Moving the Bar and Facilitating the Testimony of Vulnerable Witnesses at Court: Are advocates' witness questioning techniques in need of further reform?

Volume One: Thesis

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Abstract

In this document, I have reviewed my published research and reflected on its contribution to the existing body of knowledge in the field of vulnerable witnesses and witness testimony. I have outlined my professional background, then the research and policy developments that preceded the introduction of communication facilitators for witnesses, otherwise known as 'intermediaries'. The contribution made by my publications is then discussed under two key themes: 'The Purpose and Impact of the Witness Intermediary' and 'Witness Evidence and Advocates' Questioning Techniques'. Central to my research has been my commitment to the development of practices which are likely to improve the quality of witness evidence, namely witness intermediaries, ground rules hearings, advocacy training, judicial management of questioning, and witness preparation. In this thesis, I have argued that there is a pressing need for further reform of advocates' questioning techniques and such reform should be informed by relevant psychological research.

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Declaration

Whilst registered as a candidate for *PhD by Publication* I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

Penny Cooper

13 June 2017

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Dedication

When our youngest son was 13 years old, he came home from school at the end of the autumn term with a Christmas cake he had made. It was beautifully iced and decorated and represented months of hard work. With it there was a card which I have kept to this day. I am going to borrow his words from that lovely card to dedicate this thesis:

"To my loving family"

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Acknowledgements

It would be impossible for me to create from memory a complete and accurate list of all those who have influenced my thinking and supported my efforts to understand and improve the way witness evidence is handled. I thank them all. However, especially as this is a major academic endeavour, I would like to acknowledge four academics in particular. Firstly, Professor Adrian Keane, without whom there would have been no academic career for me. Secondly, Professors Milne and Bull, my PhD supervisors. Thirdly, Dr. Michelle Mattison, who suggested that 'Becky and Ray' would be fantastic supervisors. She was absolutely correct. You are all part of an amazing 'academic family'.

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"It is a mistake to look too far ahead.

Only one link of the chain of destiny can be handled at a time."

Winston Churchill

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Volume One: Thesis

Introduction

In this volume, I have outlined my professional and academic background, set the scene for my thesis and discussed the contributions made by my publications under two key themes, 'The Purpose and Impact of the Witness Intermediary', 'Witness Evidence and Advocates' Questioning Techniques'. I begin with a summary of my professional and academic background.

1.1 My Story

I qualified as a barrister at the Inns of Court School of Law (now part of the law school at City, University of London) in 1990. I was called to the Bar at Inner Temple on 27 November that same year. I started work at 3 Paper Buildings, Temple, London where I learnt about what it meant to be a barrister. I was an apprentice, known as a 'pupil barrister', to Mr. Samuel Parrish, then my Head of Chambers. By the spring of 1991 I was 'on my feet' and taking baby steps, representing clients at short hearings in the Crown Court and trials in the Magistrates Courts. I was learning how to be an advocate (a 'trial lawyer') and honing my witness questioning skills.

Later I started taking family court cases involving reports from psychologists and psychiatrists and I found this work to be the most interesting of all. I began to specialise in child abuse cases. As a practising barrister, I was fascinated by the courts' handling of witness evidence, in particular how families' lives were changed forever when family court judges made decisions based on oral evidence from witnesses (social workers, family members and expert witnesses) tested in the crucible of cross-examination.

In 1998, our first child was born and whilst on maternity leave, with a newly purchased Fujitsu computer (our first 'desktop') at my disposal, I began to explore the internet for interesting material (I have never stopped). I discovered that witness familiarisation courses for witnesses of fact and expert witnesses were being provided to solicitors. I began delivering such courses as an adjunct to practise at the Bar. I was constantly

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reminded by my witness tutees that the thought of giving evidence was nerve-wracking and that the ways of the courtroom were mystifying. Most of all, cross-examination was widely feared. I enjoyed these sessions with witnesses where I would demystify the court process for them. Every witness is unique.

In 2000, our second son was born and obtaining a work-life balance became the focus of my attention. In January 2002, I took up a new role as Director of Continuing Professional Development (CPD) at the Inns of Court School of Law, which soon after became part of City University (now City, University of London). There was a moment in 2002 that was to dramatically and positively impact my career and also my family life. I was sitting in my office when I received a 'phone call from a lady (whose name I sadly cannot recall) who worked at the University. She asked if my department might be interested in a government contract to design and deliver a course for intermediaries, a new role to support vulnerable witnesses in the criminal justice system. Apparently, the Office for Criminal Justice Reform (OCJR), a division of the Home Office, was looking for expressions of interest and had contacted the University.

The more I learnt of this OCJR project, the more interested I became. When the OCJR chose to introduce 'witness intermediaries' few people had heard of the role let alone had an idea of how it might work in practice. However, the idea of working on an intermediary scheme to facilitate communication with vulnerable witnesses appealed to me. I felt confident that my background at the Bar was relevant, particularly as I had some experience in criminal law and lots of experience with vulnerable witnesses in child abuse matters in the family courts. I was also able to draw heavily on my knowledge of witness familiarisation and expert witness courses I had delivered. The tender was submitted to the OCJR, we were shortlisted then chosen and I created a fledgling team at City Law School to prepare to deliver training for witness intermediaries.

The OCJR looked to me to design the course. The wording in the legislation (set out below) was opaque in places and gave little clue as to how the role should be performed. It was at least clear from the legislation that the intermediary must facilitate questioning

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and answering, be visible to the judge and advocates, make a special declaration (including if they took part in a video recorded interview with the witness), and could be prosecuted for perjury if they breached their declaration.

> Youth Justice and Criminal Evidence Act 1999
>
> *Section 29: Examination of witness through intermediary.*
>
> *(1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section ("an intermediary").*
>
> *(2) 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.*
>
> *(3) Any examination of the witness in pursuance of subsection (1) must take place in the presence of such persons as rules of court or the direction may provide, 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 intermediary, and*
>
> *(b) (except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness.*
>
> *(4) Where two or more legal representatives are acting for a party to the proceedings, subsection (3)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.*
>
> *(5) 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 rules of court, that he will faithfully perform his function as intermediary.*
>
> *(6) Subsection (1) does not apply to an interview of the witness which is recorded by means of a video recording with a view to its admission as evidence in chief of the witness; but a special measures direction may provide for such a recording to be admitted under section 27 if the interview was conducted through an intermediary and—*
>
> *(a) that person complied with subsection (5) before the interview began, and*

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(b) the court's approval for the purposes of this section is given before the direction is given.

(7) 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; and for this purpose, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of that section, that proceeding shall be taken to be part of the judicial proceeding in which the witness's evidence is given.

I set about imagining how the intermediary would operate. Would the intermediary really relay each question then each answer in turn? I thought not. Not every witness would need that and it could be patronising or insulting for many witnesses. Translating each question and answer would not be an efficient or sensible way to realise the intermediary role. It seemed to me that the intermediary could be akin to an expert advisor to the court without in fact ever giving evidence; the intermediary could assess the communication needs of the witness and then convey findings to the court and advocates in a report. Once questioning began at court, the intermediary could intervene if a communication issue arose. This is how the role was taught and how it came to operate.

In 2003, my team and I began training the first intermediaries for England and Wales (Cooper, 2012e, 2017b). They were recruited by the OCJR and most were experienced speech and language therapists. I remember being in a mock courtroom performing mock cross-examination using a case study I had written about an alleged child victim of sexual abuse by her mother's boyfriend. I conducted the cross-examination of the witness (played by Olivia Poulet, a young and very talented actress) using traditional questioning methods. These were methods that I had been taught and which I taught to others as an Advocacy Training Council and Inner Temple accredited advocacy tutor. They were the methods I was used to seeing deployed every day in court.

The trainee Registered Intermediaries were instructed to intervene if a question was communicated in a way which did not promote complete, coherent and accurate evidence from the witness. In the role play I would put a question to the witness and a trainee intermediary would intervene as taught, signalling a communication problem to

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our mock judge. “Your honour, that’s a tag question”, they would say. The first time someone did so, I asked, “What is a tag question?”.

The realisation soon dawned on us all in that classroom that intermediaries would be challenging the way that advocates typically cross-examine and the way many had been taught to cross-examine. Law school advocacy tutors, accredited by the Advocacy Training Council, taught the trainee barristers to cross-examine by telling, not asking. This often resulted in a linguistically complex ‘tag question’. The aim of such cross-examination was not to promote complete, coherent and accurate testimony from vulnerable witnesses. The aim of the cross-examiner was quite different: to undermine the witness’s testimony. In the early days I don’t think anyone, including me, realised what a big task Registered Intermediaries were taking on or how much impact the role of the Registered Intermediary would have on traditional cross-examination. However, in the classroom there was a strong sense of how important this intermediary role would be.

The first cohort of Registered Intermediaries went through rigorous selection, training, and assessment (Plotnikoff & Woolfson, 2008) and the successful candidates began taking cases in 2004. I was by this time researching and writing about witnesses and their evidence in practitioner journals. The first procedural guidance manual for intermediaries was published the following year (Office for Criminal Justice Reform, 2005). Much of it was written by me and my law school colleagues, David Wurtzel and Virginia Garaux.

My line manager at the time was Professor Adrian Keane, a renowned expert on the law of evidence. He encouraged and inspired me to develop my research and writing on the subject of witness evidence. My first serious foray into empirical research came in 2007 when I conducted a survey with over 200 expert witnesses (Cooper, 2007). My appetite for research by survey was thus whetted. My first in a series of intermediary surveys was published two years later, in 2009 (Cooper, 2009).

I trained Registered Intermediaries to include a section entitled ‘ground rules’ in their court reports. I taught them to set out in the ‘ground rules’ section a summary of the

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recommended ‘dos and don’ts’ for advocates seeking to achieve the most complete, coherent, and accurate evidence from the witness. David Wurtzel and I taught intermediaries to get the judge involved by way of a ground rules discussion or hearing. Registered Intermediaries often found that advocates were not abiding by intermediaries’ ground rules recommendations (Cooper, 2009). My second intermediary survey suggested that some advocates were adopting an attitude of ground rules are ‘made to be broken’ (Cooper, 2011a).

