tribunal systems. The Equality and Human Rights Commission (EHRC) highlighted the 2018 UK Consumer Digital Index, which shows that 46% of those aged 65 and over did not have all the assessed digital skills: managing information, communicating, transacting, problem solving and creating (which includes completing online forms). A survey of face-to-face clients conducted by Citizens Advice in 2016 found that 46% lacked basic digital skills; only 61% had internet access in their home, with a further 11% having access only on a smartphone. Lisa Wintersteiger from Law for Life argued that both skills and the motivation to use them are necessary to navigate the internet. Amanda Finlay pointed out that people who are normally confident with digital interaction may be vulnerable when faced with a "justiciable issue" (that is, a problem that could be taken to a court or tribunal). The Magistrates Association observed that the justice system could not offer inducements for digital uptake without undermining the fundamental fairness of the system."

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[247] https://publications.parliament.uk/pa/cm201920/cmselect/cmjust/190/19002.htm

[248] Statistics for 2019 on internet usage in the UK from the Office for National Statistics (ONS) demonstrate that 91% of adults in the UK were recent internet users, while 7.5% had never used it. Some 99% of adults aged 16 to 44 were recent users, but this fell to 47% of those aged 75 and over, and 78% for disabled adults

[249] Paragraphs 28-29 https://publications.parliament.uk/pa/cm201920/cmselect/cmjust/190/19002.htm

Many of those who wrote to us question assumptions about levels of digital engagement and inclusion. Revolving Door Agency's focus group research, commissioned by HMCTS in 2017, looked into the needs of digitally excluded and underserved populations, including: people with multiple and complex needs; women who had experienced domestic abuse; recipients of disability benefits; people who speak English as a second language; and older people living in care homes. The research identified a range of barriers to digital inclusion, including competence in using a computer (often a result of poor access to technology); communication barriers, including dealing with technical language and legal jargon; and psychological barriers relating to lack of trust between users and digital services and concerns about online privacy. Several participants in the research had experienced problems using the websites of public bodies and other agencies, such as "not knowing how to switch between pages, how to complete online forms […] as well as difficulties uploading pages and submitting information on time."

262. The Committee also stated:[250]

"Poor digital skills, limited access to technology, low levels of literacy and personal disadvantages experienced by particular groups create barriers to access to digital justice services."

263. With reference to literacy barriers:[251]

Revolving Doors Agency pointed out that 15% of the population are "functionally illiterate"—that is, they can understand short, straightforward texts but have difficulty reading information from unfamiliar sources or on unfamiliar topics. Other witnesses agreed that literacy issues were highly relevant to the question of digital inclusion, including Professor Richard Susskind; the Bonavero Institute of Human Rights; LawWorks/Litigant in Person Support Strategy; and a prisoner who pointed out that many women in prison did not have the most basic literacy or numeracy qualifications. Lisa Wintersteiger from Law for Life commented:

"There is real concern about the idea that technology will move things along and everybody will be fine, as our young people are more equipped. That is not the case. We have 9 million adults who lack very basic numeracy and literacy skills. They cannot read the back of an aspirin bottle. Many of them are young people."

It was noted that the reform programme may also affect access to justice for particular groups with limited access to technology. Also, that conventional processes and face-to-face hearings may remain preferable for disadvantaged and vulnerable groups.

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[250] Paragraph 38 https://publications.parliament.uk/pa/cm201920/cmselect/cmjust/190/19002.htm
[251] Ibid. Paragraph 30

264. The Committee set out that HMCTS had promised that parallel paper processes will remain available to unrepresented court users and pledged to support digitally excluded groups by providing "assisted digital" support to members of the public (including unrepresented litigants) who have limited digital capability or digital access. Support will be given by means of web-chat, telephone and/or face-to-face engagement; the latter will be provided by the Good Things Foundation, a social change charity.

265. With regard to the use of video hearings the Committee stated:[252]

> "As with criminal cases, video hearings in civil and family matters and tribunals were thought to be particularly problematic for vulnerable clients—even those who had legal representation. For example, Tessa Buchanan from the Housing Law Practitioners Association told the Committee: Vulnerable people may struggle with them; they may need face-to-face interaction with their lawyer, they might come along with a plastic bag of documents to set out their case. I stress the importance of negotiations outside court. Often, matters can be settled. If the matter is being dealt with by video, that is much more difficult to achieve."
> The Association of HM District Judges argued that there was "no substitute" for being able to see a vulnerable or apparently vulnerable person in the flesh and making an assessment on this basis. Ken Butler from Disability Rights UK doubted whether face-to-face hearings for ESA appeals could be replaced by video hearings on a regular basis. He thought that appellants would not be able to give the evidence they could otherwise provide "and the tribunal may not be able to weigh the veracity [of the evidence] and test it, which is what a face-to-face hearing does quite well." Wendy Rainbow from IPSEA warned that testing video hearings with short, uncomplicated cases where nobody attending had any vulnerabilities "does not translate at all to the kinds of cases that come before the SEND tribunal."

266. The Committee concluded:

> "Video links and fully video hearings have value for administrative hearings in civil, family and tribunal cases involving legal professionals, but may compromise justice for vulnerable people, especially those unrepresented**.** While judicial discretion in use of video hearings provides important protection, we recommend that all litigants in civil, family and tribunal cases have the right to decline to give evidence by video."
> And

[252] Ibid. Paragraphs 80-82

"Research on the use of video hearings and video links in the UK is limited. What there is raises many questions as to its suitability for anything other than straightforward cases. We recommend that, as a priority, the Ministry of Justice commissions independent research on video hearings and video links with a primary focus on justice outcomes. This research should be completed before HMCTS makes more widespread use of video technology in courts and tribunals."

267. The statements set out above, which the Council fully endorses, underline the need for those engaged in the design and implementation of HMCTS reform programme to have the consideration of vulnerability of parties and witnesses at the forefront of considerations when introducing any changes to the current procedures. Some of the proposed changes, such as video hearings, are likely to provide significant assistance to some vulnerable witnesses. However, for others they may have the opposite effect. As a result, very careful consideration must be given before their implementation. The extent to which the introduction of digital systems and other new processes positively or negatively affect vulnerable people with the civil justice system will provide a barometer of their success (as opposed to the levels of any savings achieved) in providing greater access to justice through making

"justice less confusing, easier to navigate and better at responding to the needs of the public", and

"every user to feel they have been treated swiftly, fairly and with respect."[253]

268. The Council recommends that with each and every element of the proposed reforms the question should be asked; how will this affect vulnerable court users? It should be an automatic agenda item.

269. When a proposed reform may directly or indirectly affect vulnerable parties or witnesses, an impact assessment should be undertaken and steps taken to address the potential to adversely affect the ability of vulnerable court users to participate or give best evidence.

270. JUSTICE argued that any definition of the term vulnerability should be sufficiently wide to capture the broad array of reasons why a person may be vulnerable when using an online/digital process. Whilst the Council does not propose a definition of vulnerability, the proposed amendment of the overriding objective to ensure, as far as practicable that all parties can fully participate and give their best evidence will reinforce the duty on all concerned to ensure that anyone involved in litiga-

[253] See statement at paragraph 258 of this document.

tion is not disadvantaged by digital processes or associated reforms. If new processes do cause increased difficulty or disadvantage to some vulnerable parties or witnesses it is likely that Judges will seek, to the extent that it remains possible, to revert to pre-reform processes e.g. the use of paper and face-to-face hearings.

Raising/identifying vulnerability

271. As set out above there is no specific mention of, or question relating to, vulnerability within the forms for a party's first engagement with the Court or directions questionnaires provided in each of the civil case tracks[254] in the County Court or in High Court claims.

272. In its response to the consultation paper JUSTICE pointed out that its briefing had led to the amendment of clause 1 of the Courts and Tribunals (Online Procedure) Bill[255] to ensure emphasis of the need for support to enable those who are digitally excluded to engage with online justice services. JUSTICE believes that it is essential that digital systems are "built to identify vulnerability at an earlier stage" and that when a person is engaging with the digital process there is no face-to-face opportunity to identify vulnerability. It expressed concern that some online processes will allow judges to make decisions after interacting the parties solely through online processes and without adequate ability to assess or cater for vulnerability.

273. The Council believes that whether online or on paper, all claims forms or forms commencing proceedings, acknowledgments of service or responses to claims, the questionnaires for all tracks and all requests should be amended to obtain (through straightforward and easily understandable questions) information as to the vulnerability or potential vulnerability of a party (which should include an obligation to disclose whether a party know details of the vulnerability of another party) or a witness.

Capturing data

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[254] Small Claims, fast track and multi-track; see paragraphs 102 of this document in relation to OCMC

[255] The Courts and Tribunals (Online Procedure) Bill establishes a new Online Procedure Rules framework which will enable parties to civil, family or tribunal proceedings to use an online procedure. It would establish an Online Procedure Rule Committee (OPRC). The role of the Committee will be to provide new, simple online rules which are intelligible to, and easily navigable by, all people who rely on the courts system. Section 1 provides "… (3) Power to make Online Procedure Rules is to be exercised with a view to securing— (a) that practice and procedure under the rules are accessible and fair, (b) that the rules are both simple and simply expressed, (c) that disputes may be resolved quickly and efficiently under the rules, and (d) that the rules support the use of innovative methods of resolving disputes. (4) For the purposes of subsection 3(a), regard must be had to the needs of those who require support in order to initiate, conduct, progress or participate in proceedings by electronic means, in accordance with Online Procedure Rules.

274. As set out above[256] there is no data as to the number of vulnerable parties or witnesses (or users who perceive themselves as such) who appear before the civil courts across the range of jurisdictions (and types of case) or in relation to any steps taken to assist any vulnerable party or witness. It is a "data desert". As a result, there is no evidence to assess the extent to which the civil justice system is assisting (or failing) court users and gaps/issues identified. The Council believes that this should be addressed.

275. The ability of parties to indicate on /within claims forms, responses, directions questionnaires and online processes if there is an issue in respect of vulnerability (see recommendation 2 below) will allow basic data to be captured. The Council also recommends that the use of specific measures to address vulnerability, such as intermediaries (or the appointment of legal representatives), should also be recorded.

Judicial Training

276. The one issue upon which there was near unanimity amongst those who provided views to the Civil Justice Council at any stage of its consideration of vulnerability, was that there was not enough awareness about the nature and extent of vulnerability of parties/witnesses among the civil judiciary and that additional training was needed particularly as to detecting the wide range of potential issues.

277. In the criminal courts the police, Crown Prosecution Service (CPS) and a publicly funded defence advocate[257] will usually have had significant interaction with the witnesses and/or defendant so will have had an opportunity to assess if there are vulnerability issues and inform the Court and, if necessary, make an application for assistance[258] or special measures. In public law family cases the Local Authority (and in the clear majority of private law cases involving children, CAFCASS) will have assessed the relevant circumstances and issues of vulnerability and be able to alert the court to an issue.[259] However, in many civil cases neither the parties nor any third-party agency will have considered vulnerability placing the burden upon the Judge to detect, then raise/investigate, any potential issue.

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[256] See paragraph 17 of this document.
[257] A defendant will be entitled to assistance from a duty solicitor at a Magistrates court who can advise and/or represent.
[258] In many larger Magistrates' Court there is assistance from the NHS Liaison Service in relation to any mental health concerns.
[259] In private law cases not involving children there is usually a referral for a Mediation Information and Assessment Meeting; also giving an opportunity of assessment of vulnerability issues by a third party.

