

Understanding Courts

A report by JUSTICE

Chair of the Committee
Sir Nicholas Blake



Established in 1957 by a group of leading jurists, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. We are a membership organisation, composed largely of legal professionals, ranging from law students to the senior judiciary.

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- We intervene in superior domestic and international courts, sharing our legal research, analysis and arguments to promote strong and effective judgments.
- We promote a better understanding of the fair administration of justice among political decision-makers and public servants.
- We bring people together to discuss critical issues relating to the justice system, and to provide a thoughtful legal framework to inform policy debate.

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JUSTICE

59 Carter Lane, London, EC4V 5AQ
www.justice.org.uk

THE WORKING PARTY

Sir Nicholas Blake (Chair)

Pouneh Ahari (Rapporteur) Legal Fellow, JUSTICE

Richard Blann, Solicitor

Jodie Blackstock, Legal Director, JUSTICE

Louise Bryant, Magistrate

Leslie Cuthbert, Solicitor Advocate, Crown Court Recorder, Part-Time Road User Charging Adjudicator, Judge of the First-tier Tribunal (Mental Health and SEND)

Carlos Dabezies, retired District Judge (civil and family), retired part-time Judge (Employment Tribunal)

Nick Gallagher, former Chief Executive, Personal Support Unit

Professor Felicity Gerry QC (England and Wales and Australia), Deakin University, Management Committee, the Advocate's Gateway

Professor Jackie Hodgson, University of Warwick

Theo Huckle QC

Dr Jessica Jacobson and Dr Amy Kirby, Institute for Criminal Policy Research, Birkbeck College

Natalie Kyneswood (Rapporteur) PhD candidate, University of Warwick

Michael Mallon, District Crown Prosecutor

Professor Linda Mulcahy, University of Oxford

David Wurtzel, Barrister, Fellow Emeritus, City, University of London, co-deviser, Registered Intermediary Scheme

MEMBERS OF SUB GROUPS

Debbie Pinion, Deputy Justices' Clerk

Christopher Woodrow, Deputy Justices' Clerk

The views expressed in this report are those of the Working Party members alone, and do not reflect the views of the organisations or institutions to which they belong.

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EXECUTIVE SUMMARY

It is a fundamental obligation of a democratic state to provide an effective system of justice which allows for the resolution of disputes to all within the jurisdiction. Any such legal system may only claim to be effective, and thereby legitimate, if it is designed in a way which allows for the participation of lay people, whether they are a victim, witness, juror, defendant or litigant, or someone attending court to observe. A lay person must be able to understand the court processes and the language and questioning of the legal professionals working within it. Conversely, the court must understand the needs of lay users.

Despite many attempts to simplify the process, in an era where cuts to legal aid mean that many more people go unrepresented, studies continue to cast doubt on how our justice system is currently operating. Previous research and the work of other JUSTICE working parties has revealed a disconnection between professionals and lay users in court, with the at-times chaotic nature of proceedings creating a culture that marginalises the public using our courts. As such, this working party has sought to expand upon the previous work of JUSTICE in making recommendations that we believe can improve understanding of the court process for lay users and can challenge the courtroom culture that leads to user dissatisfaction, confusion and exclusion.

Following a period of evidence gathering and consultation, our working party members have agreed 41 recommendations, which seek to further enable a lay person's understanding of the court. The findings of our report are assembled and considered under the following three headings:

- *Understanding the process*

Lay users often go to a court or a tribunal without a sufficient understanding of what they should expect from the process, and what the process expects from them. Such uncertainty and lack of clarity is capable of inhibiting the effective participation of the lay user, and can have an alienating effect on members of the public attending court. This working party concludes that HMCTS should therefore publish practical information on what to expect at a hearing or a trial that is clear, accessible and easy-to-understand. The guidance should be made available in a variety of formats, and must include explanations of the roles of legal professionals and the hearing room

layout, as well as guidance on navigating the court building, the order of proceedings and the process of giving evidence. Although we consider that our system should fundamentally remain adversarial in nature, effective participation of lay users must be facilitated as much as possible by the presiding judge, who should conclude proceedings with a clear and accessible decision on the outcome.

- *Communicating with lay users*

Members of the public attending court can often feel baffled by the at-times impenetrable language and convoluted legal jargon used by legal professionals during proceedings. It is therefore imperative that legal professionals should always be mindful of the need to communicate with lay users in a clear and unpretentious manner. The increased presence of litigants in person in recent years has made the need for this requirement all the more pressing. With this in mind, we recommend a judiciary-led consultation within the legal profession to evaluate modes of address and commonly misunderstood terminology deployed in court. The findings of such a review should inform training for new and continuing practitioners, in order to encourage lawyers and judges to communicate effectively with court users – not least by putting themselves in lay user’s shoes. The questioning of witnesses should always be fair and appropriate, so that they have the opportunity to give accurate evidence. In order to achieve this, questioning techniques should be adapted to the needs and understanding of each lay user.

- *Consistency of support and reasonable adjustments for lay users*

There are many people accessing our courts as parties or witnesses who need additional support in order to take part, irrespective of how well they are informed of the process in advance, or how well professionals communicate with them. It is crucial that the court process operates in a way which does not exclude such people from having proper access to our system of justice. The report considers the reasonable adjustments and support services currently made available to court users and recommends expansion of good practice across all jurisdictions.

Our report is clear in the overarching need for the judiciary, legal profession and the Government to facilitate a better understanding for the lay user of the practice and procedure in our courts. If the people using our courts cannot effectively participate through lack of understanding, we risk denying access to justice. Further work is

needed to achieve this aim and we make recommendations to this end. Explicit within our recommendations is our consideration that the legal system must place the lay user at its heart, and the process be shaped around their needs.

