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Alleged perpetrators of abuse as litigants in person in private family law

The cross-examination of vulnerable and intimidated witnesses

Natalie Elizabeth Corbett and Amy Summerfield
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1. Summary

Policy background

The private family law system deals with issues that may arise following the breakdown of a family, including those related to arrangements for children and finances. Currently in private family law proceedings, litigants in person – individuals who represent themselves – are able to cross-examine other parties in the case, including vulnerable or intimidated witnesses. Vulnerable witnesses may include individuals with a mental health issue or physical disability, and an intimidated witness refers to people whose evidence is likely to be diminished due to fear or distress. The situation may arise, therefore, where an alleged perpetrator of abuse can cross-examine their alleged victim.

The family judiciary has an existing range of case management practices to deal with these cases, such as relaying the questions to the vulnerable witness on behalf of the litigant in person so that direct cross-examination is not necessary, as well as using screens or video links. The President of the Family Division and others have, however, raised concerns about the current protections available for vulnerable witnesses in the family court. This issue has been further highlighted since legal aid reforms introduced in April 2013 removed most private law cases from the scope of legal aid and increased the proportion of litigants in person in the family court.

Aims and methodology

This research aimed to complement the work of the Family Procedure Rule Committee, which has been considering whether and how to implement the recommendations of the President's Children and Vulnerable Witnesses Working Group to provide additional protections for vulnerable witnesses. Due to the lack of routinely collected data on this issue, information was collected from all courts that hear private law cases in England and Wales between March and May 2015 to estimate the prevalence of cases involving the actual or potential direct cross-examination of a vulnerable witness by an alleged perpetrator of abuse. This information is outlined in this report and was used to inform this qualitative research study. The study was designed to explore how judges currently manage these cases and to establish what, if any, further provisions could be considered to support them in doing so. It also sought to understand the role of external organisations that may support vulnerable witnesses or litigants in person who are alleged perpetrators of abuse.

This report presents the findings from qualitative data collected between August and October 2015. Twenty-one semi-structured interviews were undertaken with members of the family

judiciary, including 15 judges who identified themselves as having direct experience of managing these cases. A workshop was held with external organisations that have experience of supporting vulnerable witnesses or litigants in person, and may be able to apply some of the findings and implications of this research to inform their own guidance or practice.

Findings

Current provisions for the management of cases with vulnerable witnesses

Judicial interviewees were aware of a variety of techniques to manage these cases. These included facilitating the direct cross-examination of a vulnerable witness by an alleged perpetrator of abuse, or judges relaying questions to the vulnerable witness on behalf of the litigant in person. The judiciary raised concerns that employing such practices may lead to questions about their impartiality.

Screens to separate the parties and video links to enable evidence to be given from outside the courtroom were also used, although access to these measures was perceived as inadequate and inconsistent. Her Majesty's Courts & Tribunals Service (HMCTS) legal advisors or professional McKenzie friends (someone who is paid to assist a litigant in person in court) were used for cross-examination, as were Cafcass guardians or children's solicitors, although the latter two were deemed less appropriate. Judicial confidence in facilitating the direct cross-examination of a vulnerable witness varied based on their seniority and experience. Judges called for clearer guidance on appropriate case management practices in these cases.

The role of external organisations

The judges interviewed felt that court staff or Cafcass were more appropriately placed than them to signpost relevant external organisations for support. Organisations such as the Personal Support Unit for help navigating the court process, and Citizens Advice for legal advice, were highlighted as particularly positive examples of support for vulnerable witnesses and alleged perpetrators of abuse. It was suggested that some areas of support currently defined as legal advice, such as advising which forms to complete, could be sensibly redefined as 'legal help'. This would enable a wider range of support services to provide this assistance and allow litigants in person to make better use of the free legal advice available to them.

Concerns were raised that some perpetrators would wish to cross-examine their victim as a further form of abuse, which was perceived as unacceptable. Judges were more willing to encourage litigants in person to seek legal representation than to signpost support organisations. This was normally done by directing them to the Bar Pro Bono Unit. The criteria for gaining Exceptional Case Funding for legal representation were viewed as too narrow. Other forms of external support included duty solicitor schemes or Law Centres whose remit is to provide one session of face-to-face advice. Workshop representatives highlighted that these were no longer being used as intended and were being visited repeatedly by individuals with complex needs.

Future solutions

Both the judiciary and representatives from external organisations proposed that public funding should be available to provide an advocate for the purposes of cross-examination to prevent an alleged perpetrator of abuse cross-examining a vulnerable witness. Whilst some assessed that an advocate should be available in all cases where there was the possibility for this type of cross-examination, some judges felt that due to the variable nature of both the cases and the individuals involved, it was important to apply discretion with their own case management practices. Several factors were taken into account by judges when considering when a paid advocate may be required. There was general consensus that additional provisions were required in cases of the cross-examination of intimidated witnesses in severe cases of sexual or physical abuse. In other circumstances – including cases where an individual was deemed vulnerable because they had a physical disability or learning difficulty – the judiciary may consider they are able to effectively facilitate a cross-examination without an advocate.

Other solutions suggested developing an inquisitorial approach within the family justice system and for judges to be trained accordingly. The research also suggests there is scope to strengthen the links between the judiciary, the courts, and external organisations. This may involve closer collaboration between the judiciary and the Bar Pro Bono Unit to enable them to prioritise cases with highest need, or integrating professional McKenzie friends further into the court process.

Representatives from external organisations proposed the option of introducing an assessment of vulnerability for all witnesses in private family law cases. This assessment would outline the provisions required to protect the witness, ensuring needs are met and assisting the judiciary in managing these cases.

2. Background and project aims

2.1 Policy context

The private family law system deals with the issues that may arise following the breakdown of a family, such as parents making arrangements for their children, or the separation of financial assets. Currently in private law proceedings, litigants in person – individuals who represent themselves – are able to cross-examine other parties in the case, including vulnerable or intimidated witnesses. Vulnerable witnesses may include individuals with a mental health issue or physical disability, and an intimidated witness refers to people whose evidence is likely to be diminished due to fear or distress (full definitions are provided later in this section). Current practice therefore includes the possibility for an alleged perpetrator of abuse to cross-examine their alleged victim. This is illegal in criminal courts under the Youth Justice and Criminal Evidence Act (1999), where an advocate is provided for the purposes of cross-examination. There is currently no such legislation in the family court. The judiciary has an existing range of case management practices to manage these cases as appropriate, such as relaying the questions to the vulnerable or intimidated witness on behalf of the litigant in person. Administrative arrangements such as screens to physically separate the parties, or video links to enable evidence to be given outside of the courtroom, as well as intermediaries who help vulnerable witnesses communicate during proceedings, can also be provided by the court.

The President of the Family Division has raised concerns about the lack of protections available for vulnerable or intimidated witnesses in the family court, and multiple judgments have dealt with these issues on a case-by-case basis.[1] Concerns have been raised that this issue has been exacerbated since the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) came into force in April 2013, which removed most private family law cases from the scope of legal aid and increased the proportion of litigants in person in the family court.[2] Legal aid remains available for cases where there is evidence of domestic abuse, but this applies only to the party who has alleged to have experienced abuse and not the alleged perpetrator. As such, in cases where there is a history of domestic abuse, it can result in one party being represented through legal aid, and the other litigating in person.

1 See *Re H and L and R*; *Q v Q, Re B (a child) and Re C (a child)* and *Re K and H*.

2 The volume and proportion of closed cases where neither party has recorded legal representation has increased post-LASPO. In July to September 2016, neither the applicant nor respondent had legal representation in 33% of private law cases, an increase of 12 percentage points from July to September 2013. See https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2016.

Definition of a vulnerable witness

For the purposes of this research project, a vulnerable witness was defined as:

- Someone who was under 17 years of age at the time of the hearing;
- Someone who suffers from a mental disorder within the meaning of the Mental Health Act (1983);
- Someone who has a significant impairment of intelligence and social functioning; or,
- Someone who has a physical disability or disorder.

An 'intimidated witness' was defined as someone whose quality of evidence is likely to be diminished due to fear or distress, which included alleged victims of abuse. For example, this might include being unable to fully describe their experiences in court, meaning their evidence could not be effectively assessed. Definitions of domestic abuse are broad and can vary. For the purposes of this research project domestic abuse included physical, emotional, sexual or financial abuse. Female genital mutilation (FGM)[3] and forced marriage were also considered a form of domestic abuse under this definition. Throughout this report the term 'vulnerable witness' will be used to refer to either a vulnerable or intimidated witness unless otherwise specified.

2.2 Collection of management information

There are no routinely collected data on the number of cases where a litigant in person can cross-examine a vulnerable or intimidated witness, and therefore there is limited understanding of the extent of this issue. To address this, Ministry of Justice Analytical Services (MoJ-AS) collected quantitative management information over a three-month period, between March and May 2015, from all courts in England and Wales that hear private family law cases. As part of this exercise, members of the family judiciary completed a short form for each hearing that involved the actual or potential cross-examination of a vulnerable or intimidated witness by a litigant in person accused of domestic abuse (see Appendix A). This management information was collected to provide a broad estimate of the prevalence of these cases in private family law and as the basis for the qualitative research project.

[3] FGM is intentional injury to, or alteration of, the female genital organs for non-medical reasons.

Findings from the management information

During March to May 2015, 124 relevant hearings were identified where there was the actual or potential cross-examination of a vulnerable or intimidated witness by a litigant in person accused of domestic abuse. This was based on a response rate of 89 per cent of all courts that hear private family law cases. In 34 of these 124 hearings, the litigant in person cross-examined a vulnerable witness, either directly or indirectly. The majority of vulnerable witnesses in these hearings were intimidated witnesses and the type of domestic abuse was most often recorded as physical abuse. Cases were usually managed through judges relaying the questions, or direct questioning by the litigant in person. The full breakdown of findings from hearings where this issue arose is outlined in Tables 2.1 to 2.3.

Table 2.1 Types of witness vulnerability as recorded in management information[4]

Type of vulnerability	Number of hearings
Intimidated witness	117
Under 17 at the time of the hearing	3
Had a mental disorder under Mental Health Act	3
Had a significant impairment of intelligence and social functioning	2
Had a physical disability	1

Table 2.2 Types of domestic abuse as recorded in management information[5]

Type of domestic abuse	Number of hearings
Physical	110
Emotional/psychological[6]	89
Sexual	30
Financial	20
Forced marriage	1
Female genital mutilation (FGM)	1

[4] Table 2.1 relates to hearings where there was the potential for cross-examination. For each hearing, multiple types of vulnerability could be recorded. Due to this, the figures do not sum to the total number of hearings.

[5] Table 2.2 relates to hearings where there was the potential for cross-examination. For each hearing, multiple types of vulnerability could be recorded. Due to this, the figures do not sum to the total number of hearings.

[6] The data collection form originally contained a 'psychological abuse' category but anecdotal evidence suggested that judges conflated this with emotional abuse and, almost unanimously, ticked both when either occurred. The number of hearings where psychological abuse was indicated was 87.