By the time of my third intermediary survey (Cooper, 2012a), the challenge remained of making sure that ground rules were directed by the judge and were adhered to by the advocates. In my fourth intermediary survey (Cooper, 2014a), I recommended a change to the Criminal Procedure Rules which would bolster the application of ground rules. The Criminal Procedure Rule Committee adopted my recommendation and I helped them draft the Criminal Procedure Rule 3.9.7 on ‘directions for appropriate treatment and questioning’, which was introduced in 2015. The rule requires a judge to involve the intermediary (if there is one in the case) in a ground rules discussion. Even if there is no intermediary, the judge must hold a discussion with advocates about ground rules for cross-examination if a witness or party is vulnerable (Cooper, Backen, & Marchant, 2015).

The witness intermediary scheme was rolled out in 2008 across England and Wales. The OCJR was dissolved and responsibility for criminal justice witness and victim policy moved to the Ministry of Justice (MOJ). On average, every couple of years there has been a request from the MOJ for more Registered Intermediaries to be trained to meet the rising demand for witness intermediaries.

My first peer-reviewed publication (Brammer & Cooper, 2011) appeared in the *Criminal Law Review* and addressed the gap between the approach to the evidence of child witnesses in (i) criminal and (ii) family court hearings. Subsequently, I have authored and co-authored peer-reviewed publications on witness evidence in major legal journals. These have been published, on average, at least once a year since 2011. All but one of my submitted peer-reviewed articles (i.e. Maras, Crane, Mulcahy, Hawken, Cooper, Wurtzel,

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& Memon, 2017) represents research that I have instigated, led and conducted without funding.

I have also continued to publish widely in a variety of practitioner journals in the belief that most forensic practitioners (judges, lawyers, intermediaries, police officers and expert witnesses) do not read academic journals. In my opinion, the key practitioner messages need to be disseminated in shorter, more accessible pieces as well as in academic journals.

In 2012, I was on sabbatical from City, University of London. I was writing an academic article about intermediaries and found myself wishing for one single place on the internet for all the new case law, research reports, and training materials about vulnerable witnesses. There was nowhere like that and I had a vision of a 'go-to place' on the web for anyone wanting to know more about this new and evolving area of law and practice. As a consequence, 'The Advocate's Gateway' was born – initially as a blog site produced by City University, London in the autumn of 2012. (The naming of The Advocate's Gateway was deliberate on my part, reducing it to a memorable, relevant acronym; 'TAG').

In 2012, Nick Green QC (now The Hon. Mr. Justice Green) was the new Chair of The Advocacy Training Council (the 'ATC', now the Inns of Court College of Advocacy). After I returned from sabbatical, Nick readily agreed to commit resources to create a website for 'The Advocate's Gateway' ('TAG'). At the time, the project was co-chaired by me and former Court of Appeal judge, Sir Anthony Hooper. Many academics and practitioners, including intermediaries, gave their time (usually for free) and collaborated on new TAG 'toolkits' for the website. Shortly afterwards I became the sole chair of the committee of TAG. Later in 2012, I led the first Registered Intermediary training course in Northern Ireland.

The Advocate's Gateway website was launched in 2013 by the Rt. Hon. Dominic Grieve QC MP, then Attorney General. Another ambition of mine was to hold an international TAG conference and the ATC agreed to fund this. In June 2015, The Advocate's Gateway inaugural international conference took place at the Law Society in London. The welcome

speech was delivered by guest of honour Lady Justice Hallett, Vice President of the Court of Appeal. By this time other jurisdictions, including Australia, were becoming interested in intermediaries and vulnerable witness questioning practices in England and Wales. Linda Hunting, research co-ordinator at the ATC, negotiated a book deal and she and I edited a collection of papers from the conference (Cooper & Hunting, 2016).

In 2016, following an invitation to a meeting in London with the Attorney General of New South Wales, Australia, I went to Sydney to train their first intermediaries (Cooper, 2016c). I also delivered a wide range of awareness raising training for judges, police officers, social workers and lawyers.

TAG's second international conference was held at the beginning of June 2017 and included presentations from around the world about access to justice for vulnerable people. I continue to chair the committee of The Advocate's Gateway and oversee the writing and updating of the research-based 'toolkits' of which there are now 18.

I continue to run Registered Intermediary training, most recently in November 2016 in Belfast, Northern Ireland for the Department of Justice. I have written/co-written the intermediary procedural guidance manuals for England and Wales, Northern Ireland, and New South Wales, Australia.

I have sought to explore, through published research by many people, the way in which legal systems give witnesses and parties a voice. I have also drawn attention to the disparity between what is available for vulnerable witnesses in the criminal justice system with what is currently available for vulnerable defendants and for parties in other types of courts and tribunals. Psychology publications increasingly influence my analysis.

I believe I am the first to publish (either as a sole or co-author) peer-reviewed research:

- critically analysing the inconsistencies between the treatment of children as witnesses in the criminal and family justice systems;
- detailing the shortcomings and inconsistencies in legislation and practice regarding intermediaries for vulnerable suspects and defendants in criminal cases;

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- exploring the definition of 'vulnerable' and the lack of intermediaries and other special measures in the Family Court;
- critically analysing the introduction of intermediary schemes in Northern Ireland's criminal justice system;
- exploring the introduction and operation of ground rules hearings for vulnerable witnesses and defendants and creating guidance to promulgate best practice;
- studying the first intermediary and pre-recorded cross-examination cases in New South Wales, Australia;
- analysing the responsibilities of judges and lawyers towards vulnerable witnesses and parties with Asperger's Syndrome in light of the Northern Ireland Court of Appeal judgment in *Galo* (2016).

I have deliberately chosen to look beyond the criminal and family justice systems in order to review the approach to vulnerability in other parts of the English legal system, namely the Court of Protection (Ruck Keene, Cooper, & Hogg, 2016), civil courts (Cooper, 2012b) and employment tribunals (Cooper & Arnold, 2017; Cooper & Allely, 2017). I have also been awarded Nuffield Foundation funding to lead a major study, 'Vulnerability in the Courts'.

I have a professional *and* personal interest in Asperger's Syndrome. I appear to be the only English legal academic publishing papers on the law and practice when a witness or party has Asperger's Syndrome. My eyes have been opened wide to the potential for mis-communication, poor decision making, injustice and harm created if a condition affecting communication is not recognised and adjusted for. For too long the justice system appears to have focussed on its own communication needs at the expense of the communication needs of those it seeks to serve - the witnesses, parties, and society in general. I have concluded that advocates have much to learn from psychological research about effective questioning techniques.

It has been said that over the last ten plus years there has been 'a paradigm shift' (Topolski, 2016) in the way courts in England and Wales treat vulnerable witnesses. Legal

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practice in Northern Ireland and New South Wales, Australia is following on. I, and others, think my research and teaching has played a part in that. Now seems like a very good moment to take stock.

Penny Cooper

13 June 2017

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1.2 List of My Submissions

The following peer-reviewed publications are relied on in support of my PhD submission. Volume Two contains bound copies.

A: Peer-reviewed Journal Article

1. Maras, K., Crane, L., Mulcahy, S., Hawken, T., Cooper, P., Wurtzel, D., & Memon, A. (2017). Autism in the courtroom: experiences of legal professionals and the autism community. *Journal of Autism and Developmental Disorders*. 18 May. doi: 10.1007/s10803-017-3162-9. [Epub ahead of print]

This study was led by Drs Katie Maras and Laura Crane. I assisted with the dissemination of the survey and its write-up. I was not involved in the analysis of the raw data.

It is crucial that legal professionals understand the issues likely to hinder an autistic individual in providing best evidence at trial and identify what support and adjustments are most likely to be needed. In England and Wales there is very little research on the impact of relatively recent developments (including intermediaries and ground rules hearings) aimed at making hearings fairer for those with communication impairments including autism. This paper described a preliminary investigation (by survey) aimed at addressing this gap in knowledge. A secondary aim of the paper was to supplement the views, perspectives, and experiences of legal professionals with members of the autism community who have personal experience of a criminal trial, either in the role of witness/defendant, or as the parent of an autistic individual involved in the criminal justice system. [Volume Two, p. 3]

2. Cooper, P., & Allely, C. (2017) You can't judge a book by its cover: Evolving professional responsibilities, liabilities and 'judgecraft' when a party has Asperger's Syndrome. *Northern Ireland Legal Quarterly*, *68*(1), 35–58.

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This study was my idea and I was the lead writer. It starts with an analysis of the judgment in *Galo v Bombardier Aerospace* UK [2016] NICA 25 in June 2016. In that case, a tribunal decision was set aside because no adjustments were made for the claimant's Asperger's Syndrome. I recognised *Galo* as an extremely significant judgment, not simply because of its relevance to witnesses and parties with Asperger's Syndrome but also because of the principle it enunciates for fair hearings. I decided to co-write this paper with Dr Allely, an academic expert in psychology with a strong research interest in Asperger's Syndrome. This is the first 'post-*Galo*' article analysing the professional responsibilities and tortious liabilities of lawyers in relation to the detection of a client's Asperger's Syndrome. This article also analyses a judge's responsibilities when a party has Asperger's Syndrome and explores the art of judging, or 'judgecraft' in light of the watershed judgment in *Galo*. [Volume Two, p. 19]

3. Cooper, P., Backen, P., & Marchant, R. (2015). Getting to grips with Ground Rules Hearings – a checklist for judges, advocates and intermediaries. *Criminal Law Review, 6*, 420-435.

This study was my idea and I was the lead writer. We consider how judges should use ground rules hearings to set the parameters for the fair treatment of vulnerable witnesses and defendants. This is the first peer-reviewed publication about the then new phenomenon of ground rules hearings. It is based on my intermediary survey research (Cooper, 2010, 2011a, 2012a, 2014a), caselaw, and intermediary practice at ground rules hearings. The two case studies included (from the intermediary co-authors) lend themselves to be used as advocacy teaching tools. We examined the evolution of practice and law relating to judges controlling cross-examination, including restrictions on 'putting your case' to a vulnerable witness and the interrelated intermediary role. Finally, we proposed a research-informed checklist for ground rules hearings to support the development of good practice. [Volume Two, p. 32]

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4. Cooper, P., & Wurtzel, D. (2014). Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales. *Northern Ireland Legal Quarterly*, *65*, 39-61.