I. INTRODUCTION

[O]ur present court processes, our rules, our forms, our guidance, is woefully inadequate to enable LiPs, even educated, highly-articulate, intelligent LiPs, to understand the system. And that is a shocking reproach—to us, not them. Sir James Munby, former President of the Family Division.¹

1.1 From the moment a member of the public enters a court or tribunal building, they find themselves in an unfamiliar, intimidating environment.² They must negotiate security, find the relevant courtroom, and try to make sense of the process and outcome of the hearing. Increasingly, they must also represent themselves. These features are exacerbated by the fact that legal professionals and judges are often not representative of the people using our courts – in particular in terms of gender, racial, ethnic and socio-economic background. The look, manner and language of court professionals can alienate many members of the public who do not identify with their culture, lifestyle and heritage. This can create a perception of the courts as being not only remote but lacking legitimacy. For example, a defendant said in a study of the Crown Court: *“Well, it’s posh innit? The courts are posh. It’s all posh to me, everyone in wigs. Everyone talks in this funky language.”*³ This perception can also be found in the civil and family courts. One interviewee in a study of Litigants in Person (LiPs) said the judge was *“very, very middle class; sorry, upper class. And she didn’t have a clue, I wouldn’t say, about what real people go through.”*⁴

¹ Interviewed by G. Langdon-Down, ‘Interview with Sir James Munby, Family Division President’, Lexis Nexis Family Law, 6th August 2018, available online at <https://blogs.lexisnexis.co.uk/family/interview-with-sir-james-munby-family-division-president/>

² See J. Jacobson, G. Hunter and A. Kirby *Inside Crown Court: Personal Experiences and Questions of Legitimacy*, (Policy Press: Bristol, 2015); Citizens Advice, ‘Responsive Justice: How citizens experience the justice system’, 2015, available online at <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Responsivejustice.pdf>

³ *Inside Crown Court*, *ibid*, at p. 101.

⁴ R. Lee and T. Tkacukova, ‘A Study of Litigants in Person in Birmingham Civil Justice Centre,’ 2017, at pp. 11-13, available online at http://epapers.bham.ac.uk/3014/1/cepler_working_paper_2_2017.pdf

- 1.2** Managing perceptions and expectations is something we touch on in this report.⁵ But our main concern is ensuring that lay people can understand and participate effectively in the justice process, whether they are victims, witnesses, jurors, defendants or litigants, or those attending the court hearing to observe. It is a fundamental obligation of a democratic state to provide a system of dispute resolution to all within the jurisdiction. Even if litigants can be expected to contribute to the costs of this provision and reasonable court fees are charged for those who can afford to pay, justice remains a public service that must be accessible to all its users.
- 1.3** As a physical space, the courthouse carries important symbolic value and the court environment reinforces notions of the court as a special judicial space, conveying authority and legitimacy.⁶ Legal and court professionals' use of language, dress and ritual further enhances the sense that this is a place of expertise.
- 1.4** The JUSTICE Working Party report *What is a Court* considered how best to configure justice spaces to make these easier to access and navigate, promoting the idea of flexible spaces in which justice could be brought closer to the public using our courts.⁷
- 1.5** Other JUSTICE work has identified jurisdiction specific features in need of reform. For example in the criminal context, *Complex and Lengthy Criminal*

⁵ For example, in September 2015, a Citizens Advice commissioned survey questioned over 2,000 adults about their attitudes to the justice system in England and Wales. 72% of participants agreed that trying to solve their problems might not be worth the financial and emotional cost and only 48% of participants believed that if they had to go to court, their outcome would be fair. Citizens Advice, 'Responsive justice' (2015), see note 2 above, available online at <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Crime%20and%20Justice%20Publications/Responsivejustice.pdf>

⁶ See L. Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011) and E. Rowden. (2015) 'Distributed Courts and Legitimacy: What do we Lose When we Lose the Courthouse?' *Law, Culture and the Humanities*, 14:2 (2018), pp. 263-281.

⁷ JUSTICE, *What is a Court?* (2016), available online at <https://justice.org.uk/our-work/areas-of-work/what-is-court/> chaired by Alexandra Marks, recommended a re-focus of the court estate on the needs of the user; with flexible justice spaces that can be located closer to the communities they serve and accommodate multiple jurisdictions; and enhanced services through investment in technology for remote and virtual proceedings and appropriately trained personnel.

Trials set out the need to present a clearer case for the jury to consider in the most complex cases.⁸ *In the Dock* recommended the abolition of the dock due to its interference with the effective participation of defendants in their trial.⁹ *Mental Health and Fair Trial*¹⁰ called for improved identification of the broad ranging mental health and learning difficulties that can cause vulnerability in criminal cases, and appropriate responses that will enable people to be either diverted away from prosecution or to participate effectively in their trial.

- 1.6** *Delivering Justice in an Age of Austerity* focused on civil courts and tribunals and recommended affecting a fundamental change to the way we resolve disputes where there are unrepresented parties, the use of online proceedings, as well as advocating the use of telephone and online legal assistance and the employment of a registrar or case officer role to assist case progression at court.¹¹ *Immigration and Asylum Appeals: a Fresh Look*¹² proposed using tribunal case workers as well as written and video information to assist appellants. Furthermore, our report, *Preventing Digital Exclusion from Online Justice*, considered the impact of technology on access to justice within the context of the ongoing Her Majesty's Courts and Tribunals Service (HMCTS) reform programme,¹³ recommending clear and simple features, accessible technical assistance to navigate the online process and signposting to legal information and advice.

⁸ JUSTICE, *Complex and Lengthy Criminal Trials* (2016), available online at <https://justice.org.uk/complex-lengthy-criminal-trials-2/> chaired by Sir David Calvert-Smith.

⁹ JUSTICE, *In the Dock: Reassessing the Use of the Dock in Criminal Trials* (2015), available online at <https://justice.org.uk/in-the-dock/>

¹⁰ JUSTICE, *Mental Health and Fair Trial* (2017), available online at <https://justice.org.uk/our-work/areas-of-work/criminal-justice-system/mental-health-fair-trial/> chaired by Sir David Latham.

¹¹ JUSTICE, *Delivering Justice in an Age of Austerity* (2015), available online at <https://justice.org.uk/justice-age-austerity-2/> chaired by Sir Stanley Burton.