Table 2.3 Types of cross-examination as recorded in management information[7]

Type of cross-examination	Number of hearings
Judge relaying questions	25
Direct questioning	15
Screen used	7
Legal advisor as third party questioner	4
McKenzie friend as third party questioner[8]	1
Video link used[9]	1

2.3 The qualitative research study

Following the collection of management information, MoJ-AS undertook a qualitative research study to explore further how the judiciary manage these cases, and the suitability of current provisions to ensure fairness to both parties and the protection of vulnerable witnesses in the family court. This research aimed to complement the broader work of the Family Procedure Rule Committee (FPRC), which has been considering whether and how to implement the recommendations of the President's Children and Vulnerable Witnesses Working Group.[10] During the data collection period of this research the FPRC was consulting on draft rules to provide some additional protections for vulnerable witnesses and parties in family proceedings.

Research aims

This report is structured around the aims of this qualitative research project. These were:

1. To explore how judges currently manage cases with litigants in person and vulnerable witnesses, and identify whether there are any gaps in provision in the family courts.

2. To establish what (if any) further provisions could be considered to support the judiciary in managing these cases fairly and ensure the protection of vulnerable witnesses.

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7 Table 2.3 relates to hearings where cross-examination took place. For each hearing, multiple types of cross-examination could be recorded. Due to this, the figures do not sum to the total number of hearings where a cross-examination took place.

8 A McKenzie friend may assist a litigant in person in court. They do not have to have had any legal training. They are often split into professional McKenzie friends, whose assistance is paid for by the litigant in person, or non-professional McKenzie friends who will usually be a friend or family member of the litigant in person.

9 In two known instances video links were offered but refused by the vulnerable witness and in one case a screen was also refused. This information was not requested and was volunteered by the judge. We do not therefore have any further details on this.

10 Available at: https://www.judiciary.gov.uk/wp-content/uploads/2015/03/vwcwg-report-march-2015.pdf.

3. To explore the role of external organisations that support (or could support) vulnerable witnesses or alleged perpetrators of abuse acting as litigants in person.

3. Methodology

This was a small-scale qualitative research study, based on 21 judicial interviews and a research workshop with external organisations. All data were collected between August and October 2015.

3.1 Judicial interviews

Judicial interviews were conducted to address aims one and two of this research: to explore how judges currently manage these cases, and identify whether there are any gaps in provision in the family courts, as well as to establish what (if any) further powers could be considered to support the judiciary in managing these cases fairly, whilst ensuring the protection of vulnerable witnesses. Approval was gained from the Judicial Office to conduct this element of the study.

Twenty-one telephone interviews were undertaken with members of the judiciary and magistracy (hereafter referred to collectively as 'judiciary'). These were semi-structured and each lasted approximately 30 minutes. Sampling was based on the exercise outlined in section 2.2, to collect management information on hearings that had the potential for cross-examination of a vulnerable witness by an alleged perpetrator of abuse. When judges completed these forms they were given the option of providing their contact details to take part in this research. The population from which the sample was then drawn was therefore self-selected. An interview guide was used for all interviews (see Appendix B).

Sampling strategy

Fifteen interviews were undertaken with judges who had identified themselves as having direct experience of facilitating the cross-examination of vulnerable witnesses by alleged perpetrators of abuse. Six interviews were undertaken with judges who were not known to have direct experience. Throughout the research planning, the option to undertake additional interviews was available if required to reach theoretical saturation.[11] This was assessed as unnecessary after the initial interviews were complete.

[11] Theoretical saturation in qualitative research is when you continue to gather data until no new themes are emerging.

Sample for judges with direct experience

Members of the judiciary who had direct experience were selected for interview using a quota sample.[12] The initial sampling frame of judges who, by providing their contact details, had consented to be approached for the research, was then further restricted to those who had responded to Q4a on the form. This asked how the litigant in person cross-examined the vulnerable witness. If this question was left blank, the judge was removed from the sampling frame. Any duplication of judges was also removed, for example where one judge had filled in two forms based on two different hearings and had therefore offered contact details twice. Judges were also removed if they had provided their name but no contact details. Fifteen judges were required for the initial quota sample and all remaining eligible judges were maintained as a backup in case any of those originally selected were unavailable for interview, or were no longer willing to take part. These judges are not included in the quota samples below.

The quota sample was not designed to be fully representative, but to ensure that a wide range of characteristics and experiences were reflected in relation to types of domestic abuse, case management techniques and vulnerability. The numbers in the sample in relation to these criteria are outlined in Tables 3.1 to 3.3. Most types of domestic abuse were either physical or emotional and cases were largely managed through the judge relaying the questions or direct questioning by the litigant in person. The majority of vulnerable witnesses in the sample were defined as vulnerable because they were intimidated. When similar characteristics or situations were reflected from multiple judges, the first judge to occur in the sample was selected for consistency.

Whilst the interviews initially focused on the case identified in the management information, judges were also encouraged to discuss other cases of relevance which they had experienced. This meant that the cases discussed within the qualitative data from the interviews far exceed the numbers in Tables 3.1 to 3.3.

The quota sample ensured the following types of domestic abuse were included[13]:

[12] Quota sampling splits a population into subsections and selects required amounts from each subsection to obtain participants with varying characteristics.

[13] These do not sum to 15 as some hearings included multiple forms of domestic abuse.

Table 3.1 Types of domestic abuse in original quota sample

Type of domestic abuse	Number of hearings
Physical	12
Emotional/psychological[14]	12
Financial	6
Sexual	4
Forced marriage	1
Female genital mutilation (FGM)	1

The quota sample ensured the following techniques of dealing with the cross-examination were included[15]:

Table 3.2 Types of cross-examination in original quota sample

Type of cross-examination	Number of hearings
Judge relaying questions	9
Direct questioning	8
Screen used	3
Questions approved in advance	2
McKenzie friend as third party questioner	1
Legal advisor as third party questioner	1
Video link used	1

The quota sample also included the following vulnerabilities[16]:

Table 3.3 Types of witness vulnerability in original quota sample

Type of vulnerability	Number of hearings
Intimidated witness	15
Had a mental disorder under Mental Health Act	1
Had a significant impairment of intelligence and social functioning	1
Had a physical disability	1
Under 17 at the time of the hearing[17]	0

[14] As outlined in section 2.2, emotional and psychological abuse were categorised separately during the initial collection of management information. However, for the research study, emotional and psychological abuse were dealt with collectively.

[15] These do not sum to 15 as some judges used multiple techniques.

[16] These do not sum to 15 as some hearings included people with multiple vulnerabilities (or multiple people with single vulnerabilities).

[17] There were no judges who had direct experience of facilitating a cross-examination of an individual under the age of 17 by an alleged perpetrator of abuse that were eligible for inclusion in the quota sample. However, during the interviews judges spoke of other cases where this circumstance did arise.

Sample for judges with no known direct experience

Sampling for judges who had not identified direct experience was done using random sampling. As for those with direct experience, duplicate or incomplete contact details were removed from the sample population. All eligible members of the judiciary that had consented to be contacted for the research were then allocated a number through Excel's random number generator. These were sorted in ascending order with the top six being selected for initial approach. Others were kept as a backup in case any of the originally selected six were unavailable for interview or were no longer willing to take part in the research. One judge originally approached for interview declined to take part on the basis of lack of experience; all others agreed to participate. During the interviews it became apparent that all judicial interviewees had some direct experience with these cases. This meant that the interviews were unable to capture the awareness of relevant case management techniques of judges who had not experienced this situation.

3.2 Workshop with external organisations

A workshop with external organisations was conducted to address aim three of this research: to explore the role of external organisations that support (or could support) vulnerable witnesses or alleged perpetrators of abuse. The workshop considered the organisations' experiences of supporting parties in these cases and their awareness of the support available. Discussions were also held about how organisations could further support these parties, or work with the family justice system to do so. The workshop was held in central London in October 2015. It lasted just over 90 minutes. One senior representative was identified for each organisation and was invited by email. Where they were unable to attend, they were encouraged to nominate a colleague who could attend in their absence. The workshop was semi-structured and facilitated by two Ministry of Justice social researchers. See Appendix C for the workshop guide.

Selection of organisations

The selection criteria for the workshop were twofold. Firstly, the organisation had to have sufficient direct experience or contact with vulnerable witnesses or litigants in person to be able to contribute meaningfully to the discussion. Secondly, they needed to be in a position to be able to apply some of the findings and any implications from the research to their guidance or practice to support either vulnerable witnesses or litigants in person in or out of court. Based on these criteria, the following organisations were invited:

- Association of Lawyers for Children

- Bar Council
- Bar Pro Bono Unit
- Children and Family Court Advisory and Support Service (Cafcass)
- Citizens Advice
- Family Law Bar Association
- Law Society
- LawWorks
- Personal Support Unit
- Refuge
- Resolution
- SafeLives
- The Society of Professional McKenzie Friends

Details of the role of each of the invited organisations are contained in Appendix D. The Bar Council and Family Law Bar Association sent a joint representative and Citizens Advice were unable to attend on the day. There were therefore 11 workshop participants in total.

Due to the wide range of organisations that may meet these criteria, only national organisations were included. Local organisations may also provide support for vulnerable witnesses or litigants in person and be able to apply some of the findings from this research.

3.3 Ethical considerations

Informed consent was gained verbally from all participants. This was done by telephone for judicial interviews and face-to-face for the workshop with external organisations. Participants' names have not been used in this report. Instead, workshop participants are referred to by their organisation, whereas judges are referred to by number.[18]

Research participants all dealt with these issues in their daily professional lives. All participants were told that they could move on from any individual questions that they did not wish to answer, and participation was entirely voluntary.

3.4 Analysis and presentation of findings

The interviews and workshop were audio recorded and then transcribed verbatim. All coding was done manually and thematic analysis was used. Some codes were formed from the

[18] Judges are numbered 1–21. Judges 1–15 had identified direct experience based on the previously collected management information. Judges 16–21 did not.

vocabularies of the participants; others were chosen as typical representations of themes from the qualitative data.

Findings in sections 4 to 6 are organised by key theme. Verbatim quotes are used throughout the report to illustrate themes. All quotes included from workshop participants are their own, and do not necessarily reflect the official views of any of the organisations which they represent.

4. Current provisions for the management of cases with vulnerable witnesses

Current provisions for the management of cases with vulnerable witnesses and litigants in person were considered in relation to cases that the judges had presided over. The quote below describes a typical case discussed by judicial interviewees, which can be considered in relation to the findings in this section. Throughout the interviews, judges drew on a range of experience of managing cases with the potential for cross-examination of vulnerable witnesses.

> *The case that I was dealing with was a fact-find hearing within the context of private family law proceedings. The parties were young but the respondent mother wasn't under 17 … but she'd made very serious allegations about abuse that she'd experienced at the hands of the father… She made allegations that she had been… raped by him and that he had controlled her, he had punched her in the face, there were about 12 or 13 various allegations but the rape allegation was the most significant. She presented to me as very distressed by the proceedings, very naive and very young in her attitude and experience, and I was concerned because she had the benefit of representation but the father did not, and I was presented with a situation where he would be potentially cross-examining her about the allegations that she had made.* (J11)

4.1 Judicial case management

Direct cross-examination

Some judges expressed a desire to allow direct cross-examination of the vulnerable witness by the litigant in person wherever possible. This was partly due to a perceived 'right' of the litigant in person to cross-examine if they wish, and partly due to a reluctance from the judiciary to fulfil that role themselves. This included instances of cross-examination of an alleged victim of domestic abuse by the alleged perpetrator, if the abuse was seen to be 'low level'. A detailed explanation of the perceived threshold of 'low level' abuse is included in section 6.1.