This study was my idea and I was the lead writer. This was the first research to trace the development of the intermediary scheme in England and Wales and compare it to the pilot schemes in Northern Ireland. The key question was what Northern Ireland in 2012 could learn from England and Wales operating the Ministry of Justice Registered Intermediary scheme since 2003. This article reviewed the history of intermediaries and critically analysed a decade's worth of lessons learnt from the Witness Intermediary Scheme. It compared the two schemes, concluding that, though similar, they are significantly different in respect of defendants. We suggested what is required in Northern Ireland to better support the introduction of Registered Intermediaries. This included a recommendation for mandatory vulnerable witness training for advocates. [Volume Two, p. 41]

5. Cooper, P. (2014). Speaking when they are spoken to: hearing vulnerable witnesses in care proceedings. *Child and Family Law Quarterly*, *26*(2), 132-151.

This study was my idea and I was the sole author. I set out to analyse the available adjustments in the family justice system (particularly public law care proceedings) for those parties and witnesses who are 'vulnerable'. In so doing I highlighted the lack of a definition of 'vulnerable' and grave shortcomings in the family justice system, particularly when compared to provision for vulnerable witnesses in the criminal justice system. I contrasted the guidance available for police interviewers with the dearth of guidance for family court professionals who question vulnerable witnesses. I highlighted the lack of mandatory training for Child and Family Court Advisory Service

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officers who conduct forensic interviews of children in order to put the child's wishes and feelings before the court. [Volume Two, p. 54]

6. Cooper, P., & Wurtzel, D. (2013). A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales. *Criminal Law Review, 1*, 4-22.

This study was my idea and I was the lead writer. Up until this point no research had specifically addressed in detail the legislation, caselaw, and practice in relation to intermediaries for vulnerable suspects and defendants in England and Wales. This piece distinguished the intermediary from that of the appropriate adult. It also addressed and made recommendations regarding availability and funding of such intermediaries, access to intermediaries, and eligibility criteria. We called for a review of the definition of who is 'vulnerable' and therefore eligible. We called for the inclusion of the role of the intermediary in guidelines in Codes of Practice of the Police and Criminal Evidence Act 1984 (Home Office, 2014) regarding the questioning of vulnerable suspects. We called for a scheme that would match and allocate trained, regulated intermediaries for vulnerable suspects and defendants. By the time this article was published, there was a growing amount of interest in the defendant intermediary role which was beginning to operate outside the Ministry of Justice Witness Intermediary Scheme. [Volume Two, p. 65]

7. Brammer, A., & Cooper, P. (2011). Still waiting for a meeting of minds: Child witnesses in the criminal and family justice systems. *Criminal Law Review, 12*, 925-942.

This study was my idea and I was the lead writer. Alison and I met in 2010 at a conference in Athens. I suggested we write about the landmark Court of Appeal decision in *R v B* [2010] and compare the treatment of child witnesses in family and

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criminal courts. In *R v B* the Court of Appeal made it clear to advocates in criminal cases that child witnesses demanded special skill and that questioning should be done in a developmentally appropriate way. In the absence of a statutory regime for special measures in the family courts, we argued that family judges can and should rely on their inherent jurisdiction to order special measures for child witnesses, including intermediaries, where necessary. This approach has been reflected in subsequent caselaw. We argued that - notwithstanding the Supreme Court judgment in *Re W* [2010] UKSC 12 (which abolished the presumption against children being witnesses in family cases) - there was still no 'meeting of minds' about how to handle the evidence of child witnesses. Our analysis proved to be correct (Cooper, 2016b). Unfortunately, years later in the Court of Appeal in *Re E* [2017], it was remarked that despite the principle laid down in *Re W,* in practice the previous presumption against children giving evidence in the family court still remained (Cooper, 2016b; Marchant & Cooper, 2016). [Volume Two, p. 75]

B: Case Commentary/Letter in Peer-reviewed Journal

8. Cooper, P. (2017). R v Rashid. *Criminal Law Review*, *5*, 420 – 421.
   -Dealing with the need for a review of advocacy training in respect of questioning witnesses. [Volume Two, p. 87]

9. Cooper, P. (2016). Re E (A Child) (Family Proceedings: Evidence), *Criminal Law Review, 9*, 649-652.
   -Dealing with the differences between the questioning of child witnesses and family and criminal cases and the proper approach to recording ABE interview processes. [Volume Two, p. 90]

10. Cooper, P. (2016). Achieving best practice: F v Crown Prosecution Service. *Criminal Law Review*, *2*, 124-127.
    -Dealing with the use of intermediaries in the Youth Court. [Volume Two, p. 93]

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11. Cooper, P. (2015). R v Jonas (Sandor). *Criminal Law Review*, *9*, 742-746.
 -Dealing with judicial case management of questioning when there is more than one defendant and the use of ground rules hearings. [Volume Two, p. 96]

12. Cooper, P. (2015). R v Krezolek (Mariusz); R. v Luczak (Magdalena). *Criminal Law Review, 8*, 628-630.
 -Dealing with the challenge to ABE interviews when the interviewer departs from the ABE guidance. [Volume Two, p. 100]

13. Cooper, P. (2014). Letter to the Editor. *Criminal Law Review, 6*, 451-452.
 -Response to Daniele, 'Testimony through a Live Link in the Perspective of the Right to Confront Witnesses', comparing face-to-face encounters with live link. [Volume Two, p. 103]

14. Cooper, P. (2012). Jones v Kaney and Other Disincentives: Why the Supreme Court's Decision Should Prompt a Law Commission Review of the Law in Relation to Expert Witness Evidence in Family Cases. *Child and Family Law Quarterly*, *24*(2), 234-250.
 -Looking at the liabilities for expert witnesses and the abolition of immunity from being sued by their clients for what they say in court. [Volume Two, p. 104]

C: Peer-reviewed Case Study

15. Cooper, P. (2016). A Double First in Child Sexual Assault Cases in New South Wales: Notes from the first witness intermediary and pre-recorded cross-examination cases. *Alternative Law Journal*, *41*(3), 191-194. [Volume Two, p. 115]

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1.3 Setting the Scene

What follows in this section is a short summary of key research that preceded the introduction of communication facilitators for witnesses, otherwise known as 'intermediaries'. This section describes how the scene was set for intermediaries for vulnerable witnesses (and my research) to 'take off'.

Interviewing children and vulnerable adult witnesses

Until relatively recently in England and Wales, the issue was not how children should be treated as witnesses, but whether they should be witnesses at all. In the 1980's high profile cases in the press reflected changing public attitudes to the treatment of children; paediatricians, lawyers, psychiatrists, psychologists, policemen, social workers and civil servants began to "think seriously" about children's evidence (Spencer & Flin, 1990. p. 12). For example, "Freud's theory that children tend to fantasise about sexual behaviour with their parents was rapidly discarded by professionals" and became regarded as bad science (Spencer & Flin, 1990, p. 7).

Esther Rantzen DBE, a well-known television presenter, opened up "the public debate around sexual abuse of children" in the 1980's (Codd, Thomas & Scullion, 2016, p.5). This was against a backdrop of

> …the second wave of the women's movement in the UK during the late 1960s and 1970s, and the development of the left realism movement in criminological research which utilised a range of methods to explore and document the 'dark figure' of unreported crime. (Codd, Thomas & Scullion, 2016, p.5).

In England and Wales the work of campaigners, for example social worker Baroness Lucy Faithfull, as well as academics in the field of law such as John Spencer and Glanville Williams (Spencer, 2012) and in the field of psychology such as Ray Bull, Graham Davies, Rhona Flin added weight to the reform movement. Relevant and important work on the questioning of children and other vulnerable witnesses was also emanating from academics in other jurisdictions with adversarial systems, for example from psychologist

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Gail Goodman (United States of America), criminologists Mark and Roslin E. Brennan (Australia) and sociolinguist Diana Eades (Australia). How best to question vulnerable witnesses in court was, and continues to be, an issue that that spans continents and academic disciplines.

By the early 1990s, questioning of child witnesses had already gone through significant changes in England and Wales. Research by psychologists helped debunk myths about children's evidence and showed that children could provide reliable accounts as long as they were interviewed properly (Bull, 1996).

Following the report of the inquiry into child abuse in Cleveland (Butler-Sloss, 1988), major changes were introduced into English courts. Videotaped interviews with children in criminal proceedings could be used instead of evidence in chief and a live television link ('live link') was available for a child giving evidence at court (Lyon & de Cruz, 1993).

In 1992 the Home Office issued the *Memorandum of Good Practice on Videorecorded Interviews with Child Witnesses for Criminal Proceedings* (the 'MOGP') (Department of Health, 1992). Bull, who co-wrote the first draft of the MOGP (Bull & Milne, 2004), described it as a guide "on how to do the easy ones" (Bull, 1996, p. 97). Marchant and Page (1992) recognised that the approach in the MOGP would need adapting for children with disabilities. Lyon and de Cruz concluded that "many of [Marchant's and Page's] findings" could apply to all children (Lyon & de Cruz, 1993, p. 302).

The MOGP evolved into a much larger, more detailed guide. It was superseded by *Achieving Best Evidence* (Home Office, 2002), 'ABE', and later revised and published in 2007 by the National Policing Improvement Agency. Both the MOGP and ABE "relied heavily on relevant psychological research" (Milne, Shaw & Bull, 2007, p. 68). The most recent revision of ABE was published in 2011 (Ministry of Justice, 2011) and the next edition is expected in 2017.

'Special measures' for children and vulnerable adult witnesses at court

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The *Pigot Report* (Pigot, 1989) set out a series of recommendations regarding the way in which the evidence of children and vulnerable adults could be taken. For example, it was suggested that children's evidence could be taken ahead of time; in exceptional cases, the court could also order that the questions would be put by a person (an 'interlocutor') approved by the court who enjoyed "the child's confidence" (Pigot, 1989, para. 2.32). McEwan found *Pigot* disappointing because it concentrated on child witnesses and failed to consider in detail other vulnerable witnesses (McEwan, 1990).

Some years later, the "concept of the 'vulnerable witness' took root in the report *Speaking up for Justice* [Home Office, 1998] which in turn led to the Youth Justice and Criminal Evidence Act 1999" (Cooper & Wurtzel, 2014 p. 42). *Speaking up for Justice* was giving effect to a Labour party manifesto commitment to address concerns about not only child witnesses but also adults, including those with learning disabilities, who are vulnerable (Home Office, 1998).

The Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) set out a statutory scheme of 'special measures'. 'Vulnerable' and 'intimidated' witnesses (as defined in s.16 and s.17, YJCEA 1999 respectively) would be eligible for adjustments to enable them to give their best evidence. Section 16 witnesses are those who are young (under 18 at the time of the hearing) or for whom the quality of their evidence is likely to be diminished because of a mental disorder within the meaning of the Mental Health Act 1983, a significant impairment of intelligence and social functioning, or a physical disability or a physical disorder. References to the quality of a witness's evidence 'are to its quality in terms of completeness, coherence and accuracy' (s. 16(5) YJCEA 1999). For a 'vulnerable' witness (s.16), the court may direct the use of one or more of the statutory special measures including the intermediary (s. 29) and a communication aid (s. 30).

The special measures set out in the YJCEA 1999 are: screening the witness from the accused (s. 23), giving evidence by live link (s.24), giving evidence in private, i.e. clearing the public gallery (s.25), removal of wigs and gowns (s.26), video recorded evidence in chief (s.27), video recorded cross-examination or re-examination pre-trial (s.28),

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examination through an intermediary (s.29), and use of communication aids (s.30). They may be used singly or in combination. Intermediaries and communication aids were made available to vulnerable witnesses only. There is no doubt that the YJCEA 1999 is a "highly complex piece of legislation, made all the more opaque by its protracted and convoluted implementation" (Cooper, 2010, p. 2).

Speaking Up for Justice said that if witnesses were to be classified as 'vulnerable',

> …any definition would need to identify first, which group or category of witnesses are eligible for consideration for special provisions to assist them to give best evidence, and secondly, to guide the court on how to exercise the discretion in selecting from that group those needing assistance. The definition should be clear and understandable and it should encompass those witnesses who are likely to require special provisions, while excluding the vast majority who do not need such assistance. (Home Office, 1998, p. 20)

Questioning the vulnerable accused person at the police station and at court

In the late 1970's, a Royal Commission on Criminal Procedure, set up partly in response to a miscarriage of justice based on a false confession, in its report (Royal Commission on Criminal Procedure, 1981) included a recommendation for better training for interviewers including a greater awareness of psychology (Bull & Milne, 2004).

A further Royal Commission on Criminal Justice was set up in 1991, partly as a result of a series of miscarriages of justice resulting in false convictions. Its recommendations included the mandatory tape-recording of police interviews of suspects for reasons of transparency and fairness (Royal Commission on Criminal Justice (Runciman Commission), 1993). The advent of tape recordings created new opportunities for researchers to gather data about how suspect interview questioning was conducted. Ground-breaking research and a major national review of police interviewing by the Association of Chief Police Officers and the Home Office led to new training courses and updated interviewing principles (Bull & Milne, 2004; Bull, 2013). The principles behind training and best practice models in some countries, including England and Wales, began a shift away from 'interrogating' to achieve confessions towards 'investigative interviewing' to obtain accurate information (Bull & Milne, 2004).

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The role of the appropriate adult (AA) for vulnerable suspects detained at the police station

The Police and Criminal Evidence Act 1984 (PACE) gave rise to eight codes which regulate police powers and protect public rights. Code C sets out the requirements for the detention, treatment and questioning of suspects not related to terrorism in police custody.

Under Code C, a child or otherwise mentally vulnerable suspect detained at a police station should be provided with the opportunity to have an appropriate adult with them. The appropriate adult role is designed to "safeguard the welfare and rights of children and mentally vulnerable adults who are detained or interviewed by police. The PACE codes set out the purpose and powers of [appropriate adults], and the responsibilities of the police in this regard" (Bath, Bhardwa, Jacobson, May, & Webster, 2015, p. 4). The purpose of the presence of the appropriate adult is to "advise the person being interviewed; observe whether the interview is being conducted properly and fairly; and facilitate communication with the person being interviewed" (PACE, Code C, para. 11.17).

Research showed that vulnerable suspects are not always identified as such at the police station and even when vulnerability is detected it is not always acted upon (Gudjonsson, 2010). There were often problems finding an appropriate adult and even if an appropriate adult was found, "most, whether parents or social workers, do not appreciate the nature of their role." (Hodgson, 1997, p. 4). Hodgson concluded: "The requirement for effective appropriate adults must be consistently reinforced by the courts, in order that we do not repeat the miscarriages of justice which have so tragically demonstrated the dangers of producing unreliable evidence in cases of vulnerable people." (Hodgson, 1997, p. 8)

Mistreatment and miscarriages of justice arising from poor questioning of vulnerable people, and the public outcry that followed these, prompted government action and changes in law from the late 1970s.

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The scene was set

The Labour Government's 'watchword - tough on crime and tough on the causes of crime' brought about 'instant legislative actions to demonstrate a concern for the victims of crime' (Blom-Cooper, 2005, p.234). By 2002, more children and younger children were coming before the courts but the problems they faced in the adversarial system had become increasingly evident (Cashmore, 2002). The scene was set for the introduction of the intermediary to facilitate communication with children and vulnerable adult witnesses.

1.4 Key Themes

What follows is the main body of my thesis set out under two key themes. I have considered my publications and what they add to the existing body of research under the headings 'The Purpose and Impact of the Witness Intermediary' and 'Witness Evidence and Advocates' Questioning Techniques'. The table below shows which theme/s each paper relates to.

Table 1: Key themes in this commentary and the submissions which relate to them

Key Themes	Supporting publications
The Purpose and Impact of the Witness Intermediary	1, 2, 3, 4, 5, 6, 7, 8, 10, 13, 15
Witness Evidence and Advocates' Questioning Techniques	1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 14

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1.5 Theme 1 - The Purpose and Impact of the Witness Intermediary

A substantial amount of my published work has been about or related to the purpose and impact of the witness intermediary. The role has had three different names and a somewhat convoluted history prior to its introduction in England and Wales.

The 'interlocutor' role (Pigot, 1989) was not implemented. However, the role was considered afresh by the Home Office Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses, which produced the *Speaking up for Justice* report (1998). This time it was referred to as a "communicator or intermediary" role (p. 59). *Speaking up for Justice* noted 'The Western Australia Experience', where legislation had already given the court discretion to appoint a communicator for a child under 16 to explain to the child, put evidence to the child and explain the evidence given by the child. *Speaking up for Justice* noted a study (O'Grady, 1996) showing that the role of child communicator had been "used only once" in Western Australia (Home Office, 1998, p. 58).

The working group saw advantages to the role but also "had reservations about the role of an intermediary" because it could lead to the witness's evidence being "distorted" in the interpretation process (Home Office, 1998, p. 59). *Speaking up for Justice* recommended legislation for a "communicator or intermediary where this would assist the witness to give their best evidence at both any pre-trial hearing and the trial itself" as well as the creation of a "scheme for the accreditation of communication/intermediary" (Home Office, 1998, p. 59). My research noted that neither *Speaking up for Justice* nor the subsequent legislation explained how the interpreter/intermediary was to operate in practice (Cooper & Wurtzel, 2013).

South Africa began using a system of child witness intermediaries in 1993. Intermediaries there have the role of accompanying the child witness in the live link room, translating questions into child appropriate language and "buffering aggression and intimidation and of informing the court when the witness tires or loses concentration in order for the

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presiding officer to adjourn the court" (Jonker & Swanzen, 2007, p. 95). The purpose of the role in South Africa is to reduce the trauma associated with giving evidence.

In contrast, under the English model, the intermediary's role is to facilitate communication, not to reduce trauma though that may be a secondary result. My research noted that under the English model the intermediary is not a translator but rather an advisor aiming to enhance interviewers' and advocates' question planning and communicative competence; the intermediary will only intervene in questioning if they believe there is miscommunication between the interviewer/advocate and the witness (Cooper & Wurtzel, 2013, 2014).

My research has explored and demonstrated the significance of intermediary schemes in England and Wales, Northern Ireland and New South Wales, Australia (Brammer & Cooper, 2011; Cooper & Wurtzel, 2013; Cooper & Wurtzel, 2014; Cooper, 2014b; Cooper at al., 2015; Cooper, 2016a; 2016c; Cooper & Allely, 2017; Maras et al., 2017). These three jurisdictions operate the first schemes of their kind in the world and the effect of the role on the adversarial trial system in England and Wales has been significant.

The English model for the witness intermediary

Prior to implementation, no specific guidance was given on how the intermediary role would operate and one commentator envisaged a passive, translator-type role (Ellison, 2002). Hoyano (2000) predicted a very high risk of loss or distortion if the intermediary explained questions or answers as well as significant challenges - including disputes between the questioner and the intermediary - which the judge would have to resolve. Research published by me has shown that fears about the role turned out to be unfounded (Cooper & Wurtzel, 2014).

My research identified that the English witness intermediary was used quite differently compared to how it was used in other countries (Cooper & Wurtzel, 2014). Under the English model they became facilitators advising the police and courts, only intervening if miscommunication occurred and introducing 'ground rules' for questioning witnesses

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(Cooper & Wurtzel, 2013, 2014). I delivered the training with the assistance of colleagues at City, University of London (Cooper, 2012, 2017b).

In the end, resistance, including from some legal professionals, was, according to Judge (2011, p. 16), overcome: "There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested that they were expert witnesses or supporters of the witness. They are not. They are independent and neutral. They are properly registered".

My research noted that Registered Intermediaries do not inappropriately interfere with cross-examination because they have been carefully trained about how, why and when to intervene:

> The statute does not expressly grant the right to the intermediary to intervene during the questioning but from the start they assumed the right to do so as an essential part of their function. The interventions are based on the ground rules which in turn are based on the intermediary's report to the court. Counsel may be asked to use the witness' name to re-focus before each question, to use concrete rather than abstract ideas, to break down the question to something simpler, to slow down, to check that the witness understands a particular word, to give the witness time to process the question, to avoid a tag question etc. It depends on the particular witness's needs. The judge, to whom the intervention is addressed, and who retains control of questioning, then upholds the intervention or not. The Registered Intermediary, if requested, will suggested alternative ways to put the question. (Cooper & Wurtzel, 2014, p. 45).

An evaluation report commissioned by the MOJ and produced by independent researchers was published (Plotnikoff & Woolfson, 2007). The report found that experiences of the scheme were almost entirely positive. In 2007, the MOJ began to roll out the scheme across England and Wales (Cooper & Wurtzel, 2013).