¹² JUSTICE, *Immigration and Asylum Appeals: a Fresh Look* (2018), available online at <https://justice.org.uk/our-work/areas-of-work/administrative-justice-system/immigration-asylum-determination-reform/> chaired by Professor Sir Ross Cranston.

¹³ JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018), available online at <https://justice.org.uk/our-work/areas-of-work/assisted-digital/> chaired by Amanda Finlay CBE.

The Working Party

- 1.7** This working party, under the working title *What is a Trial*, sought to expand upon JUSTICE’s previous work by focusing on what happens across all of our courts and tribunals from the perspective of the public who use them. Our starting point was the empirical research report *Inside Crown Court* and follow up research on youth courts which conclude that the ritualised nature of proceedings, the disconnect between professionals and lay users, and the “organised yet chaotic nature of proceedings” creates a culture that marginalises the public using our courts.¹⁴ Research on LiPs in civil and family proceedings also raises concerns about their understanding of the process and interaction with court professionals.¹⁵
- 1.8** This Working Party was tasked by JUSTICE with finding ways to improve the participation of court users in their own proceedings, which have a significant impact upon their lives, but from which they often feel excluded by overly legalistic processes that are difficult for them to understand. The group comprised judges, academics, lawyers and leaders in the advice sector. We met with a variety of relevant stakeholders and experts, and undertook our own research. Building upon progressive work in particular jurisdictions and organisations, we make 41 recommendations that we believe can improve understanding of the court process for lay users and can challenge the courtroom culture that leads to user dissatisfaction, confusion and exclusion.
- 1.9** In making our recommendations, we have considered the language and questioning processes used during court and tribunal hearings, the nature of lay and professional user interactions and the culture and training of legal professionals, in order to identify where improvements can be made. It is necessary that the public is better accommodated and their concerns addressed, albeit within procedural, evidential and current financial constraints. Courts and tribunals are arenas in which the public resolve legal disputes. If they cannot understand and feel connected to the legal process, access to justice is undermined.

¹⁴ Jacobson et al (2015), see note 2 above, and A. Kirby, ‘Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts: A Question of “Court Culture”?’ [2017] Crim LR 949, 953.

¹⁵ Lee and Tkacukova, see note 4 above.

1.10 Procedural justice theorists have identified features that might create a sense of legitimacy and fairness among lay users,¹⁶ which are reflected in surveys of user experience.¹⁷ These include the feeling of being listened to and being treated with dignity and respect by authorities.¹⁸ Drawing on this, and other research, our report suggests ways to improve user participation under three broad themes:

- (1) Understanding the process at courts and tribunals: before, during and after a hearing and the way that hearings are organised, managed and conducted by professional court users;
- (2) Communicating effectively with lay users, in the language court professionals adopt, the manner of evidence taking, and by adjusting legal professional culture through training and self-regulation; and,
- (3) Providing consistent support and making reasonable adjustments to enable lay users to give their best evidence and make their arguments.

Initiatives and reforms

1.11 The last two decades have seen significant reform across all legal jurisdictions in England and Wales, which have impacted on the experience of lay users. A major reform to the administrative justice system occurred in 2007 when multiple and disparate tribunals were made independent of their sponsoring departments and largely brought together in a single system established by the Tribunals, Courts and Enforcement Act 2007 (TCEA) and administered by a new single Tribunals Service.¹⁹ The Tribunals Service merged in 2011 with HMCTS.²⁰

¹⁶ For a discussion of procedural justice theory, see J. Jacobson et al (2015), note 2 above, ch. 7.

¹⁷ Ministry of Justice, 'HM Courts & Tribunals Service: Citizen User Experience Research' (HMCTS Customer Insight Team 2018), <https://www.gov.uk/government/publications/hmcts-citizen-user-experience-research>

¹⁸ The ability of a party to participate effectively in a hearing liable to impact upon their rights, interests and legitimate expectations goes to the heart of the requirements of natural justice and is seen as promoting impartiality and the rule of law, H.L.A. Hart, *Concept of Law* (Oxford: Clarendon Press, 1961) pp. 156 and 202. It also is fundamental to the language of human rights conventions, which recognise the right to be treated with dignity and respect, expressly stated in Article 1 of the Universal Declaration of Human Rights and developed in the European Convention on Human Rights and UN Convention on the Rights of Persons with Disabilities.

¹⁹ Devolved Welsh tribunals sit outside the structure established by the TCEA in 2007. Between 2011 and 2013 the administration of most of the Welsh tribunals was transferred from their sponsoring departments to the Welsh Tribunal Unit. The Wales Act 2017 created a statutory

Tribunals are intended to provide a simple, accessible system of justice where users can represent themselves.²¹ As Sir Andrew Leggatt noted in his review of tribunals which precipitated the TCEA, *“It should never be forgotten that tribunals exist for users, not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases”*.²²

1.12 The TCEA places a duty on the Senior President of Tribunals to have regard to the following features in carrying out his or her functions: tribunals should be accessible, their proceedings should be fair and handled quickly and efficiently; members of tribunals should be experts in the subject matter or law with which the tribunal is concerned; and innovative methods of resolving disputes should be developed.²³ Tribunals decide appeals across a very wide-range of jurisdictions, meaning their nature, the issues they deal with and their caseloads vary considerably as do their approaches to adjudication.²⁴ It is therefore difficult to make generalisations that are applicable to all tribunals – never mind across all

definition of “Welsh Tribunals” and established the post of the President of Welsh Tribunals for the first time.

²⁰ The Employment Tribunal and Employment Appeals Tribunal are not part of the First-tier and Upper Tribunal system. However, they are administered by Her Majesty’s Courts and Tribunal Service.

²¹ Sir A. Leggatt, *Tribunals for Users – One System, One Service, Report of the Review of Tribunals* (2001), para 7. Available online at <https://webarchive.nationalarchives.gov.uk/20070815230000/http://www.tribunals-review.org.uk/index.htm>

²² *Ibid*, para 6.