> *They wanted to present their own case and I think you've got to make a judgement call… I've had some cases where I've had cross-examination which has been absolutely fine… and, in my experience, it's just a case of let it go initially to just see how it pans out and then if it becomes too difficult… I think you*

> *are left with having to intervene but you're wrong, in my view, for you to take the stance at the beginning that 'I am going to deal with this case'.* (J1)

Other judges took an opposing stance, believing that court was a generally stressful experience for the parties, without the additional stressors of cross-examination. When considering the facilitation of direct cross-examination, judges raised issues including litigants in person not allowing the witness to answer, or approaching them in a threatening manner. Due to previous experience of inappropriate behaviour from litigants in person, some judges were now reluctant to allow direct cross-examination by alleged perpetrators of abuse.

> *So, as far as questioning is concerned, the witness herself was very distressed… he wasn't prepared to ask a single question so he would ask multiple questions as part of one question… He then refused to wait for the witness to finish their answer to any part of the question before he would then start another question… I also had to give him continual warnings in relation to approaching the witness and preventing the witness from answering.* (J9)

Splitting the type of cross-examination between direct cross-examination by the litigant in person and judicial questioning on their behalf, was raised by some judges as a tool to manage the case. The questions were requested from the litigant in person in advance of the hearing and then divided depending on the topic. General questions that were unlikely to cause undue emotional stress were asked by the litigant in person, whereas questions about the actual allegations themselves were put forward by the judge. This approach was based on a perceived 'right' by the litigant in person to ask questions directly if they were appropriate and they wished to do so, and hesitancy from judges to put questions themselves to a vulnerable witness if it was not absolutely necessary.

Judicial questioning

Many judicial interviewees spoke of their own experiences of putting the questions to the vulnerable witness on behalf of the litigant in person, but concerns were raised about this practice. Concerns mainly centred on the importance of retaining, and appearing to retain, judicial impartiality. Many judges saw this form of intervention as a last resort but felt that they had no choice when funding could not be found for representation, and the vulnerable witness was unable to give their best evidence due to fear. In relation to private family law hearings where allegations of FGM or forced marriage were raised, judges expressed particular concerns about putting questions themselves to the alleged victim but felt that

there was no acceptable way to facilitate a cross-examination by an alleged perpetrator without acting as the intermediary in these cases. This is described further in section 6.1.

Judges said that they occupied an awkward position when putting questions to a vulnerable witness, and their perspective on whether it was acceptable to be inquisitorial and interventionist influenced their technique. Interviewees stated that due to their impartiality they could not 'ask questions like an advocate would ask questions', which would include the intention to undermine the opposing party. This was believed to disadvantage the litigant in person, who is likely to have been more challenging in their questioning – either themselves or through a legal representative. Judges also felt the need to reassure the vulnerable witness that they were not 'on the side of' the alleged perpetrator when they were putting questions on their behalf. Some admitted openly to the parties that this was an unfortunate balancing act. Judges perceived that this unique situation left both parties feeling neglected and possibly questioning the judge's impartiality. One judicial interviewee stated that 'justice was done, but whether it was seen to be done to the extent I would have liked is a different matter'.

> *I was holding back, I think. I was asking the right questions but I wasn't being as direct as I think I would have been if I'd been standing there alongside the father… and there are limits to what you can do, you can't keep shifting your guise or your colours like a chameleon, you've still got to be pretty judicial and neutral about it but you do have to try and then step to one side for a moment and think well, what are the points I want to raise?* (J5)

In some instances, judges identified something noteworthy in the case bundle[19] that the alleged perpetrator of abuse had not identified themselves. Interviewees said that these situations caused particular issues for the judge as there was no certainty surrounding the acceptability of referring to the point in questioning. Not doing so could disadvantage the litigant in person and doing so could disadvantage the vulnerable witness. One judge opted to question on such a topic, based on their judicial desire to have an explanation, and their belief that it was important to the case.

> *So in the end maybe I overstepped the mark, I don't know. But that's what I decided to do. It put me in a difficult position.* (J19)

[19] A bundle contains copies of all the relevant documents needed by the parties or their legal representatives for the case.

There was a general consensus that a judge facilitating the cross-examination by putting questions to the witness on behalf of the litigant in person lengthened proceedings. This was due to the judicial time required to read questions, assess their suitability, or reword them for appropriateness. Judges also needed to have more thorough knowledge of the bundle, clarify what the litigant in person meant and ensure that they understood the case's key points. The time spent reassuring the vulnerable witness and any objections to this approach, or concerns about judicial impartiality, could further lengthen proceedings. Judges also raised concerns that they had to spend more time putting the questions to one party, and therefore less time assessing and analysing the evidence during the hearing.

Receiving the questions in advance

Whether used in conjunction with judicial questioning as a case management technique, or alongside direct questioning by the litigant in person, requesting the questions in advance from the alleged perpetrator was viewed as a useful judicial tool. The effectiveness of this was perceived to be dependent on characteristics of the litigant in person. Interviewees believed that a well-educated, mature and sensible individual may be capable of constructing their own, non-aggressive and appropriate questions. However, an individual with low emotional maturity, or one who is determined to intimidate a vulnerable witness, may not be relied upon to do so. Further, identifying the core issues of a case and determining questions in advance for cross-examination was viewed as difficult even for experienced litigators, such as senior barristers, and was therefore felt to present substantial challenges for litigants in person.

Once formulated, questions would then be approved by the judge and the legal representative for the vulnerable witness, where there was one. It was emphasised that legal representatives were not allowed to disclose questions to their client, so that vulnerable witnesses were not put at an advantage. This was also perceived as important so that the witness's reactions could still be gauged in the courtroom, which might provide indications of truth or evidence of fact. However, when both parties were litigants in person, this meant the judge had to approve the questions in isolation, and there was no one to object to a question on behalf of the vulnerable witness.

The questions might also be modified by the judge if they were phrased in an oppressive or aggressive manner, or removed from questioning entirely if they were inappropriate. Some judges were concerned that due to the litigant in person's lack of representation, questions might not be constructed in a way to challenge adequately the vulnerable witness, which could be detrimental to the litigant in person's case.

Judicial confidence, guidance and training

The main form of advice and guidance the judicial interviewees took when deciding how to handle a sensitive case was informal advice from judicial colleagues. This was seen as particularly beneficial in large courts with experienced judges whose knowledge could be sought. Judges often approached more senior colleagues, and among District Judges, their Designated Family Judge was highlighted as a positive source of information. Others referred to previous case law to determine how these issues had been dealt with, including cases that the President of the Family Division had presided over. The Working Group Paper and judicial guidance were also referenced,[20] particularly by the more senior of the judicial interviewees, and the judicial intranet was consulted for detail on relevant cases and research.

Judges who dealt with these issues regularly spoke more positively of their confidence in their decisions and case management strategies. The regularity with which judges said they dealt with these cases depended on their judicial tier, as judges in higher tiers are regularly allocated more sensitive or complex cases.

According to our interviewees, another factor that increased judicial confidence was the judge's background. For example, those who had practised as a solicitor or barrister in family law spoke more confidently of their ability to handle these cases. Judges who dealt with criminal cases as well as family cases felt they had more experience with vulnerable witnesses, and therefore also expressed confidence. Importantly, individuals who had not had experience of cross-examining vulnerable witnesses before joining the judiciary felt that training in how to deal with these cases was lacking. Whilst this was understood to be because cross-examination was not part of the routine role of a judge, many interviewees expressed concern that they had not been offered opportunities for training in this area, and wanted to find out more about what case management tools were available to them. General training in obvious pitfalls to avoid when managing these cases was also raised as a way of enabling judges to increase their confidence whilst not jeopardising their impartiality. It was noted that judges have training opportunities on general issues relating to litigants in person, but nothing specifically relating to the cross-examination of vulnerable witnesses.

[20] There is no single document providing guidance for family judges on how to manage the cross-examination of vulnerable witnesses by alleged perpetrators of abuse. However, guidance such as Part 22 of the Family Procedure Rules concerning evidence and special measures in the family court is available to judges. Available at: http://www.justice.gov.uk/courts/procedure-rules/family/parts/part_22.

As I say, through the reading that I've done, I know there are all sorts of different discussions about approaches but I think a lot of us, particularly at District level, are perhaps not clear on which avenue we should be proceeding with really. (J14)

Use of other third party questioners

The use of Cafcass[21] officers, guardians and HMCTS legal advisors as cross-examiners was raised by workshop participants and judicial interviewees. There was a general consensus that Cafcass staff, or a child's solicitor, would be inappropriate for this purpose because their role is to represent the child. They felt, for example, that having to cross-examine a mother abused by an aggressive father may harm their independence.

I wouldn't have thought that would happen because it would be inappropriate, and it's not something they're trained to do, so how could they do that? They're trained to represent the child and they're social workers. They're not solicitors. (Cafcass workshop representative)

Cafcass also need to maintain a working relationship with both parties, and their ability to do so may be restricted by having to put questions to one party on behalf of another. Nonetheless, one judge spoke of using this technique effectively in a recent hearing.

HMCTS legal advisors were deemed more suitable to conduct cross-examination, but were normally unavailable for District Judges who sit on their own in court. One interviewee raised the potential of transferring a sensitive case down a tier, to the lay magistracy, for the fact-finding hearing so that a legal advisor could be involved in the cross-examination. However, they had not used this practice themselves, nor did any other participants raise this as a solution. Importantly, concerns were raised that many legal advisors, whilst qualified lawyers, have never practised and therefore may have no experience of cross-examination. They may also have other priorities that could reduce their effectiveness as a cross-examiner, such as case timeliness, or retaining an image of court impartiality.

And no matter how sympathetic or supportive legal advisors may be, if they're working with the Magistrates or a judge, their focus is, obviously, on progressing the case, progressing the court, making a decision. They have

[21] The Children and Family Court Advisory and Support Service (Cafcass) is a non-departmental public body that ensures the welfare of the child is put first in legal proceedings relating to them.

to keep an appropriate distance… (Association of Lawyers for Children workshop representative)

Only one interviewee considered the use of an amicus,[22] but dismissed them as an option due to queries over funding; they believed that HMCTS do not have the funds, and the Legal Aid Agency will not provide the funds.

Due to the issues raised with using third party questioners, judges often felt that they were better placed to put the questions themselves to the vulnerable witness, despite concerns about risks to their own impartiality.

McKenzie friends

Judges spoke positively of their experience with 'professional'[23] McKenzie friends. These were normally representatives from organisations that lobby for the rights of fathers, and were representing the father who was often the alleged perpetrator of abuse in the case. According to interviewees, these McKenzie friends often had previous personal experience of the family court system and of losing contact with their own children. This was reflected in the workshop, where the representative from the Society of Professional McKenzie Friends emphasised how their own personal experience and background assisted them in their role, particularly in understanding the need for a non-confrontational approach in the courtroom. Some judges drew on their experience with more general professional McKenzie friends, who are independent and do not belong to any organisational group. They spoke of how these McKenzie friends were regularly seen in the local court assisting litigants in person.

