

## One step forward and two steps back? The '20 Principles' for questioning vulnerable witnesses and the lack of an evidence-based approach

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## **One step forward and two steps back? The “20 Principles” for questioning vulnerable witnesses and the lack of an evidence-based approach.**

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### **Abstract**

It is a widely held belief that questioning vulnerable witnesses is a specialist skill. In England and Wales vulnerable witness advocacy training built around '20 Principles' has been developed and is being delivered. The 20 Principles do not cite a tested theoretical framework(s) or empirical evidence in support. This paper considers whether the 20 Principles are underpinned by research evidence. It is submitted that advocacy training and the approach to questioning witnesses in the courtroom should take into account the already available research evidence. The authors make recommendations for revision of the training and for a wider review of the approach taken to the handling of witness evidence.

## Introduction

Few would disagree with Mr Justice Green<sup>1</sup> when he said that “*how the courts treat those who are exposed and weak is a barometer of our moral worth as a society*”.<sup>2</sup> A similar sentiment was expressed in the Advocacy Training Council (ATC) research report *Raising the Bar*<sup>3</sup>, which considered how vulnerable witnesses<sup>4</sup> are questioned by barristers in the courts of England and Wales.

Whilst “in some respects the law in relation to vulnerable witnesses has moved very slowly over the past quarter century”, at the same time there has been a “growing recognition among practitioners and policy-makers of the significance and implications of vulnerability within the criminal justice system”.<sup>5</sup> Vulnerability matters because individuals are entitled to access to justice, those who are vulnerable must not be excluded or marginalised and the courts have a duty to safeguard the welfare of children and vulnerable adults; however developments in England and Wales have resulted in a “mixed and complicated” picture of provisions and case law and a “multiplicity” of procedural guidance.<sup>6</sup>

In England and Wales, “the concept of the ‘vulnerable witness’ took root in the report *Speaking up for Justice* [Home Office, 1998<sup>7</sup>], which in turn led to the Youth Justice and

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<sup>1</sup> Now Lord Justice Green.

<sup>2</sup> Green, Mr Justice (2016), Introduction, in Cooper, P. & Hunting, L. (Eds.) (2016), *Addressing Vulnerability in Justice Systems*. London: Wildy, xiii.

<sup>3</sup> Haddon-Cave QC, C. (2011). Foreword, *Raising the Bar*. London: ATC, 2. Available at <https://icca.ac.uk/images/download/advocacy-and-the-vulnerable/raising-the-bar.pdf> (accessed 18 March 2018). (Now Lord Justice Haddon-Cave).

<sup>4</sup> Sometimes the term witness and victim appear to be used interchangeably in the literature. However, here we use the term witness to refer to both witnesses and victims. In quoted material we retain the source terminology.

<sup>5</sup> Jacobson, J. (2017). Introduction in Cooper, P. & Norton, H. (Eds.) (2017) *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice*. Oxford: OUP, 2-3.

<sup>6</sup> Ibid, 3 and in Cooper & Norton (2017) generally.

<sup>7</sup> The Home Office (1998). *Speaking Up for Justice. The Report of the Home Office Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*. London, England: Author.

Criminal Evidence Act 1999”<sup>8</sup> (YJCEA 1999). That Act includes a statutory scheme of “special measures” for *vulnerable* and *intimidated* witnesses and defendants albeit that what is available for vulnerable defendants is more restrictive<sup>9</sup> and unequal.<sup>10</sup> The English legal system has no single definition of what constitutes a vulnerable witness, but a touchstone is section 16 of the YJCEA 1999, which defines those vulnerable witnesses eligible for special measures. Section 16 witnesses are those who are young (under 18 at the time of the hearing) or for whom the quality of their evidence is likely to be diminished because of a mental disorder within the meaning of the Mental Health Act 1983, a significant impairment of intelligence and social functioning, or a physical disability or a physical disorder.

One of the strong themes that emerged from *Raising the Bar* was “the inconsistency and weaknesses of some advocates in handling and questioning vulnerable people”.<sup>11</sup> The first twelve of 48 recommendations of *Raising the Bar* were for:

(i) Training: A comprehensive modular programme of training in handling vulnerable witnesses, victims and defendants should be put in place for all criminal and family practitioners, both new and experienced. It is suggested that it should be led by the Bar Council in partnership with the Inns of Court and Criminal Bar Association, with training programmes approved and moderated by the Advocacy Training Council (Recommendations 1-12).<sup>12</sup>

The Bar Council did not lead the training initiative. Rather, it was led by the ATC who began to develop a vulnerable witness advocacy course,<sup>13</sup> the responsibility for which

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<sup>8</sup> Cooper, P., & Wurtzel, D. (2014). Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales. *Northern Ireland Legal Quarterly*, 65(1), 39-61, 42.

<sup>9</sup> Cooper, P., & Wurtzel, D. (2013). A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales. *Criminal Law Review* (1) 4-22.

<sup>10</sup> Fairclough, S. (2018). Speaking up for Injustice: Reconsidering the provision of special measures through the lens of inequality. *Criminal Law Review* (1) 4-19.

<sup>11</sup> ATC (2011), Executive Summary, *Raising the Bar*. London: ATC, 3.

<sup>12</sup> ATC (2011), Recommendations, *Raising the Bar*. London: ATC, 4.

<sup>13</sup> Initially through a working group chaired by HHJ Peter Rook QC.

subsequently passed to the Inns of Court College of Advocacy ('ICCA').<sup>14</sup> ICCA then created the *Advocacy and the Vulnerable Training Programme*, which is:

“...designed to ensure that all advocates, when dealing with vulnerable witnesses, understand the key principles behind the approach to and questioning of vulnerable people in the justice system, irrespective of the nature of the allegation, or the jurisdiction in which the advocate appears”.<sup>15</sup>

Delegate materials for the *Advocacy and the Vulnerable Training Programme*<sup>16</sup> describe the stages and steps of the training and include various training films and text-based material<sup>17</sup> referring to *20 Principles of Questioning*.<sup>18</sup> ICCA states:

“The programme's national rollout is now in motion aiming to deliver training to 14,000+ delegates. **This training will become mandatory** for any advocate wishing to undertake publicly funded work for serious sexual offence cases involving vulnerable witnesses.”<sup>19</sup>

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<sup>14</sup> Established in 2016 by the Council of the Inns of Court, ICCA is the successor to the ATC. ICCA acts ‘on behalf of all the Inns in the development of education and training for the Bar and the wider profession’ – Wood, D. (2016). *Evolving Advocacy Training*. *Counsel*, June 2016. Available at <https://www.counselmagazine.co.uk/articles/evolving-advocacy-training> (accessed 18 March 2018). ICCA ‘comprises barristers, judges and others drawn from the Inns, the Circuits, the Bar Council of England and Wales, Specialist Bar Associations and other representative organisations.’ - <https://www.icca.ac.uk> (accessed 9 February 2018).