²³ TCEA, s.2(3)

²⁴ There are seven different chambers in the First-tier Tribunal covering over 36 separate jurisdictions. In addition, there are still a number of tribunals that remain outside the unified system. Some tribunals such as the Immigration and Asylum Chambers operate much more like a court, whereas others, such as Social Security, are more likely to adopt an active mode of adjudication. The method of adjudication is also likely to vary within tribunals depending on a number of factors including the subject matter of the case, whether the parties are represented or received any initial advice and constraints imposed by statutory rules (see R. Thomas, *‘Adversarial v Inquisitorial’ to ‘Active, Enabling, and Investigative’: Developments in UK Administrative Tribunals* (2012), available at SSRN: <https://ssrn.com/abstract=2144457>).

court jurisdictions. However, given the purpose and nature of tribunals, there are some lessons that can be learnt from the ways in which they interact and communicate with lay users and we have throughout the report sought to highlight good examples.

1.13 In all jurisdictions, procedural rules have been introduced with three main aims: to increase trial efficiency, improve fairness and to encourage a more pro-active approach to case management by judges. There have also been initiatives to raise the status of the lay user and make courts and tribunals less daunting and more understandable, such as the removal of wigs in most civil proceedings, the introduction of a Victims Code in criminal proceedings and special measures in family and criminal hearings.²⁵ These are all welcome developments and across the jurisdictions, court professionals can be seen working hard to make the legal process one that lay users can fully contribute to. We recognise and applaud the many examples of good practice, training initiatives and innovative approaches to involving lay users in proceedings.

1.14 Nevertheless, despite these endeavours, research we have considered and the views of those we have spoken with in preparing this report indicate persistent dissatisfaction and confusion among lay users. Furthermore, limited– and declining – access to legal representation in many parts of the justice system has created the conditions for lay users’ understanding of proceedings to further deteriorate rather than improve. Justice in the age of austerity has removed the availability of legal aid in many difficult trials; particularly in family and civil cases outside areas of the law where conditional fee agreements may provide access to high quality justice. Legal aid has also been abolished for a great deal of first instance appeals to administrative tribunals. Though the nature of the criminal trial means that legal assistance is available where there is a risk of loss of liberty,²⁶ the reduction in rates of pay in real terms for advocates in recent

²⁵ We also note the recent publication of the Solicitor General’s Committee on Public Legal Education, ‘A Ten Year Vision for Public Legal Education’ (October 2018), available online at <https://www.youngcitizens.org/Handlers/Download.ashx?IDMF=40641aa6-5896-418b-9989-95b408259611>, which recognises the importance of enabling individuals to get advice, information and self-help tools so that they gain the confidence and skills to attain access to justice. One of the Ten Year Vision’s goals is for public legal education to be “of high quality, maintained to ensure that it remains accurate, accessible and useful for the people who need it and have significant social impact”.

²⁶ Or any other of the Widgery criteria, set out in s. 17(2) Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), such as loss of livelihood, serious damage to reputation, a complex matter of law, lack of ability to understand the proceedings, or the need to trace defence

years, coupled with long working hours and dilapidated court facilities, raises serious doubts about the ability of the professions to attract high quality lawyers in the future.²⁷ As many commentators have made clear, the increase in LiPs places an additional burden on the courts to resolve disputes fairly and provide a sufficient allocation of time to ensure that an LiP is heard properly.²⁸ Measures said to have been taken as a result of austerity have led to cuts in court centre staff, reception desks and a reduction in court centres, which have created further need for renewed efforts to improve lay user understanding.²⁹

1.15 The consequence of these changes has been to require court professionals to engage with lay users more than ever. As such, professionals are inevitably being forced to adapt their attitude and approach to courtroom communication and advocacy. They are increasingly doing this by providing practical assistance, guidance and support throughout the judicial process in ways that often mean that the boundaries between different types of judicial and legal roles are increasingly blurred. From experience and those we have spoken with, it seems that younger professionals – judges, lawyers and legal advisers – are far more accepting of this altered role than those who have practised law for many years in ways that they already consider to be appropriate and fair. For all court professionals,

witnesses or conduct expert cross-examination. Nevertheless, a significant number of defendants, particularly in the magistrates' court are unrepresented, which is accepted to put them at a disadvantage, see P. Gibbs, *Justice denied? The experience of unrepresented defendants in the criminal courts* (Transform Justice, 2016), available at http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf

²⁷ By contrast with others areas of professional life, publicly funded family and criminal work are increasingly not seen as attractive career options, with the result that experienced practitioners are leaving practice and younger practitioners are not paid sufficiently or at all to undertake the necessary pre-trial preparation required to conduct the case properly. See also Institute for Criminal Policy Research, 'Judicial Perceptions of the Quality of Criminal Advocacy', 2018, available online at <https://www.sra.org.uk/sra/how-we-work/reports/criminal-advocacy.page>

²⁸ See for example, Law Society of England and Wales, *Access denied: LASPO four years on: a Law Society review* (2017), available at <https://www.lawsociety.org.uk/News/documents/laspo-4-years-on-review/>

²⁹ Criminal practitioners we spoke to suggest that lack of consideration of the lay user by professional court users generally, and inappropriate questioning of witnesses in particular, was directly attributable to austerity, declining numbers of court staff and rates of pay.

communicating complex legal concepts and procedure to lay people can be difficult. Nevertheless, it is an integral part of our role.

- 1.16** The programme of reform being pursued by Her Majesty’s Courts and Tribunals Service (HMCTS) to reduce the court estate and digitise the court and tribunal system, in addition to the increasing use of video link technology, presents a timely opportunity to review how the justice system and court professionals interact with lay users. There is a pressing need to investigate the degree to which existing initiatives are working in practice, whether good practice may be shared across jurisdictions, and to consider alternative formal or informal means of assisting lay users to participate effectively. Such measures will not only enable the public to better comprehend our courts and tribunals but serve the interests of a fair trial and enhance the legitimacy of the courts and tribunals system.