The then Lord Chief Justice described the role to fellow judges in Australia:

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> Intermediaries are not interpreters in the way we normally understand them. They do not, as interpreters do, simply translate exactly whatever it is the witness has said… The use of intermediaries has introduced fresh insights into the criminal justice process...But their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial. (Judge, 2011, p. 15)

Police officers interviewing witnesses, subject to obtaining the necessary consents, may contact the Registered Intermediary 'matching service' and submit a 'request for service form'. The matching service attempts to find an intermediary with suitable expertise who is available as required (Cooper & Wurtzel, 2013; Ministry of Justice et al. 2015; Plotnikoff & Woolfson, 2015). The intermediary undertakes an assessment of the witness' communication needs and abilities (Ministry of Justice et al., 2011, 2015; Cooper & Wurtzel, 2013, 2014; Cooper et al., 2015; Plotnikoff & Woolfson, 2015; Cooper & Mattison, 2017). Findings from the intermediary's assessment inform his/her recommendations to the police and the court about how best to communicate with the witness (Ministry of Justice et al., 2015; Cooper & Mattison, 2017).

Research published by me and others noted that if the matter proceeds to trial, the Registered Intermediary writes a detailed report for the court, assists communication at the court witness familiarisation visit (usually organised with the Witness Service), attends a ground rules hearing, and if necessary intervenes during questioning at trial in accordance with the ground rules (Cooper & Wurtzel, 2013, 2014; Cooper et al., 2015; Ministry of Justice et al., 2011, 2015; Cooper & Mattison, 2017, Wurtzel & Marchant, 2017). The English model for the role of the intermediary, where appropriate, is an integral part of the criminal justice system (Plotnikoff & Woolfson, 2015); a snap shot study of practitioner feedback suggested the scheme was "overall highly successful" (Henderson, 2015, p. 168).

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My research has shown that, more recently, the model has been introduced via pilot schemes in Northern Ireland (Cooper & Wurtzel, 2014) and New South Wales, Australia (Cooper, 2016c; Cooper & Mattison, 2016, 2017). I have called for more research into the role's impact (Cooper & Mattison, 2017).

The role the Registered Intermediary from the service user's perspective has rarely been studied (although see, for example, O'Mahony, 2012; Maras et al., 2017). Collins, Harker and Antonopoulos (2016) conducted a study whereby mock jurors observed a mock cross-examination of a four or thirteen-year-old child. The results showed that when an intermediary was present the children's behaviour and the quality of cross-examination was more highly rated.

At the time of writing, no empirical results have been published comparing the quality (completeness, coherence and accuracy) of witness evidence with/without an intermediary (Cooper & Mattison, 2017). However, one recent study claimed that the use of intermediaries with six to eleven-year-olds in mock, lab-based interviews improved the volume of accurate recall for typically developing children (n=199) but not for those with ASD (n=71) (Henry, Crane, Nash, Hobson, Kirke-Smith, & Wilcock, 2017).

The intermediary for a vulnerable suspect/defendant

O'Mahony (2012) examined dialogue that had taken place in the police interview of a vulnerable suspect accused of murder. He concluded that, "…even by adhering to the law and having a legal adviser and an [appropriate adult] present during the police interview, this does not necessarily mean that the police interviewer can relax and assume that the vulnerable suspect comprehends the police caution and subsequent questions" (2012, p. 79).

My research also noted that the appropriate adult role is not the same as that of the intermediary; "the presence of an appropriate adult does not obviate the need for an intermediary" (Cooper & Wurtzel, 2013, p. 7). My research noted that, in England and Wales, the Registered Intermediary scheme only covers witnesses and identified that the

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the vulnerable defendant intermediary legislation (not yet in force) is inadequate (Cooper & Wurtzel, 2013).

Recent research on the appropriate adult scheme further underlines the inadequate provision for vulnerable suspects. There are continuing shortcomings with the appropriate adult scheme including the absence of simple police screening questions for suspect vulnerability, and police training on vulnerability and when to obtain an appropriate adult. The same research recommended mandatory training for appropriate adults and noted concerns of police, service users and providers about the suitability of using family members who were unlikely to be trained and, because of their familiarity with the suspect, would not have detached objectivity (Bath, Bhardwa, Jacobson, May & Webster, 2015).

Legislation, (Section 33BA (3) of the Youth Justice and Criminal Evidence 1999 Act inserted by s.104 Coroners and Justice Act 2009) providing intermediaries for eligible vulnerable defendants, is not in force and there are as yet no plans to make it so. My research showed that even if brought into force, there would still be barriers relating to finding and funding an intermediary for a defendant at court (Cooper & Wurtzel, 2013). Currently intermediaries for vulnerable defendants are unregistered and unregulated and, resources are scarce and case law and practice guidance say that intermediaries for defendants should be used rarely (Cooper, 2017b; Hoyano & Rafferty, 2017).

My research showed that, uniquely, Northern Ireland's intermediary legislation and Registered Intermediary scheme makes available intermediaries for vulnerable suspects at both the police interview and at court at the time the defendant gives evidence, if s/he chooses to (Cooper & Wurtzel, 2013, 2014). Northern Ireland's Registered Intermediary scheme process has been positively evaluated (Department of Justice, 2016). A study of youth court proceedings (Carlile, 2014) and a Law Commission report (Law Commission, 2016) considered intermediaries for vulnerable defendants in England and Wales. Both reports cited my research (Cooper & Wurtzel, 2013) inter alia and called for fresh legislation for intermediaries for vulnerable defendants so that they could be available to

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assist for the whole trial if necessary. No steps have yet been taken by the Government in England and Wales to introduce a Registered Intermediary scheme for vulnerable defendants. My research noted they are appointed under the courts inherent jurisdiction and there is no standard training, accreditation or regulation (Cooper & Wurtzel, 2013).

Beyond the criminal justice system

The value of intermediaries in supporting communication with witnesses and parties in other parts of the legal system has been identified by my research (Cooper 2011a, 2011b, 2011c; Cooper 2012a, 2012b, 2012c; Cooper, 2014b). In 2011, at the Family Justice Council Biennial Conference, I presented a paper to senior judges and lawyers which, amongst other things, highlighted the value of intermediaries. I pointed out that even without legislation, judges could use their inherent powers to order the use of an intermediary where necessary (Cooper, 2011b). This is indeed what subsequently occurred and I have also repeatedly drawn attention to the absence of family court rules and legislation for vulnerable witnesses.

An intermediary for a vulnerable party in the family court can mean the difference between a fair hearing or not (*Re D (A Child) (No 3)* [2016]). My research noted the family courts have no scheme of special measures to support obtaining the best evidence from child witnesses (Brammer & Cooper, 2011) and the many vulnerable adults who come before them (Cooper, 2014b, 2016d; see also Geekie, 2016). There are as yet no specific procedural rules to enable the voices of vulnerable witnesses and parties to be heard in the family courts. The recommendations of the Vulnerable Witnesses & Children Working Group (2015), of which I was a member, have yet to be implemented. One recommendation was that the family courts adopt the same definition of 'vulnerable' as the criminal justice system. However, in light of recent research (Ewin, 2016) and three 2017 Court of Appeal Criminal Division judgments (*R v Blackman, R v Hamberger and R v SG;* Cooper, 2017d, 2017e, 2017f), it is doubtful that a clear, understandable definition of 'vulnerable' exists (Cooper, 2017d, 2017e, 2017f).

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My research identified the obstacles to children being heard as witnesses in the family courts even though the legal presumption against this was removed in 2010 (Brammer & Cooper, 2011; Cooper, 2014b, 2016). Another difficulty is that alleged abusers acting in person can cross-examine vulnerable witnesses in the family court (*H v L* [2006]; Geekie, 2016; Munby, 2017; Cooper, 2017c). Legislation that was proposed (Pearce, 2017) but a general election ensued and it is not known if the new Government will pursue reform (Cooper, 2017f). Law reform to protect vulnerable witnesses in the family courts is long overdue and my research has strengthened calls for reform.

My research and that of others has shown that intermediaries could be useful in family courts (Cooper 2011b, c) and were later used in family courts (Cooper 2014a, 2014b, 2016c, 2016d, 2017a; Geddes, 2015, 2016) albeit on an unregulated basis (Handa & Tyler, 2014). Their value has been recognised in the Court of Protection (Ruck Keene et al., 2016; Charles, 2016; Series, Fennell & Doughty, 2017). Intermediaries have also assisted vulnerable witnesses in the Mental Health Tribunal and the Coroner's Court (Wurtzel and Marchant, 2017). My research has identified gaps in provision for vulnerable witnesses and the significance of intermediaries and ground rules hearings in the employment tribunal (Cooper & Arnold, 2017; Cooper & Allely, 2017).

The impact of special measures

Very little is known about the impact of special measures although practitioners report that they have a positive impact on witnesses (Ewin, 2016). Intermediary pilot scheme processes have been evaluated but not the impact, if any, of the intermediary on the outcome of the case (Plotnikoff & Woolfson, 2007, 2008; Department of Justice, 2016). A study which compared video-recorded police interviews of rape complainants with the live evidence-in-chief suggested that using the video interview as evidence provides an opportunity to provide the most complete evidence from a witness and may improve just outcomes (Westera, Kebbell, & Milne, 2013). More mock jury research has also been called for (O'Mahony, 2012, Collins et al. 2016).

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Daniele (2014) has argued that testimony over live link is a sub-optimal 'confrontation' and 'naturally produced' evidence from a 'face-to-face encounter in the courtroom' is better. My research has noted that nothing is particularly natural about giving evidence in court (Cooper, 2014d, e) and there is no evidence base to support the notion that face-to-face is generally better than questioning over a live link (Cooper, 2014d).

Meanwhile, for reasons of cost saving, the Government has committed funding to 'digitisation' of the courts (Thomas, 2016), although there is a long way to go before the courts are fully digitised as opposed to reflecting the world of Charles Dickens (Munby, 2016). Since technology may mask communication difficulties if the lawyer does not meet the client face to face (McEwan, 2013), further research should be conducted before pressing ahead with digitisation of the courtroom.