<sup>15</sup> <https://www.icca.ac.uk/advocacy-the-vulnerable> (accessed 9 February 2018).

<sup>16</sup> <https://www.icca.ac.uk/advocacy-the-vulnerable/delegate-materials> (accessed 9 February 2018).

<sup>17</sup> <https://www.icca.ac.uk/advocacy-the-vulnerable-training-delegate-online-preparation-stage-1> (accessed 9 February 2018).

<sup>18</sup> <https://www.icca.ac.uk/images/download/advocacy-and-the-vulnerable/20-principles-of-questioning.pdf> (accessed 9 February 2018).

<sup>19</sup> Emphasis appears in the original text, available at <https://www.icca.ac.uk/advocacy-the-vulnerable/delegate-materials> (accessed 12 July 2018)

The *20 Principles of Questioning*, also referred to in the delegate material as “rules”,<sup>20</sup> are shown in Appendix 1 of this article along with the “reason” stated for each rule in the ICCA materials. The first three principles are for ‘preparation’, followed by nine principles for advocates’ conduct and eight principles for questioning. The 20 Principles are central to delegate preparation for and engagement with the training. There are five steps in the compulsory materials which precede a face to face, group training session:<sup>21</sup> Watching the videos which introduce the course and the legal background, watching the “plenary” session video of the 20 Principles of Questioning delivered by HHJ Cahill, reading the case study *R v Graham*<sup>22</sup> (a mock brief in a criminal case), watching the video of a ground rules hearing (discussed further below), and finally learning to apply the 20 Principles which are set out in a table which lists them as rules and gives reasons with examples of how to apply them.<sup>23</sup> Delegates are required to prepare cross-examination of three witnesses in the case study (a 37 year old with “mild learning disability”, a 15 year old with “ADHD” and “Asperger’s Syndrome” and a typically developing 6 year old) in accordance with the 20 Principles.

The ICCA training pages refer the delegates to a large amount of “optional material” and within that long list they refer to a “set of 18 toolkits” on The Advocate’s Gateway website; it provides “free access to practical, evidence-based guidance on vulnerable witnesses and defendants” and is “hosted by” ICCA.<sup>24</sup> These toolkits clearly cite the research on which they are based. In contrast ICCA does not claim that the 20 Principles are based on research but this may not be well understood because the 20 Principles are described as “created by” and

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<sup>20</sup> In the document headed “Advocacy and the Vulnerable National Training Programme The 20 Principles of Questioning” (2017), the principles are set out and numbered 1 to 20 on page 1 and then set out again under the three columns “No.”. “Rule” with “Reason” given in the third column, pages 2 to 14.

<sup>21</sup> <https://www.icca.ac.uk/advocacy-the-vulnerable-training-delegate-online-preparation-stage-1> (accessed 13 July 2018).

<sup>22</sup> Available at <https://www.icca.ac.uk/images/download/advocacy-and-the-vulnerable/r-v-graham-case-study.pdf> (accessed 13 July 2018).

<sup>23</sup> <https://www.icca.ac.uk/images/download/advocacy-and-the-vulnerable/20-principles-of-questioning.pdf> (accessed 13 July 2018).

<sup>24</sup> <https://www.theadvocatesgateway.org> (accessed 13 July 2018).

“endorsed by” two research academics alongside a Circuit Judge.<sup>25</sup> The preamble to the table setting out the 20 Principles reads as follows:

“The 20 Principles have been created by HHJ Cahill QC, Professor Michael Lamb and Dr. Jacqueline Wheatcroft. They are not intended to be exhaustive. They have been devised to assist in giving consistent feedback to delegates on the training programme. The cross-examination of vulnerable witnesses is case-specific and this approach should be adjusted accordingly, depending on the extent and type of vulnerability in each witness in each case.”<sup>26</sup>

Undoubtedly, the 20 Principles are well motivated and address an important gap in advocacy training provision. The Solicitors Regulation Authority noted “increased scrutiny of the quality and future of criminal advocacy” and the need for a “proactive approach to the competence of advocacy in the criminal courts”.<sup>27</sup> A 2018 study based on interviews with fifty circuit and High Court judges<sup>28</sup> in England and Wales revealed that overall judges thought that advocacy was “generally competent”, advocates’ skills in dealing with young and vulnerable witnesses were improving and “[t]he training provided to advocates on vulnerable court users, and the available court adaptations for vulnerability which are now embedded in routine practice, were said to have brought significant benefits.”<sup>29</sup>

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<sup>25</sup> “The 20 Principles of Questioning, endorsed by HHJ Sally Cahill QC, Professor Michael Lamb and Dr Jacqueline Wheatcroft” under “Stage 1 Online Preparation Compulsory Materials” at <https://www.icca.ac.uk/advocacy-the-vulnerable/delegate-materials> (accessed 12 July 2018).

<sup>26</sup> Available at <https://www.icca.ac.uk/advocacy-the-vulnerable-training-delegate-online-preparation-stage-1> (accessed 9 February 2018).

<sup>27</sup> Solicitors Regulation Authority (2018). *Criminal Advocacy Thematic Review*, SRA, 8, <https://www.sra.org.uk/sra/how-we-work/reports/criminal-advocacy.page> (accessed 12 July 2018)

<sup>28</sup> These were judges who sit in criminal cases in the Crown Courts.

<sup>29</sup> Hunter, G, Jacobson, J. & Kirby, A. (2018). *Judicial Perceptions of the Quality of Criminal Advocacy Report* of research commissioned by the Solicitors Regulation Authority and the

Measuring the overall effectiveness of the 20 Principles, or any advocacy training, is not currently possible because, at present in England and Wales, there are no agreed criteria for measuring the effectiveness of advocacy training or the quality of advocacy. The ‘QASA’ quality control scheme for criminal advocacy developed by regulatory bodies, was “abandoned” in late 2017 after more than four years of discussion and argument.<sup>30</sup> In the absence of an advocacy quality standard in England and Wales, we echo the call for further research<sup>31</sup> to establish principles to underpin the quality assurance of advocacy.

