



The Inns of
Court College
of Advocacy

CROSS-EXAMINING CHILDREN AND VULNERABLE PEOPLE – RADICAL CHANGE

Lynda Gibbs QC (Hon)

**Young Commonwealth Lawyers Association
Masterclass Series Part 2**





The Inns of
Court College
of Advocacy

**What was the
impetus for change
in England & Wales?**



ANDREW NORFOLK

In 2010, journalist Andrew Norfolk started to investigate **on-street grooming of girls** in the Midlands & northern England. His first article was published in Jan 2011.

His work has prompted **3 major enquiries** and a national action plan.



FRANCES ANDRADE

In January 2013, Frances Andrade **committed suicide** the week after being cross-examined about historical sexual abuse during a Crown Court trial.

She described her experience as being **'raped all over again.'**



The Inns of
Court College
of Advocacy



The Inns of
Court College
of Advocacy



"Processes are to be judged not by their antiquity but by their efficacy in enabling us to protect what matters most"

Dr. Emily Henderson 2014



The Inns of
Court College
of Advocacy

What happens if we do not adapt?

**We do not
achieve best
evidence from a
child or
vulnerable
person**

**Juries cannot
assess the
credibility or
accuracy of a
vulnerable
person's evidence**

**Justice is neither
done nor seen to
be done**

**Special
measures
alone are not
enough to
ensure full
participation**

**Those least able
to cope are re-
traumatised**

Understanding Trauma

- Trauma is common across human experience; one-third of adults in England report having experienced at least **one traumatic event** during their lifetime.
- Traumatic events can include: seeing someone die or thinking you are going to die; being seriously injured and experiencing **sexual violence**.
- Trauma continues to impact people's lives **after the event**. A person may start to behave differently by displaying detachment, reckless behaviour, anger, hypervigilance or **apathy**.

Effects of trauma

- Psychological and physiological reactions occurring at the time of trauma can have an impact upon someone's ability to give a **coherent, consistent account** of their experiences.
- Post-traumatic symptoms can potentially affect **recall and consistency**.
- Victims experience feelings of **shame** which may result in an incomplete or **inaccurate account** of the circumstances surrounding an assault, for example.
- Cultural issues may have a **significant impact**, as may the stage of development, if the victim is a child.

Some landmark cases

- **R v Barker [2010] EWCA Crim 4** - undermining a child's credibility need not be a matter for cross-examination. It can be properly addressed after the child has finished giving evidence. **R v Wills [2011] EWCA Crim 1938 15** provides support for this.
- **R v Pipe [2014] EWCA Crim 2570** - issues pertaining to medical records need not necessarily be a matter for cross-examination if it is possible to identify areas of inconsistency and reduce those to written admissions or even agreed facts.
- **R v Sandor Jonas [2015] EWCA Crim 562** - Multi-handed cases should be carefully managed, and advocates should not typically be permitted to repeat questions in cross-examination that have already been put. Issues may well be divided up between the parties.

R v Lubemba [2014] EWCA Crim 2064



- This was a conjoined appeal heard together on the same point – **‘what measures could a trial judge legitimately take to protect a vulnerable [witness] without impacting adversely on the right of an accused to a fair trial.’**
- **Hallett LJ Vice President** - All witnesses including the defendant and defence witnesses should be **enabled to give the best evidence they can**. In relation to young and or vulnerable people this may mean **departing radically from traditional cross-examination**;
- It would be entirely reasonable for the trial judge **to invite the defence advocates to reduce their questions of the witness to writing in advance**.

S.28 Youth Justice and Criminal Evidence Act 1999

S.28 allows for pre-recorded cross-examination of vulnerable witnesses to **take place before trial**, regardless of the offence.

Vulnerable witnesses include all child witnesses, and any witness whose quality of evidence is likely to be diminished because they:

- are suffering from a mental disorder
- have a significant impairment of intelligence and social functioning
- have a physical disability or are suffering from a physical disorder

The witness gives an initial statement to the police, which is video recorded. When they are ready, the cross-examination is then recorded with defence and prosecution lawyers present. These recordings are played back during the trial itself, meaning the witness does not have to attend the trial in person.

Progress of S.28 YJCEA 1999



S.28 was partially available from **December 2013** - in 3 Crown Courts - for child witnesses under 16 or witnesses vulnerable due to physical or mental disability.

In January 2017, the provision was extended to **all child witnesses under 18**.

The service was then introduced for the first time, for **child and adult vulnerable witnesses**, to six additional Crown Courts.

In June 2019, it was extended to **adult complainants of sexual offences and modern slavery offences** in the three original courts offering s.28. This is an ongoing pilot.

During the course of April 2022, the reach of s.28 procedure will be extended to a further 5 court centres for those eligible under s.17(4) of the YJCEA 1999.