In some cases the McKenzie friend was granted a right of lay audience by the judge, which allowed them to represent the litigant in person to the court. Examples were given where this was extended to allow the McKenzie friend to cross-examine a vulnerable witness. Although this point was raised in interviews, judges believed that their judicial colleagues rarely used this case management tool and were uncertain as to how appropriate the practice was. Nevertheless, judges did feel that the parties in the courtroom, and any legal representatives, were normally satisfied by this approach.

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[22] Amicus is from *amicus curiae*, meaning 'friend of the court'. The Attorney General has appointed an amicus of the court for cross-examination in exceptional circumstances (see *Re H and L and R*).

[23] Throughout this report, a 'professional' McKenzie friend refers to one that is paid for their services. This does not necessarily mean they are members of the Society of Professional McKenzie Friends and they may not be required to abide by any set professional standards.

And I think when you've got barristers or solicitors for the victim they're quite happy as long as the questions are suitable and appropriate and the conduct of the lay representative is entirely appropriate, they are pleased that there is that buffer then between their client and the alleged perpetrator. (J11)

The judge in this case decided that cross-examination by the McKenzie friend was appropriate because the McKenzie friend had 'sufficient wherewithal to become a lay representative' and had an accurate understanding of the court process. The Society of Professional McKenzie Friends perceived a difference in approach between judicial tiers, with the higher tiers more willing to grant a right of audience. They also spoke of the difference in their role when they were not granted a right of audience, which was 'sit there and you say nothing, apart from whisper quietly'. Even without a right of audience, however, professional McKenzie friends may be able to support an alleged perpetrator of abuse when directly cross-examining a vulnerable witness.

So we're just there supporting and saying… 'You've got to focus on the issue here; you can't bring in other things. You've just got to focus and make sure that it doesn't become bickering and, if you ask a question, you let them answer it and don't cut across', but it's very difficult.
(Society of Professional McKenzie Friends workshop representative)

The 'wherewithal' and understanding of the process was a perceived benefit of a professional McKenzie friend, rather than a friend or family member acting as a McKenzie friend. Non-professional McKenzie friends were often perceived to make situations tenser in court as they could not act as 'counsellors and psychologists' in the same way as professional McKenzie friends. It was also viewed as inappropriate for the judiciary to give them lay rights of audience.

I could see it making things worse… bearing in mind that McKenzie friends are often members of family, so you'd have, potentially, ex-father-in-law cross-examining the husband about allegations that he raped his daughter. It's not going to work is it? (J17)

McKenzie friends that were friends or family were, however, viewed by some interviewees to be beneficial in terms of providing emotional support for the litigant in person. They were seen as calming influences and a source of reassurance. The Society of Professional McKenzie Friends also supported their use in an effort to reduce any tension in the

courtroom, particularly if both parties were litigants in person, and a professional McKenzie friend was acting on behalf of the other party. Other judicial interviewees directly contradicted this assumption, and stated that a friend or family member was more likely to inflame a situation, rather than calm it. On this basis they were hesitant to allow non-professional McKenzie friends into court.

Only one judge had had a negative experience with a professional McKenzie friend, believing this individual to be confrontational and lacking professional distance. Any confrontational attitude was perceived to hinder the case, rather than assist it. Judges without direct experience of McKenzie friends drew on negative perceptions of them from other jurisdictions, such as employment tribunals, to explain why they were wary of allowing them in the family court. It was advocated that there should be regulation for McKenzie friends and a way to sanction any negative behaviours. In the workshop this was viewed as particularly important because McKenzie friends have an overriding duty to their client only, and not to the court or the child who may be the subject of proceedings. The Society of Professional McKenzie Friends also believed that additional protections could be considered for the McKenzie friends themselves, as they identified examples where they believed they were the victim of allegations from an opposing party in sensitive cases.

Intermediaries

Intermediaries are individuals who help vulnerable witnesses communicate in court. Judges spoke of intermediaries assisting witnesses with learning difficulties in private law cases, although this was not perceived to be a regular occurrence. Intermediaries could also be used to provide a report in advance to the judge about how questions should be put to the witness and what case management techniques could be used effectively with that individual. Judges saw this as particularly beneficial, and stated that they accepted the advice of intermediaries in these circumstances. Judges also saw part of an intermediary's role as 'assisting and befriending'. This entailed providing emotional support to the vulnerable witness on the day and sitting in the witness box with them. Whilst no interviewees had objections to the use of intermediaries, their cost and availability were raised as likely obstacles to their use. Workshop participants expressed confusion over the funding of intermediaries and perceived this as a barrier. Judicial interviewees believed there had been a recent decline in their use, after a perceived increase, and were unable to explain why this might be.

4.2 Special measures and security arrangements

Screens and video links

All judicial interviewees were aware of the possibility of using screens to separate parties or video links to enable vulnerable witnesses to provide evidence remotely in hearings. However, for some this was a hypothetical measure as the facilities were not available within their court. When available, they were often perceived to be below the necessary standards. One judge described a 'sort of plastic, very basic, cottage hospital type screen' that was taken from the court's first aid room to be used for a hearing. Workshop participants raised other issues, such as the screen being 'so peculiar and antiquated that it falls over half way through or you can see round it'.

> *It isn't brilliant… doing it behind a screen because you have, especially if somebody is represented so you have one party and their legal representative behind a screen because you can't do it any other way in my court so it's very difficult when the… father in this case gives his evidence because he's being asked questions from behind a screen by the legal representative… but you have to make do with the facilities that you have and there isn't any other way that we can set up the courtroom so as to just screen the witness and their legal representative, unfortunately.* (J1)

When video link facilities did exist in the court, they were often unavailable for private family law cases where there was the potential for cross-examination of a vulnerable witness. Judges spoke of examples where the court's video link had been designed for people away from court to give evidence; for example, experts at an alternative site, a witness living overseas, or someone being required to appear in court from prison, and the court did not have the capability to video link a witness from another room in the same building. It was also noted that advance notice needs to be given for the set-up of any video link, although this created difficulties because relevant issues may not be always be apparent in advance. Workshop participants spoke with concern about the lack of access to screens and video links when required, and questioned why these could not be routinely provided.

When facilities were available in a court, they were often provided inconsistently. Workshop participants raised issues of screens being booked but not arriving for the hearing. A judicial interview highlighted one case where over three hearings a video link was used for the first, a curtain for the second, and for the third neither were available so the witness refused to attend court due to fear.

Nonetheless, some judges, particularly in the larger courts or courts which had been recently refurbished, spoke positively of their experiences with these special measures. It was felt that alleged perpetrators of abuse were not normally resistant to the vulnerable witness receiving screens or video links from the court, and requests were normally made by the vulnerable witness's legal representative early in the process. Other judges were proactive and were able to transfer their case to another local court building with more updated facilities if required, to enable the use of video link.

Whilst screens and video links were normally considered together, it was stated that only video links, not screens, would be appropriate in the most serious of cases, as there would be physical distance between the parties, rather than just the visible and psychological distance that a screen provides. Also, the lack of visual cues when a screen is used was seen to potentially disadvantage both parties during any cross-examination. The judicial view on these special measures varied, and one judge referred to them as 'normal measures', on the basis that they should be available to anyone who felt they needed them. Conversely, other judges were more hesitant and saw their use as a tactical tool within the case. It was said that a legal representative for a vulnerable witness 'might be … trying to make a point by stressing the need for special measures which may not necessarily be appropriate'. This was referred to as 'chest beating' by another interviewee. These judges viewed special measures as 'preferential treatment' and saw them as disadvantaging the alleged perpetrator during proceedings. Concerns were also raised by these judges that the use of screens and video links involved determining who the vulnerable witness was at the start of proceedings, before any evidence had been heard.

Court security facilities

Separate entrances and exits for alleged victims and perpetrators of abuse were seen as a positive measure by all interviewees, although there was variable availability across courts. Additionally, separate waiting areas were seen as essential, not just for physical safety, but also for providing emotional reassurance for the vulnerable witness. In some courts, such as the Central Family Court, this was perceived to be well managed and one judge spoke of an instance where they not only had the parties leave by separate exits, but also escorted off the premises in different directions. In other courts, provisions were perceived to be lacking, and parties may have to wait in the same area before a hearing or during lunch breaks. Instances were raised where a party assaulted the other immediately after the hearing.

Judges also spoke of litigants in person intimidating other witnesses and experts in the public areas of the court. If aggression is observed in the courtroom itself, judges considered their ability to use non-molestation orders[24] as an option 'to control people' as they can make an order in their own right under the Family Law Act. When there is a risk of aggression in the public areas of the court, ushers or security guards may be warned to look out for a particular individual and administrative staff can be used to assess the mood of individuals and raise any concerns.

The security and searching strategies at the entrance to the court buildings were seen as vital. Judges recalled alleged perpetrators of abuse attempting to bring items such as household scissors or 'sharp implements' into court. In some circumstances these items got through security checks and were used in a threatening way in the courtroom. Judges who had not experienced threats of physical violence questioned whether that was due to luck, or their case management techniques. Techniques included setting ground rules at the start of the hearing, and taking a zero-tolerance approach to the use of bad language, interruptions, and aggressive behaviour from the outset. Many judicial interviewees spoke of being sworn at and verbally abused, and techniques to deal with this varied. One judge said they did not use their contempt of court powers if a litigant in person swore at them as 'half of the punters would be in jail', whilst another gave a 14-day prison sentence to a litigant in person for contempt of court after an extreme example of verbal abuse. Adjournments were used strategically by judges as a cooling down period if arguments got heated, as well as a threat to delay proceedings if individuals could not control their behaviour.

Judges are also able to request security guards in the courtroom itself if they feel this is necessary, and many spoke of doing so. Reasons for this varied from reassurance for the intimidated witness, to the judge's own fear of violence from the litigant in person. Judges would sometimes request that security was present at the beginning of a case to 'get the atmosphere right', and security could then be reduced when the parties settled into the process. There was a general consensus that there were not enough ushers or security guards in court, particularly at District level.

> *Well there was two occasions I'm thinking of. One when the man just… I mean he was shouting at me and very loudly at his partner… I mean it was really quite difficult to conduct the hearing with the volume he was producing. In the other one, it was a man who was just quite simply I thought, seriously threatening…*

[24] A non-molestation order is a court order aimed at protecting a victim of domestic abuse from violence, or the threat of violence, from the alleged perpetrator.

> *I thought he presented a significant risk… the Cafcass officer tipped me off, they were going out on an adjournment… she hung back and said to me, you ought to know the reason why I've come onto the case and don't know very much about it is they needed to find a Cafcass officer who was anonymous and couldn't be traced.* (J8)

The layout of the courtroom was also seen as a key factor in whether security arrangements were adequate, and judges strategically managed where the parties sat in relation to the security guards and doors. One judge explained that their courtroom had been 'deemed not fit for purpose as a courtroom' but was still being used for private family law cases where there was the potential for cross-examination of a vulnerable witness by an alleged perpetrator of abuse.