Although there is no quality standard against which to measure the training, it is possible to assess whether the 20 Principles are underpinned by research evidence. Addressing this issue is important, for three reasons. First, the principles are designed to apply to questioning vulnerable witnesses (including vulnerable defendants who give evidence), yet some appear to be guides to general ‘good’ questioning practice *per se*, rather than being specific to vulnerable witness handling. Failing to differentiate between general and specific guidance may reduce the impact and credibility of key principles specific to vulnerable witnesses and under-represent the difficulty of, and care needed in, questioning vulnerable witnesses. Second, if the principles are to be observed reliably by advocates, then it is important to establish their empirical evidential status. If ‘rules’ referred to in the principles are merely opinions based on anecdotal accounts or individual preference, or if they are unhelpful for some vulnerable witnesses, then they are likely to fall into disuse over time. Third, and most critically, if rules go against the available research evidence, their

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Bar Standards Board, ICPR/ SRA, iv. <https://www.sra.org.uk/sra/how-we-work/reports/criminal-advocacy.page> (accessed 12 July 2018)

<sup>30</sup> Walters, M. (2017). Quality scheme for criminal advocates finally abandoned. *The Law Society Gazette*, 29 November 2017. Available at <https://www.lawgazette.co.uk/practice/quality-scheme-for-criminal-advocates-finally-abandoned/5063900.article> (accessed 13 July 2018)

<sup>31</sup> Gibbs, P. (2018). “The battle is won and lost before the court doors are unlocked”, Transform Justice, 6 July 2018, <http://www.transformjustice.org.uk/the-battle-is-won-and-lost-before-the-court-doors-are-unlocked/> (accessed 12 July 2018).



application may be harmful rather than helpful for the effective participation of vulnerable witnesses and thus to the fairness of the trial.

### **Are the 20 Principles underpinned by empirical research?**

There is a dearth of empirical evidence in respect of advocacy in general, and in particular, the questioning of vulnerable witnesses in the courtroom. Anyone who reads the widely available books on advocacy will find them filled with courtroom advice and anecdotes but little or no reference to peer-reviewed empirical research on the techniques espoused.<sup>32</sup> The emphasis is on “craft”<sup>33</sup> rather than science. In order to identify whether a rule is underpinned by published, empirical research we looked at studies concerned with assessing the impacts of practices relevant to each rule<sup>34</sup> on the completeness and accuracy of witnesses’ responses.

“Around the world, there is no generally agreed definition of the word ‘vulnerable’ as it applies to witnesses in the investigative setting”<sup>35</sup> nor is there a generally agreed definition of ‘vulnerable’ as it applies to the witness in the courtroom; thus the authors scanned the peer-reviewed, psychological literature published in the last 25 years relating to the forensic questioning of child and adult witnesses including those with and without “intellectual disability” and those “interrogated” as suspects as well as “interviewed” as witnesses. Studies

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<sup>32</sup> See for example, Morley, I. (2015). *The Devil’s Advocate*. London, England: Sweet & Maxwell; Munkman, J. (1991). Reprinted 2017. *The Technique of Advocacy*. London, England: Butterworths Lexis Nexis; Du Cann, R. (1964). Revised edition 1993. *The Art of the Advocate*. London, England: Penguin; Wellman, F.C. (1905). *The Art of Cross-examination*. London, England: Macmillan;

<sup>33</sup> Gray, G. (1991), Foreword, in Munkman, J. (1991). Reprinted 2017. *The Technique of Advocacy*. London, England: Butterworths Lexis Nexis, v.

<sup>34</sup> We did not include qualitative studies concerning how witnesses felt on being questioned in court, since these do not provide a scientifically robust way to assess the completeness and accuracy of a witness’s testimony.

<sup>35</sup> Bull, R. (2010). The investigative interviewing of children and other vulnerable witnesses: Psychological research and working/professional practice. *Legal and Criminological Psychology*, 5-23, 15.

included witnesses giving evidence about child abuse and those with Asperger's Syndrome. A range of vulnerabilities is captured in the body of research literature and the majority of the literature scanned relates to children. The articles subsequently cited are those which best reflect the types of vulnerable witness described in the case study witnesses to which delegates are asked to apply 20 Principles. The authors also scanned the legal, peer-reviewed literature, legal procedure guidance and case law where the Principle/ rule related to how an advocate should prepare their questioning. Overall, we found there to be a modest amount of empirical evidence from mock court questioning studies mostly with children, compared to a relatively well-developed body of empirical research relating to the questioning of vulnerable witnesses in investigative interviews.

Our evaluation of the rules underlying the 20 Principles in the light of empirical evidence is described below, and we have identified three categories in which we place each of the 20 Principles.

1. Rules that are clearly *supported* by empirical evidence from scientific research with witnesses: Rules 17 and 20 ("Supported").
2. Rules that *lack empirical evidence from scientific research* showing they apply to vulnerable witnesses *only*. ("Lacks VW research"); these rules, or some of them, might apply to all witnesses but the empirical evidence is not available. Rules 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, and 19.
3. Rules that appear *contrary* to empirical evidence from scientific research with witnesses, and so are likely to impair rather than enhance questioning of vulnerable witnesses: Rules 4 and 6 ("Contrary").

These category assignments are necessarily subjective and may indeed change with subsequent research. However, category assignments are principled. Note that by empirical evidence we refer to published, peer-reviewed reports of properly conducted scientific studies and published reviews of theses, and we exclude case anecdotes. The categories capture the extent to which a practitioner can have confidence based on research evidence in the use of each rule. In essence, the higher the category number, the less confidence a

practitioner should have in applying a rule in that category to a practical setting. The evaluation is summarised in Table 1 and described in more detail below.

**Table 1: The 20 Principles for Vulnerable Witnesses evaluated in terms of available research**

<b>Rule</b>	<b>Abbreviated Title</b>	<b>Category</b>
1	Comply with the Ground Rules Hearing	Lacks VW research
2	Identify the Issues	Lacks VW research
3	Draft questions in advance	Lacks VW research
4	You do not need to build rapport	Contrary
5	Do not suggest you will talk to the witness	Lacks VW research
6	Keep to a chronological order	Contrary
7	Suitable pace for the witness	Lacks VW research
8	Do not make statements	Lacks VW research
9	Signposting is important	Lacks VW research
10	No repetition	Lacks VW research
11	Keep behaviour in check	Lacks VW research
12	Watch for witness distress/ tiredness	Lacks VW research
13	Avoid "Do you remember..." questions	Lacks VW research
14	Use names not pronouns	Lacks VW research
15	Care re. asking what witness told someone else	Lacks VW research
16	Avoid asking 'how' and 'why' questions	Lacks VW research
17	No 'tag' questions	Supported
18	No compound questions	Lacks VW research
19	Ask short directed questions	Lacks VW research
20	Do not ask leading questions	Supported

## Category 1: Rules that are supported by empirical evidence

Rules 17 (No 'Tag' questions) and 20 (No leading questions) are supported by published, empirical evidence from studies with vulnerable witnesses. For example, "children can be pressured into changing their answers during cross-examination even when they remember the target event very well"<sup>36</sup> and "compared with other question types, open and closed questions that presumed certain information to be true elicited the greatest number of errors in children and adults with intellectual disabilities compared with other question types".<sup>37</sup> Nonetheless, we suggest these rules would benefit from modification for clarification purposes.