278. Further, given the move to increased use of technology to obviate the need for "face-to-face" meetings, as stated in the 2019 JUSTICE report in the context of video link. [260]

"Of particular concern is the fact that anecdotal evidence suggests that it may be more difficult for representatives to identify court users' vulnerabilities or disabilities via video link"
and
"Due to the issues highlighted above, it is all the more important for judges and magistrates to clearly explain to participants in hearings involving video what will happen at the start of the hearing and what is happening throughout the course of the proceedings. We know from video enabled remand hearings that the use of video can become routine for magistrates. However, judges and magistrates must bear in mind that both the proceedings, the use of video and the implications of appearing on a link will most likely be unfamiliar to the person on the screen. We are not aware of any specific guidance on running a video link court. As such, we also consider that guidance and training on whether a video hearing is appropriate and how to run a video hearing is necessary for all court professionals".

279. The Council considers that it is necessary that judicial training upon vulnerability includes consideration of detecting and assessing potential vulnerability when a party/witness is communicating with the court online, or using the telephone, video or skype.

280. The impending introduction of a rule change within the Family Procedure Rules was the trigger for a change in the training provided for the family judiciary by the Judicial College. It is the Council's view that even in the absence of a rule change within the CPR, given the concerns as to the ability to detect and cater for vulnerability using the current rules, the College should re-consider the adequacy of training of civil judges, both salaried and fee paid, in relation to issues of vulnerability and the need to cover, in greater depth than at present, three core elements:

i. Detecting/assessing vulnerability (including increasing awareness of the presence of court users with mental health conditions and learning disabilities);
ii. Case management when a party or witness is vulnerable;
iii. Conduct of hearings (to include examination of witnesses,[261] including questioning by the Judge so as to avoid questioning by a party) and communicating, engaging and working with court users with mental health conditions and learning disabilities.

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[260] Paragraphs 2.77-2.78 https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf
[261] See the guidance in PS v BP [2018] EWHC 1987 (Fam) and paragraph 101 of this document

281. As indicated above[262] concern was raised within several responses to the consultation report that there was no mandatory training for civil judges (or on available civil courses) specifically concerning vulnerability. Given all family judges have now received trained on the new rules, it is clear that the college can implement a scheme of mandatory training.

282. The Council believes that training in respect of vulnerability (including consideration of the changes to be implemented under the reform programme) should be a mandatory part of the training of all new judiciary and a requirement of all existing civil judiciary within a three-year cycle. The Council does not believe that vulnerability issues are likely to be adequately covered by distance/e-learning.

283. Given vulnerability of parties and witnesses is an issue for each jurisdiction (and that many Judges will sit in more than one jurisdiction) consideration should be given to a core cross-jurisdictional module.

284. A suggestion was raised within the initial consultation undertaken by the Council that the case management of cases concerning sexual abuse/assault should be restricted to judges with family public law tickets, as such judges will have greater experience in cases raising these issues. Provided there is a mandatory training programme, the Council believes that the significant listing complications (with potential for increase delay) created by such a restriction would be likely to be greater than the benefit gained.

Practical assistance before, during and after hearings

285. Although self-representation does not axiomatically equate to vulnerability, many who could/should be considered vulnerable have to represent themselves. As considered elsewhere in this paper there is a need to identify potentially vulnerable parties and witnesses at the earliest possible stage so that they may gain assistance to ensure that they can properly participate in proceedings. However, many acting without legal representation do not know how to raise their issues/concerns as to obstacles to, or fetters upon, their participation in proceedings. Also, many vulnerable parties and witnesses will greatly benefit from even basic support in relation to the practicalities of the litigation process. Support Through Court (formerly known as the Personal Support Unit (PSU)) is a legal charity that supports people who have to represent themselves in court. The aim is to "reduce the disadvantage of people facing the civil and family justice system without a

[262] See paragraph 154 of this document

lawyer …", and that "no one should face court alone."[263]

286. Support Through Court does not offer legal advice, but provides support, reassurance and guidance to clients in a variety of other ways including: explaining how the court system works, signposting to other organisations who do provide legal advice, some types of help to fill in court forms and papers, and accompanying clients to their hearings. As at 2019 it operated from 23 courts in 18 different towns/locations across England and Wales.

287. The Charity's 40 staff and 750 volunteers help with most aspects of civil legal proceedings;[264] nearly 17% of cases involve a money claim, and 14% concern housing problems (often clients are defendants in possession hearings). After being helped by a volunteer, 97% of clients reported that the assistance provided made them feel they had had a fairer hearing. There are few, if any, Judges who do not praise the charity for its work.[265]

288. In February 2017 Support through Court reached the milestone of having helped on over 200,000 occasions, and on 56,119 occasions in the previous year, with the figure rising to 75,432 in 2018-19. Given the reduction in availability of legal aid[266] and the increase in the number of litigants in person, most of the Charity's units have seen, in recent years, an annual rise in the number of people assisted in the region of 20%.

289. The charity has recently undertaken a restructure which, at least in the short term, has seen the closure or reduction of services in some areas. It has plans to increase services in appropriate ways when and where possible.

290. The Commission on Justice in Wales in its detailed report of October 2019 specifically recommended that Support Through Court should be expanded so it is available at all courts and tribunals in Wales.[267]

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[263] The PSU was founded in 2001, led by Diana Copisarow OBE. Whilst volunteering for the Witness Service, Lady Copisarow supported an unrepresented litigant through contested divorce proceedings. The litigant's experience was in her view "horrendous" as she faced the confusion of the court system, uncertainty about appearing before a Judge, and the general emotions of litigation. These experiences drove Lady Copisarow to establish the PSU to meet the human, non-legal, needs of people attending court alone and without legal representation. Together with Michael Naish, the Director of the Witness Service and with the help of Mark Sheldon, CBE from Linklaters, and also seed funding from the firm, she set up the charity.

[264] Over half of Support through Court help is provided to people involved in family cases.

[265] In 2014 the PSU won the Guardian's 'Small Charity, Big Difference' Award.

[266] In the first ten years of the charity, from 2002-2012, contact figures rose steadily to an annual total of 10,000. Since Legal Aid, Sentencing and Punishment of Offenders Act 2012 these figures have increased by approximately 10,000 per year.

[267] See report paragraph 3.66.4 page 123. Available at https://gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL_2.pdf

291. A significant proportion of those assisted by the charity are vulnerable parties or witnesses. The volunteers are a vital source of guidance and notification, not only to the people needing their help, but also to court staff and the judiciary. They explain issues that those assisted, would not, or would not know how to raise.

292. Support Through Court is a partner in what is known as the Litigant in Person Support Strategy, together with other key charities (many of whom, in contrast to Support Through Court, do provide legal advice). [268] The Ministry of Justice provides financial support to that Strategy. Allocation of funds within the Strategy is considered by the partners together and then agreed. The Ministry of Justice has recently increased the amount provided to the Strategy, as part of the Action Plan published alongside the review of LASPO in 2019. The increase will enable support for increased regional reach through the Strategy, and additional partners.

293. The Council well recognises that the Ministry of Justice has financial constraints. However, it shares the views expressed by Judges, court staff and other organisation that the unique service provided by Support through Court is a vital part of the support provided at court to vulnerable parties/witnesses, alongside the support provided by other charities, including the advice sector.

294. The Council commends the partnership approach between Support Through Court and other charities that the Litigant in Person Support Strategy encourages. This is important to achieve the best support within the resources available for vulnerable parties and witnesses. The Council recommends that every opportunity is taken by the Ministry of Justice to improve further the funding to the Litigant in Person Support Strategy, and that every opportunity is taken by the partners (including Support Through Court) to continue to work together in a strategic and collaborative way.

Court facilities

295. The HMCTS estate contains a wide variety of court facilities which are used for civil (and family)

[268] The Litigant in Person Support Strategy (the Strategy) was launched in October 2014 in response to the increasing numbers of vulnerable people facing the prospect of court proceedings without advice or support. The Strategy is a collaborative project involving Law for Life, LawWorks, Support through Court, RCJ Advice, Advocate (the Bar Pro Bono Unit) and the Access to Justice Foundation, and others. In March 2017, an online platform, the Litigant in Person Network (the Network) was launched with the aim of connecting a wide range of people with a common goal of improving access to justice. It is co-ordinated by the Litigant in Person Support Strategy, and supported by The Legal Education Foundation. See http://www.lipnetwork.org.uk/

hearings ranging from modern multi-court combined centres with modern equipment to buildings with a single hearing room. As a result, court staff and Judges are often restricted in relation to the directions /arrangements that can be made to accommodate the needs of vulnerable witnesses and/or parties.[269] The FPR expressly acknowledge this difficulty, providing:

"If the family court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the family court sits and the measure is available."[270]

296. In his 2017 statement the President of the Family Division stated of HMCTS reforms which are intended to assist vulnerable parties/witnesses:

"None of this will work, as it should and must, unless our courts are fitted out with the necessary facilities and have the necessary 'kit'. The simple fact is that they are not and do not and they must be. In too many courts the only available special measure is a screen or curtains round the witness box. What, for example, about the safe waiting rooms for which the APPG has justifiably called? The video links in too many family courts are a disgrace – prone to the link failing[271] and with desperately poor sound and picture quality…More, much more, needs to be done to bring the Family courts up to an acceptable standard, indeed to match the Facilities and 'kit' available in the Crown Court."[272]

297. In its response to the consultation paper the Association of District Judges stated that:

"there is currently concern as to the quality of technology provided with the video links not consistently working correctly."

298. Other consultees referred to the difficulty in getting access to video link facilities for civil cases with priority, for such equipment as available is being given to family cases. One Designated Civil Judge reported difficulties in providing any of the basic protections that should be available for vulnerable witnesses; video link facilities, screens or even an appropriate entrance (the relevant court cur-

[269] E.g. Reading Hearing Centre has only two waiting rooms for five hearing rooms.
[270] FPR 3A.8(2)
[271] One District Judge lost an entire day in a complex case as the link kept cutting out. After investigation it was established that the problem was that too many phones were being used in the Court building, and the case had to be moved to a different court.
[272] By way of example, Cardiff Civil and Family Justice Centre has just one live link and vulnerable witness suite

rently using the goods loading bay). Another Judge reported reliability issues in relation to technology used which is patchy.

"Breakdowns of communication between live link (vulnerable witness suite) and courts are too common and highlight the need to maintain such facilities properly."

299. As set out above since 2016[273] the justice system has entered a period of huge reform[274] with HMCTS committing to:

"an ambitious programme of court reform, which aims to bring new technology and modern ways of working to the way justice is administered".[275]
During the first phase of the reforms, projects included putting new infrastructure into existing court buildings (including more Wi-Fi) and modelling/design work on "the Court of the Future" design guide. The design guide set out that accessibility for the most vulnerable should be extended to civil hearing rooms. It stated
"Model waiting rooms for victims and witnesses have already been established in five criminal courts across the country. These are intended to improve the experience of the criminal justice system for all victims, including victims of domestic abuse. Her Majesty's Courts and Tribunals Service is using these model waiting rooms along with a new design guide and the results of a facilities audit to target further improvements. As an early priority, it is focusing on increasing the number of privacy screens available to allow vulnerable and intimidated victims and witnesses to give evidence without being seen by the defendant or the defendant's family".[276]

300. Work is on-going which includes building 'enabling' services (such as video connections and technology). In a pilot started in March 2019 HMCTS is exploring how video hearings might be used to improve access to justice in civil and family cases and help cases progress faster.[277] In a press release of 9th May 2019[278] it was stated of fully video hearings:

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[273] See the UK Government White Paper "Transforming Our Justice System" (September 2016) Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf
[274] The reform programme now comprises more than 50 distinct projects, working across all jurisdictions - in criminal, civil, family and tribunals
[275] Gov.uk website *HMCTS reform programme.* February 2019. Available at https://www.gov.uk/guidance/the-hmcts-reform-programme
[276] Compare e.g. with the number of waiting rooms at Reading Hearing centre; see footnote 272 of this document.
[277] See footnote 116 of this document.
[278] HMCTS/MOJ; https://www.gov.uk/government/news/video-hearings-tested-in-domestic-abuse-cases

"This has been used in six cases so far and feedback from those involved has been positive. Testing will continue in the family and civil courts during the coming months and is being independently evaluated. Justice Minister, Lucy Frazer, said:

We are hearing that, even in the early stages, testing fully video hearings are having a positive effect and ensuring the justice system is supporting people at one of the most difficult times in their lives. I look forward to seeing the evaluation of this work and ensuring we continue to improve access to our courts through new innovations."