Special measures – Intermediaries – Defendants



C v Sevenoaks Youth Court – EWHC 3088 (3/11/09) - an application was granted on behalf of a juvenile Defendant on a charge of assault. The case was heard in the High Court on an application for permission to apply for judicial review. Paragraph 16 of the judgment of Openshaw J reads:

“I have already made clear that **there is no statutory power permitting the appointment of an intermediary for a Defendant**, but there may be some procedural power in the Criminal Procedure Rules. Criminal Procedure r 1.11 sets out the **overriding objective** to deal with criminal cases justly, which includes at (c) **recognising the rights of a Defendant, particularly under art 6 of the European Convention on Human Rights**. Furthermore, the court’s case management powers at r 3.10(b)(v) require the court to consider what arrangements are necessary to facilitate the participation of any person in the trial, including the Defendant. In an appropriate case this surely requires the appointment of an intermediary for the Defendant himself.”



The Inns of
Court College
of Advocacy

History of the training in England & Wales

2014 - Ministry of Justice (MOJ) indicated a need for mandatory training

September 2015 – 1st Pilot at the Old Bailey (London) by the pan-profession working group

2016 - 2nd Pilot Middle Temple with ICCA & HHJ Sally Cahill QC

2017-20 - National rollout via Inns, Circuits and Chambers

2021 - Family Law Bar Association (FLBA) new A&V Course

R v Rashid (Yahya) [2017] EWCA Crim 2

Advocates should undergo specific training before taking on such cases.

Communication

It is more than words. Advocates need to understand trauma and its impact on vulnerable people.

Hidden Disabilities

They can make the process of sequencing related events difficult.

Professional Competence

Understanding communication

Identifying vulnerability

The 20 Principles of Questioning



The Inns of
Court College
of Advocacy



1. GROUND RULES HEARING

Judge never relinquishes responsibility for approving questions.

2. IDENTIFY KEY ISSUES

Do not spend time working up to the key issues.

3. DRAFT QUESTIONS IN ADVANCE

This allows the advocates to check for misuse of tenses, poor drafting, overuse of 'did' questions.

4. RAPPORT

Do not exploit this opportunity or lull the vulnerable person or child into a false sense of security

5. PACE

Response times to questions will be slower. Young children need twice as long.

6. YOUR BEHAVIOR & 7. WATCHING FOR DISTRESS

Remember this is another traumatic event. Adopt a neutral stance and avoid reactions that may be misinterpreted.

Principles for Conduct



The Inns of
Court College
of Advocacy



The Inns of
Court College
of Advocacy

Thirteen Principles for Questioning

8.
SIGNPOST A NEW
TOPIC

9.
TELL THE
VULNERABLE
PERSON OR CHILD
THAT YOU ARE
GOING TO ASK
THEM QUESTIONS

10.
THINK ABOUT THE
ORDER IN WHICH YOU
WILL TAKE THE
EVIDENCE -
CHRONOLOGICALLY
OR IN A STRUCTURED
WAY

11.
AVOID
REPETITION

12.
AVOID
STATEMENTS
POSED AS
QUESTIONS



The Inns of
Court College
of Advocacy

Thirteen Principles for Questioning



13.

USE PLACES,
NAMES, OBJECTS
AND SUBJECTS –
AVOID PRONOUNS

14.

AVOID 'DO YOU
REMEMBER (DYR)'
QUESTIONS

15.

TAKE SPECIAL CARE
WHEN ASKING
ABOUT TELLING
SOMEONE ELSE

16.

EXERCISE CARE
WHEN ASKING
ABOUT DURATION,
WEIGHT, HEIGHT,
AGE AND SENSORY
IMPACT

17.

AVOID 'WHY'
QUESTIONS



The Inns of
Court College
of Advocacy

Thirteen Principles for Questioning

18.

AVOID 'TAG' AND
'LEADING'
QUESTIONS

19.

NO COMPOUND
QUESTIONS

20.

ASK
CONCISE/DIRECT
QUESTION

The MOJ has described the ICCA training as "both recognised and highly valued by relevant experts who work to support victims' rights and with organisations such as the NSPCC".

'One area of practice that is recognised to be largely improving, is advocates' ability to deal with young and vulnerable witnesses. The training provided to advocates about vulnerable witnesses and defendants, and the adaptations to court practice for vulnerable court users, now more routinely embedded in court procedures, are thought to have benefitted advocates'.

Judicial Perceptions of the Quality of Criminal Advocacy (October 2018)

Is it making a difference?

International acclaim

Training has started in Australia, USA, Northern Ireland, Scotland, Montserrat, Antigua, Turks and Caicos.

Masterclasses

For those with practices dominated by this type of work, we will deliver masterclasses focussing on trauma and identifying vulnerability.

Civil and Family Jurisdictions

Rollout is expected to reach other jurisdictions in 2022 - 23 and for advocates appointed to cross-examine on behalf of litigants in person.

**What does the
future hold?** ■

Questions



www.icca.ac.uk



the-inns-of-court-college-of-advocacy



@Inns_College