> *I actually had to rearrange the courtroom before the next day because he was sort of leering, the witness box was near where he was and his whole body language to the mother… and to the Cafcass officer who was also female was so intimidating that the next day I moved it around and when he was giving evidence I had him beside me, you know, I moved the whole witness box round… it did make a difference although my colleagues criticised me because I'd put him too close to me and he could have just swung over and punched me… while I sort of contained the heat against everybody else, everyone else thought I'd maybe made myself a bit vulnerable.* (J15)

This risk of making the judge vulnerable was substantiated by other interviewees who spoke of harassment and direct threats made by litigants in person towards the judge. Physical assault of security guards by alleged perpetrators of abuse was also experienced.

The size of the room was perceived to modify the dynamics between parties, and whilst judges were hesitant to use large, formidable courtrooms for cases involving children, the larger rooms were seen to be beneficial in putting distance between uncooperative parties. One judge expressed their belief that parties 'behave better' if they are in a formal courtroom, rather than a hearing room, and used this as a case management tool.

> *Because no one takes hearing rooms seriously… they think they're coming in for a chat. If they come into a courtroom, basically it's what they've seen on TV… They just behave better than they do if they're just sitting round a little table next to each other.* (J17)

Cases where alleged perpetrators of abuse had bail conditions which meant that they were not allowed inside the same room were also perceived to be commonplace. It was highlighted that there could be existing bail conditions, restraining orders and non-molestation orders set by different courts, but because the alleged victim and the perpetrator have to be in court together to enable cross-examination, these orders could easily be breached. Workshop participants believed that in these cases members of the judiciary and legal representatives would 'turn a blind eye' as they needed to progress with the hearing. Having the possibility of cross-examination in these instances was regarded as unacceptable.

5. The role of external organisations

External organisations were asked about their collaboration with the court or members of the judiciary, as well as the services they provide including support through the court process and legal representation. Judges discussed their experience of liaising with members of external organisations and of signposting their services for litigants in person or vulnerable witnesses.

5.1 Signposting relevant organisations

The willingness to signpost for a vulnerable witness or an alleged perpetrator of abuse a relevant external organisation which would provide support through the court process varied according to judicial perspective. Some felt that their role was to handle the case as effectively as possible, which might include seeking assistance from outside organisations. Others believed that their judicial independence would be jeopardised by signposting, and queried how they would know who should be directed to which organisations under which circumstances. Concerns were highlighted in relation to signposting specialist organisations, such as some professional McKenzie friends who will only assist fathers, not mothers.

The ability to signpost, even among those judges willing to do so, varied by geographic location. Judges in large cities felt that more assistance was available, should their parties seek it, whilst those from rural areas often felt that large cities had access to more resources. In urban areas, where there were allegations of domestic abuse, the police were identified as useful contacts, particularly when there was a family support unit,[25] and they may take on the role of signposting relevant organisations.

Judges who were concerned about jeopardising their independence often perceived HMCTS staff, such as legal advisors or ushers, or Cafcass employees, as being better placed to signpost for the parties. In some courts HMCTS staff maintain a list of relevant organisations that individuals can be referred to, with contact details and leaflets about their services. Details of the costs for each overall service, and for set pieces of work, were highlighted as useful information for litigants in person. This may include unbundled services such as legal advice prior to a hearing, or support in preparing paperwork for the court. Other information perceived as useful was a glossary of family justice terms, a list of what to bring to court, and what to expect in terms of court layout and etiquette. This information was viewed as helpful

[25] Some local police services have created designated family support units to support victims of domestic abuse. These may also be called family safety units, or domestic violence units. They are trained in issues surrounding domestic abuse and often form contacts with other local support services.

for all litigants in person, not just those who are vulnerable witnesses or alleged perpetrators of abuse.

The GOV.UK website was not seen to be used effectively by workshop participants and judicial interviewees. Resolution stated that they also have a website for litigants in person, but that it is not specifically designed for vulnerable witnesses or alleged perpetrators of abuse. Resolution also felt that web content alone could not provide adequate and appropriate support in these cases, although they have also produced guides for their members on working with litigants in person and vulnerable people. The Law Society and Bar Council also have guides for members, which include information they can pass to clients on what to expect at court.

Whilst judicial interviewees were aware of organisations such as Women's Aid that assist victims of domestic abuse, they did not signpost them for individuals, nor had they come across them directly in their judicial activities. Judges felt that they would not be able to signpost victim support organisations as their role would often encompass an assessment of whether abuse had occurred. Following this, any signposting could only legitimately be done at the end of the case, after any assistance for the court process was required. Another practical problem with signposting included lack of notice about the details of the case. Judges stated that allegations of abuse often only arose during the case, and not in advance, meaning that referrals could not be made before the hearing.

5.2 Legal representation

Even judges who did not regularly signpost support organisations for parties stated that they did encourage litigants in person to seek legal representation. This was either in the form of pro bono representation, normally through the Bar Pro Bono Unit, or through a free initial advice session with a local solicitor. When the solicitor approached could not provide more than the initial advice session on a voluntary basis, judges hoped they would adequately signpost other support services. The Bar Pro Bono Unit reported that in 2014 family law applications which passed their review procedures accounted for around a third of their applications. They also believed there had been a shift in judicial attitudes, and reported that in some cases judges were now including the need for individuals to approach them as part of a court order, although this was not raised by judicial interviewees and there are no routinely collected data on this. This may place an additional burden on the Bar Pro Bono Unit and its volunteers.

A duty solicitor scheme, running in some courts, was also highlighted as a positive service. However, the duty solicitor can only act for one party, so if both parties are litigants in person, it was perceived as a race for advice on the day. Some judges would seek to make litigants in person aware that there is a public access scheme for barristers,[26] so they could avoid paying for a solicitor and still seek paid-for representation for any fact-finding hearings where cross-examination may occur. Workshop participants stated that Law Centres often had a rota advice scheme, where legal advice could be given on an emergency basis. These are intended to provide one free face-to-face advice session to unrepresented individuals, but concerns were raised that these units were not being used as intended, and parties would often return for ongoing advice. LawWorks said that the clinics they support have seen a large increase in family law enquiries and also an increase in complex cases.[27]

> *What you see now… is the people coming in are increasingly vulnerable, increasingly low in means. Increasingly struggling with even basic literacy or English as a second language, and have increasingly complex family law problems… I mean, technically, under those Law Centre schemes, people aren't supposed to keep coming back.*
> (Association of Lawyers for Children workshop representative)

Some concerns were raised in both the workshop and judicial interviews that perpetrators of abuse may seek to avoid getting legal representation so that they can cross-examine their victim. This was viewed as another form of abuse and control, referred to by one judge as a 'power kick', and participants and interviewees were keen that this should not be allowed to continue. Many drew on the fact that the Youth Justice and Criminal Evidence Act (1999) ensured that this could not happen in criminal courts and that the case characteristics and vulnerabilities may be identical in family law cases, but without the same provision.

> *I've had cases where… I was crying out for these people to get representation. Actually people who could have afforded representation but they were just determined not to.* (J8)

[26] The public access scheme allows individuals to contact a barrister directly without using a solicitor to minimise costs. Barristers do not have to accept public access cases, and must have been through a Bar Standards Board training course on direct public access before they can accept them.

[27] Whilst LawWorks supports a network of clinics, and helps set up new clinics, the clinics themselves are independently run.

Conversely, some alleged perpetrators of abuse were seen to be representing themselves as they felt confident enough to do so, and wished to handle their own case, rather than as a way of exerting control over a vulnerable witness.

Some judicial interviewees were hesitant about approaching organisations such as the Bar Pro Bono Unit, either directly themselves or by encouraging the parties to do so. This hesitation was due to the perception that the Bar Pro Bono Unit was an extremely active organisation that cannot cope with current demand. Judges also expressed a reluctance to approach the voluntary sector due to a perception that it has traditionally been the role of the government, through the Legal Aid Agency (LAA), to provide assistance in these cases.

Some cases were identified by interviewees where applications had been submitted for Exceptional Case Funding (ECF). ECF is provided by the LAA for cases that are outside the scope of legal aid following LASPO. It is still means- and merits-tested, but provides funding where it is likely to breach an individual's human rights if representation is not provided. Only two judicial interviewees had experience of a case where an application for ECF was successful. Both were perceived to be extreme cases. One included allegations of rape and violence and the vulnerable witness was subject to a witness protection programme. In this case ECF was only given after the intervention of senior members of the judiciary. The other case also involved substantial domestic abuse and the alleged perpetrator was diagnosed with a severe mental illness and was an inpatient in a psychiatric hospital.

Workshop participants raised concerns that ECF was being given in a narrower proportion of cases than they believed it was originally intended for. Judicial interviewees expressed frustration at the narrow criteria and questioned whether it was worth encouraging parties to submit applications, due to the approval rate being perceived as low.

5.3 Other forms of support from external organisations

Universities and colleges were identified as sources of free legal assistance, although not representation, for litigants in person. Whilst potential issues of insurance and capacity were raised, some universities were perceived to run effective Advice Units, helping prepare cases and draft initial documents for the court. This was seen as a mutually beneficial exercise, as students on law courses could receive valuable experience of the court process, potentially receiving credit as part of their course, while the parties to the case would have additional assistance.

Citizens Advice was seen as the first point of contact for many vulnerable witnesses or alleged perpetrators of abuse. The Citizens Advice brand was perceived to be known within the community as free, helpful and authoritative on key issues. However, issues were raised relating to their lack of funds. The Personal Support Unit (PSU) was also highlighted as a useful support service for litigants in person throughout the judicial interviews. In the workshop, the PSU emphasised that as they do not provide legal representation or advice, they could support either party if they were unrepresented, and they therefore had a role in supporting vulnerable witnesses as well as alleged perpetrators of abuse. The PSU were perceived to support in a variety of ways, from practical support throughout the hearing such as writing down page references from the bundle regarding key points of the argument, to emotional support in a tense situation.

Other organisations exist solely to assist victims of abuse. Both SafeLives and Refuge provide Independent Domestic Violence Advisors (IDVAs), or Independent Sexual Violence Advisors, who support women following their abuse, including through the court system. However, workshop participants were uncertain of the influence they had during proceedings and believed this varied by judge. Some IDVA services also had a role in training members of the judiciary, but this was done on an ad hoc basis and varied by location.

6. Future solutions

The judiciary and workshop representatives were encouraged to identify and discuss options for supporting vulnerable witnesses and litigants in person in light of their experiences with these cases. They considered how these options could work in practice, and any obstacles to their implementation.

6.1 Paid advocacy for cross-examination

Judicial interviewees and workshop participants both felt that the 'magic wand' would be legislating for public funding for an advocate to act as a cross-examiner. This advocate would be able to be partisan, on the side of the alleged perpetrator of abuse, and might only undertake the cross-examination. This would not advantage the litigant in person by providing them with full case representation, and would also minimise the public funds required for this provision. It would enable the vulnerable witness to be examined effectively by an advocate who could apply more scrutiny than an impartial judge whilst protecting the vulnerable witness from being directly cross-examined by their alleged perpetrator.