301. However, the information provided to the Council has revealed that currently provision of basic (and reliable) equipment and facilities is frequently inadequate. Immediate action is needed in some Courts and the reform programme must ensure that its plans, which may take some years to fully implement, do not delay the review and improvement of existing forms of assistance for vulnerable parties and witnesses e.g. the availability and reliability of video links. The Council recommends an immediate audit of the equipment and facilities used to assist vulnerable witnesses in each court and where practicable that measures be taken to improve them without delay.

302. An audit would also assist in providing data and a baseline which would allow assessment of the nature and extent of improvements as a result of the reform programme. If there is to be structured and properly prioritised improvement, it is necessary to know exactly what stands in need of improvement.

303. Although the "Court of the Future" design plan will assist when court buildings are altered (or more rarely) built, it is understood that the reform programme will not have sufficient funds for wholesale changes to the existing court estate (beyond the addition of new technology). This means that the vast majority of existing buildings/hearing rooms will continue to be used as they currently are i.e. current limitations, such as the lack of separate waiting rooms/facilities, will remain. An audit would allow assessment of what steps can be taken short of physical changes to the estate.

304. The responses to the consultation paper have shown that the reform programme continues to cause considerable concern because of the reduction of facilities. The Law Society stated:

"… we are concerned that court closures, the reduction in court staff, the uncertain nature of some of the reform projects, and the potential move to flexible operating hours may individually and collectively impact adversely on vulnerable parties. The funding of robust court infrastructure is vital to the achievement of the aims of the recommendations listed. The Law Society agrees that the modernised court service and efficient use of technology would benefit all users provided it does

not come at the expense of justice. We would be concerned if vulnerable groups encountered difficulties with the modern nice system which does not meet the needs of all users, especially those who are unrepresented".

305. The Council recognises the limits of available funding for the reform programme. However, a guiding principle must be that robust court infrastructure, adequate staffing levels and reliable equipment are vital to the achievement of the aim set out in September 2016 of building a modern system for administering justice which will benefit everyone who uses it.

Assisted Digital

306. An overarching project within the reforms is "Assisted Digital" which has a dedicated department. From March 2018 onwards assessment and testing has been taking place so to ascertain how best to provide help to people using a range of new digital Courts and Tribunal Services.[279] Concerns about the potential for "digital exclusion" for those without the means or ability to use digital methods have been raised by a wide range of bodies.[280]

307. Given the clear recognition by HMCTS of the vital importance of providing adequate digital support for users, and the ongoing work, the Council does not believe it is necessary, for the purposes of this paper to go further than to repeat its recommendation that with each and every element of the proposed reforms, and in particular the digital elements, the question should be asked; how will this affect vulnerable court users? Some digital processes may assist the vulnerable but there is a real and obvious potential for many court users to suffer disadvantage and their ability to fully participate to be impaired unless steps are taken to provide easily accessible, adequately resourced and comprehensive assistance.

308. The reform project has recognised that given the insurmountable difficulties some court users may face with digital communication a parallel paper system will have to be retained. It is the Council's

[279] This project is in part managed by Good Things Foundation under a contract with HMCTS which will run until September 2020. The contract is a "test and learn contract" intended to help HMCTS establish what is required from an assisted digital service.

[280] See e.g. the JUSTICE report "Preventing Digital Exclusion from Online Justice"; June 2018 and the letter of 27th February 2018 from the Justice Committee to the Parliamentary Under Secretary for Justice (increasing reliance on Impaired mobility: affecting access to the building and to toilets; difficulty moving around the room virtual and online justice). The Civil Justice Council had a presentation from the Assisted Digital Team in 2018.

view that use of the paper system must not place a party (or witness) at a disadvantage; including during hearings.[281]

Court Protocols and information for Court users

309. Some Courts already have protocols in relation to vulnerable witnesses (as recorded in the draft Domestic Abuse Bill)[282] . However, as their creation arose out of the requirements of the Family Court, civil staff[283] are often unaware of their existence.[284] An example of a current court protocol is at Annexe 4.

310. The Council believes that a national protocol is required to cover the issues arising from vulnerability of all court users (parties, witnesses and other visitors) on a cross-jurisdictional basis. Consideration should be given to enshrining the recommendations within the 2010 research paper[285] and the 2019 JUSTICE report within the protocol. Specifically, the protocol should require each court centre to:

(a) Set up a team of staff (or for single court buildings a nominated member of staff) who should receive training to work with court users with mental health and physical conditions, learning disabilities, limited mental capacity and other vulnerabilities. These members of staff should have clearly defined lines of communication to enable court users to contact them, and a full understanding of all the available support mechanisms. Further they should regularly liaise with representatives from the local Citizens' Advice Bureau, any Support Through Court[286] office and other voluntary sector support organisations.

(b) Consider how to ensure that vulnerable court users are offered support before arrival at court, during and after a hearing or attendance at court[287] (including ensuring that there is a single point of contact and the supervision/overseeing of the provision of support).

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[281] E.g. if the Judge and other party are using screens.
[282] See paragraph 72 of this document.
[283] The document "Special measures and facilities for vulnerable family court users" [HMCTS] states "every family court is expected to develop a protocol setting out the specific procedures and practicalities for assisting vulnerable court users, adapted to their local circumstances. These will be devised by local operations managers, with input from the Designated Family Judge (p22)"
[284] By way of example working group members sit at Reading and Edmonton where the staff were not aware of any protocol.
[285] See paragraph 19 of this document.
[286] Formerly known as the PSU
[287] Including through liaison with Citizens' Advice Bureau, Support Through Court and other voluntary sector support organisations

(c) Introduce the provision of pre-trial visits to vulnerable court users and promote their availability.[288]

311. The Council also believes that HMCTS should review the nature and extent of information for vulnerable (and other) court users and ensure that there is easy access[289] (recognising that not all court users will have access to the internet) to comprehensive guidance (in simple and accessible language) covering:

(i) What to expect when attending at a court building.

The 2019 JUSTICE report stated:

"We consider that the webpage for each jurisdiction on gov.uk that we propose above, should be followed by a prominently featured, engaging, clear and high-quality production video entitled 'What to expect at Court'. It should include court professionals explaining their roles and lead viewers through actual court locations, to give a realistic picture of court processes. This should be produced by HMCTS and cover practical and procedural information. Consideration should be given, based on user testing, to whether it would be possible to have an overview video that applies irrespective of jurisdiction."

The Council endorses this suggestion but believes that consideration must be given to those who will not have easy access to a webpage.

i. the use of Mackenzie Friends/lay representatives;
ii. being a witness in a case[290]. The Government has set out that
"Her Majesty's Courts and Tribunals Service and the Ministry of Justice will develop a series of videos to explain the process of giving evidence to court and how special measures might assist";

[288] Pre-hearing visits were referred to within the APIL survey as clearly beneficial for vulnerable Claimants. See also the specific recommendation in the 2019 JUSTICE report at Chapter V recommendation 15
[289] See HMCTS "Citizen User Experience Research" [2018] as to the importance of "good information". See also the JUSTICE report at paragraph 2.19 in relation to leaflets available at court; "In some Courts, the number of leaflets is overwhelming, and in others there are none at all. Many leaflets are also out of date, with information that is insufficient in terms of content and substance". Also see the recommendation at paragraph 2.55, "Court and Tribunal staff should be familiar with the information that is online, in leaflets and on the video screens in order to signpost lay users to this".
[290] The 2010 research made a recommendation of the production of an equivalent DVD to "Going to Court – A step-by-step guide to being a witness" used for criminal cases on the civil and family court processes and promote its availability to court users

iii. How to raise issues/concerns about the ability to participate in the Court process or to give best evidence;
iv. How to access a list of any local agencies/relevant organisations who may be able to provide advice, assistance and/or representation in relation to the conduct of litigation such as any local pro-bono scheme and the Citizens Advice Bureau.[291]

312. The Council believes that whilst there should be a national protocol, given the diverse facilities within the estate,[292] each court centre/group of courts should also prepare (after consultation with the Designated Civil Judge and the Designated Family Judge) a comprehensive bespoke local operational protocol which should include consideration of the assistance/protections available to all vulnerable parties/witnesses across the civil and family jurisdictions. To take obvious examples of environmental features which need to be considered for each court:

a) The access to the building or parts of a building and to toilets for those with impaired mobility. Also, the ease of movement in/around the court or hearing room (these factors may affect which hearing rooms are suitable in particular cases).
b) The ability to provided separate access/egress from buildings/courts for vulnerable parties/witnesses.
c) The availability of video link rooms and separate waiting rooms (in an APIL survey 96% of those who responded said that a separate waiting room would assist vulnerable witnesses.
d) The layout of hearing rooms (e.g. screens[293] are easy to use, relatively inexpensive and their use has a minimal disruptive effect upon court proceedings provided the courtroom is large enough. However, they cannot be used for hearings in some hearing rooms used by District Judges due to layout/size).[294]

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[291] From April 2019 The Citizen's Advice Bureau is running a pilot scheme in up to 12 Family Courts extending its Witness Services to provide information, practical and emotional support. The first three courts on the pilot are Wolverhampton, Teesside Combined Courts, Stoke on Trent to be followed by Leicester, Portsmouth, Derby, Norwich, Northampton, Kingston upon Hull, Worcester, Swindon and Truro later in 2019. See also the 2019 JUSTICE report paragraph 2.30-2.31
[292] Many Crown Courts are better equipped, in terms of video links and separate waiting areas for witnesses than the civil estate. Given the reduction of sitting days in the Crown Court consideration should be given to the potential for use of crown courts for civil and/or family cases which involve vulnerable witnesses/parties. See footnote 269 of this document in relation to Reading Hearing Centre.
[293] HMCTS has recently taken delivery of a further 300 screens
[294] See the statement within the Court of the Future Design Guide at paragraph 303 of this document. There are other features of the court environment that should be considered e.g. physical discomfort in the room: seating arrangements, temperature, handling of large trial bundles when in the witness box, difficulty hearing the judge or advocates due to the size of room or background noise or size.

313. In addition to national and local court protocols it is essential that staff who handle civil cases are given adequate basic training in relation to vulnerable court users.[295] In the 2019 paper[296] it was stated in relation to staff that:

"In addition, we provide ongoing training to all professionals working within the family justice system. Her Majesty's Courts and Tribunal Service is committed to increasing the awareness and understanding of domestic abuse among all family court staff. At the end of November 2017, a new training programme was rolled out to all court staff focusing on the needs of vulnerable court users, including victims of domestic abuse."

The Council's initial consultation exercise revealed a widely held view that there is currently an unsatisfactory picture in relation to staff training across the civil courts (in part because of the turnover of staff). In many combined court centres, family court staff (including ushers who often work in both family and civil courts) have already received training in respect of vulnerable parties/witnesses; but staff who work solely in the civil section have not.[297] This should be addressed as a matter of urgency. Given that staff may be called upon to work in either family or civil sections the starting point should be cross-jurisdictional training.