Definitions and concepts

- 1.17** In this report, we have intended the term “lay user” to include all non-professional individual participants spanning the full range of civil, family, administrative and criminal proceedings.³⁰ This includes those playing a part in the proceedings, whether in person or through a representative, and/or being directly impacted by the outcome of proceedings, such as jurors, victims, defendants, claimants, respondents and other witnesses, as well as their family and members of the community attending the hearing.
- 1.18** The recommendations contained in this report are intended to provide broad principles applicable to all jurisdictions and lay users. However, we acknowledge that the particular experiences and needs of each lay user are likely to differ according to the role that they play in the proceedings and the type of proceedings they are part of. For example, a witness’s needs might be different from someone on trial; jurors are also a very different type of lay user whose role, type of support and information needs vary substantially to those of others. Even among the same category of witness or group of lay users, training on vulnerable and intimidated witnesses demonstrates that requirements and assistance may differ greatly between diverse individuals according to age,

³⁰ The term ‘jurisdiction’ and ‘cross-jurisdictional’ in this context is therefore intended to refer to the different types of hearings and trials which take place in England and Wales (and also within this jurisdiction, which has devolved legal aspects and reform processes, see the Justice Commission for Wales, available online at <https://beta.gov.wales/commission-justice-wales>) rather than referring to international law or comparative legal systems in other states.

physical or mental disability, race, socio-economic background and education. Necessarily, some lay users will need to be given greater care and support in the process than others. This may be the case with a child witness, for example, and in some jurisdictions more work will be needed to ensure that this is possible. The complex and diverse nature of different proceedings in our justice system will dictate the specific role and level of engagement that is appropriate for lay users.

1.19 We also consider the particular problems faced by certain categories of user. These include LiPs and court users that are intimidated by the circumstance of the case or are vulnerable. A recently revealed internal Ministry of Justice report from 2015 found that judges and prosecutors expressed concern that unrepresented defendants in criminal cases had “varied but limited understanding” of what was going on in court.³¹ Concerns about LiPs’ understanding of the proceedings in civil and family courts have also been raised.³²

1.20 In a system where everyone needs legal assistance in any case of substance, the task of explaining and communicating should fall primarily on the legal representative. Inevitably, any legal proceeding will deploy terms that will be challenging for a person who has no legal training to understand. While JUSTICE presses the case for legal aid to be once more made available for those who really need it, we also make the case for reducing the barriers to effective participation so that those who do not have their own lawyer, for whatever reason – and even those who do have their own lawyer – will be better able to understand what is going on. The title of this report *Understanding Courts*, implies a two way process: lay users need to understand what is happening in

³¹ Ministry of Justice, ‘Exploratory research into unrepresented defendants in the Crown Court in England and Wales – perspectives from a small sample of practitioners’ (Unpublished Analytical Summary, August 2016) p. 1 available online at: <http://www.transformjustice.org.uk/wp-content/uploads/2018/04/Exploratory-research-into-unrepresented-defendants-FOI-release-04-2018-1.pdf>

³² These were relayed to us in our discussions with PSU volunteers and others that we heard from. See also R. Lee and T. Tkacukova, (2017), pp. 11-12, see note 4 above. Though 49% of respondents agreed that they had understood the law that applied to their case, those results ought to be treated with a degree of caution. The results were derived from self-reporting, with no objective criteria to assess whether respondents had in fact understood the applicable law and does not accord with the tenor of the study, where researchers reported an impression from the court waiting areas “that appearance in court was lonely and a little scary”.

court and courts need to understand why the position of lay users, especially the unrepresented and vulnerable, needs thoughtful consideration and adjustment of practice.

- 1.21** In relation to vulnerable or intimidated users, our references to ‘vulnerability’ draw upon two ideas which we recognise, to some extent, may be contradictory. First, by virtue of being in an unfamiliar and anxiety-inducing environment, it could be argued that every lay user is vulnerable to some degree, as one judge suggested to us, as a result of the process they find themselves in. Second, however, we also refer to the formal definitions of particular types of ‘vulnerability’ as set out in sections 16 and 33A of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 and procedure rules, regarding disability, age and access to special measures.
- 1.22** We define “professional users” as those whose employment involves attending courts and tribunals: primarily judges, magistrates, advocates, solicitors, barristers, but also, where applicable, police, court staff and intermediaries. Unless otherwise indicated, we do not include organisations offering voluntary support to LiPs and other lay users. We recognise that the vast majority of legal matters are dispensed with by magistrates and tribunal members who are lay people themselves. As a result, their methods of communicating with lay users are helpful to consider. However, both groups are trained in court procedure and the experience of repeated sitting in cases, directed by a legal adviser or panel member, means that much of what we raise here is also relevant to them.³³
- 1.23** Our aim in the report is to enhance the effective participation of the lay user. For litigants effective participation is a fundamental aspect of the right to a fair trial, enshrined in Article 6 ECHR.³⁴ Other lay users who are not parties in the trial

³³ Recent research on the Youth Court recommends that magistrates adapt their approach in hearings to help young people better understand and engage in the process: J. Thomas and C. Ely, *The voices of young adult defendants* (The Centre for Justice Innovation, 2018), available at http://justiceinnovation.org/wp-content/uploads/2018/11/CJI_VOUNG-VOICES_DIGITAL.pdf

³⁴ “The right of an accused to effective participation in his or her criminal trial generally includes, inter alia, not only the right to be present, but also to hear and follow the proceedings... “effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his

will also need to effectively participate in the proceedings as experts, victims or otherwise. With this in mind, we envisage effective participation to have three aspects, which have informed our recommendations in this report.