Rule 17 (No 'tag' questions) could be expressed more clearly and with reference to the judgment of the immediate past Lord Chief Justice in *Grant-Murray*:

"Tag questions are defined as making a statement with the addition of a short question inviting confirmation, for example, 'John didn't touch you, did he?' or 'John didn't touch you, right?'. Questions of this kind are "powerfully suggestive and linguistically complex"...Although they should be avoided, this does not mean that all tag questions have an adverse effect..."<sup>38</sup>

Rule 17 refers to "an adult whose intellectual development equates to that of a child or young person". This is overly simplistic, since each vulnerable witness will present with unique communication needs and abilities. Moreover, it is not always the case that "tag

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<sup>36</sup> For example, Zajac, R. O'Neill, S. & Hayne, H. (2012). Disorder in the courtroom? Child witnesses under cross-examination. *Developmental Review*, 32, 181–204, 189, M. Bruck, S.J. Ceci, E. Francoeur, R. Barr. I hardly cried when I got my shot! Influencing children's reports about a visit to their paediatrician. *Child Development*, 66 (1995), pp. 193-208, S.J. Ceci, M. Bruck. *Jeopardy in the courtroom: A scientific analysis of children's testimony*, American Psychological Association, Washington. DC (1995).

<sup>37</sup> Peter V. Bowles & Stefanie J. Sharman (2014). A Review of the Impact of Different Types of Leading Interview Questions on Child and Adult Witnesses with Intellectual Disabilities, *Psychiatry, Psychology and Law*, 21:2, 205-217.

<sup>38</sup> Lord Thomas of Cwmgiedd, CJ in *R v Grant-Murray & Anor* [2017] EWCA Crim 1228, 114 – 115.

questions contain a positive and a negative". A tag question might contain two positives (e.g., 'You like ice-cream, yes?' or two negatives 'You are unsure now, aren't you?'). It would also be beneficial to distinguish between tag questions (Rule 17) and Leading questions (Rule 20); tag questions are by definition leading, but there are other ways of phrasing leading questions.

In any event, it is also important to be clear about what falls within the 'Rule 20' definition of a *leading* question. An advocate has a "general *duty* to ensure that the defence case is put fully and fairly and witnesses challenged"<sup>39</sup> and the advocate may seek to put the defence case to the witnesses using a leading question. Keane and Fortson submit,

'[t]he right to lead in cross-examination is an essential adjunct to the separate but related rules relating to the need to put one's case which can fairly be said to lie at the heart of the adversarial process... However, in the case of vulnerable witnesses, including children, the form of the questions may need to be modified and, in the case of evidence capable of undermining the witness's credibility, restricted in scope.'<sup>40</sup>

Rule 20 is partly problematic because the reason given (see Appendix 1) suggests that *all* vulnerable witnesses are suggestible and/or desire to please the questioner, and therefore leading questions should not be asked, but there is no research that supports this view. Recent research for example challenges the established view that child witnesses are more suggestible, demonstrating that under certain conditions, adults are more susceptible to suggestion and false memories than children.<sup>41</sup>

Rule 20 also states that questions that start with 'what', 'where', 'when' and 'did' are not leading. This is not always the case. For example, if a witness said, "Richard touched me",

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<sup>39</sup> Hallett LJ, VP in *R v RK* [2018] EWCA Crim 603, paragraph 27 (unreported).

<sup>40</sup> Keane, A. & Fortson, R. (2011). Leading questions - a critical analysis. *Criminal Law Review*. Crim. L.R. 2011, 4, 280-295, 294-295.

<sup>41</sup> Otgaar, H., Howe, M. L., Merckelbach, H. & Muris, P. (2018). Who is the better eyewitness? Adults and children. *Current Directions in Psychological Science*.

then was asked “Where did Richard put his hand?”, the question is a leading one if it is not already in evidence that Richard used his hand to touch the witness. “Did you feel annoyed when Richard touched you?” is leading the witness by suggesting the emotion of annoyance. “How did you feel when Richard touched you?” is preferable, although even that question suggests to the witness that he or she was feeling something, but this is unlikely to be objectionable in most circumstances.

**Category 2: Rules that *lack empirical evidence showing they apply to vulnerable witnesses only.***

Sixteen of the rules (1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19) are not supported by empirical evidence to show they apply to vulnerable witnesses *only*. These rules, or some of them, may apply to the questioning of *all* witnesses. We have set out some examples from these sixteen rules to illustrate why research relating to these rules for vulnerable witnesses would be beneficial. Exploring the scientific research for all witnesses for each rule is outside the scope of this article. However, unless the rule can be shown to apply to vulnerable witnesses only, as opposed to all witnesses, we submit it is unhelpful to advocates to present these within a set of rules specifically for vulnerable witnesses.

Rule 1 (Comply with the Ground Rules Hearing) is correct as a matter of law; ground rules are indeed “sacrosanct” (see Appendix 1) because “the advocate is ultimately bound to abide by the rulings of the court”.<sup>42</sup> However as a matter of science, little is known about the application of the ground rules hearing system. The ground rules approach (the preemptive setting of the rules for advocates for the management of vulnerable witness evidence) is a concept created by the first author in Registered Intermediary training.<sup>43</sup> The system is proving to be popular but its usefulness in practice depends on the competence of the advocates and judges when the ground rules are discussed and directed. In response to

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<sup>42</sup> Lord Judge, CJ, in *R v Farooqi & Ors* [2013] EWCA Crim 1649, paragraph 109.

<sup>43</sup> Cooper, P., Backen, P., & Marchant, R. (2015). Getting to grips with Ground Rules Hearings – a checklist for judges, advocates and intermediaries. *Criminal Law Review*, 6, 420-435.

the first author's research-based recommendations,<sup>44</sup> the ground rules hearing approach was written into the Criminal Procedure Rules for England and Wales and their use has been widely adopted in other parts of the English Legal System and internationally.<sup>45</sup> Studies have concluded that ground rules hearings can be an effective strategy, but that they are not always used to their greatest effect.<sup>46</sup> There is no published scientific research that evaluates whether the ground rules set by judges for questioning are supporting complete and accurate evidence from vulnerable witnesses.

An intermediary<sup>47</sup> (if appointed) with expertise in the communication needs and abilities of the vulnerable witness can contribute to a ground rules hearings discussion, however, not all vulnerable witnesses have an intermediary. "[J]udges and advocates need specialist skills" and the judiciary has been pressing the Ministry of Justice for "further resources to extend [vulnerable witness] training to judges".<sup>48</sup> This is an area where practice has developed rapidly over the last ten to fifteen years. Since advocates are bound in law to follow ground rules set by the judge, further research is required into (i) the effectiveness of rules set by judges at Ground Rules Hearings, and (ii) how best to support judges in this task

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<sup>44</sup> Cooper, P. (2014). *Highs and lows: the 4th intermediary survey*. (Project Report) Kingston upon Thames, U.K.: Kingston University.