[295] See footnote 97 of this document in relation to The UN Convention on the Rights of People with Disabilities 2006 and the obligation that "States Parties shall promote appropriate training for those working in the field of administration of justice"
[296] See paragraph 73 of this document.
[297] There is an internal HMCTS training document entitled "Special measures and facilities for vulnerable family court users".

Section 6 - Compensation orders

314. The Council notes that the interim recommendation of The Inquiry stated that for the victims and survivors of child sexual abuse, cost is a barrier for those who wish to claim compensation in the civil courts for the abuse they suffered and the Ministry of Justice should ensure that this barrier "is not further increased."

315. It is not necessarily the case that victims and survivors of child sexual abuse need to make a civil claim to obtain compensation, or at the least an initial award. Apart from an award under the Criminal Injuries Compensation Scheme[298] a victim or survivor of a sexual offence in respect of which there has been a conviction can receive compensation from the criminal court without facing any financial barrier associated with bringing civil claims. The Ministry of Justice stated in its closing submission to the Inquiry:

> ".. one area which, on the evidence before the Inquiry, clearly requires careful attention is the lack of Criminal Compensation Orders (CCOs) being made by the Courts. The Inquiry is aware of the legislative framework and the obligation on the court to consider the making of such orders. It is also aware of the statistics, confirmed by the evidence of the police and victims/survivors, which indicates that the power to make a CCO is infrequently exercised.
>
> It seems to the Ministry of Justice that there is clearly a training issue here, which needs to be grappled with by the bodies concerned. The Lord Chief Justice, who has responsibility for training the judiciary, will no doubt wish to consider how judicial awareness of the applicable legislation might be improved, as will the professional bodies responsible for the training of solicitors and barristers whose job it is to ensure that the Court is fully informed of its powers and obligations when it comes to sentencing. The CPS and police will also have a role to play in this regard. A key theme which has emerged from the victim and survivor evidence has been the value attached to the making of such an order even if it does not ultimately lead to much money actually being recovered, and that is something that all those involved will wish to take into account when it comes to considering whether a CCO should be made."[299]

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[298] The Inquiry recommended that the Ministry of Justice revise Criminal Injuries Compensation Authority (CICA) rules; but this is beyond the scope of this paper;

[299] It is interesting to note that the "Code of Practice for Victims of Crime" published by the Ministry of Justice in October 2015 pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004 makes no reference to the courts power to award compensation or to the need for those who are service providers to consider making an application. This appears to be a surprising omission.

316. The statistics do indeed support the view that compensation orders are rarely made. According to figures from the Ministry of Justice provided in response to a written question by Andrew Griffiths MP only 26 awards were made to victims of child sexual abuse in 2017 although 6,861 defendants were convicted of relevant offences. Of the 26 compensation orders, eight were for £100 or less.[300]

317. The All-Party Parliamentary Group for Adult Survivors of Childhood Sexual Abuse[301] explored survivors' experiences of the criminal justice system through an Inquiry during 2019. In its response to the consultation paper the Group stated:

"The Inquiry heard that courts are not making use of the power to issue criminal compensation orders in child sexual abuse cases, and the Police are not providing CPS with requisite information to place before the courts so that an order can be made. The Inquiry received written evidence arguing that survivors are regularly asked to consent to medical records and victim impact statements being placed before the Court and this should be sufficient to facilitate the awarding of criminal compensation orders".

318. Section 130 of the Powers of Criminal Courts (Sentencing) Act 2000 provides a power to impose a compensation order against a convicted person (in addition to dealing with him in any other way) requiring him/her to:

"…pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence."[302]

319. A court must consider making a compensation order in any case where it is empowered to do so and, importantly, must provide reasons if it decides not to do so. As for the amount of compensation, it should be:

"…of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor."[303]

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[300] Figures set out in the introduction of the Compensation Orders (Child Sexual Abuse) Bill 2017-19 ; a Private Members' Bill on Tuesday 26 March 2019 by Andrew Griffiths MP under the Ten Minute Rule.
[301] Formed in 2018. The chair is Sarah Champion MP who provided a response to the consultation paper on behalf of the group.
[302] S130 (1)(a) Available at http://www.legislation.gov.uk/ukpga/2000/6/section/130/enacted
[303] Subsection (4)

The amount of loss must be agreed or proved by evidence, as opposed to inference or guesswork.[304] Currently the approach of most Judges is that the process of making an order should not be complex or protracted and a court should decline to make an order unless it is based on relatively simple propositions which have been agreed or are easy to resolve. When the amount of loss or damage is disputed there may be a need to hear evidence but the court should hesitate before undertaking a complicated investigation.[305]

320. In determining whether to make a compensation order against any person, and in determining the amount to be paid by any person under such an order, the Court shall have regard to his means so far as they appear or are known to the court. If the order may require the sale of the matrimonial home the court is required to take into account the consequence of making such an order.[306] If the order cannot be paid immediately the court must have regard as to how long it might take for the order to be satisfied; the longer the period the less likely it is that the order will be justified. Where the court considers that the offender has insufficient means to pay both an appropriate fine and appropriate compensation, compensation shall take precedence.

321. As for the effect of compensation order on subsequent award of damages in civil proceedings, section 134 provides:
(2) The damages in the civil proceedings shall be assessed without regard to the order…, but the plaintiff may only recover an amount equal to the aggregate of the following-
(a) any amount by which they exceed the compensation; and
(b) a sum equal to any portion of the compensation which he fails to recover.

322. The Magistrates Court has powers in relation to the enforcement of a compensation order, including an ability, to discharge the order or reduce the amount which remains to be paid if the injury, loss or damage in respect of which the compensation order was made has been held in civil proceedings to be less than it was taken to be for the purposes of making a compensation order.[307]

323. As powers exist to award compensation it is necessary to consider why so they are so rarely used. After a limited investigation of the issue (given the scope of this report) the Council understands that there are a number of reasons. Some Judges have referred to the failure of the prosecution to

[304] Amey [1982] 4 Cr App R (S) 410
[305] Kneeshaw (19740 58 Cr App R 439; Hyde v Emery (1984) 6 Cr App R (S) 206.
[306] Parkinson [2015] EWCA Crim 1448
[307] See section 133 (1) and (3) Available at http://www.legislation.gov.uk/ukpga/2000/6/section/133/enacted

adduce evidence of the nature and extent usually required within a subsequent civil claim; particularly medical evidence as to causation of psychiatric conditions.[308] Others have referred to difficulty presented by a contested or lengthy hearing at the conclusion of a trial given that guilt and/or causation of injury may not be accepted by the Defendant. Reference has been made to the difficulty in assessing and awarding compensation other than in a very conservative or nominal sum (which may be seen as "offensive").[309] Concern was expressed about placing a monetary value on the impact of being a victim of crime as the victim may struggle to understand the disconnect between the harm they have suffered and the available means of the offender (this not being a limiting factor when awarding damages in a civil claim). Many offenders receive sentences of immediate imprisonment with the consequent impact on their capacity to satisfy any compensation order (and/or upon the determination of issues in relation to a potential order). There was limited recognition that Judges may not always adequately set out their reasons for not awarding compensation (and that such reasons would help victims better understand the difficulties faced).

324. Some responses questioned whether the Council, given its civil remit, should be concerned with any issues relating to compensation orders. However, given the provenance of this report, the impact on likelihood of and issues within a subsequent civil action when a compensation order is not made and the views expressed by the Council of Circuit Judges that the enforcement of compensation orders could be transferred to the civil courts, the Council considers limited recommendations to be appropriate and necessary.

325. Addressing matters solely from a civil perspective (and therefore with caution), the Council believes that given the very low number of orders made current practices/issues in relation to compensation orders should be considered by the Judicial College in light of the potential need to revise and augment current training for criminal Judges. Given this recommendation the Council makes only some limited further observations.

326. Reasons should always be given why a compensation order is not appropriate. The explanation may be of considerable assistance within a subsequent civil action (e.g. in indicating that no adverse inference should be drawn from the lack of an award against the victim's credibility on the extent of injury/damage suffered).

327. In respect of causation, although a Judge would have to consider the fact that (whilst abuse may have been proved or admitted) the extent/causation of any medical condition is uncertain on the

[308] This is an issue which should be considered by the Crown Prosecution Service.
[309] See generally article in the Sunday Times 16th June 2019; Catherine Wheeler.

verdict(s) and/or disputed and/or there may be issues as to the appropriate quantum, this should not mean that no award is made if there is clearly an element of identifiable personal injury, loss or damage resulting from conduct which has been proved or admitted.[310] If there are areas of doubt then a conservative approach should be taken, but otherwise an appropriate award should be made. Again, giving reasons will assist in indicating why a subsequent civil case may result in a very much greater sum being awarded.

328. In many personal injury cases the Claimant receives (by agreement or order) an interim payment in respect of damages long before a final sum of compensation is agreed or ordered. The earlier provision of an element of the damages (on a conservative basis and in a sum to avoid any risk of overpayment)[311] means that the Claimant is not "kept out of" his/her damages for longer than is necessary and also, importantly can fund treatment far earlier than will often be the case if he/she is otherwise reliant upon provision by the NHS/statutory services; sometimes leading to a much earlier reduction in symptoms/effects. Even if only in a necessarily limited amount, a compensation order can be the equivalent of an early interim payment and avoid the need for the issue to be contested before the civil courts and lead to earlier treatment.

329. Many sexual offences are assaults and elements of injury and loss can be established without specific medical evidence upon causation; for example, a judge may make a factual finding that a victim has suffered severe psychological harm:

"The judicial assessment may in some cases be assisted by expert evidence from a psychologist or psychiatrist. However, we reject the submission that it is always essential for the sentencer to consider expert evidence before deciding whether a victim has suffered severe psychological harm. On the contrary, the judge may make such an assessment, and will usually be able to make such an assessment, without needing to obtain expert evidence".[312]

330. As for quantum of an award the Criminal Injuries Compensation scheme 2012 tariff awards and Judicial College Guidelines provide an appropriate framework.

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[310] The standard of proof in civil cases is on the balance of probabilities and not the more onerous criminal standard.
[311] See Cobham Hire Services Ltd -v-Eeles 2009] EWCA Civ 204 and recently Farrington -v-Menzies [2019] EWHC 1297 (QB)
[312] R-v-Chall and others [2019] EWCA Crim 865; "The judge must act on evidence. But a judge will usually be able to make a proper assessment of the extent of psychological harm on the basis of factual evidence as to the actual effect of the crime on the victim. Such evidence may be given during the course of the trial, and the demeanour of the victim when giving evidence may be an important factor in the judge's assessment. The relevant evidence will, however, often come, and may exclusively come, from the VPS. The court is not prevented from acting on it merely because it comes from a VPS."

331. As for the means of an offender to pay an order, the Court is not limited to income or immediately accessible savings. An equitable interest in the property is a relevant consideration when assessing means. The fact that the order may require the defendant to sell property or re-mortgage is no bar to the making of an appropriate order, although that may affect the length of time to pay.[313] Such assets would be likely to be the subject of enforcement of any subsequent civil award.

332. The Council sees force in the comments made by the Ministry in its submissions that there may be a "training issue" for criminal Judges and also a need for the Crown Prosecution Service to consider its current practices and training (given the comments of the All-Party Parliamentary Group at paragraph 317 of this document). Certainly, an increase in compensation awards may significantly reduce the need for subsequent civil actions.