- 1.24** First, the lay user's understanding of the main rules and purpose of the hearing – what is required of them and expected of others and why. Second, recognition by professional court users of the presence of the lay user in the process; their status as parties, witnesses, jurors, friends and relatives or other participants; why they are in court and to what extent their existence and contribution to open justice needs acknowledgement.³⁵ This could be done, for example, by acknowledging the existence and attendance of those in the public gallery.
- 1.25** Third, and perhaps most importantly, depending on the type of lay user, participation in the trial may also involve permission or invitation from professional court users to move or speak, take part in hearing processes or respond and, through doing so, make a real contribution to the hearing and its eventual outcome. The level of direct participation will vary according to the type of lay user – an unrepresented litigant in person needs to be fully engaged in making their case compared to the passive observer in the public gallery – and also their willingness to take part - a defendant in a criminal trial may elect not to give evidence but a young child witness may be assisted to do so.
- 1.26** All lay users, at whatever kind of hearing, will feel to some extent involved if they are able to understand what is going on. Comprehending the order of the hearing, the roles of respective professional and lay users, the terminology used and where they fit into that process undoubtedly empowers lay users, particularly those who need to take an active role in the proceedings. The report draws upon best practice initiatives relating to particular types of lay user, court setting or jurisdiction which might be helpfully introduced or adapted in other jurisdictions. Our recommendations promote legal proceedings that are more transparent,

version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence”: *SC v UK* (2005) 40 EHRR 10, at paras 28 and 29.

³⁵ It has been suggested to the Working Party that the role that witnesses play in the process, though pivotal to the evidence gathering process reliant on oral proceedings, is not sufficiently recognised and acknowledged by professional court users or court staff. For example, witnesses are sometimes not kept informed of the outcome of proceedings or asked if they would like to stay for the rest of the proceedings once they have given evidence.

understandable and inclusive of the lay user. They also make the case for better access to reliable and up-to-date information.

II. UNDERSTANDING THE PROCESS

*New and existing materials need to be more accessible to litigants in person; we need to produce information in a range of media and levels of complexity. We also need to do a better job of making sure that LiP information or links to LiP information is in the places where people expect to find it.*³⁶

2.1 A recent survey of court and tribunal users commissioned by HMCTS considered the key factors that impact court user experience. It found that the most influential factors are ‘being listened to’ and ‘good information’.³⁷ According to the research, more than one third of users thought that the information they received was not good enough and there is a need for increasing visibility of the process.³⁸ The provision of clear information creates more realistic expectations about the process and higher levels of satisfaction.³⁹ These findings are reflected in evidence received by the Working Party.

2.2 It stands to reason that a person who is expected to attend a court process but has no real concept or knowledge of what will happen there is going to be less able to participate effectively than one who is fully informed. This is the case whether the person has legal representation or not. The provision of information ahead and during the process is crucial to the proper involvement of lay users. It also enables open justice and lends legitimacy to the outcome. As such, this chapter considers the information that is already available, how users receive this, and details our proposals for improved provision and accessibility.

Finding out about the process

2.3 Court and tribunal centres are an unfamiliar environment for most lay users. People attending court are there to address serious matters that significantly

³⁶ Law for Life, *Meeting the information needs of litigants in person* (2014), available online at <https://www.lawforlife.org.uk/wp-content/uploads/Meeting-the-information-needs-of-litigants-in-person.pdf> Law for Life: the Foundation for Public Legal Education is an education and information charity that aims to increase access to justice by providing everyone with an awareness of their legal rights together with the confidence and skills to assert them. One way in which it does this is through its website Advicenow, <https://www.advicenow.org.uk>, which provides accurate, practical information on rights and the law in England and Wales.

³⁷ HMCTS, ‘Citizen User Experience Research’, (June 2018), see note 17 above, at p. 9.

³⁸ *Ibid*, at pp. 9-10.

³⁹ *Ibid*.

impact their lives, homes or relationships, through formalised and unfamiliar processes that involve technical language and concepts. It is an understandably daunting process. From our court attendance and taking of evidence we have found significant variation in the availability and quality of information provided for the public about the court process.

- 2.4** Information that is clear, accessible, and easy-to-understand⁴⁰ – and available in a variety of formats – can give a lay user greater confidence when navigating the justice system by ensuring that users are informed and know what advice and support can be accessed. It can help mitigate the anxiety that many may be feeling and encourage them to participate in their proceedings. Research on effective learning demonstrates that information should be presented on different occasions and in different ways. Information should be communicated aurally as well as in written form, and, ideally, involve an opportunity to experience or engage, to be fully understood. This includes mediums such as video.⁴¹ The way in which the content is presented is equally important. For example, following basic communication design principles such as using plenty of white space, establishing a hierarchy of information through differences in size, style and colour of fonts and composing from the top left-corner down, will make the information easier for the user to read and process.⁴²

⁴⁰ See, for example, Law for Life’s Advicenow project, *Meeting the information needs of litigants in person*, note 36 above, which recommends using plain English in court forms, information, and the language used by professionals. This draws on the guidance provided by the Plain English Campaign, including ‘How to write in plain English’ (2009), available online at <http://www.plainenglish.co.uk/files/howto.pdf>

⁴¹ J. Kruger and S. Doherty, ‘Measuring cognitive load in the presence of educational video: towards a multimodal methodology,’ *Australasian Journal of Educational Technology* (2016), 32(6); see also Legal Tech Design, which conducts research into complex communication, including in law, science and healthcare and considers that visual design improves laypeople’s understanding of complex information. Available online at <http://www.legaltechdesign.com/>

⁴² The Financial Distress Research Project, led by the Access to Justice Lab at Harvard University Law School, produced a paper that identified shortcomings in the layout, design and organisation of legal material as an obstacle to lay users’ effectively deploying that material to advance their legal cause, J. Greiner, D. Jiminez, L. Lupica, ‘Self-Help Reimagined’ (2017) 92 *Indiana Law Journal* 1119. Legal Tech Design offers a solution to this problem through a “Legal Design Toolbox” which sets out basic communication design rules to follow when presenting legal information as well as downloadable tools that make good visuals and examples of good legal design. It also provides a user centred design process to follow for those developing legal products and services. Available online at <http://www.legaltechdesign.com/LegalDesignToolbox/>

2.5 As the Foundation for Public Legal Education, Law for Life, has observed,

*It is important not to patronise your audience. But using simple language and avoiding a ‘professional dialect’ is not ‘dumbing down’ or talking to your reader as though they were a child. Advicenow’s advice is always to aim the language of your document at the members of the audience with the least level of legal knowledge, understanding and skills. You are far more likely to lose this section of your audience because they don’t understand than to lose the more capable sections of your audience because they do.*⁴³

2.6 We consider that comprehensive information on court processes, in simple and accessible language, should be provided for each jurisdiction. The information should include practical details such as: what to expect at a hearing or trial, the roles of the legal professionals,⁴⁴ the order of proceedings, the process of giving evidence and the courtroom layout. The content, formatting and channel of presentation (paper, website, mobile app etc.) should be developed based on research and testing with user groups, and draw on best practice. This is frequently referred to as “Human Centred Design.”⁴⁵

2.7 In designing such information, thought should also be given to users who have communication difficulties, such as those with learning or literacy difficulties,

⁴³ Law for Life, see note 36 above.