<sup>45</sup> See for example Cooper, P., & Mattison, M. (2017). Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model. *International Journal of Evidence and Proof*. 21(4) 351–370 and Cooper, P. (2018). Participation of vulnerable people: don't expect fireworks. *Fam. Law* 2018, 48 (Jan), 3.

<sup>46</sup> Cooper, P. (2014). *Highs and lows: the 4th intermediary survey*. (Project Report) Kingston upon Thames, U.K.: Kingston University. Henderson, E. (2017) Taking control of cross-examination: judges, advocates and intermediaries discuss judicial management of the cross-examination of vulnerable people. *Criminal Law Review*. 2016, 3, 181-205. Cooper, P & Farrugia, L. (2017) Ground Rules Hearings in Cooper, P. & Norton, H. (Eds.) (2017) *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice*. Oxford: OUP.

<sup>47</sup> For an explanation of how an intermediary conducts a witness communication needs assessment see Cooper, P., & Mattison, M. (2017). Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model. *International Journal of Evidence and Proof*. 21(4) 351–370.

<sup>48</sup> Cooper, P. (2018). *R. v Dinc (Zafer)* (Case Comment). *Criminal Law Review*. 2018, 3, 263-266, 266.

which inevitably at times will be complex. Furthermore, it has been suggested that universal ground rules could be beneficial when questioning all witnesses.<sup>49</sup>

Rule 2 (Identify the issues) reflects *The Better Case Management Handbook* and Criminal Procedure Rule 3.3 which “requires parties to engage with each other about the issues in the case from the earliest opportunity and throughout the proceedings.”<sup>50</sup> It could be argued that such a rule is evidently good practice for all witnesses and research is unnecessary. If that is so, why is it in a list of rules specifically for vulnerable witnesses?

Rule 3 (Draft your questions in advance), like ground rules, has not been scientifically tested. This is a new practice, which has been developing since 2003 alongside the use of intermediaries to review the draft questions of the advocate. There are in fact three separate steps that occur in practice: (i) the drafting of questions in advance by the advocate, (ii) the checking of questions with an intermediary (if there is one) and (iii) the checking and approval of questions by the trial Judge. Cooper and Mattison describe a short case study example from the pre-recording of cross-examination of a vulnerable witness in which the advocates were “directed to upload a copy of their questions to the Digital Case System so that the Judge could review them in advance of [cross-examination]”.<sup>51</sup>

If a judge pre-approves the advocate’s intended questions, it is unclear if the advocate can depart from the pre-approved questions if a witness gives an unexpected answer in cross-examination, or how pre-drafting and pre-approval applies (if at all) to the re-examining

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<sup>49</sup> Cooper, P. (2017). Moving the Bar: Is Cross-examination any good? *Mental Capacity Report: Practice and Procedure*, March 2017, 74, 3-6 and

Cooper, P & Farrugia, L. (2017). Ground Rules Hearings in Cooper, P. & Norton, H. (Eds.) (2017) *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice*. Oxford: OUP, 415.

<sup>50</sup> Judiciary of England and Wales (2018), *Better Case [M]anagement Handbook*, 5. Available at <https://www.judiciary.gov.uk/publications/the-better-case-management-bcm-handbook/> (accessed 5 May 2018).

<sup>51</sup> Cooper, P., & Mattison, M. (2018). "Section 28" and the pre-recording of cross-examination. *Criminal Law & Justice Weekly*. 2018, 182(1). Available at <https://www.criminallawandjustice.co.uk/features/“Section-28”-and-Pre-Recording-Cross-Examination> (accessed 9 February 2018).



advocate. The re-examiner would normally be expected to put their questions immediately after cross-examination. If the advocate then has to reconvene with the judge to formulate a new question, this would interrupt the flow.<sup>52</sup>

We know from research that pre-planning both the questions and the topics to be addressed during an investigative interview improves the quality of interviews, hence pre-planning is a basic requirement in ABE guidance.<sup>53</sup> However, this doesn't necessarily mean listing questions. In an investigative interview the order of questioning is witness driven. Being able to adapt questioning approaches in real time, in response to the answers provided is also an essential skill for investigative interviewers, and one that improves interview outcomes.<sup>54</sup> However, similar research has not been undertaken in relation to questioning witnesses in court. The authors know of no published research showing that the pre-drafting of questions in advance of questioning a vulnerable witness helps "advocates to keep a 'flow'" (Appendix 1) or leads to a better quality of questioning by advocates.

Rule 7 (Put questions at a suitable pace for the witness) on the face of it seems self-evidently correct for all witnesses, but we are not aware of any scientific studies supporting the contention that "Response time with vulnerable witnesses will be slower" (Appendix 1). One could hypothesise, in order to illustrate why research would be beneficial, that some vulnerable witnesses when questioned by advocates at a slow pace may lose concentration and tire more if questioning takes longer overall.

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<sup>52</sup> Cooper, P. (2018). R. v Dinc (Zafer) (Case Comment). *Criminal Law Review*. 2018, 3, 263-266, 266: "...it would be ridiculous to suppose that, if a witness gave an unexpected answer, automatically their testimony would be put on hold so that the judge and advocates could reconvene for further discussions to adjust the "script"".

<sup>53</sup> Ministry of Justice (2011) *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (London: MoJ).

<sup>54</sup> See for example, Smith, K., and Milne, R. (2011). Planning the interview. In M. Lamb., La Rooy, D., Katz, C., and Malloy, L. (Eds.), *Children's testimony: A handbook of Psychological research and forensic practice* (87-107). Chichester: Wiley and Smith, K., and Milne, R. (2017). Vulnerable witnesses: the investigation stage. In Norton, H., & Cooper, R. (Eds.), *Vulnerable people and the criminal justice system*. Oxford: Oxford University Press.

Rule 8 (Ask questions. Do not make statements) is not based on research. Again, one could hypothesise, in order to illustrate why research would be beneficial, there is a place for statements in the right context when combined with a question, as demonstrated by this example:

“With the judge’s approval and on the advice of the intermediary, defence counsel’s questions were reframed. The traditional statement and tag form was avoided. Instead two simple statements were followed by a simple question for each of the above, for example:

Q: You said D put his willy in your mouth.

D says he didn’t put his willy in your mouth.

Did D really put his willy in your mouth?

What followed in cross-examination was this:

Q: You said D put his willy in your mouth.

D says he didn’t put his willy in your mouth.