333. The Council does not recommend that the enforcement of criminal compensation orders be transferred to the County Court.

[313] See R v Martindale [2014] EWCA Crim 1232 and R-v- McIntosh [2019] EWCA Crim 231. In McIntosh The Appellant who was ordered to pay £36,577.08 towards the costs of the prosecution argued that the Court took insufficient account of the appellant's means to pay when making the order that it did. If he used all his disposable weekly income, which is put at £220, that would take him 150 weeks to pay off. Even using half, she points out, would take 6 years and his income is likely to be affected in any event by reason of the disqualification order. The Court held that the short answer to the appellant's argument in relation to his means to pay lies in his equitable interest in his property of £255,000 in a domestic property although it did allow a further 6 months "to sell the property or re-mortgage it, whatever is appropriate".

Section 7 – Recommendations

334. In light of the matters covered by this report, the Council proposes to make eighteen recommendations

Recommendation 1: Rule changes

335. The Civil Procedure Rule Committee should consider:

(a) Amending the overriding objective to reflect the need to ensure:

i. that all parties can fully participate in proceedings;

ii. that all witnesses can give their best evidence

(b) A new practice direction directly addressing vulnerability in a way that gives assistance to litigants in person and representatives with the identification of circumstances in which a court may consider a party or witness to be vulnerable and some of the steps/measures which can be taken to give assistance.

After consultation with the Ministry of Justice, the Civil Procedure Rule Committee should also consider:

(c) Amendment of the definition of proportionality in CPR r.44.3(5) to include additional work/expense generated by the fact of vulnerability of parties/witnesses

The Ministry of Justice should consider whether amendments to the rules are necessary to provide discretionary increases in fixed, scale and capped costs regimes where vulnerability has required a specific measure to be taken which has resulted in additional work/expense.

Recommendation 2: Claims forms, responses, directions questionnaires and online access

336. Claim forms and all other methods of commencing proceedings, initial response forms or other forms of first engagement with the Court should contain a question as to whether the proceedings involve or may involve a vulnerable party or witness.

337. Questionnaires for all tracks and requests within online procedures should be amended to obtain (through straightforward and easily understandable questions) information as to the vulnerability or potential vulnerability of a party (which should include an obligation to disclose whether a party know details of the vulnerability of another party) or a witness.

338. Any online portal/access which dispenses with directions questionnaires should ensure a request is made for such information at the earliest opportunity.

Recommendation 3: Capturing Data

339. HMCTS should consider the capture of data in relation to vulnerability of court users. An analysis is required as to what data should be retained/obtained, how it can be reliably captured and how it could be used. As a basic minimum consideration should be given to ensuring that data is available as to the number of vulnerable parties or witnesses (or users who perceive themselves as such) who appear before the civil courts, and also in relation to any specific steps taken to assist any vulnerable party or witness.

Recommendation 4: Training for civil Judges

340. The Council believes that training in respect of vulnerability (including consideration of the changes to be implemented under the reform programme) should be a mandatory part of the training of all new, and a requirement of all existing, civil judiciary within a three-year cycle. The training should, at the least, cover three core elements:

i. Detecting/assessing vulnerability
ii. Case management when a party or witness is vulnerable
iii. Conduct of hearings (including the questioning of witnesses)

341. Given that vulnerability of parties and witnesses affects each jurisdiction (and that many Judges will sit in more than one jurisdiction) consideration should be given to a core cross-jurisdictional training module.

Recommendation 5: Training for legal representatives

342. All relevant regulatory and training bodies should consider the adequacy of, and requirements of members to undertake, available training in relation to vulnerability, and in particular the questioning of vulnerable witnesses.

343. The Court should expect all advocates who may undertake questioning of vulnerable witnesses to have had some relevant training or, at the least, to be familiar with the Advocates Gateway and toolkits.

Recommendation 6: Case management in sexual or other assault/abuse cases

344. A court managing a civil case in which there has been a conviction in respect of assault or abuse should clarify the basis (if any) upon which any conviction is being challenged and as a result consider what issues properly remain for determination and what orders should be made in respect of

the evidence to be adduced. Such consideration should include (but is not limited to) consideration of the extent to which evidence within or transcripts of the criminal trial should form the evidence considered by the court and a requirement that the Defendant presents his/her evidence first.

Recommendation 7: Case Management; ground rules for oral evidence

345. Consideration should be given in every case when case management directions are given, whether at an attended hearing (being either a general case management hearing or one specifically listed to consider the issue) or in the absence of the parties, to the need to set out ground rules with regard to the giving of evidence by any vulnerable witness (or the challenging of evidence by a vulnerable witness).

346. If ground rules have not been considered during case management then they must be considered at the outset of any hearing in which a potentially vulnerable individual is to give evidence.

Recommendation 8: Cross-examination by a self-representing party

347. If a prohibition in relation to cross-examination of a witness by a self-represented party who has been charged, cautioned or convicted of a specified offence against that witness (and vice versa) is to be enacted then a like provision should be extended to the civil jurisdiction, but with the difference that a discretion to order otherwise should be added (given the breadth of the civil jurisdiction and range of potential circumstances).

348. There should also be a provision that if a prohibition upon cross-examination is in place, the court must consider whether it is necessary, having regard to the overriding objective (as amended) for the witness to be cross-examined by a qualified legal representative appointed by the court.

349. Provision must be made for the appointment of a legal representative with funding through central funds (unless a Judge otherwise orders) and the rates of remuneration must be at such a level that the Court will be able to appoint representatives without undue difficulty or delay.

Recommendation 9: Intermediaries

350. The Ministry of Justice and HMCTS should jointly review the availability and use of intermediaries in the Civil Courts as a matter of urgency. There is a clear need to recruit and train intermediaries for the civil and family courts.

351. Guidance is needed for all court users (and Judges) in relation to the availability, use and funding of intermediaries in civil courts.

Recommendation 10: Mediation

352. Any mediator employed or recommended by HMCTS (e.g. placed on a list of approved or recognised mediators) must have appropriate training.

353. The Judicial/ADR Liaison Committee should consider the issue of vulnerability of parties.

Recommendation 11: The reform programme

354. Those designing and implementing the reform programme should consider in relation to each and every element of the proposed reforms; how will this affect vulnerable court users?

355. When a proposed reform may directly or indirectly affect vulnerable parties or witnesses there should be an impact assessment and steps taken to address the potential to adversely affect the ability participate or give best evidence.

Recommendation 12: Court facilities and an audit

356. The Ministry of Justice and HMCTS should recognise that a guiding principle of the civil justice system must be that adequate court infrastructure and staffing levels, and also reliable equipment, are vital to the achievement of the aim of a modern system for administering justice and, in particular, to facilitate full participation by all court users and obtain the best evidence of witnesses.

357. Immediate action is needed in some courts to bring facilities and equipment up to the necessary standard and there should be an immediate audit of premises, equipment and facilities used to assist vulnerable witnesses in each court and, where practicable, measures be taken to improve them.

Recommendation13: Assisted Digital

358. HMCTS must provide easily accessible, adequately resourced and comprehensive assistance so to avoid the risk of some court users suffering disadvantage, and their ability to fully participate being impaired, because of difficulties with digital access to, and communication with, the court.

359. The use of a paper system must not place a party (or witness) at a disadvantage as opposed to use of digital systems; including during hearings.

Recommendation 14: Court Protocols

360. A national protocol is required to cover the issues arising from vulnerability of all Court users (parties, witnesses and other visitors) on a cross-jurisdictional basis. Consideration should be given to enshrining the recommendations within the 2010 research paper and the 2019 JUSTICE report within the protocol. Specifically, the protocol should require each court centre to:

(a) Set up a team of staff (or for single court buildings a nominated member of staff) who should receive training to work with court users with mental health and physical conditions, learning disabilities, limited mental capacity and other vulnerabilities.
(b) Consider how to ensure that vulnerable court users are offered support before arrival at court, during and after a hearing or attendance at court (including ensuring that there is a single point of contact and the supervision/overseeing of the provision of support).
(c) Introduce the provision of pre-trial visits for vulnerable court users and promote of their availability.

361. Each court centre/group of courts should also prepare (after consultation with the Designated Civil Judge and the Designated Family Judge) a comprehensive bespoke local operational protocol which should include consideration of the assistance/protections available to all vulnerable parties/witnesses across the civil and family jurisdictions.[314]

Recommendation 15: Litigant in Person Support Strategy and Support Through Court

362. The Ministry of Justice should take every opportunity to improve further still its financial support to the Litigant in Person Support Strategy (and through that to Support Through Court and the other key charities within that Strategy).

363. The partners in the Litigant in Person Support Strategy (including Support Through Court) should take every opportunity to continue to work together in a strategic and collaborative way.

Recommendation 16: Information for Court users

364. HMCTS should review the nature and extent of information for vulnerable (and other) court users and ensure that there is easy access (recognising that not all court users will have access to the internet) to comprehensive guidance (in simple and accessible language) covering:

i. What to expect when attending at a court building;
ii. The use of Mackenzie Friends/lay representatives;
iii. What being a witness in a case entails;
iv. How to raise issues/concerns about the ability to participate in the Court process or to give best evidence;

[314] See generally paragraphs 309-310 of this document.

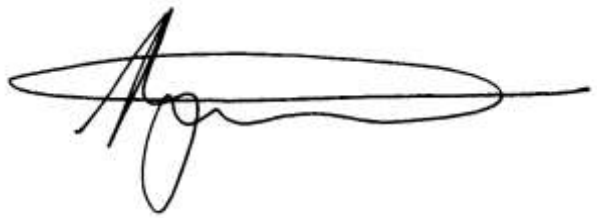
v. How to access a list of any local agencies/relevant organisations who may be able to provide advice, assistance and/or representation in relation to the conduct of litigation such as any local pro-bono scheme and the Citizens Advice Bureau.

Recommendation 17: Staff training

365. As a matter of urgency HMCTS should ensure all staff who handle civil cases are given adequate training with regard to identifying, communicating with and assisting vulnerable court users.

Recommendation 18: Compensation orders

366. The Judicial College should consider the need for guidance/training/re-enforcement of training as to applications for and the making of/refusal to make compensation orders in cases of sexual assault/abuse. The Crown Prosecution Service should also consider its current practices and training in relation to seeking compensation orders.



His Honour Judge Cotter Q. C.
Civil Justice Council
February 2020

Civil Justice Council Working Party

- Mr Justice Pepperall
- Mrs Justice Lambert
- His Honour Judge Picton
- His Honour Judge Lethem
- District Judge Byass
- District Judge Gibson
- District Judge Middleton
- District Judge Watkins
- Professor Andrew Higgins
- Amrita Dhaliwal

Civil Justice Council Secretariat

- Sam Allan
- Leigh Shelmerdine
- Graham Hutchens

With additional assistance provided by Kate Pearson

Annexe 1 - Extract from the consultation on the preliminary report

Section 7 - Recommendations

In light of the matters covered by this preliminary report the Council proposes to make seven recommendations

Recommendation 1: Rule changes

The Civil Procedure Rule Committee should consider amending the current procedure rules (and any relevant accompanying practice directions) to focus the attention of all civil Judges, parties and advocates upon the issue of vulnerability. The rules should be amended to reflect the principle that the requirement to deal with a case justly includes the court and all parties to the proceedings,

iii. ensuring that all parties can effectively participate in proceedings;
iv. ensuring that all witnesses can give their best evidence;

and specifically, that the court and parties need:

a. to identify any party or witness who is a vulnerable person at the earliest possible stage of proceedings;
b. to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result;
c. to consider "ground rules" before a vulnerable witness is to give evidence (to determine what directions are necessary in relation to the nature and extent of that evidence, the conduct of the advocates and/or the parties in respect of the evidence of that person, and/or any necessary support in place for that person).