⁴⁴ For lay users who have legal representation, it is important that this includes clear information about what they can expect. Solicitors are required at the outset of their professional relationship with clients to supply details of the service that they will be providing (including any limitations on what they can do), their responsibilities and fee arrangements. However, clients may not even be aware that they should be given such information. Helpfully, the SRA provides an online leaflet “Thinking of using legal services? What to expect.” The leaflet is also translated into ten different languages (<http://www.sra.org.uk/consumers/using-solicitor/what-to-expect.page>)

⁴⁵ Human centred design is an approach to problem solving systems that focus on the needs and desires of users, see for example: <http://www.designkit.org/human-centered-design> Research conducted through Stanford University’s Legal Design Lab at California state courts’ Self-Help Centres proposed that well thought through design which focuses on the experiences of court users can: (1) counter negative emotions; (2) enhance perceived control of the court process by lay users; (3) help people make wise choices as they navigate the court process; (4) make court processes easy to use; and (5) improve the user experience of procedural justice, Margaret Hagan, ‘A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Intervention to Make Courts User Friendly’ (2018) 6:2 *Indiana Journal of Law and Social Equality* 199, pp. 220-221.

who speak minimal English or have visual or hearing impairments. There is already a body of information and research in this field which can and should be drawn upon.⁴⁶ These needs will vary from court to court and are likely to need local adaptation.⁴⁷

2.8 A good example of how information can be provided to lay users to promote comprehension of the court process is the guidance made available to jurors. Jurors play a crucial role in criminal trials and as a consequence, much thought has been given to ensuring that they fully comprehend the process. Research by Professor Cheryl Thomas has shown that juries understand the legal process best if they are provided with written instructions alongside oral directions from the judge.⁴⁸ Jurors receive a detailed but clear and simple guide to jury service well ahead of the trial; watch a video on arrival at court;⁴⁹ have a dedicated jury officer, and are repeatedly told how to raise queries about the process. There is now an online jury summons process, which explains the requirements in even clearer terms and provides easy to navigate information on how to respond.⁵⁰ A

⁴⁶ The concept of “easy read” is an approach to writing and drafting developed to help people with language difficulties understand information more easily, using short, simple sentences and pictures. See for example the organisation Change, which develops easy read documents for a variety of situations, <https://www.changepeople.org/>. In collaboration with Keyring, an organisation working to improve the use of easy read documents for learning disabled people in the criminal justice system, the Criminal Cases Review Commission (CCRC) created easy read forms for applicants alleging wrongful conviction. Keyring recorded that the use of the easy read application form resulted in a significant surge in applications from vulnerable groups, and helped prisoners’ access services, available online at <http://www.keyring.org/cjs/easy-read/easy-read-stories.aspx>. The CCRC has since assisted the Criminal Procedure Rule Committee to produce easy read forms for appeals from magistrates’ courts, see <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/acc003-eng.pdf>

⁴⁷ For example, courts and tribunals in Wales will need to offer simple and accessible information in Welsh as well as English.

⁴⁸ The research with jurors compared perceptions and actual understanding of legal directions and jury rules, finding that when jurors received written directions, the actual understanding significantly improved, C. Thomas *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010), available at <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>; C. Thomas, ‘Avoiding the perfect storm of juror contempt’, *Crim LR* 2013 6, 483-503, p. 497.

⁴⁹ The video explains the role and responsibilities of a juror, trial process and roles of the different people at court. It also demonstrates the swearing in process. It has recently been made available online, see <https://www.gov.uk/jury-service>

⁵⁰ *Ibid.*

new printed leaflet, *Your Legal Responsibilities as a Juror*, which is given to every sworn juror in every Crown Court trial has also recently been introduced to help ensure jurors can understand their legal responsibilities with respect to contempt of court. It also provides jurors with information on sources of support should they have any concerns about what they have experienced during the trial process. This document has been produced following extensive research by Professor Thomas conducted with jurors at court who have served on trials. It explains key responsibilities in clear language and the text is broken up by relevant images.⁵¹ The leaflet has resulted in a substantial increase in juror understanding of their legal responsibilities and jurors say they find the design to be helpful because it makes the process less daunting and is user-friendly as opposed to text-heavy. The leaflet responds appropriately to its target audience and communicates complex rules around contempt of court, which previously were not fully understood.



Your Legal Responsibilities as a Juror

By serving on this jury you are fulfilling a very important **PUBLIC SERVICE**. This means you have some important **LEGAL RESPONSIBILITIES**.

As a juror you have taken a **LEGAL OATH** or **AFFIRMATION** to try the defendant based **ONLY** on the evidence you hear in court.

This means the **FAIRNESS** of the trial depends on you following a few very **IMPORTANT LEGAL RULES**. These rules are explained to you in this Notice.

You need to **READ** these rules, and make sure you **UNDERSTAND and FOLLOW** these rules at all times.

You should keep this Notice with your **SUMMONS** at all times while you are on Jury Service.