Pre-recording cross-examination and the piloting of 'Barnahus'

Parliament has responded to high-profile, highly critical media coverage of sexual offences trials (Pidd, 2013; Norfolk, 2013; Rantzen, 2013) by piloting the pre-recording of cross-examination (section 28, YJCEA 1999) for some children and vulnerable adults (UK Parliament, 2013). Mr. Justice Green, when Chair of the Advocacy Training Council, noted that high-profile cases created a risk of a 'crisis of confidence' in the role of the advocate (Green, 2014). Following positive findings of the 'section 28' process evaluation (Ministry of Justice, 2016), pre-recording for vulnerable witness cross-examination will be rolled out across England and Wales (Cooper, Mattison & Norton, 2017, Cooper & Mattison, 2017). The results of the analysis of section 28 hearing transcripts by academics at Cambridge University may be enlightening.

In other jurisdictions, such as South Africa and Norway, cross-examination of vulnerable witnesses is not conducted by advocates but by specialist questioners (Keane, 2012b) whilst the judge continues to oversee questioning. England and Wales will shortly pilot a version of the Norwegian method of questioning child sexual assault complainants by a trained psychotherapist overseen by the judge with lawyers observing (Cooper et al., 2017). This 'Barnahus' model was also favoured in a recent review in Scotland (Scottish

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Courts Service, 2015); meanwhile steps are being taken to further reduce the need for vulnerable witnesses in Scotland to come to court to give evidence (High Court of Justiciary, 2017). In the meantime, the vast majority of witnesses will continue to be questioned by advocates and there is a pressing need for a fresh and improved approach to their questioning of *all* witnesses.

1.6 Theme 2 - Witness Evidence and Advocates' Questioning Techniques

My research has shown the need for advocates to be better trained in questioning techniques, for judges to apply ground rules to control advocates' questioning, and for witnesses to be better prepared for giving evidence.

Training for advocates

My research has noted that over recent decades there have been regular and repeated calls (for example, Flin, Bull, Boon, & Knox, 1993; Keane, 2010) for training for advocates on how to question vulnerable witnesses (Cooper & Wurtzel, 2013). The Advocacy Training Council (2011) recognised that this was a specialist skill; their *Raising the Bar* report produced the first 'toolkits' to assist advocates to prepare their questions and concluded that consideration be given to compulsory training in vulnerable witness questioning. Vulnerable witness training is now available for advocates though it is voluntary and not yet part of 'basic training' (Rook, 2015).

A recent youth court survey of 215 advocates and 30 other justice practitioners found a 'widespread view' that many advocates were not effective (Wigzell, Kirby, & Jacobson, 2015). Constraints included advocates' lack of training or expertise and language and communication difficulties with some young defendants and witnesses. My research has argued that mandatory vulnerable witness training is necessary (Cooper & Wurtzel, 2014).

My research has identified dissonance at the core of an adversarial system; a defence advocate may successfully apply to have an ABE interview of a vulnerable witness ruled

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inadmissible on account of the use of leading - and thus poor quality - questions but that same advocate may cross-examine that same vulnerable witness using leading questions (Cooper, 2016b). This has led to questions about how, if at all, advocates should 'put their client's case' to vulnerable witnesses and my research has suggested alternative questioning strategies (Cooper, Backen, & Marchant, 2015).

Even when a witness is not 'vulnerable' (according to the criteria set out in s. 16 YJCEA 1999), the quality of their testimony can be diminished if the advocate's questioning technique is poor. Lawyers are instructed by advocacy tutors who use the 'Hampel method'. The designers of the method advise that unless there is a good reason not to, leading propositional questions should be used in cross-examination (Hampel, Brimer, & Kune, 2008). The latest edition of a more recent advocacy guide does at least recognise that traditional cross-examinations methods must be adapted for vulnerable witnesses (Morley, 2015).

Leading scholars (Spencer, 2012; Keane & Fortson, 2011; Gabbert & Hope, 2016; Wheatcroft, 2017), reflecting a large body of psychological research, have drawn attention to the fact that witnesses, under the pressure of leading questions and in the alien and intimidating environment of the courtroom, may be suggestible or compliant. A key advocacy manual (Hampel, Brimer, & Kune, 2008) does not recognise that there are inherent dangers in using leading questions with *any* witness. My research noted that the judgment in *R v Rashid* was especially important because it highlighted the need for advocates to be competent at asking questions of *all* witnesses (Cooper, 2017b).

The Lord Chief Justice said,

> [Professional] competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions (*R v Rashid* [2017], at para [80]).

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However, open questions can still be leading and studies have shown that children and adults with intellectual impairment are more likely to give inaccurate answers in interview if questions are leading (Bowles & Sharman, 2014).

I have observed miscommunication in court on each occasion that I have taken trainee intermediaries to observe a trial. I now frequently use the examples given below when I train judges, lawyers and intermediaries. Table 2 gives examples of questions posed to witnesses in Crown Court (England and Wales) and District Court (New South Wales); I observed these on visits to court with trainees between 2014 and 2016. This table is adapted from one that I present to judges at Judicial College training courses in 2017. My key message to judges is to take control of questioning; even a question without preamble or comment can confuse witnesses.

Table 2: Example questions

	Includes preamble to the question	Includes comment by the advocate	Includes complex and/or formal language
"Just two points. The first is your proposition with which I do not disagree, the first and last calls usually indicate the home address?"	Yes	Yes	Yes
"You weren't there when that alleged confrontation took place? [Pause] It will be the defendant's case that that confrontation never took place, do you understand?"	Yes	Yes	Yes
"You know how to repel the advances of an unattractive woman don't you?" [The witness replied, "What do you mean?"]	No	No	Yes
[To a witness describing an argument	No	No	Yes

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between two neighbours] “What was it that passed between them?” [The witness replied, “A fence.”]			

Adult witnesses deemed in need of no special measures can find cross-examination difficult to understand on account of the formal legal language (Hunter, Jacobson, & Kirby, 2013). My research identified a weddedness to cross-examination rooted in practices originating in the 1700s (Cooper & Wurtzel, 2014). One study, which analysed court transcripts in New Zealand from rape cases, found little had changed in cross-examination compared to fifty years ago (Zydervelt, Zajac, Kaladelfos, & Westera, 2016). The tools of cross-examination that are used and relied on as a means of identifying accurate and inaccurate witness evidence are essentially no different to those described in *The Art of Cross-examination* (Wellman, 1905) over a hundred years ago.

My research noted advocates must be communicatively competent when questioning any witness (Cooper, 2017b). In *Farooqi* [2013], Lord Judge, then the Lord Chief Justice, criticised the modern habit of advocates asserting comments when cross-examining: “This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate” (para. 113). Unfortunately, modern advocacy training encourages leading, propositional questions which in turn probably encourages advocates to assert comments when cross-examining.

It is not only questioning at court which is a cause for concern. Witness statements that are created as a result of this lawyer-witness interview process, have been filtered through, and often drafted by, the lawyers. Mr. Justice Leggatt has acknowledged the risk of contamination of the evidence during the statement-taking process: “[S]ubtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute” (Gestmin [2013], para. 19).

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The risk of 'subtle influence' may be even greater with vulnerable witnesses. My research shows there is no equivalent of 'ABE' or a training programme for those who interview venerable witnesses in the family courts and since their interviews are not video-recorded there is no means of independent scrutiny (Cooper, 2014b). I have argued that in the family court "it is vital that the adult carefully asks the right questions, properly understands what the child has said and passes it on accurately without anything crucial being lost in editing." (Cooper, 2014b, p. 139). Well-developed vulnerable witness interview training exists for police officers (Stewart, Katz & La Rooy, 2011; Davies, Bull, & Milne, 2016; Milne et al, 2007; Milne, Griffiths, Clarke, & Dando, (in prep.)). That said, I recognise that training alone is not a panacea; a recent report into the use of ABE in child sexual abuse cases found that it is not achieving what it set out to do due mainly to poor compliance and record keeping (HMCPSI/HMIC, 2014).

Judicial control of advocates' questioning

My research explored in detail the application of ground rules hearings, a case management procedure during which the judge makes directions for the fair treatment of a vulnerable people (Cooper et al., 2015; Cooper & Allely, 2016, 2017; Cooper & Farrugia, 2017). My research noted that judges should explicitly control cross-examination as opposed to relying on advocates' assurances as occurred in *R v Jonas* [2015] (Cooper, 2015b). It has been argued that judges need stronger guidance and training so that they allow witnesses "greater freedom to answer questions in a full and comprehensive manner" (Doak, 2015, p. 146). The advent of ground rules hearings has enabled me to deliver stronger guidance and training to judges via Judicial College courses.

It is not practical in an adversarial system where the judge must be and be seen to be independent, for the judge to take over the questioning and become 'bowler as well as umpire' (Cooper, 2014c). However, my research shows that when young children are witnesses, judges have prohibited the cross-examiner from cross-examining in the traditional way (Cooper et al., 2015).

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The ground rules approach has been endorsed in the Court of Appeal. The Vice-President of the Court of Appeal said the following on the issue:

> We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances…The trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocate's questioning is confusing or inappropriate. (*R v Lubemba; R v JP* [2014*],* para. 42).

I have noted that ground rules hearings are not solely for cases where people are vulnerable (Cooper, 2017e). In a major review of the criminal justice system, where it was noted that ground rules hearings have contributed to the success of pilot schemes for the use of pre-recorded cross-examination, it was also said that "consideration should be given to whether or not this approach may sensibly be extended to other areas of cross-examination" (Leveson, 2015, p. 71).

I have considered recent case law and identified the makings of 'universal ground rules' for advocates (Cooper, 2017a, Cooper & Farrugia, 2017). Cross-examination should:

- Be short and focus on one point.
- Use simple vocabulary.
- Use simple sentences (not 'tag' questions; that is, statements with a generic question tacked onto the end. Avoid, for example: "You would agree wouldn't you, [statement]?" or "[Statement], that's right isn't it?")
- Properly direct the witness to the matter which requires their answer; a question should not invite the witness to speculate or debate.
- Not contain preamble (for example, a preamble such as "In light of your previous answers, let me ask you about this, if I may…" should be dispensed with altogether.)
- Not contain comment on the evidence (if it is a good comment, save it for the speech.)

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- Not use intonation to imply a question (for example, do not say, “You were unhappy about that?”, instead ask, “Did that make you unhappy?” or “Were you unhappy?”)

I contend that if universal ground rules were applied by judges, this would increase the general standard of advocates’ witness questioning.