Recommendation 2: Directions Questionnaires and online access

Directions Questionnaires should be amended to request information as to the vulnerability or potential vulnerability of a party (which should include an obligation to disclose know details of the vulnerability of another party) or a witness. Consideration of the wording for the questionnaire will need to be considered with care and settled upon following consultation with relevant bodies.

Any online portal/access which dispenses with directions questionnaires should ensure a request is made for such information.

Recommendation 3: Training for civil Judges
The Judicial College should consider enhancing the training of civil judges, both salaried and fee paid, in relation to issues of vulnerability to cover, in greater depth than at present, three core elements:

iv. Detecting/assessing vulnerability
v.Case management when a party or witness is vulnerable
vi.Conduct of hearings (to include direct questioning of witnesses[315])

Recommendation 4: Intermediaries
HMCTS should review and produce guidance in relation to the availability, use and funding of intermediaries in civil cases.

Recommendation 5: Court protocols and Guidance
HMCTS should ensure that individual court centres/courts should (after consultation with the Designated Civil Judge and Designated Family Judge) prepare comprehensive operational protocols which should include consideration of the assistance/protections that can be given to vulnerable parties/witnesses given available facilities in both civil and family cases.

Recommendation 6: Staff training
As a matter of urgency HMCTS should ensure all staff who handle civil cases are given adequate training with regard to identifying, communicating with and assisting vulnerable court users.

Recommendation 7: Compensation orders
The Judicial College should consider the need for guidance/training/re-enforcement of training as to applications for and the making of/refusal to make compensation orders in cases of sexual assault/abuse. The Crown Prosecution Service should also consider its current practices and training in relation to seeking compensation orders.

Section 8 - Consultation Questions

Question 1.
Are there issues in relation to vulnerable parties/witnesses in the civil courts which have not been covered/adequately covered within this preliminary report? If so please give relevant details.

[315] See paragraphs 96-101, 145 and 163 of this document.

Question 2.
Do you agree with the proposed recommendations set out at section 7? If not why not?

Question 3.
Do you believe that there should be further or alternative recommendations? If so please set out relevant details”

Annexe 2

Those who provided detailed submissions/contributions before the preparation of the report

HHJ Brian Rawlinson – DCJ for Staffs & West Mercia
HHJ Sarah Richardson – DCJ for the Humber Courts
HHJ Nigel Godsmark QC – DCJ for Nottinghamshire, Derbyshire and Lincolnshire
HHJ Alison Hampton – DCJ for Leicester and Northampton
HHJ Allan Gore QC – DCJ for Devon and Cornwall
HHJ Robert Harrison – DCJ for Wales
The High Court QB Masters
The Association of Personal Injury Lawyers (50 responses)[316]
Leigh Day Solicitors

[316] The Council is very grateful for the assistance provided by John McGlade; APIL Policy Research Officer

Annexe 3 - A summary of the responses to the consultation paper

SUMMARY OF RESPONSES CONSULTATION PAPER ON VULNERABLE WITNESSES AND PARTIES WITHIN CIVIL PROCEEDINGS – OCTOBER 2019

SUMMARY OF RESPONSES

1. A total of 31 responses to the consultation were received. The responses received represent a wide variety of interest areas - organisations and individuals who work directly with vulnerable parties and witnesses, organisations that seek to influence policy and/or reform, associations and representative bodies from various sectors, non-departmental public bodies and some from members of the judiciary.

Legal Profession: firms and representative bodies	8
Individuals	6
Associations, other representative bodies and other interest groups	6
Judiciary	4
Arm's length bodies and elsewhere within government organisations	4
Charities and support organisations	3
Total	31

A full list of respondents is attached at **Annexe A**.

Executive Summary

2. Some respondents answered directly the three questions which were posed in the consultation; others chose to send a summary response on the area as a whole. The majority of respondents welcomed the proposed ideas and recognised the need for improvements in the system to enable vulnerable witnesses and parties to participate in all stages of the process and give their best evidence to the court at all points, some pressing for the recommendations to go even further than outlined. Many of the responses commented on the lack of definition of vulnerability within the report and recommendations, they urged the definition to be as broad as possible.

3. Although there was broad support for specific training for the judiciary and court staff, many respondents felt that the training would need to be mandatory for it to have the desired effect. Many of the responses mentioned that training for the professions should also be a mandatory requirement. The need for awareness of vulnerability by others involved in cases e.g. mediators, was flagged as missing from the initial recommendation.

4. A number of the submissions outlined concerns about funding for implementing the suggested amendments. It was noted that by HHJ Wendy Backhouse on behalf of judges sitting at Central London County Court that many of the recommendations would be helpful to vulnerable persons "if the court has the necessary resources and staff to actually provide the promised assistance." PIBA echoed these sentiments, "All of the suggestions and provisions in the Consultation require funding at a time when the civil courts have fewer resources and legal aid/support for litigants has decreased substantially." The Law Society had apprehensions about funding "if guidance and protocols are to be updated regularly and kept current."

Responses to specific questions

QUESTION ONE - Are there issues in relation to vulnerable parties/witnesses in the civil courts which have not been covered/adequately covered within this preliminary report? If so please give relevant details.

5. Many responses received highlighted that no definition of vulnerability had been described in the preliminary report. JUSTICE argued that "The CJC report ought to more strongly flag the challenge of vulnerability, specifically digital exclusion, within online justice processes and recommend that HMCTS and the Online Procedure Rules Committee adopt a working definition of vulnerability for the Reform Programme sufficiently robust to capture all the types of inhibitions upon participating…" This view was echoed by The Law Society who stated,

"The definition should be kept broad, with the 'vulnerability indicators' noted in the Law Society's Practice Note on 'Meeting the Needs of Vulnerable Clients' providing a useful starting point."

6. Others suggested areas which should be considered when a definition of vulnerability is being outlined. Resolve specified, "Substance and Alcohol dependency must also be considered as a vulnerability but are not mentioned throughout the report and will affect an individual's participation in a hearing… there is no mention of elderly [who could be considered vulnerable]." Womble Bond Dickinson required a non-exhaustive definition to include, "Those who have capacity to make decisions and provide instructions, but by reason of a range of mental and/or physical disabilities need extra support; those who lack mental capacity to make decisions and provide instructions, for whom a range of statutory or other safeguards must be followed; those who are vulnerable to undue influence or duress and who may or may not have mental capacity to make decisions and provide instructions; those for whom all contact and correspondence is with a third party on behalf of the witness or party." APIL suggested, "There should also be accessible guidance available to litigants in person, to help them recognise whether they are vulnerable."

7. In the preliminary report the issue of there being no set method to elicit information as to vulnerability or potential vulnerability was highlighted. Several respondents agreed that this is an issue which must be addressed. Minster Law asserted, "Whilst there are good powers in place for the court to limit evidence (32.1 CPR), these are of no meaningful benefit if the court is not aware of vulnerability issues." The Law Society declared, "The identification of vulnerability at an early stage is to be encouraged, however it is unclear from the consultation what the process will be for making a final determination." PIBA remarked, "There needs to be early identification of those who may not be able to give evidence in court (but have capacity to do so) and those who may be vulnerable as a party or witness." The Association of District Judges said, "Provision similar to CPR 3.1A (which relates to where one party is a litigant in person) could be incorporated to reflect the need for positive action to ensure vulnerable individuals engaged in civil proceedings have access to justice. Such consideration should be both under consideration in all case management decisions and at any hearing. A requirement to address such issues in the Directions or Listing Questionnaires would assist case management decisions."

8. Stemming from this same issue, other respondents commented on the lack of data available to inform decision making. Rights of Women commented, "There is a dearth of data on the number of cases in the civil courts which involve one party who is the survivor of violence against women and girls… We believe there should be a recommendation for HMCTS to collect

such data, which will help identify gaps and assess the potential impact of changes and new measures to the civil justice system." JUSTICE advised, "Data and information on vulnerability in an online process ought to be collected…"

9. Several respondents supported the suggestion in the preliminary report that the judiciary should receive training and guidance on vulnerability, but stressed that similar training is also essential for advocates. JUSTICE declared, "the approach of a trained advocate to vulnerable witnesses has universal application across the courts. In *Understanding Courts*[317], the Working Party highlighted how Ground Rules Hearings have created a culture of advocates successfully adapting their questioning style to pitch their questions appropriately and in a manner that is easy to understand for vulnerable witnesses." David Wurtzel said, "Although the report rightly deals with training for judges and staff it does not confront the issue of advocates. They however are crucial, in dealing with the vulnerable participants (including taking instructions from them), recognising vulnerability, and in questioning witnesses."

10. Three respondents highlighted the additional costs of working with vulnerable parties and witnesses and urged the report to consider this in relation to fixed costs and budgeted cases. APIL pointed out, "There is no costs budgeting in cases involving children, as it is recognised that children are vulnerable and extra work is required to ensure that their case is resolved fairly."

11. In addition, the following comments were made:

    a. Elinor Martell mentioned, "What appears not to have been explicitly covered in the report is the Court of Protection (CoP), which is a civil jurisdiction falling within the Family Division."
    b. "The Civil Justice Council does not believe that a party or witness should axiomatically be deemed vulnerable, or receive automatic special measures, simply because of the subject matter or nature of the action; Equality Human Rights Commission disagrees."
    c. Rights of Women recommended, "The provision of special measures in the criminal courts be extended to include family courts and civil courts."
    d. The Judges sitting at Central London County Court suggested, "A specific recommendation is made for the provision and funding of interpreters. Apart from the familiar problems with non-professional interpreters, family members may well have their own agenda (well-intentioned or not) in cases involving vulnerable parties."

[317] https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf

e. Official Solicitor to the Senior Courts raised a concern that omitted from the preliminary report were recommendations related to "the use of online forms and the skills of out of court dispute arbitrators/mediators."
f. FOCIS raised, "There may be instances where the pre-recording of evidence of a witness may be appropriate or desirable and we do not believe that this option should be excluded."

QUESTION TWO - Do you agree with the proposed recommendations set out at section 7? If not why not?

12. Eight of the responses outlined their general agreement with the recommendations as set out in consultation. The responses to each of the seven recommendations will now be taken in turn.

Recommendation 1 – Rule Changes

13. Two respondents favoured amending the current rules and suggesting using the Family Procedure Rules as a starting point to do so. HHJ Wendy Backhouse on behalf of judges sitting at the County Court at Central London stated, "the similar rule change in the Family Procedure Rules has created a welcome focus for all involved in the family courts on the issue of vulnerability and would be of benefit in the civil courts."

14. Support Through Court mentioned, "Paragraphs 55 and 58 discuss rule 3A and 12J of the Family Procedure Rules, which in our experience are not universally implemented…We would encourage the CJC to make suggestions for ensuring that new rules, as well as existing ones, are universally and consistently applied." Women's Aid and APIL echoed that the current rules "are not widely or consistently used".

15. Dr Jaime T. Lindsay warned, "The imposition of special rules in relation to 'vulnerable' parties, such as a requirement to have ground rules hearings where vulnerability is present or the use of intermediaries, also risks having a counter-productive effect by excluding 'vulnerable persons' further from routine participation in proceedings through their own voice."

16. Rights of Women and EHRC supported the idea of new rules in principle, but wanted to ensure a full draft was shared and consulted upon before being implemented.

17. PIBA urged, “There should be a change to the Overriding Objective so that these considerations are placed at the heart of the case management process in every case.”