> *I think there should be provision, public funding, for litigants in person to be represented… if only for the purpose of the cross-examination of the vulnerable witness, as is the case in the crown court. And I can't see any reason why, apart from cost – and that isn't a justification in my view – I can't see any reason why the same protection as is afforded in the crown court, isn't afforded in the family courts to vulnerable witnesses.* (J6)

Judicial discretion

Some judges felt that public funding for representation was necessary for all cases where there are allegations of domestic abuse and the possibility of cross-examination, and justified this on the basis that the core element of domestic abuse was control and intimidation. This view was also reflected by organisations in the workshop.

> *It doesn't have to be a word, it can be as simple as a look, which would create such distress because of the backdrop of abuse … We have narrative from IDVAs coming back from those court situations saying 'I just watched that look happen, and they shrunk… they absolutely shrunk.*
> (SafeLives workshop representative)

Nonetheless, for many judges, judicial discretion was seen as more important than any set criteria for determining whether public funding may need to be considered. This need for discretion was partially due to the complex assessment that judges must undertake to determine how vulnerable someone is, but also due to the varying nature of distress.

> *[S]he also did seem to be more sensitive than she had at the previous hearing, and that's not unusual when you deal with vulnerable witnesses. Women, and it's usually women who have been abused, can become more aware of the abuse and the effect it's had on them subsequently… so the approach of a vulnerable witness and how vulnerable they feel can change in the course of the hearing.* (J6)

As judicial interviewees explained, this is further complicated because domestic abuse may affect vulnerable witnesses in different ways. What may be assessed as 'low-level' abuse may actually have far-reaching consequences, whereas abuse that is extreme may have less impact on certain individuals. It was due to this that judges believed that the characteristics of the vulnerable witness also needed to be taken into account.

The variable nature of the behaviour of litigants in person over the course of proceedings may also be another factor. Judges noted that any assessment of whether an advocate was required for cross-examination might be modified during the case if a litigant in person became verbally or physically aggressive. In these cases it was emphasised that the judge would need to have the ability to order a paid advocate, even if the litigant in person was resistant and wanted to cross-examine the vulnerable witness, potentially as a form of control.

The characteristics of the litigant in person were therefore also seen as important in deciding whether an advocate would be required for cross-examination, or whether current provisions were adequate. Individuals who were focused on achieving the best outcome for the child were perceived to be easier to manage by judges, but judges consistently spoke of the need to apply their discretion.

> *And it worked well and I think it worked well in that case because, as I say, he wasn't angry, he wasn't disrespectful to the court, he wasn't nasty in his questioning, he was quite child-focused and he wanted to get through the hearing so that he could look at the longer term decision… So he was a very compliant*

> *litigant in person… [and] the process went smoothly in that case because he was a sensible and respectful litigant.* (J11)

Severity of abuse

Many judges stated that the threshold where they would not feel confident in handling the cross-examination of a vulnerable witness was where there were allegations of serious sexual abuse. Sexual abuse at all levels, but particularly rape, was perceived to be harder to case manage than cases with allegations of physical or emotional abuse.

> *Cases of rape, the offence of rape, is far more than simply the physical aspect, it's also the emotional aspect… and the influence or duress which the victim experiences and the prospect of that being repeated, by being asked what, by nature, are extremely insolent and sensitive questions, by her alleged perpetrator in a… place where there are other people [would require additional support to manage].* (J7)

The range and emotional impact of physical abuse was seen to be broader; for example, from an 'over-chastisement to a heavy beating'. There was a general consensus that at the lower end of that scale, often referred to by interviewees as 'low-level abuse', judges would be equipped to facilitate cross-examination. On the more severe end of the scale, where abuse may have been long-term and resulted in general submissiveness by the vulnerable witness, judges said they would require funding to order an advocate for cross-examination in order to effectively manage the case.

Private family law cases where there were allegations of FGM or forced marriage were also seen to require advocacy for cross-examination, as members of the judiciary putting questions to the vulnerable witness on behalf of the alleged perpetrator was perceived as inappropriate. Judges believed that this was due to the need for increased sensitivity in these cases, and the long-term consequences that these forms of abuse can have on a vulnerable witness. Cases that had already been through the criminal courts due to the abuse were also highlighted as a severe example where advocacy would be required, whether or not the party was found guilty. The general consensus was that if the intimidated witness had a formal diagnosis of post-traumatic stress disorder due to the abuse then this, too, would need more sensitive handling as court proceedings could make this condition worse. Judges therefore felt that they might need to authorise an advocate for the cross-examination in this instance.

Types of vulnerability

Judges perceived very young witnesses (aged 10 or under) as particularly vulnerable and requiring special protection in court. Generally, though, it was believed that young people aged 15 or 16 would not necessarily need additional protections, and depending on the case and their own characteristics, cross-examination may be acceptable. Individuals between the ages of 10 and 15 were not discussed in depth; it was considered that these would be determined on a case-by-case basis, depending on the characteristics of the child. Judges also suggested that it was easier for them to put the questions on behalf of the litigant in person in cases involving individuals under the age of 17 because of how they approached these interactions in court in general. Conversations with individuals under 17 were purposefully kept informal and relaxed, and therefore cross-examination 'could be done in more of a conversational way'. Following this, judges did not generally perceive additional funding for a paid advocate to be necessary in these cases.

> *The chap… had an astonishing degree of maturity in social terms and very emotionally intelligent. That was a 15-year-old boy, he didn't need me, he could manage things quite well on his own.* (J16)

Physical disabilities were also seen as vulnerabilities where a paid advocate for cross-examination was unlikely to be required. It was noted that having a physical disability does not necessarily mean that the individual is any more emotionally vulnerable than their physically able counterpart and they could therefore be directly cross-examined.

Multiple techniques were identified to facilitate the cross-examination of individuals who were defined as vulnerable due to their learning difficulties. Examples of such techniques included reminding the litigant in person to speak clearly, the judge helping to break the question down into smaller questions to make it easier to understand, and taking breaks throughout the hearing. The use of intermediaries was also advocated in this instance. Workshop participants agreed that use of these case management techniques was effective and had become more common. Due to the availability of these techniques, a paid advocate was not seen as necessary.

> *That was a fact-finding hearing where the mother was making very serious allegations against the father, and she suffered from ADHD and various other conditions, which made it very difficult for her to process information and she found it very difficult to give evidence, and she gave evidence actually from behind the… screen, and we also… had early starts and short days and gaps*

between the days on which she gave evidence, and dim light because light was distracting her and we used the blinds in the court. (J6)

Whilst there was general consensus among judges that an advocate may not be required for vulnerable witnesses with a physical disability or learning difficulty, there was less agreement relating to appropriateness of cross-examination of individuals who are defined as vulnerable due to a mental disorder under the Mental Health Act (1983). There was a perceived increase in the number of cases appearing in court where a witness had a mental illness. One judge asserted that in these cases they were likely to have expert evidence relating to any psychiatric condition and that the expert should have outlined 'the ability of the witness to give evidence and any particular pitfalls that one should be alert to'. This was viewed as adequate for the judge to facilitate any cross-examination by a litigant in person. Other cases were raised where the judge, despite their best efforts, could not understand the litigant in person due to the latter's mental illness and could therefore not effectively manage the hearing. Some judges believed that without specialist training in this area, they were unable to effectively facilitate the cross-examination of a mentally ill witness, particularly if there were issues of lack of capacity. Cases where the alleged perpetrator was mentally ill were also seen as more challenging to facilitate, particularly when the illness affected the individual's ability to think logically or carefully consider their actions. In this instance, judges felt that a paid advocate might be required for the cross-examination.

When considering those groups of individuals who could be cross-examined by an alleged perpetrator of abuse, such as young adults and individuals with physical disabilities, this was only considered acceptable if the witness was not also an intimidated witness. Therefore, the judge would need to be sure that their evidence was not likely to be diminished due to fear or distress in connection with giving the evidence. If they were also a victim of serious domestic abuse and intimidated due to that, it was felt that they might need a paid advocate for the cross-examination in the same way as other intimidated witnesses.

6.2 Closer collaboration with external organisations

The general consensus amongst judicial interviewees was that there was scope for further engagement between either the judiciary or HMCTS and external organisations. Local contacts were highlighted as particularly valuable, and judges considered that it was feasible for HMCTS to take on a standardised signposting role for litigants in person and vulnerable witnesses. One judge believed the optimal way to signpost services was to include a leaflet in the pack that is sent to the applicant in person and in the papers that are to be sent to the respondent. Subsequent concerns were raised, however, that the applicant could remove the

leaflets before the papers are sent to the respondent. Additionally, the problem of ensuring that information was sent in the right language may be problematic; one judge believed that in the vicinity of their court over 120 different languages were spoken. There would also be accessibility requirements such as the need for large font or Braille. Electronic signposting was viewed as unsatisfactory as judges believed that people are unsure where to look for the information online. The GOV.UK website was not seen to be used effectively by litigants in person or vulnerable witnesses as there was a perception that individuals were not accessing it at the time of need, and that it was not providing information relevant to the cross-examination of a vulnerable witness. It also relies on the parties having internet access, which participants raised as a possible barrier.

Judges were concerned with the additional burden that any closer collaboration with external organisations would place on the third sector, and regularly praised the work that was already being done.

> *The problem with the third sector is it is heavily reliant upon people who are employed full-time and whose employers won't always give them time off. Relying on the voluntary sector to provide a safety net is like fishing with a blunt hook; some you'll catch, some you won't, or, if you like, fishing with a net full of holes. The provision is too gappy, it's not reliable, if you're trying to deliver justice… it can't be delivered on a wing and a prayer where people can just slip through the net simply because they happen to ask at the wrong time to the wrong people.* (J16)

Workshop participants believed that the family judiciary needed a clearer understanding of the roles that external organisations could play. For example, the PSU highlighted a case where volunteers were asked to take the parties outside the courtroom to mediate their dispute, while the Society of Professional McKenzie Friends noted an example where they were asked to draft the court order despite not having had a right of audience. Neither of these requests were perceived as appropriate. Judges formally ordering representation from the Bar Pro Bono Unit was also viewed as unfeasible due to lack of volunteers, although closer collaboration with the judiciary may enable the Bar Pro Bono Unit to prioritise cases where judges have clearly emphasised the need, either directly to the organisation or through a court order. The Society of Professional McKenzie Friends also expressed a desire to work more closely with HMCTS and members of the judiciary by having a presence in courts, similar to the PSU's set-up, where their members would be on site to provide assistance to litigants in person.

6.3 Special measures and vulnerability assessments

Workshop participants suggested having an initial assessment of vulnerability for all parties in private family law proceedings. If an individual was assessed as having a vulnerability the case management hearing would need to outline what provisions should be put in place to support the vulnerable witness. This might include a paid advocate for cross-examination, but might also be a series of special measures and case management techniques. This provision was discussed in relation to a duty on the family court to ensure the safety of vulnerable witnesses.