Witness preparation

In my research, I have consistently been a proponent of witness familiarisation as a means of supporting witnesses to give their best evidence (Cooper, 2004a, 2006, 2012b, 2017a). Done properly, it is lawful whereas coaching or dress-rehearsing witnesses is not (Cooper, 2004a, 2004b, 2005). Good preparation is important not least because, as noted by the President of the UK Supreme Court, “[h]onest people, especially in the unfamiliar and artificial setting of a trial, will often be uncomfortable, evasive, inaccurate, combative, or, maybe even worse, compliant.” (Neuberger, 2017, para. 10). How a witness presents can affect the weight that fact finders attach to their evidence.

Empirical research in mock trials with adult witnesses has now shown that familiarisation can help witnesses give more accurate evidence (Ellison & Wheatcroft, 2010). Henderson and Seymour (2013) found that expert witnesses in the criminal and family courts in New Zealand found the court environment stressful but training helped them to participate. Registered Intermediaries are taught that their role includes accompanying the witness on their court familiarisation visits in accordance with the guidance I wrote (Ministry of Justice et al., 2015, Cooper, 2016f, Cooper, Wurtzel, & Department of Justice, 2016). Intermediaries may help the witness to practise being asked questions and give replies (Ministry of Justice et al., 2015). Wheatcroft (2017) has argued that best practices for the elicitation of accurate evidence should be developed rather than leaving it for witnesses to “combat the system's shortcomings” (p. 158). It is an argument with which I agree and thus my research has focussed on improving practices which elicit witness evidence.

An expert witness’s right to give opinion evidence, comes with the special duty to give independent evidence uninfluenced by the pressure of litigation (‘*The Ikarian Reefer’,*

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1993). I conducted a detailed case analysis of the 2011 UK Supreme Court decision in *Jones v Kaney.* The judgment removed expert witness immunity from being sued for negligence by their clients. My research has shown that quite apart from the risk of being sued for negligent evidence (including what they say or do not say under cross-examination), an expert witness might be reported to their professional body, be ordered to pay a costs order or admonished by the judge in public if they do not meet the high standards required of the role (Cooper, 2012d). This gives added emphasis to the importance of proper training and preparation for expert witnesses. My research identified a need for better training and accreditation for expert witnesses (Cooper, 2006, 2007, 2012d).

1.7 Discussion and Research Gaps

Intermediaries advise and facilitate questioning of vulnerable witnesses and, case by case, have an educative role as regards the questioning of vulnerable witnesses. Where an intermediary is engaged, the rules require that they are part of the ground rules discussion, a procedure introduced by my intermediary training and developed through my research. Whether the use of intermediaries has brought better quality evidence or a general improvement in advocates' witness questioning techniques is as yet unknown. The introduction of intermediaries and resultant research by me and others has highlighted the disparity between what is available for vulnerable witnesses and defendants. It is an ongoing concern. What is available for vulnerable defendants is less generous and very different (Hoyano, 2010; McEwan, 2013; Cooper & Wurtzel, 2013, Fairclough, 2016; Cooper, 2017b, Hoyano & Rafferty, 2017).

As my research has shown, in other parts of the legal system, less clear, less generous arrangements exist for vulnerable witnesses and parties. In fact, the term 'vulnerable witness' has no definition in law outside the criminal justice system. I have sought to raise awareness of disparities as well as the general applicability of the ground rules approach as a means of exerting greater judicial control of questioning in any court or tribunal. My research identified that the family courts lag far behind the criminal justice system

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(Brammer & Cooper, 2011; Cooper, 2014b; Vulnerable Witnesses & Children Working Group, 2015; Cooper, 2017c) as do other courts and tribunals (Ruck Keene et al., 2016, Cooper & Arnold, 2017). There have been some moves towards reform in the family justice system.

Specialist training for those questioning vulnerable witnesses is necessary (ATC, 2011; Cooper & Wurtzel, 2014). The Advocate's Gateway toolkits reflect the professional standard to which advocates should adhere when questioning vulnerable people (Green, 2014) yet the efficacy of these toolkits have yet to be researched. The Inns of Court College of Advocacy (which also supports The Advocate's Gateway) is in the early stages of rolling out a twelve-hour training programme for criminal advocates called 'Advocacy and the Vulnerable' (Inns of Court College of Advocacy, 2017). The training remains voluntary - the regulatory authorities for lawyers in England and Wales do not appear to grasp the nature of problem (Keane, 2012a). It is not a training course which, for instance, covers the sort of in-depth understanding of autism (including Asperger's Syndrome) which my research shows legal practitioners need (Cooper, 2013; Maras, et al, 2017; Cooper & Allely, 2016, 2017, Allely & Cooper, 2017).

There is no system of quality assuring advocates' witness questioning techniques. I have argued that imposing 'universal ground rules' on advocates' cross-examination would be a step in the right direction (Cooper, 2017a). I have expressed the hope that there will be a review of basic advocacy training in order to bring advocacy "in line with research-informed practice for eliciting the best quality evidence from witnesses" (Cooper, 2017b, p. 422). I am not optimistic that this will happen because concerns about how advocates question witnesses are not new and resources seem scarcer than ever.

I believe that when witness evidence is being adduced, one of the most significant shortcomings in the legal system is its failure to learn lessons from the relevant psychological research. It could be argued that there is in fact a wilful blindness when it comes to seeing the significance of psychological research to advocates' questions.

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Research on the psychology of memory and investigative interviewing (including detecting lies) is also relevant to achieving the best witness evidence when advocates question witnesses.

Lessons from psychological research on memory, investigative interviewing and detecting lies

A 2008 report from the Research Board of the British Psychological Society set out findings based on a review of the scientific studies and findings relating to human memory. Keane found it "remarkable that so little attention has been paid to the report in the legal community" (2010, p. 20) and called for "detailed analysis and refinement" of the findings if they are to be used in the legal context (2010, p. 29). There are signs that the legal community is beginning to pay attention. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013], Mr Justice Leggatt said that "[w]hile everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony" (para. 16).

In *Cusack v Holdsworth* & Anor [2016] the judge noted that research by Elizabeth Loftus "reveals the malleability of memory by showing that witness testimony can, after the fact, be shaped and altered" (para. 25). Howe and Knott (2015) considered that the research on memory has been successfully integrated into some courtroom procedures relating to child witness interviewing, historic sex abuse cases and eye witness testimony, but recognised the need for further changes in policy and forensic practice.

The challenges of introducing lessons from psychological research on witness memory into the advocate's classroom and into the courtroom should not be underestimated. The culture of traditional cross-examination is deeply embedded. Psychology is not a standard part of the syllabus for those studying to be advocates in England and Wales. Although some English Judges appear to open the door to the use of such psychological research in the courtroom, there are others who appear to close the door. For example in 2012 in *R v*

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Anderson, the Court of Appeal declined (and not for the first time) to receive the evidence of a professor on children's memory.

I believe that advocates who question witnesses need more than an appreciation of the psychology of memory. Cross-examination, if conducted as interrogation of the witness rather than investigation of the truth, appears increasingly 'out of step' with the relevant psychological research on investigative interviewing. The cognitive interview has been widely researched (Geiselman & Fisher, 2014) and has fundamentally shaped the prevailing approach to investigative interviewing in the UK and many other countries (Milne, Griffiths, Clarke, and Dando, in prep).

The aim of investigative interviewing is to obtain the best quality information (Milne & Powell, 2010). In my opinion that is also the proper aim of cross-examination. Cross-examiners should use techniques that are known to help reveal rather than obscure the truth. Current teaching practices appear to regard cross-examination as an exercise in trying to persuade the fact-finder that the witness is unreliable. I have contended (Cooper, 2011 b) that lawyers should question whether cross-examination is "a most valuable instrument in ascertaining the truth" (Denning, 1949) or is as suggested by Loftus, an "impoverished" tool (Loftus, Wolchover & Page, 2006). It is perhaps no wonder that the President of the Supreme Court has, extra-judicially, indicated general scepticism about the value of oral testimony (Neuberger, 2017).

If cross-examination is to be a tool to ascertain the truth, it must also take into account that some witnesses lie and obscure the truth (Judge, 2013). Cross-examination training has yet to embrace the latest knowledge on detecting lies (for example, Vrij, 2010; Vrij & Nahari, 2017) or on suspect questioning (for example, Leahy-Harland & Bull, 2016). Psychological research suggests techniques which may help to distinguish truth tellers from liars (Deeb, Vrij, Hope, Mann, Granhag & Lancaster, 2016; Vrij, 2010; Vrij & Nahari, 2017).

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Research has yet to provide answers to important questions regarding advocates' questioning and witness testimony including:

- Which witnesses and parties are 'vulnerable' and thus eligible for special measures?
- Do special measures improve the completeness, coherence and accuracy of witness testimony?
- Do toolkits improve the quality of advocates' questioning?
- Will psychological research be allowed to inform a new approach to advocates' training on questioning techniques?

I believe research in these areas should be planned with a view to its application in the courtroom and the advocate's classroom. It should be conducted by academics from both psychology and law together with other disciplines where relevant (for example criminology, linguistics, and sociology).

1.8 Conclusion

In this thesis, I have evaluated my past research contribution. I have paid considerable attention to the paradigm shift over the last fifteen years regarding the questioning of vulnerable people in court. My publications indicate that intermediaries have had a clear and significant impact on the questioning of vulnerable witnesses in England and Wales, Northern Ireland and New South Wales, Australia. My research has led to the introduction and use of the ground rules approach to manage the questioning of witnesses.

Intermediaries have an educative effect on advocates on a case-by-case basis and many intermediaries have helped with the development and writing of 'toolkits' on The Advocate's Gateway. My research has also highlighted how the rest of the legal system is lagging behind the criminal justice system as regards provision for vulnerable witnesses. Whatever their impact on the outcome of cases, intermediaries and research associated with the role, has firmly placed a spotlight on witness questioning in the courtroom.

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The golden thread running through all my publications is a desire to ensure better quality witness evidence. My research has argued that even when witnesses are not 'vulnerable' they should also have proper preparation for court; ground rules for questioning should be set and enforced by judges and traditional advocacy training requires reform.

The title of this thesis asks: Are advocates' questioning techniques in need of further reform? I have concluded that they are. The 'research gaps' identified above are likely to shape my plans for future research. Future reform of advocates' questioning techniques requires an evidence base. Where relevant psychological research already exists, it should be incorporated into advocacy training.