18. Stewarts stated, “We agree that complete consistency in rules between crime, family and civil is not required but we do consider that further thought should be given to the fact that a defendant might be permitted to cross examine the claimant in a civil case (including abuse) where this is not permitted in criminal proceedings. The CPR does give the Court power to limit cross examination[318], but it is essential that the use of this discretion avoids parties/witnesses being exposed to a level of distress that would not be permitted in criminal or family cases.”

19. The Law Society queried, “There is a danger of the adversarial system being undermined if protections for vulnerable parties are imposed primarily through the judges. For example, will judges in civil courts now be asking parties what they want to ask witnesses, and then putting question on their behalves? The training of civil judges is to be encouraged, although careful consideration should be given to the conduct of hearings.”

Recommendation 2 – Directions Questionnaires and Online Access

20. The Advocates Gateway had concerns that, “remote filing of claims and remote case management (e.g. telephone hearings) reduce the opportunity for the litigant in person to become aware of and engage with support people/ units at court. This probably means it is less likely that vulnerability is identified before the final, face to face hearing.” This was repeated by JUSTICE who stated, “we remain concerned that insufficient regard has been given as to how vulnerability might be defined and identified within online processes.”

21. FOCIS, Stewarts and HHJ Wendy Backhouse on behalf of judges sitting at the County Court at Central London agreed that claim forms/directions questionnaires should be amended to request vulnerability information.

22. PIBA agreed that the way in which vulnerability issues are elicited from parties will need careful handling, whether done through DQs or otherwise. They highlighted the following issues.
    a. The process will need to be tailored to the vulnerable, especially LIPs with vulnerabilities, to avoid the process defeating the object it seeks to achieve.
    b. There is an issue with timing and declaration. People (parties or witnesses) may not wish to disclose vulnerability, may have difficulty expressing it without support, may not

[318] CPR 32.1

know they have a vulnerability that should be disclosed or may not want to expose themselves to being taken advantage of tactically.

c. Litigants may well be unaware of vulnerabilities of any witnesses they seek to rely upon or vulnerabilities among potential witnesses for the other parties.
d. There will need to consideration of court powers to sanction a party which raises bogus vulnerability issues on its own side- or suggests them about the other side- simply to make mischief or for some perceived tactical advantage.
e. Whilst there are pros and cons about the stage at which a party may be obliged to raise vulnerability issues, the issue cannot be put off, since vulnerability will affect and infect the whole proceedings. Accordingly, it needs to be known about as soon as possible.
f. Consideration should be given to an option for this to be done without disclosing it to the other side if so advised, for the Court to consider.
g. Consideration also needs to be given to the digital nature of Portal cases and/or the plans for online courts and paper / electronic cases and how the current proposals will function in an increasingly online civil justice system, particularly for lower value cases.
h. The system will also need a safety net for issues which only become known or only arise late in the litigation process or for those where the vulnerabilities are just not recognised.
i. There will need to be sufficient flexibility of process and protocols for inter-jurisdictional cooperation to avoid this derailing a trial by, for instance, transferring to a different court centre (perhaps a crown court) with necessary facilities rather than adjourning the trial.

Recommendation 3 – Training for Civil Judges

23. The vast majority of the responses welcomed the idea of judicial training; other suggestions to extend the recommendation were also made, as outlined below.

24. The Judicial College stated, "…at part 130 [of the consultation it states] there is no specific civil training covering vulnerable witnesses. However, the CJC in association with the Judicial College produced 5 modules concerning litigants in person and one of the modules covers a vulnerable witness. Additionally, next month, the college will publish 4 modules concerning vulnerable LIPs. Both programmes are/will be available on the Judicial College Learning Management System (LMS)."

25. HHJ Wendy Backhouse on behalf of judges sitting at the County Court at Central London noted, "We agree that some specific training as proposed would be useful, particularly on the difficult issue of how a judge should conduct questioning of a witness. The paper does not say whether such training would be mandatory but to be effective, judges would have to be required to attend it." This view was supported by Elinor Martell who requested, "should make awareness, training, and identification mandatory, rather than 'considered' or 'proposed'."

26. APIL, PIBA and Stewarts shared the view put by EHRC that, “We do not consider judicial training alone sufficient.”

Recommendation 4 – Intermediaries

27. The recommendation on intermediaries received a range of responses.

28. PIBA thought, “These are perhaps less important than the need to have properly resourced and trained legal representatives. When there is proper party representation then intermediaries are not required.”

29. FOCIS shared the view expressed by Stewarts that, “Where intermediaries are to assist a vulnerable party, it should be clear that the cost of such service be recoverable inter-partes in civil proceedings, in the same manner as the costs of an interpreter/translator would be.”

30. John Holtom stated, “Can it be imagined that a system that has barely enough Judges to sit in trials, has courts being closed up and down the country to save money, has a policy which is about digitisation of cases, has constant downward pressure on legal fees, actively discourages the involvement of lawyers at all, can it be imagined that the MoJ will find money sufficient to set up and fund a system of registered intermediaries for civil disputes? Does this mean that although some form of intermediaries will be imported into civil disputes, they will be a watered down version of the ‘super’ intermediaries in Criminal proceedings?“ This view was also communicated by HHJ Wendy Backhouse on behalf of judges sitting at the County Court at Central London, “…the availability of intermediaries in the civil courts would be extremely helpful. Currently, they are almost never used because of a lack of funding.”

31. David Wurtzel commented, “Recommendation 4 does not directly deal with the question of where the intermediaries are to come from. If it is the pool of those recruited by the MoJ, then there won’t be enough to go round. Such training as they receive in legal matters refers only to the criminal courts. If intermediaries should be recruited specially for the civil courts and trained to participate in the civil courts, then the report should recommend that.

Recommendation 5 – Court Protocols and Guidance

32. With regard to this recommendation a significant majority of responses wanted to ensure that any protocols and guidance to be produced in a variety of formats are written in an accessible and easily understandable way for vulnerable users.

33. Concerns were raised that promised assistance in any guidance produced needs to be resourced and available as stated. Giving an example of the Central London County Court, HHJ Wendy Backhouse on behalf of judges sitting at the County Court at Central stated, “In a court of this size, even on a conservative estimate that 10% of users have some vulnerability, several extra members of staff would be needed to provide the services suggested. It is a source of

considerable distress to court users and of time-consuming complaints if the service they receive does not match up to the promised standard."

34. The Council of Her Majesty's Circuit Judges wrote, "It would be helpful if generic draft protocols could be prepared which could then be amended in the light of individual on-site circumstances. It is an extremely big task to prepare individual protocols from scratch. If a generic protocol was used as a starting point, there is a greater prospect of country wide consistency. It is also likely that by reference to a generic protocol, individual court sites might identify deficiencies in equipment about which the Court might not otherwise be aware."

Recommendation 6 – Staff Training

35. As mentioned in response to judicial training, many respondents urged training to be mandatory rather than recommended.

36. Availability of resources was a concern raised in several responses. HHJ Wendy Backhouse on behalf of judges sitting at the County Court at Central London remarked, "…staff training on identifying, communicating with and assisting vulnerable court users would also be helpful. In reality, the amount of training which court staff now receive in relation to any of their work has been significantly curtailed. It may be better to focus the training on the staff who are to provide assistance under the operational protocol." Stewarts said, "Court resourcing must be considered in relation to ensuring staff are adequately trained but also in implementing that training when communicating with vulnerable court users." PIBA commented, "this is important as is continuity of staff dealing with a particular matter and/or proper record keeping for those who may pick up an ongoing matter, so that a party is not worn down by having to explain their situation repeatedly. It is also important for there to be a clear way of communicating with the court, telephone lines that are answered and an ability to visit the court for face-to-face contact between the vulnerable and staff members etc."

37. It was reported, "Staff and volunteers from Support Through Court have found in more than one London court centre that staff are reluctant to publicise the availability of special measures, in case too many court users ask for them, as they don't have enough resource to provide them."

38. Women's Aid stated, "We welcome the commitment to provide training on supporting vulnerable parties and witnesses for all staff handling civil cases. As with judicial training, this training should include modules specifically focusing on domestic abuse and coercive control, which should be developed and delivered by specialist domestic abuse organisations."

39. Womble Bond Dickinson suggested the recommendation should go further, "We would go further to suggest that an Officer at each local court and court centre ought to be responsible for monitoring, reporting and contract with the Judiciary in relation to the progressive development of the package of reforms which follow this consultation. To do so would ensure

that sufficient measures would be in place for the Judiciary to monitor the effectiveness and potential action areas of the reforms following implementation at local level."

Recommendation 7 – Compensation Orders

40. FOCIS echoed APIL's statement, "We question the inclusion of this recommendation, and whether this issue falls within the remit of the Civil Justice Council's review."

41. PIBA stated, "this is a very good idea for the cases where compensation could be dealt with by the criminal court and so prevent a need to come to the civil court at all. A culture change will be needed given the apparent reluctance of judges to use their existing powers to award compensation in criminal cases. But this is only a partial answer as often, in save but the most straightforward cases, there will be insufficient evidence as to diagnosis, prognosis, causation and other losses for a realistic valuation to be put on a compensation award of the type which would obviate a need for a civil claim entirely. This is before one considers issues of enforcement of such awards."

42. Sarah Champion MP wrote, "The Judicial College should consider the need for guidance /training/re-enforcement of training as to applications for and the making of/refusal to make compensation orders in cases of sexual assault/abuse. The Crown Prosecution Service should also consider its current practices and training in relation to seeking compensation orders."

43. She continued, "The revised Victims Code should detail a survivor's right to Criminal Compensation Orders. The Government should annually report to Parliament on the use of Criminal Compensation Orders in child sexual abuse cases. The Government should seek to understand why judges are not issuing Criminal Compensation Orders in child sexual abuse cases and publish its findings. The Government should review the totals awarded and ensure a fair and proportionate tariff is equally applied. The Government should produce information and guidance for survivors on civil remedies."

QUESTION THREE - Do you believe that there should be further or alternative recommendations? If so please set out relevant details.

44. Several responses received disagreed that the consultation did not recommend an automatic ban on cross-examination. Women's Aid wrote, "We are disappointed that the council does not believe that a specific prohibition on cross-examination of a victim of domestic abuse or sexual abuse by a perpetrator is justified in the civil courts. We note that the council feels that its proposed changes to the Civil Procedure Rules to add duties in relation to vulnerable

witnesses will be sufficient, and recommends that the issue also be addressed as part of judicial training. However, our experience in the family courts has shown that existence of guidance on vulnerable parties and witnesses, along with judicial training on domestic abuse, has not been sufficient to address the distress and fear that cross-examination by an abuser can create for victims, and the impact on quality of evidence that it has."

45. This view was shared by EHRC who commented, "the Commission considers that the cross-examination in person of a survivor by an alleged perpetrator should be prohibited across all criminal, family and civil jurisdictions in all cases where domestic abuse or sexual violence is raised or where the party who is to examine the survivor has been found or has admitted (whether in civil, family or criminal proceedings) to have perpetrated domestic abuse or sexual abuse (with provision made for the appointment of a legal representative to conduct the cross-examination and the payment out of central funds to cover such representation)."

46. Rights of Women stated, "[We are] of the firm view that there should be a recommendation to prohibit direct cross-examination of witnesses:

    a) in any civil proceedings in which the witness has alleged that the party who is to examine her has subjected her to domestic abuse, sexual abuse, child abuse, stalking or harassment and these allegations are contested but have not yet been determined; and
    b) in civil proceedings in any circumstances in which the party has been found or has admitted (whether in civil, family or criminal proceedings) to have perpetrated domestic abuse, sexual abuse, child abuse, stalking or harassment against the witness.