(Before counsel could ask Did D really put his willy in your mouth?)

A: Well he is joking with you because he did put his willy in my mouth.

Q: You said D put his willy in your bottom.

D says he didn’t put his willy in your bottom.

(Again, before counsel asked did D really put his willy in your bottom?)

A: Well D is just JOKING ABOUT with you guys down there. Because he really, really did put his willy in my bottom LOADS OF TIMES.”<sup>55</sup>

Rule 11 (Behaviour), implying remaining calm and polite, speaks more to professional conduct. If a witness is traumatised they may be hyper-vigilant and thus sensitive to their environment and focussed on reading the behaviours of others. Moreover, hyper-vigilance is one of the diagnostic criteria for Post-Traumatic Stress Disorder.<sup>56</sup> The reason given that

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<sup>55</sup> Cooper, P., Backen, P., & Marchant, R. (2015). Getting to grips with Ground Rules Hearings – a checklist for judges, advocates and intermediaries. *Criminal Law Review*, 6, 420-435, 429.

<sup>56</sup> *Diagnostic and Statistical Manual of Mental Disorders (DSM 5)*

all “[v]ulnerable witnesses find human behaviours hard to read” is not supported by empirical evidence.

Rule 18 directs “No compound questions”. Research tell us that for the sake of clarity compound questions should be avoided. “Like children, adults also find it more difficult to accurately answer linguistically complex questions relative to questions phrased in more simple terms”.<sup>57</sup> There is no evidence to support a generalisation about vulnerable witness evidence that “...answers obtained from a vulnerable witness as a result of this type of question will be confused and lacking in any value.” Unfortunately, this wording suggests, without foundation, a relative lack of value in answers from vulnerable witnesses. In addition (see Appendix 1) the example given of what not to do is in fact a compound statement and, the suggested better alternatives are leading questions which contravene Rule 20.

Rule 19 (Ask short, directed questions) is surely best practice for all witnesses but the examples given are problematic because the first, second and fourth (Appendix 1) contravene other rules. The example “Did you go to the park with Jason?” and “Did you want to go to the park with Jason?” are compound questions of the sort that would contravene rules 14 and 18. They are also leading, thus contravening Rule 20. If the witness answers ‘No’, they could be indicating one of a number of things including that that they didn’t go to the park, or that they went to the park but not with Jason, or that they went somewhere with Jason but not to the park. ‘Are you sure Harry wasn’t with you?’ mixes a positive and a negative and is thus potentially confusing. It is also a leading question which contravenes Rule 20 (see above).

Several of the reasons associated with the rules under this category would benefit from clarification or a more nuanced explanation. If they apply to all witnesses, including them in the 20 Principles without clarifying that they apply to all witnesses is something of a missed

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<sup>57</sup> Zajac, R. (2009) Investigative Interviewing in the Courtroom: Child Witnesses under Cross-Examination, in Bull, R., Valentine, T. & Williamson, T. (Eds) *Handbook of Psychology and Investigative Interviewing*. Oxford: Wiley-Blackwell.

opportunity in terms of advocacy training; this could even have a negative effect if advocates think these rules are limited to the questioning of vulnerable witnesses.

**Category 3: Rules that appear *contrary* to empirical evidence with witnesses, and so are likely to impair rather than enhance questioning of vulnerable witnesses.**

Rule 4 says “You do not need to build a rapport with the witness. A simple polite greeting is fine.” The notion that building rapport is not needed because a loss of focus may occur if witnesses are “side tracked” by “irrelevancies” runs contrary to the contemporary theoretical and empirical evidence on how to support children and other vulnerable groups to communicate effectively about their experiences during witness interviews, and interviews conducted with children suspected of having committed a crime.<sup>58</sup>

In investigative and intelligence gathering contexts, rapport is broadly considered to be the interpersonal relationship between interviewer and interviewee, based on reciprocal respect, empathy, and trust, and which is established and maintained over the course of an interaction.<sup>59</sup> Drawing on this literature, a judge explaining to a witness “*that it is OK if they don’t understand or don’t remember*” (Appendix 1) is not rapport building nor a substitute for rapport building.

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<sup>58</sup> Krähenbühl, S. (2012). Does the jury really need to hear it all? The effect of evidence presentation practice on jury assessment of children's eyewitness testimony. *Psychology, Crime & Law*, 18(9), 847-858; Roberts, K. P., Herman, M. E., & Sternberg, K. J. (2004). The effects of rapport-building style on children's reports of a staged event. *Applied Cognitive Psychology*, 18(2), 189-202. For a review in relation to child witnesses see Herschkowitz, I. (2011). Rapport Building in Investigative Interviews of Children, in Lamb, M.E., La Rooy, D.J., Malloy, L.C. & Katz, C. (Eds.) *Children’s Testimony: A Handbook of Psychological Research and Forensic Practice*. Chichester: Wiley.

<sup>59</sup> Evans, J. R., Meissner, C. A., Brandon, S. E., Russano, M. B., & Kleinman, S. M. (2010). Criminal versus HUMINT interrogations: The importance of psychological science to improving interrogative practice. *The Journal of Psychiatry & Law*, 38(1-2), 215-249; Kelly, C. E., Miller, J. C., Redlich, A. D., & Kleinman, S. M. (2013). A taxonomy of interrogation methods. *Psychology, public policy, and law*, 19(2), 165.

A recent study of prosecutors in the United States found poor quality rapport-building between prosecutors and child witnesses.<sup>60</sup> As far as the authors are aware, empirical research investigating rapport in the courtroom in England and Wales has yet to be undertaken. If Crown Prosecution Service prosecutors follow the latest practice CPS guidance, which includes “[t]he prosecutor conducting the case should meet all witnesses before they give evidence” and detailed guidance on what to discuss with the witness,<sup>61</sup> they will necessarily have built (or made concerted attempts to build) rapport with the witness. However, if the defence advocate is required to follow Rule 4, he or she is likely to start their questioning with no rapport with the witness. This would immediately place the defence at a disadvantage.

Investigative and intelligence gathering interview research substantiates the significant benefits of building and maintaining rapport; it can significantly improve the quality and quantity of information provided, increase cooperation, and improve concentration. The evidence is clear, where rapport is absent, the accuracy of the information provided decreases, as does the amount of information provided be that in a witness or suspect interview.<sup>62</sup> Accordingly, not only is Rule 4 contrary to the available forensic literature in

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<sup>60</sup> Ahern, E.C., Stolzenberg, S.N & Lyon, T.D. (2015). Do Prosecutors Use Interview Instructions or Build Rapport with Child Witnesses? *Behavioural Sciences and the Law*. Volume 33, Issue 4, 367 – 594.

<sup>61</sup> CPS (2018). *Speaking to Witnesses at Court CPS Guidance February 2018*, 3 – 7.