> *[T]here needs to be some sort of basic assessment process… before anybody gets into a court… if we started from the basics of everybody has a screen, at least, you've started with something, haven't you, and then if, from there on, it looks like they need something more, then you move upwards.*
> (SafeLives workshop representative)

Legal Help, a previous version of free legal assistance, was viewed as a cheaper alternative to legal aid that may be considered to provide these assessments. If re-introduced, it could also act as initial advice, so that parties did not need to rely on the availability of a duty solicitor, or face concerns if the other party sought assistance before they did. It would not provide in-court assistance, and parties would need to manage their own case, prepare their bundle and represent themselves. However, it might outline an individual's rights and provide them with a 'reality check' about their case. It could also be an effective way of signposting alternative services in a standardised manner, and remove the perception of HMCTS or the judiciary breaching their impartiality by doing so. Workshop participants believed that combining Legal Help with the vulnerability assessment process may ensure that assessments are undertaken thoroughly and consistently.

Some participants were not optimistic about the likelihood of Legal Help being introduced to provide thorough vulnerability assessments. These participants instead advocated approaching private family law cases by assuming that any individual who is allegedly the victim of domestic abuse is also likely to be an intimidated witness. This would then justify the use of a screen in all cases where there is an intimidated witness and the possibility of their cross-examination by an alleged perpetrator of abuse. This approach was not agreed upon by judicial interviewees, whose views on special measures varied, and concerns were raised that their use could disadvantage the alleged perpetrator of abuse.

Where this approach was not perceived as feasible or desirable, solutions instead focused on more consistent provision of screens and video links across all courts that hear private family law cases. This would need to allow for witness testimony via video link from another room in the building, and screens would need to be fit for purpose; i.e. provide adequate coverage, not fall down, and not be transparent. Workshop participants noted that there was no directory of special measures available in each court. This made it more difficult to request special measures for vulnerable witnesses, as people were unsure what resources each court had to offer. It was perceived that a directory of this kind, and its open access for litigants in person, legal representatives, and support organisations, might help to ensure that vulnerable witnesses received more protection in the family court. Other court-based solutions proposed included increasing the number of security guards and ushers at court to increase safety, and ensuring that separate entrances, exits and waiting rooms are available for parties.

6.4 Judicial techniques

Case management techniques

Certain case management techniques were identified that, whilst not being perceived to entirely solve the current concerns, may make cases more manageable for the judiciary. This included making it compulsory to hold a case management hearing to consider the use of special measures and how to proceed with any cross-examination. This hearing may also need to reconsider, based on any in-depth assessment of vulnerabilities, which judicial tier the case should be allocated to. This is because judges who felt most confident dealing with the cross-examination of vulnerable witnesses were only confident with cases that had been accurately allocated to them in accordance with the guidance. Following the case management hearing it was felt that having the same judge throughout the process was important to build a rapport with both parties. This would also assist with providing greater reassurance for vulnerable witnesses, reinforcing the message that the parties will be safe in court and will receive a fair hearing.

The inquisitorial approach

One judge believed that if public funding could not be provided for paid advocacy, and judges continue to put questions on behalf of a litigant in person, then if one party was cross-examined by the judge, both should be. This would negate perceptions of judicial bias, although it may also be seen as wasting existing funding from the Legal Aid Agency for legal representation for the alleged victim.

A more radical solution raised by judicial interviewees was the idea of a system overhaul, abandoning the adversarial family justice system, and aiming for one which is based on an inquisitorial approach. Some judges suggested that they were already managing cases in this way. This move would need to be considered alongside additional judicial training in dealing with vulnerable witnesses, including victims of extreme domestic abuse, forced marriage and FGM.

> *I particularly like the Children Act jurisdiction because we're under an obligation to be inquisitive and I think you'll find that more modern judges generally aren't prepared to just sit there and be passive observers as to what is going on in front of them, and I would say that I sometimes struggle to be a passive observer.* (J9)

6.5 Re-categorisation of legal advice

One issue raised in the workshop related to the confusion of parties about the roles of Citizens Advice, PSU and HMCTS staff within the court, and how the parties could effectively receive advice.

> *They [the parties] go to the [HMCTS] counter and they say, 'I want to do this', and they [HMCTS] say, 'Ok, we're not allowed to tell you what form you need, so go up to the fourth floor', which is where we are, 'and you'll get some help'. Now that [help] is actually considered to be legal advice. And we aren't allowed to tell them what form to use, so what we do is we sit with them and we go on to HMCTS form finder and look. 'These are the options; do you think this would suit you?'… When it's legal questions that we can't answer, there's the CAB [Citizens Advice] on site. They do provide free legal advice and we refer people to CAB. Very often a solicitor will see them and say, 'Right, this is the process you need to follow. Go back to the PSU and they'll help you fill in the forms', which we do…* (Personal Support Unit workshop representative)

Following this, there may be a way to simplify this process and re-categorise advice on areas such as which form to complete as 'non-legal advice'. HMCTS or PSU staff who felt confident enough to do so would then be able to advise on which forms to complete, which would enable legal advice from Citizens Advice to be given on more complex legal issues for vulnerable witnesses or litigants in person.

7. Conclusions and implications

The current situation in private family law permits the possibility that litigants in person who are alleged perpetrators of abuse can cross-examine vulnerable witnesses. In response to a lack of evidence on the extent and nature of this issue, this research explored how the judiciary manage these cases and the sufficiency of current provisions. In light of the experiences of both the judiciary and representatives from external organisations, the study has set out implications for policy and practice that may be further considered to ensure the fairness and protection of both vulnerable witnesses and litigants in person in the family court.

7.1 Judicial case management and gaps in provision

Judges reported a variety of case management techniques to manage these cases, although their confidence in employing them – and their views on whether they were appropriate – varied. Practices ranged from facilitating the direct cross-examination by the litigant in person, to putting the questions themselves to the vulnerable witness. Requesting the questions in advance from the alleged perpetrator was seen as a useful practice, but because the litigant in person would still be cross-examining the vulnerable witness, it was considered effective only in cases where the litigant in person did not want to cause undue distress to the witness.

Judges spoke of some concerns around issues of impartiality when conducting cross-examination on behalf of the litigant in person. For this reason, other third parties may be used as an alternative. Where available, and dependent on their level of experience, legal advisors or professional McKenzie friends were seen as more appropriate than Cafcass guardians or solicitors for the child to undertake this role.

Special measures such as screens and video links were used by the judiciary to manage cases, but their provision was perceived as inadequate and inconsistent. Judges also sought advice on managing these cases from peers but expressed a need for training and clear guidance in appropriately facilitating the cross-examination of vulnerable witnesses in order to protect them from direct cross-examination by their alleged perpetrator of abuse, whilst maintaining judicial impartiality.

7.2 Proposed ways forward

The challenges experienced and gaps in provision identified by both judicial interviewees and workshop participants highlight several policy and practice implications for further consideration.

The primary solution put forward by research participants was the provision of publicly funded advocates to be appointed for the purposes of cross-examination. Whilst some judges believed this should be routine provision in all cases with litigants in person and vulnerable witnesses, others felt confident in being able to apply discretion. The nature of the case and the severity of the abuse, the vulnerability of the witness, and the behaviour of the litigant in person could all influence how a judge assessed the appropriateness of facilitating the cross-examination through their existing case management practices. Consideration could be given to developing some further training and guidance for the judiciary in managing these cases, particularly in relation to exploring the potential for developing a more inquisitorial approach.

Another solution proposed was the introduction of routine vulnerability assessments in all private law cases. This would outline which provisions are required to protect vulnerable witnesses, including the option of a paid advocate. This was expressed alongside the need for more consistent and fit-for-purpose special measures such as screens and video links across family courts. The latter could be supported through the development of a directory of measures available to assist the court and external organisations in providing support for vulnerable witnesses. Providing separate entrances, exits and waiting areas for vulnerable witnesses and alleged perpetrators would improve the current situation.

The research highlighted positive examples of the support being provided by external organisations for litigants in person and vulnerable witnesses; the judiciary identified Citizens Advice and the Personal Support Unit as particularly helpful. It was suggested that some areas of legal advice could be sensibly redefined as legal help; for example, advising on which forms to complete. This would mean HMCTS and PSU staff being able to deliver more tailored support whilst enabling litigants in person and vulnerable witnesses to make better use of free legal advice services offered by other external organisations.

There is scope for closer collaboration by the court and the judiciary with these external organisations. External organisations expressed a willingness to strengthen these links, although capacity and funding remain a barrier. Further clarification on the roles of different organisations to improve the judiciary and the court's awareness would help facilitate this.

Judges questioned the appropriateness of signposting external support for parties as it may jeopardise their impartiality and, for this reason, HMCTS were viewed as more suitably placed to take on this role.

Appendix A
Data collection form

Vulnerable Witnesses Data Collection Form: Private Law Family Proceedings

This form is to be completed for any **Private Law** hearing in the Family Court or Family Division where an issue arises in relation to the actual or potential cross-examination of a vulnerable or intimidated witness (see section 2 below) by a litigant in person accused of domestic abuse.

The President of the Family Division asks for this form to be filled out in **all** instances where either:
a) A situation of this nature arises but the direct cross-examination of the vulnerable or intimidated witness by the litigant in person does not occur, or;
b) A situation of this nature arises and the litigant in person directly cross-examines the vulnerable or intimidated witness.

Please complete this form for all relevant hearings and give to your nominated contact at HMCTS, who will forward to the Ministry of Justice. The nominated contact at this court is: _____.

Court Name		
Case Number		
Level of judge		
Date of hearing		
Hearing type	Directions (any hearing in which oral evidence is not heard)	
	Final (any hearing in which oral evidence is heard)	

1) Which type of domestic abuse was relevant to the case? Domestic abuse includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse.

Please tick all that apply.

Psychological	
Physical	
Sexual	
Financial	
Emotional	
Forced Marriage	
FGM	

2) Which definition of a vulnerable or intimidated witness applied to this case? Please tick all that apply.

Someone who is under 17 years of age at the time of the hearing	
Someone who suffers from a mental disorder within the meaning of the Mental Health Act 1983	
Someone who has a significant impairment of intelligence and social functioning	
Someone who has a physical disability or disorder	
Someone whose evidence is likely to be affected due to fear or distress in connection with giving evidence.	

3) Was the litigant in person encouraged at this hearing to seek legal representation and/or public funding for representation?

Yes	
No	

(a) If yes, what was the outcome?

Representation sought: hearing continued	
Representation sought: hearing rescheduled	
Representation not sought: hearing continued	
Representation not sought: hearing rescheduled	
Other (please describe)	

4) Did the litigant in person cross-examine the vulnerable or intimidated witness?

Yes	
No	

(a) If yes, how was this done? Please tick all that apply

Direct questions put to the witness by the litigant	
Judge relayed questions to the witness	
Third party relayed questions to the witness	
Please specify who (professional group, not name):	
Screen placed between litigant in person and witness	
Video link used	
Other (please describe)	

The collection of this management information will inform a small research project. The research will explore the current powers available to the judiciary in managing these cases fairly in the Family Court to ensure the protection of vulnerable witnesses. If you are willing to be contacted in relation to this follow-up research, please provide your contact details below.

Name	
Telephone	
Email address	

Thank you for your time. Please send this completed form to your nominated contact at HMCTS.