I end where I began. It was recommended in the 1980s that police interviewers should have a greater awareness of psychology and their training should be improved. I believe this applies equally to advocates ('trial lawyers') and the need is pressing. It was said over a century ago by an American lawyer in his book *The Art of Cross-examination:* "We are thus beginning to appreciate in this country what English courts have so long recognized; that the only way to ensure speedy and intelligently conducted litigation is to *inaugurate a custom* of confining court practice to a comparatively limited number of trained trial lawyers." (Wellman, 1905, pp. 17-18)

In my opinion, now is the time to inaugurate a custom of advocacy conducted by trained trial lawyers better informed by psychological research.

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1.9 Dissemination

As well as seven peer-reviewed journal articles, seven peer-reviewed case commentaries and one case study relied in support of this submission, I have also published, either solely or jointly, the following:

- One book on vulnerable people in the criminal justice system
- Two books for professional witnesses reporting to court
- Seven chapters for practitioners about witness evidence
- Five open access research reports on witness evidence/intermediaries
- More than 60 practitioner articles published on witness evidence and related topics.
- Three toolkits on The Advocate's Gateway and contributed to numerous others.

Since my inaugural lecture in 2009 ('Cross-examination trick or fair treatment', at City, University of London, attended by over 300 people including the then Attorney General) I have given over 50 presentations and lectures to judges, lawyers and other professional on the subject of witness evidence and adaptations for vulnerable people. My 2017 lectures and presentations include The Advocate's Gateway international conference, the Judicial College (three training events), Broadmoor Hospital Autism in the Criminal Justice System conference, an International Criminal Court seminar and the Mental Health Lawyer's Association conference.

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1.10 Impact

My research and publications have:

i. Given rise to the English model for intermediary schemes in three jurisdictions;
ii. Helped shape policy and case law on intermediaries for vulnerable defendants;
iii. Advanced understanding of case management when a party has Asperger's Syndrome;
iv. Led to guidance and recommendations for new rules in the family courts regarding vulnerable witnesses and parties;
v. Given rise to Ground Rules Hearings including Criminal Procedure Rule 3.9(7) (an approach now used internationally);
vi. Given rise to The Advocate's Gateway (guidance used in England and Wales and internationally).

(i) The English model for intermediary schemes now in three jurisdictions

My research underpins intermediary schemes in England and Wales, Northern Ireland and New South Wales, Australia and the training in each jurisdiction. They are the first schemes of their kind in the world. My training, procedural guidance and research shapes the way intermediaries operate and my research has been cited in *Re X (A Child)* [2011] EWHC 3401 (Fam) at [43], *R v Christian* [2015] EWCA Crim 1582, at [34] and *R (On the Application Of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), at [5]. I provided expert evidence to the court in the latter case. In March 2016, I gave evidence to the Royal Commission into Institutional Responses to Child Sexual Abuse in Sydney Australia on the English intermediary model for vulnerable witnesses.

In England and Wales, by 2016 more than 15,000 witnesses had given evidence with the assistance of an intermediary (Wurtzel & Marchant, 2017). In total so far, several hundred witnesses have been assisted by intermediaries in Northern Ireland and New South Wales (Cooper & Mattison, 2017).

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(ii) Policy and case law on intermediaries for vulnerable defendants

My publication calling for change to the unregulated, ad hoc and unsatisfactory system for defendant intermediaries (Cooper & Wurtzel, 2013) has been cited with approval and relied on in the Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court (Carlile, 2014) and by the Law Commission in its Unfitness to Plead report (Law Commission, 2016). A leading case is *OP* and my intermediary research was cited in the judgment (*R (On the Application Of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin), at [5]).

(iii) Case management when a party has Asperger's Syndrome

My articles on Asperger's Syndrome have been submitted to the Criminal Cases Review Commission on behalf of Tom Hayes. I gave an invited lecture in November 2016 to the Judicial Studies Board, Northern Ireland (attended by the Lord Chief Justice and other senior judges) about Asperger's Syndrome and case management. I have provided expert, academic advice in numerous cases when a defendant has Asperger's Syndrome.

(iv) Guidance and recommendations for new rules in the family courts regarding vulnerable witnesses and parties

At the invitation of the President of the Family Division, Sir James Munby, I was a member of the Vulnerable Witnesses & Children Working Group (2015). My article (Cooper, 2014b) was cited in the report and I, along with others, was specially acknowledged for assistance to the group. Following on from this report, draft rules and a practice direction for vulnerable witnesses and parties (Munby, 2017), including provision for ground rules hearings, are under consideration.

I also instigated and participated in the drafting of the only vulnerable witness and party guidance currently available for family court practitioners: Toolkit 13: Vulnerable Witnesses and Parties in the Family Court - Available at https://www.theadvocatesgateway.org/images/toolkits/13-vulnerable-witnesses-and-parties-in-the-family-courts-2014.pdf, accessed 8 June 2017

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(v) Ground Rules Hearings

I devised the ground rules approach in the intermediary classroom (Cooper et al., 2015). Building on my earlier research (Cooper, 2009, 2011a, 2012a), my research findings and recommendations (Cooper, 2014a) directly led to the introduction of rules on ground rules discussions or hearings. Criminal Procedure Rule 3.9 (7) on ground rules hearings was induced (Cooper et al., 2015). I help draft this rule. Ground rules hearings have been referred to positively in numerous cases in criminal and family court judgments (for example *Re X (A Child)* [2011] EWHC 3401 (Fam), at [13] and *R v RL* [2015] EWCA Crim 1215, at [7 & 10]). The ground rules approach has now also been endorsed in Northern Ireland (Cooper & Allely, 2017) by the Court of Appeal in *Galo v Bombardier Aerospace UK* [2016] NICA 25, at [53]. Ground rules hearings are included in the Criminal Practice Directions 2015 and the Equal Treatment Bench Book (Judicial College, 2013).

I author the Ground Rules Hearings toolkit and checklist on The Advocate's Gateway (see below).

(vi) The Advocate's Gateway ('TAG')

In 2012, I co-founded The Advocate's Gateway, a free public resource to assist in the fair handling of cases involving vulnerable witnesses. The work is supported by the Council of the Inns of Court. My contribution is and always has been 'pro bono'. I have led the project and its supporting team of collaborators since its inception and I write/oversee the writing of research-based guidance known on the site as 'toolkits'.

The Advocate's Gateway has been endorsed by major organisations and senior judges in England and Wales and in other jurisdictions. For instance, the Vice-President of the Court of Appeal in *R v Lubemba; R v JP* [2014] EWCA Crim 2064, at [40], said that toolkits "provide excellent practical guides and are to be commended. They have been endorsed by the Lord Chief Justice in the Criminal Practice Directions…The aim of the training,

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which all judges who try cases involving vulnerable witness are expected to undergo, echoes the aim of the Toolkits."

The Criminal Practice Directions [2015] recommends the use of the toolkits as does the Crown Prosecution website guidance on 'Special Measures' - Available at http://www.cps.gov.uk/legal/s_to_u/special_measures/, accessed 27 April 2017.

Mr. Justice Charles also recommended use of The Advocate's Gateway in the 2017 guidance on the participation of vulnerable people on the Court of Protection - Available at
http://www.familylaw.co.uk/system/froala_assets/documents/1245/Practice_Guidance_Vulnerable_Persons.pdf Accessed 27 April 2017. I helped draft this guide.

TAG toolkits are recommended in the Equal Treatment Bench Book (Judicial College, 2013) - Available at https://www.judiciary.gov.uk/publications/equal-treatment-bench-book/, accessed 8 June 2017.

Scotland

The High Court of Justiciary Practice Note (No. 1 of 2017) Taking of evidence of a vulnerable witness by a Commissioner issued in 2017 recommends The Advocate's Gateway - Available at http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts---practice-note---number-1-of-2017.pdf?sfvrsn=4, accessed 27 April 2017.

Europe

Toolkits were used in 2016 at a training event in Budapest.

"The Advocate's Gateway toolkits featured at a 3 day 'Train the Trainers' event hosted by the Mental Disability Advocacy Centre at DLA Piper, in Budapest, Hungary. The training, part of an EU wide project on innovating European Lawyers to Advance the Rights of Children with Disabilities, was attended by participants from across the EU, including

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lawyers and NGOs and Human Rights organisations." - see http://www.theadvocatesgateway.org/news, accessed 14 April 2017.

Australia

In 2016 in New South Wales I conducted a wide-ranging awareness raising programme of professional development, including sharing knowledge about The Advocate's Gateway, for police officers, family social workers, intermediaries, lawyers and judges. Since then, the feedback from the Department of Justice (New South Wales) has been very positive.

> In New South Wales (NSW) TAG has been of immense value in the development and implementation of the recent Child Sexual Offences Evidence Pilot. The pilot commenced on 31st of March this year and will run for three years. It is currently in two District Courts, Sydney (Downing Centre) and Newcastle.
>
> Professor Penny Cooper (Chair of The Advocate's Gateway) was requested by the NSW Government earlier in this year to develop and deliver training for witness intermediaries and author a procedural guidance manual for them. There are currently 52 witness intermediaries in the NSW database. The team at Victims Services match referrals from Police and Courts with appropriately skilled intermediaries. They also receive referrals from four Child Abuse Squad (Police) locations across Sydney and Newcastle.
>
> Since 31st of March, 142 referrals have been received to Victims Services from Police, and they have been able to match 87% of these with witness intermediaries. Due to the nature of the investigation process, there are occasions where Police are required to interview within three hours of a report being made; the majority of those that Victims Services fail to match are due to the urgency of the interview and difficulty getting an Intermediary out in time. As a result, TAG resources, and in particular the toolkits, have been invaluable and have been used extensively. This has been the case with witness intermediaries and the legal fraternity and other project stakeholders.
>
> In the very first pre-recorded hearing with a witness intermediary, the Judge recommended Defence Counsel visit the TAG website and peruse the resources, particularly the training video 'A Question of Practice'.
>
> Victims Services at the New South Wales Department of Justice said; 'TAG is a brilliant resource for any jurisdiction seeking to improve the justice process for vulnerable

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witnesses.' - Available at http://www.theadvocatesgateway.org/news, Accessed 14 April 2017.

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