<sup>62</sup> Abbe, A., & Brandon, S. E. (2014). Building and maintaining rapport in investigative interviews. *Police practice and research*, 15(3), 207-220;  
Collins, R., Lincoln, R., & Frank, M. G. (2002). The effect of rapport in forensic interviewing. *Psychiatry, psychology and law*, 9(1), 69-78;  
Hershkowitz, I., Lamb, M. E., Katz, C., & Malloy, L. C. (2015). Does enhanced rapport-building alter the dynamics of investigative interviews with suspected victims of intra-familial abuse? *Journal of Police and Criminal Psychology*, 30(1), 6-14;  
Lyon, T. D., Wandrey, L., Ahern, E., Licht, R., Sim, M. P., & Quas, J. A. (2014). Eliciting maltreated and non-maltreated children's transgression disclosures: Narrative practice rapport building and a putative confession. *Child development*, 85(4), 1756-1769;  
Roberts, K. P., Lamb, M. E., & Sternberg, K. J. (2004). The effects of rapport-building style on children's reports of a staged event. *Applied Cognitive Psychology*, 18(2), 189-202;  
Teoh, Y. S., & Lamb, M. E. (2010). Preparing children for investigative interviews: Rapport-building, instruction, and evaluation. *Applied Developmental Science*, 14(3), 154-163;

respect of forensic interviewing, but there appears no evidence to support this rule, nor the reason given for it.

Rule 6 (Keep to a chronological order) requires the questioner to keep questions in an order “which the witness can follow chronologically” and says that “jumping about a timeline...will be especially difficult for a vulnerable witness” (Appendix 1). Contrary to Rule 6, research indicates that enforcing a strict chronological order when asking vulnerable witnesses, or indeed any witness to recall or answer questions about experienced events can make the task of remembering more cognitively demanding.<sup>63</sup> <sup>64</sup> Evidence-driven questioning, that is, a questioning approach driven by the questioner’s priorities rather than the desire to support witness cognition, is known to elicit less information, to reduce the accuracy of that information, and does not contribute to therapeutic jurisprudence.<sup>65</sup>

Remembering a past personal event requires witnesses to remember consciously what has occurred at a particular time and place (a type of memory known as episodic memory). Importantly, each witness’s mental record of an event is unique.<sup>66</sup> Questions tailored to the witness’s mental record, which may or may not be organized chronologically, can improve accessibility to event details, typically because the questions are perceptually related.<sup>67</sup>

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Vallano, J. P., & Compo, N. S. (2011). A comfortable witness is a good witness: Rapport-building and susceptibility to misinformation in an investigative mock-crime interview. *Applied Cognitive Psychology*, 25(6), 960-970;

Walsh, D., & Bull, R. (2012). Examining rapport in investigative interviews with suspects: Does its building and maintenance work? *Journal of police and criminal psychology*, 27(1), 73-84.

<sup>63</sup>Bowler, D. M., Gardiner, J. M., & Grice, S. J. (2000). Episodic memory and remembering in adults with Asperger syndrome. *Journal of autism and developmental disorders*, 30(4), 295-304.

<sup>64</sup> Koriat, A., Goldsmith, M., & Pansky, A. (2000). Toward a psychology of memory accuracy. *Annual review of psychology*, 51(1), 481-537.

<sup>65</sup> Fisher, R. P. (2010). Interviewing cooperative witnesses. *Legal and Criminological Psychology*, 15(1), 25-38.

<sup>66</sup> Dando, C. J. (2013). Drawing to Remember: External Support of Older Adults’ Eyewitness Performance. *PLoS One*, 8, e69937.

<sup>67</sup> Dando, C. J., Ormerod, T. C., Wilcock, R., & Milne, R. (2011). Change temporal order retrieval: Help or hindrance? *Cognition*. 121, 416-421. doi:10.1016/j.cognition.2011.06.015

Chronologically predetermined questions can interfere with the underlying organization of that material in memory, which is known to be detrimental.<sup>68 69</sup>

If advocates are required to adhere to the rules of no rapport and chronological questioning, this is likely to impair questioning of the witness/accused. Impaired questioning may lead to unfairly inhibited evidence elicitation and testing and ultimately to appeals against conviction. For instance an advocate might be prevented from building rapport and thus gaining cooperation from a witness whose account their client maintained was false and needed to test in cross-examination. In addition, if the questioner is required to conduct questioning chronologically, their cross-examination could be thwarted if the witness or accused was not capable of remembering/ remembering fully in accordance with a chronological order of questioning. The end result of the 'no need for rapport' and 'chronological questioning' rules could be an unfair trial and thus an unsafe conviction or an erroneous acquittal.

### **Witness advocacy and its research evidence base**

If the research evidence-based toolkits on The Advocate's Gateway represent a step forward in advocacy, the 20 Principles might represent two steps back. ICCA's vulnerable witness training course materials do not cite a tested theoretical framework(s), or empirical evidence in support of any of the 20 Principles. Whilst this article specifically questions the legitimacy of 20 Principles at the heart of vulnerable witness advocacy training in England and Wales, the authors believe that a wider debate is required about the approach to witness evidence in court. It is an issue which is beginning to attract the attention of senior judges.

In *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), a civil dispute, Mr Justice Leggatt (now Lord Justice Leggatt) made this observation:

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<sup>68</sup> Polyn, S. M., Norman, K. A., & Kahana, M. J. (2009). Task context and organization in free recall. *Neuropsychologia*, 47(11), 2158-2163.

<sup>69</sup> Fisher, R. P., & Geiselman, R. E. (2010). The cognitive interview method of conducting police interviews: Eliciting extensive information and promoting therapeutic jurisprudence. *International journal of law and psychiatry*, 33(5-6), 321-328.

“While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony ... the best approach for a judge to adopt ... is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.”<sup>70</sup>

Lord Justice Leggatt’s observations were endorsed by Howe and Knott in 2015<sup>71</sup> and cited with approval by Lord Kerr JSC in 2018 in *R (on the application of Bancoult No 3) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)*.<sup>72</sup>

*Gestmin* has been referred to many times in subsequent judgments which perhaps indicates not only that advocates seek to rely on the principles espoused in it, but also that judges have an appetite for a research evidence-based approach to the evaluation of witness testimony. In many cases fact-finders do not have the advantage of documentary evidence or known/ probable facts against which to compare the witnesses’ oral evidence; they must evaluate conflicting witness testimony which stands alone. In any case there are additional challenges where the communication needs of vulnerable witnesses or defendants require advocates to take a different approach. In all cases there are no agreed measures of quality for the advocacy deployed.