47. Dr Jaime T. Lindsay wrote, "I propose two amendments to the recommendations: 1) a clear definition of vulnerability and 2) a rebuttable presumption that vulnerable parties directly participate in proceedings."

48. The Family Justice Council encouraged, "…coordination between civil and family courts, in relation to both shared court facilities and consistent procedures, guidance and training so far as possible."

49. Association of HM District Judges (ADJ) stated, "The main concern is one relating to adequate additional resources being made available." This viewed was similar to that of Stewarts, "…we remain concerned that current resource levels within the court system will have an unfortunate impact on the aim of these proposals and indeed the vulnerable witnesses. It will be incumbent on the courts to be able to provide the necessary video conferencing facilities, screens, or separate room facilities and entries as described in the paper, wherever necessary."

50. Support Through Court added, “An issue that could be considered more fully in the consultation paper is monitoring judicial compliance with best practice on vulnerability.” Also, “Accessible information on special measures, intermediaries, compensation orders and other adaptations should be created and publicised to raise awareness among court users.” It furthered, “State funding should be made available to make the point for, and then implement, cross examination of vulnerable court users by legal representatives when someone’s vulnerability is preventing them from being able to represent themselves in a way that meets the overriding objective.”

51. FOCIS wrote, “Representatives’ professional bodies (The Law Society, The Bar Council, CILEX) and regulators should be promoting a widespread understanding of vulnerability, and insist that practitioners dealing with civil litigation, using the civil courts, should be fully aware of the available guidance and best practice in this area, such as an inside knowledge of The Advocates’ Gateway toolkits.”

ANNEXE A - LIST OF RESPONDENTS
Associations, other representative bodies and other interest groups
JUSTICE
News Media Association
Resolve Antisocial Behaviour
The Advocate's Gateway (TAG)
The Association of Consumer Support Organisations (ACSO)
The Inns of Court College of Advocacy (ICCA)
Individuals
David Wurtzel
Diana Isitt
Dr Jaime Lindsey
Elinor Martell
John Holtom
Sarah Champion MP
Law firms
Minister Law
Mishcon de Reya
Stewarts
Womble Bond Dickinson
Legal representative bodies
Personal Injuries Bar Association (PIBA)
The Association of Personal Injury Lawyers (APIL)
The Forum of Complex Injury Solicitors (FOCIS)
The Law Society
Judiciary
Association of HM District Judges (ADJ)
Council of Her Majesty's Circuit Judges
HHJ Robert Harrison – Designated Civil Judge for Wales
HHJ Wendy Backhouse on behalf of judges sitting at the County Court at Central London
Arm's-length bodies and organisations elsewhere within government
Equality and Human Rights Commission (EHRC)
Family Justice Council (FJC)
Judicial College
Official Solicitor to the Senior Courts
Charities and support organisations
Rights of Women
Support Through Court (formerly PSU)
Women's Aid

Annexe 4 - Example of vulnerable witness protocol

BRISTOL CIVIL AND FAMILY JUSTICE CENTRE VULNERABLE WITNESS PROTOCOL

FEBRUARY 2018 (AMENDED MAY 2019)

OFFICIAL

Introduction

Ensuring the safety and participation of vulnerable persons at court goes to the core of our role as a family court. This protocol sets out the procedures Bristol Civil and Family Justice Centre has in place to ensure that vulnerable court users receive appropriate support and protection at all points in the court process.

The protocol takes account of Part 3A of the Family Procedure Rules 2010 and Practice Direction 3AA on vulnerable persons in family proceedings, which both came into force on 27 November 2017. These require the judge in each case to consider if (a) a party's participation in proceedings is likely to be diminished by reason of vulnerability and/or (b) the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability, and in either case whether it is therefore necessary to make a "participation direction", for example because there is a need for a particular measure (such as protective screen or video link).

Court staff will take appropriate action to arrange any measures ordered by a judge in proceedings. Staff will also consider, even before the first hearing takes place, whether steps are required to protect a court user elsewhere in the court building, beyond the courtroom.

Facilities

- We have 19 courtrooms.
- Entrance into the court is via the main entrance. There are separate entrances into the court building via the staff entrance and via the car park for secure accommodation hearings.
- There are 31 waiting rooms, located on the 1st, 2nd 3rd and 4th floors which may be reserved by asking an usher.
- There is a children's waiting room and a separate vulnerable witness suite on the 4th floor.

- The Personal Support Unit (PSU) has an office at the court and is located on the ground floor within the public counters area.
- There are 2 fixed video link facilities in courts 16 and 17. The remaining courts have provision for a mobile video link to be used, with the exception of courts 10. Please ask an usher for a machine to be present in court or its operation.
- We have 12 mobile screens which can be used as protective screens, whether as a partition in the courtroom or to be placed around the witness stand. Please ask an usher for these to be provided.
- Separate toilets are available on each floor, including the vulnerable witness suite.
- The court has secure car parking spaces in the staff car park. Secure accommodation car parking spaces are to be requested via the Support Services Manager.
- Our security has the ability to adjust the public lifts so they open onto the secure area. Our job is to ensure that witnesses, and indeed any of our other customers, feel that they have experienced a justice system which is just, accessible and proportionate. They'll feel this because:

  - they were able to present their evidence well
  - they were treated with respect
  - and they understood what was happening when it mattered

Witnesses tell us they need to:

- feel safe and comfortable
- be kept fully informed
- feel their time is valued and
- feel their contribution is appreciated.

What vulnerable witnesses can ask of us?

- To be given information about the court process.
- To be given information about the court and its location.
- To be given information/signposted to the support services available at the court such e.g. PSU
- To be offered the opportunity to visit the court before the hearing in conjunction with PSU.
- To be provided with a safe environment.
- To be provided with a separate waiting room by arrangement.
- To have special measures put into effect. Examples may include being able to give evidence by video link or from behind a screen if an application is granted by a Judge.

- Parties in cases can only be provided with an interpreter or with an intermediary if ordered by a Judge. This service is more often used in Family and Tribunal cases

Our responsibilities for vulnerable witness support at court.

- Ensure that if a member of HMCTS staff is asked by the Judge or Magistrate to accompany a child into the video link room on their own, the relevant member of staff has been cleared by the Disclosure and Barring Service (DBS) or alternative arrangements are put in place.
- As a matter of course, all our ushers will have Enhanced DBS clearance.

Pre-court attendance.

- The listing team will enter details of any vulnerable witnesses' requirements in the RAF diary (Reasonable Adjustment diary) and notify Court Support team to cross-reference on the Judge's list.
- Court support will inform the court clerk and ushers of any arrangements made.
- If there are any safety or security issues, the listing officer should alert the relevant Delivery Manager who will decide whether to invoke the red dot policy.
- The listing team will confirm the arrangements put in place to the witness or their legal representative or support worker following a red dot meeting.
- The court support team will arrange a pre-court visit after being informed by the listing team and in consultation with the ushers' manager, who will make an usher available to conduct the visit at a suitable time.
- If a judge has ordered video link or protective screens, we will carry out checks in advance of the hearing to make sure the equipment is working and available. If protective screens are to be used, we will consider how best to ensure the vulnerable court user enters and leaves the courtroom without being seen by the other party/parties.

Pre-court visit

The pre-court visit should include information on the following:

- Where witnesses should go when attending court (has a separate entrance previously been agreed or required?)
- Front-desk security procedures and security at court
- Location of the Personal Support Unit and their contact details
- Tour of the building, including entrances, the courtroom, waiting area and separate waiting rooms, (vulnerable witness suite and video link if applicable)
- What will happen when the witness is called to give evidence.

- Where appropriate, provide an opportunity for the witness to stand in the witness box and speak from there.
- Oath/Affirmation taking procedures – you may be able to ascertain the preference of the witness at this meeting. Note this in the RAF diary if ascertained.
- Who will be present in court, where they will sit, and what their roles will be.
- Provide enough details on what special measures will entail that are relevant to the witness. For example, allow them to see the screens.
- If using video link, let the witness see the link in operation and use it (research has highlighted that for witnesses using the video link, particularly young witnesses, experience of using the link in advance of the hearing is highly beneficial)
- Explain to vulnerable witness that when they give evidence via video link the parties in the case will see their face on the screen in court. In some cases, the Judge may agree that they do not have to be seen.
- Inform the witness that we will try to keep witness waiting times to a minimum but advise them to bring a book, magazine or iPad etc. since delays are sometimes inevitable.
- The Security Team must be informed of any changes in arrangements when the vulnerable witness is at court i.e. moving to a different hearing floor or changing waiting room arrangements
- General court facilities e.g. toilets, refreshments
- Car parking arrangements to be discussed, only if it's a secure accommodation
- Arriving early to avoid meeting parties on the case
- Provide follow up details for any questions following the visit
- You should also check to see if there are any reasonable adjustments that need to be made for victims and witnesses with disabilities and explain how they will be provided on the day. For example, if hearing enhancement facilities are required, alert the ushers who will ensure that these are tested with the witness to make sure they meet their needs.
- Explain the parameters of confidentiality; specifically advise the witness that if they tell you something that may put them or others at risk, you would have to disclose this to your manager. Explain to the witness that they cannot discuss any of the evidence with you, if they do you will have to stop the support as it may jeopardise the case as it could be seen as coaching the witness.

Arriving at court

- If a witness has asked to use a separate entrance/exit, we should confirm the time of arrival. An usher should be assigned to meet the witness at the entrance. A security guard must always accompany the usher as all witnesses must be searched on entry to the building.

- In exceptional circumstances a space can be made available in our car park. The same arrangements regarding searches apply when meeting the witness.
- The usher will then escort the witness to the allocated waiting room. This will often be the secure vulnerable witness suite on the 4th floor.
- The usher should remain in the witness area ready to provide support, if practical, in operating the video link equipment where required, inform the witness about taking the oath, and keeping the witness informed about progress of the case they are involved in.
- If the witness is a child, the usher will stay in the witness area ready to provide support, operation of the video link equipment where required, inform the witness about taking the oath, and keeping the witness informed about progress of the case they are involved in.
- The witness may be accompanied by a legal representative, support worker, friend or family member. Should it be a family member, they must not be involved in the present case.
- Ensure that the witness is aware of evacuation procedures.

The hearing

- The court clerk or usher on reception will ensure where possible that waiting time is minimised and that the witness is kept informed of progress of the case he/she is involved in at regular intervals.
- The usher will be available to support the witness, assist them in taking the oath and liaise between the witness and the court as necessary.
- Judges may stagger entry into the courtroom in order to avoid the parties and/or witnesses meeting prior to commencement of the hearing.
- If a protective screen is being used, the court should be set up prior to the parties/witnesses entering. The screen can be used to partition the room or to shield the witness stand, so that the judge can see the vulnerable individual but the other party/witness cannot.

Leaving Court

- Judges may stagger the exit of parties or witnesses, with one leaving some minutes after the first.
- The usher and security shall escort the witness out of the building through a separate exit if necessary.

Subsequent hearings

- Following the hearing we will consider any issues arising and any changes required for future attendance at court. Listings will update the court diary for all subsequent hearings unless notified that the additional assistance/special measures are no longer required.

Raising awareness of our vulnerable court user protocol

- This protocol is included in the new staff induction training, alongside the HMCTS training package on vulnerable court users.
- We will make new or visiting judges aware of the procedures we have in place for vulnerable court users.
- We will inform key partner agencies, including Cafcass and police, of the process by which they can make us aware of any risk of harm to an individual.

Complaints process

- Complaints can be made in person, by email or telephone or letter