Appendix B
Judicial interview guide – Direct experience[28]

Alleged perpetrators of abuse as litigants in person in private family law: Cross-examination of vulnerable witnesses

Judicial interview topic guide: Identified direct experience

Hello,

My name is X and I work as a X within the Analytical Services Directorate at the Ministry of Justice.

Thank you for speaking with me. You have been approached to take part in this interview as you provided your contact details as part of the collection of management information about vulnerable witnesses in private family law between March and May 2015. You indicated that you would be willing to take part in follow-up research.

The main areas that I would like to explore in this interview are:

- Your experience of handling cases where a litigant in person can potentially cross-examine a vulnerable witness.
- Your confidence in your ability to handle these cases.
- Your awareness of case management techniques available to deal with these cases.
- Anything else that would further support you in managing these cases.

Your feedback is very important to us. It will help develop our understanding of how best to support the judiciary in managing these cases and ensuring the protection of vulnerable witnesses.

For the purposes of this research, a 'vulnerable witness' is defined as:

- Someone who is under 17 years of age at the time of the hearing
- Someone who suffers from a mental disorder within the meaning of the Mental Health Act (1983)
- Someone who has a significant impairment of intelligence and social functioning
- Someone who has a physical disability or disorder.

An 'intimidated witness' is defined as someone whose evidence is likely to be diminished due to fear or distress in connection with giving evidence (which includes alleged victims of abuse). To make things easier, I will be referring to both as 'vulnerable witnesses' throughout this interview.

Neither you, nor any cases we discuss, will be identifiable in any research outputs. With your permission, I am recording this interview to help with the analysis. Please let me know if you don't feel comfortable with answering any questions and we'll move on.

Do you have any questions before we get started?

---

[28] The interview guide for no identified direct experience was similar to that contained in Appendix B, but had minor amendments to account for the difference.

1. Based on the management information we collected earlier this year, we understand that you have experience of facilitating the cross-examination of a vulnerable witness by an alleged perpetrator of abuse. This may have been directly by the litigant in person, or by allowing cross-examination via a third party such as a legal adviser, or you may have intervened and relayed the questions to a vulnerable witness yourself in this circumstance. Could you tell me about how you managed this case?

If not cited, prompt in the following areas:

- What factors made you consider that relaying questions yourself/putting special measures in place/using a third party/ allowing the direct cross-examination was appropriate?
- Was there anything specific about that case that made you adopt this approach?
- Did you seek any advice or guidance, and if so, from whom?
- Have you had other cases like that, and if so could you describe these?

2. Thinking back to that hearing, did you feel confident in your ability to handle the case effectively?

If not cited, prompt why/why not?

3. What additional case management techniques or alternative measures are you aware of that are available to you to manage private family law cases with vulnerable witnesses?

If not cited, prompt in the following areas:

- Did you consider using any of these additional case management techniques or alternative measures?
- Do you think this range of options is sufficient?
- Are there any other provisions that should be considered to support you in managing these cases? And if so, what, and why?

4. Are there any characteristics of cases where you feel confident in managing the cross-examination of a vulnerable witness, and others where you feel you would need additional support?

If not cited, prompt whether the following case characteristics would make a difference:

- Representation status (i.e. both LIPs/one party represented)?
- Type of vulnerability (i.e. under 17 or intimidated witness)?
- Type of alleged abuse (i.e. sexual or physical)?
- Level of abuse (i.e. groping or rape)?
- Certain offence words such as FGM or forced marriage?
- Type of hearing (i.e. directions/final)?
- Type of order applied for (i.e. child arrangements or prohibited steps)?

5. We've spoken about the provisions available to you as a member of the judiciary, but do you work with any external organisations in cases involving vulnerable witnesses, or encourage the parties to? (I.e. the Bar Pro Bono Unit?)

If yes, how do you/the parties work with these organisations? Does this support you in the management of these cases, and if so, how?

6. Could HMCTS or the judiciary consider further engagement the third sector in efforts to support vulnerable witnesses?

Prompt based on original answers regarding any current gaps in provision and the powers needed to address these. Prompt to gain an understanding of how this would work in practice, any obstacles or benefits.

7. Do you have any other comments about the cross-examination of vulnerable witnesses in private family law by alleged perpetrators of abuse that we have not covered?

Thank you very much for your time today. If you have any questions about this research please contact [name and contact details removed].

Appendix C
Workshop guide

Alleged perpetrators of abuse as litigants in person in private family law: Cross-examination of vulnerable witnesses

Workshop Guide

Hello,

My name is X and I work as a social researcher within the Analytical Services Directorate at the Ministry of Justice.

Thank you for attending this workshop today. You have been invited as we are currently undertaking a research project to understand how vulnerable witnesses can be supported in private family law cases, including in situations of cross-examination by a litigant in person who is an alleged perpetrator of abuse. For clarification, by a 'litigant in person' we mean someone who is representing themselves in court.

The main areas that we would like to explore in this workshop are:

- Your organisation's experiences of supporting vulnerable witnesses or litigants in person in these cases, or working with the family justice system to do so.
- Your awareness of current support available to vulnerable witnesses or litigants in person in these cases, and your views on whether these are sufficient.
- Your views on how non-government organisations may further support vulnerable witnesses or litigants in person in these cases, including working with the family justice system to do so.

This should take no more than 90 minutes. Your feedback is very important to us. It will help develop our understanding of how best to support the family judiciary in managing these cases and ensuring fairness to vulnerable witnesses and litigants in person.

For the purposes of this research, a 'vulnerable witness' is defined as:

- Someone who is under 17 years of age at the time of the hearing;
- Someone who suffers from a mental disorder within the meaning of the Mental Health Act (1983);
- Someone who has a significant impairment of intelligence and social functioning; or,
- Someone who has a physical disability or disorder.

An 'intimidated witness' is defined as someone whose evidence is likely to be diminished due to fear or distress (which includes alleged victims of abuse). To make things easier, we will be referring to both as 'vulnerable witnesses' throughout this workshop.

Whilst your organisation may be named, you as an individual will not be identifiable in any research outputs. Any cases we discuss, or details of the parties that may have been involved with those cases, will also be anonymised. Whilst we understand that you may want to discuss this workshop with colleagues afterwards, please do not attribute what was said to any particular individual.

With your permission, I am audio recording this workshop to help with the analysis. Therefore, please try not to talk over one another or the recorder will struggle to capture the data. We may also make notes as we go, but these will mainly just be things we would like to follow up with you. Using the audio recorder means that we do not have to attempt to write down everything you say. Please let me know if you don't feel comfortable with answering any questions and we'll move on.

Does anyone have any questions before we get started?

---

1. Firstly, can we please go round the table and introduce ourselves. Please can you include your name, role and organisation?

2. Do your organisations, or members of your organisations, have any experience of supporting vulnerable witnesses or litigants in person in private family law cases? If so, could you tell me about your organisations' roles?

If not raised, prompt in the following areas:

- Providing advocacy for litigants in person?
- Conducting cross-examinations at the request of the judge?
- Providing formal or informal advice to vulnerable witnesses or litigants in person?
- Representing vulnerable witnesses or litigants in person more broadly, i.e. through public engagement?

2a. If yes, how does this work in practice?

2b. If yes, how do your organisations come into contact with these parties?

3. Do any of your organisations work directly or indirectly with members of the judiciary, HMCTS or specific courts, to support vulnerable witnesses or litigants in person in these cases?

If not raised, prompt in the following areas:

- Do you have a representative based in the court?
- Do you advertise within courts?
- Do HMCTS or members of the judiciary signpost individuals to your organisation?
- Do HMCTS or members of the judiciary liaise with you directly about individual cases?

3a. If yes, how does this work in practice?

3b. If yes, how does this support the parties or assist the judiciary?

4. Can you tell me about a typical case or individual that your organisations might come across and what the main issues or concerns are that are raised by either vulnerable witnesses or litigants in person who are alleged perpetrators of abuse?

5. What case management techniques or special measures are you aware of that are available to either the judiciary or HMCTS to manage private family law cases with vulnerable witnesses?

6. Do you think the current range of options is sufficient?

- Prompt why/why not.

7. Are there any further provisions which you believe should be considered?

If not raised, prompt in the following areas:

- How would this work in practice?
- What are the benefits of considering this provision?
- Can you see any potential obstacles with providing this?

8. Are there any characteristics of cases where you would feel that these further provisions would need to be considered and others where the current range of options is sufficient?

If not cited, prompt whether the following case characteristics would make a difference:

- Representation status (i.e. both LIPs/one party represented)?
- Type of vulnerability (i.e. under 17 or intimidated witness)?
- Type of alleged abuse (i.e. sexual or physical)?
- Level of abuse (i.e. groping or rape)?
- Certain offence words such as FGM or forced marriage?
- Type of hearing (i.e. directions/final)?
- Type of order applied for (i.e. child arrangements or prohibited steps)?

9. Can you think of any additional ways your organisations could work with either HMCTS or the judiciary in efforts to support vulnerable witnesses or litigants in person in these cases?

Prompt based on original answers and to gain an understanding of how this would work in practice, any obstacles or benefits.

10. Do you have any other comments about the cross-examination of vulnerable witnesses in private family law by alleged perpetrators of abuse that we have not covered?

Thank you very much for your time today. If you have any questions about this research please contact [name and contact details removed].

Appendix D
List of workshop invitees

Association of Lawyers for Children

Aims to develop and improve the practice of lawyers in meeting the needs of children who become involved in legal processes.

Bar Council

Represents barristers across England and Wales and aims to promote high-quality advocacy, access to justice, and equality and diversity.

Bar Pro Bono Unit

Aims to match people involved in legal proceedings that are not eligible for legal aid, but cannot afford representation, with barristers who can act on their behalf on a voluntary basis.

Cafcass

An independent organisation that represents children in family court cases and aims to ensure that their voices are heard and that decisions are made in their best interests.

Citizens Advice

Aims to provide free, independent, confidential, and impartial advice to individuals on their rights and responsibilities.

Family Law Bar Association

Represents both employed and self-employed family law barristers.

Law Society

Represents all solicitors in England and Wales. Aims to support, promote and represent all solicitors and protect everyone's right of access to justice.

LawWorks

Aims to enable access to justice by connecting people who need lawyers, and not-for-profit organisations that support them, with volunteer solicitors.

Personal Support Unit

Aims to help litigants in person, their friends and families, witnesses, victims and inexperienced court users by providing free, independent assistance.

Refuge

Aims to help women and children who have been subjected to domestic abuse by providing high-quality services, advocating for improvements in policy, and preventing violence through campaigning, education, training and research.

Resolution

Represents family solicitors and aims to aid the constructive resolution of family disputes through publishing best practice, training and campaigning.

SafeLives

A national charity dedicated to ending domestic abuse in the UK. It is committed to using data and evidence to find out what works to make more people safe and then informing local and national policy, as well as providing training and support for services and frontline professionals. It has the largest dataset on domestic abuse in the UK.

The Society of Professional McKenzie Friends

A self-regulatory body of professional McKenzie friends. Aims to protect the interests of consumers and the courts and members must meet set standards of conduct and qualifying criteria.