## **Discussion and conclusions**

How best to support the participation of vulnerable witnesses and defendants in the justice system “is not a straightforward task”<sup>73</sup> but ensuring advocates conduct questioning skilfully

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<sup>70</sup> [2013] EWHC 3560 (Comm), paragraph 16 and 22.

<sup>71</sup> Howe, M. L. & Knott, L. (2015). The fallibility of memory in judicial processes: Lessons from the past and their modern consequences. *Memory*, 23(5), pp. 633-656.  
doi: [10.1080/09658211.2015.1010709](https://doi.org/10.1080/09658211.2015.1010709)

<sup>72</sup> [2018] UKSC 3.

<sup>73</sup> Lady Justice Hallett (2017), Foreword, in Cooper, P. & Norton, H. (Eds.) (2017), *Vulnerable People and the Criminal Justice System*. Oxford: OUP, v.



is a fundamental part of that task. To the authors' knowledge this is the first widespread, post-qualification advocacy training initiative in England and Wales; practising advocates have volunteered to be trained as trainers or to attend as delegates. It is laudable that attempts are being made to engage advocates in training to improve the questioning of vulnerable witnesses and defendants, however the 'rules' or 'principles' are a matter of concern.

Whilst we commend the initiative, the key messages to emerge from our review are as follows. First, the 20 Principles (or the 'rules' as they are also referred to in the training), taken as a whole, cannot be said to be underpinned by empirical evidence from scientific research. Two of the rules are supported by scientific research with vulnerable witnesses. The majority of the rules (sixteen) are not supported by scientific research that applies specifically to vulnerable witnesses *only*. Two of the rules are contrary to the available empirical evidence and may impair rather than enhance the cross-examination of vulnerable witnesses.

It must be remembered that the start of the 'rules' includes an extremely important caveat: "The cross-examination of vulnerable witnesses is case-specific and this approach should be adjusted accordingly, depending on the extent and type of vulnerability in each witness." Unfortunately expressing guiding principles as 'rules' contradicts the spirit of this caveat. Questioning witnesses is a complex activity requiring specialist training and contextual adaptation by the questioner. Questioning vulnerable witnesses is even more complex and the skills required cannot be done justice by an inflexible list of rules. Instead, advice to advocates should capture the importance of research evidence-based, contextual questioning and the need for flexible adaptation to suit the needs of each vulnerable individual.

It is submitted that referring to 'rules' is not the best way to refer to general principles as they may render an approach to advocacy which is unnecessarily inflexible and stilted. It is vital not to violate an alternative principle missing from the list of 20 Principles, but one we believe critical to interactions with the vulnerable: a principle of contextually appropriate dialogue. Every vulnerable witness is different and how the testimony unfolds in every

cross-examination is different, and guidance needs to recognize and support this individuality. Principles which contravene scientific research and a rule-based approach which glosses over individual differences are likely to be highly counter-productive.

Intermediaries and practitioners in Europe, America and Australia are referred to the evidence-based materials on The Advocate's Gateway.<sup>74</sup> Other jurisdictions look to England and Wales and follow its lead in relation to intermediaries for vulnerable witnesses.<sup>75</sup> The Advocate's Gateway website is hosted by ICCA, but The Advocate's Gateway does not design or endorse any advocacy training courses.

On the other hand ICCA's vulnerable witness training will become mandatory<sup>76</sup> [in England and Wales], according to ICCA's website. ICCA's website states that it provides training as part of its "international work"; it says its "courses" usually last 2-3 days and show "remarkable results in raising confidence and standards of advocacy and assisting local Bars to establish their advocacy training facilities."<sup>77</sup> The validity of the 20 Principles is not only an issue for the justice system of England and Wales, but also for international justice systems if training based on the 20 Principles is promulgated overseas.

Before any further vulnerable witness advocacy training is conducted by ICCA, it is recommended that the 20 Principles are withdrawn and guidance written with explicit

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<sup>74</sup> The first author, who is Chair of The Advocate's Gateway and has led it since inception, trains intermediaries and practitioners around the world and refers them to The Advocate's Gateway. In England and Wales they have been cited with approval by senior judges on many occasions, for example: "The Toolkits may be downloaded at no cost from the Advocate's Gateway Website. They provide excellent practical guides and are to be commended. They have been endorsed by the Lord Chief Justice in the Criminal Practice Directions Amendment No. 2 as best practice." – Lord Thomas of Cwmgiedd, CJ, in *R v Grant-Murray & Anor* [2017] EWCA Crim 1228, paragraph 112.

<sup>75</sup> Cooper, P., & Mattison, M. (2017). Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model. *International Journal of Evidence and Proof*. 21(4) 351–370.

<sup>76</sup> <https://www.icca.ac.uk/advocacy-the-vulnerable/delegate-materials> (accessed 6 May 2018). Mandatory "for any advocate wishing to undertake publicly funded work for serious sexual offence cases involving vulnerable witnesses"

<sup>77</sup> <https://www.icca.ac.uk/international-work> (accessed 13 July 2018).

reference to the relevant scientific research evidence where it exists. In addition references to 'rules' should be omitted, principles for this particular training should be focussed fully on vulnerability and principles 4 and 6 should be reversed because they are currently suggesting an approach which runs contrary to the empirical data. In addition, ICCA should make clear which principles apply to all witnesses (vulnerable or not) and explicitly reference the relevant empirical evidence where it exists.

The focus of this article has been the issue of whether ICCA's "20 Principles" for questioning vulnerable witnesses are underpinned by research. Based on our review of the available research, our answer is 'no'; of the 20 Principles, two are supported by empirical evidence, two are contrary to empirical evidence, and the remaining 16 lack any empirical foundation that would justify including them in these "principles" or "rules" specifically for questioning vulnerable witness. This review highlights a need for further research into advocacy as it is practised in courtrooms and the research evidence-base for principles of effective witness questioning in court.

Notwithstanding the need for further research into advocacy in the courtroom, there are already lessons from psychological research that have yet to be absorbed into advocacy training and possibly have yet to be absorbed by many fact-finders who oversee trials and evaluate witness evidence. In short, too little attention has been paid to establishing research evidence-based principles for the handling of witness evidence. Vulnerable witness advocacy training underpinned by "20 Principles" which are not based on research, is symptomatic of a wider issue that relates to all witnesses. Where are the research-based principles for handling witness evidence? If the principles underpinning approaches to questioning and evaluating witness evidence do not take into account the research evidence, trials may not be fair. The authors invite the Law Commission of England and Wales to instigate a review of the handling of witness evidence because there appears to be a yawning gap in law where a research evidence-based approach to witness evidence should exist.

## APPENDIX 1

The 20 Principles of Questioning can be found at

<https://icca.ac.uk/images/download/advocacy-and-the-vulnerable/20-principles-of-questioning.pdf> (pages 3 to 6)