2.9 During the trial jurors may still find it difficult to follow multiple sources of evidence and complex language. More is being done to assist with this, and we set out in **Chapter 3** recommendations with respect to language and questioning. Following the Leveson Review, judges are now encouraged to produce written

⁵¹ The leaflets have been produced in English and Welsh, see ‘Your Legal Responsibilities as a Juror’, available online at <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/j001-eng.pdf> The leaflet was made compulsory in all jury trials in 2018 by Criminal Practice Direction (Crim PD) 26 G.5.

routes to verdict in all criminal trials to help jurors answer the legal questions necessary to determine if a crime has been committed.⁵² The Leveson Review also recommended explaining evidential and legal tests prior to evidence being given to help jurors assess the evidence as they go along rather than receiving this information all in one go during the summing up. Such recommendations are increasingly being used in criminal cases, with notable effect on the ability of jurors to understand what is happening and what is expected of them in decision making.⁵³ The JUSTICE working party report *Complex and Lengthy Criminal Trials* recommended the following range of aids for jurors to help deal with multiple sources of evidence. Judges might consider whether such measures should be provided to jurors in other kinds of trials, having regard to length and complexity:⁵⁴

- A core bundle that they can highlight and notate throughout the trial, which will expand as the trial progresses;⁵⁵
- A running bundle to which photographs of each witness, their name and neutral summary of evidence can be added to help jurors remember their evidence;⁵⁶

⁵² Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings* (2015), available online at <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>, part 8.4.

⁵³ As now required by Criminal Procedure Rule (Crim PR) 25.14 and Crim PD 26.K. The Crown Court Compendium now provides judges with sample written directions for most cases, see ‘Part 1, Jury and Trial Management and Summing Up’, (Judicial College, December 2018), available at <https://www.judiciary.uk/wp-content/uploads/2016/06/crown-court-compedium-part1-jury-and-trial-management-and-summing-up-dec2018.pdf>

⁵⁴ At para 4.22, see note 8 above.

⁵⁵ Darbyshire endorses research which concludes that note-taking alone can be more of an obstacle to comprehension than an aid, partly because jurors are generally not skilled at note-taking and attempting to capture a full record of live evidence may inhibit visual cues from witnesses: P. Darbyshire, ‘Judicial case management in ten Crown courts’ [2014] Crim LR 30, 47. Similarly, Dann’s US study found that note-taking, alone, did not increase juror comprehension, as it requires jurors to rely entirely on their own initiative. However, a combination of aids, including note-taking, was found to have a positive effect on juror comprehension of evidence (B.M. Dann et al, ‘Testing the Effects of Selected Jury Trial Innovations on Juror Comprehension of Contested DNA Evidence, Final Technical Report’ (2005), available online at <https://www.ncjrs.gov/pdffiles1/nij/grants/211000.pdf> pp.70-73).

⁵⁶ A practice known to be used by, at least, HHJ Rivlin, and was followed in *R v Page*, Southwark Crown Court (unreported) April-July 2009.

- A written summary of the judge’s summing up and route to verdict so that these can be taken into the jury room on retirement;⁵⁷ and
- Written directions on the relevant legal issues in the case, to be given with an oral direction at the start of the trial on the legal ingredients of the offence (such as dishonesty), and, where appropriate, prior to evidence being heard (such as identification evidence).

We also think that a glossary of legal terms could be provided to jurors at the start of the trial, which could be added to if necessary as the trial progresses.

2.10 Another good example is the Advicenow website, which presents simple and easy to follow legal advice and information for non-lawyers. The home page organises legal problems under headings with related photos, such as “Benefits”, “Police and crime” and “Employment”, with sub-headings in drop down boxes enabling a user to identify more precisely the nature of their problem. Clicking on a sub-heading takes a user to authoritative sources of advice and information, hand-picked by Advicenow from sources such as Citizen’s Advice, the Equality and Human Rights Commission and Government. The website also features plain English PDF guides on topics such as “How to win a PIP appeal” and a “Survival guide for young workers”, which use colour coding, diagrams and real-world examples to help explain user’s rights.⁵⁸

2.11 To ensure that it is accurate, information on court processes should be prepared by, or at the very least with input from, the lead judiciary from across the range of court and tribunal jurisdictions and, to ensure that it is accessible for all lay users, should be reviewed for ease of understanding by linguistic specialists. The Ministry of Justice should have responsibility for

⁵⁷ The experience of one of our members in Australia demonstrates that this is possible. There, jurors receive full transcripts of the evidence, speeches and judge’s summing up, which is indexed and referenced to the evidence, as well as a checklist on the law.

⁵⁸ ‘Advice Now’, see note 36 above. In recognition of its work, Advicenow received the Access to Justice through IT award at the 2017 Legal Aid Lawyer of the Year Awards, see <https://www.lapg.co.uk/lalys/>. A particularly impressive feature is Advicenow’s interactive tools to help people request a mandatory reconsideration of their PIP or DLA awards. The tool, which sits alongside a step-by-step appeal guide, translates the DWP’s descriptors into easier language and allows people to work out what they ought to receive. The person has the opportunity to add in more information about how they are affected. The tool then generates a mandatory reconsideration request letter, which they can send to the DWP. In 2017/2018, 15,832 PIP mandatory consideration request letters were generated. Advicenow receives lots of very positive feedback about this tool. Available online at <https://www.advicenow.org.uk/pip-tool>

regularly updating the information. The information should also include references to any other relevant sources of information from non-governmental organisations.⁵⁹ The information should be made available as widely as possible and its existence clearly signposted. Taking into consideration that lay users are unlikely to attend court ahead of their hearing, HMCTS should also direct people in advance of attending court to where information can be found.

- 2.12** We are encouraged that HMCTS shares some of our concerns regarding the lack of information across the courts and tribunals estate, and support the efforts underway to address the disparity in information provision, both at court and online. Information should be made available through a range of channels: on paper, online, through video and in person, for users to fully familiarise themselves with the system.⁶⁰

Procedure rules

- 2.13** The main method for understanding and navigating legal process is currently through the procedure rules – for which there are Civil, Criminal, Family and Tribunal. The first of these to be established, the Civil Procedure Rules (CPR), were implemented following Lord Woolf’s Access to Justice Final Report, which described the problems of the pre-CPR civil justice system as including a “lack of equality between the powerful, wealthy litigant and the under resourced litigant...and [that] it is incomprehensible to many litigants.”⁶¹ Section 1(3) of the Civil Procedure Act 2007 requires that the rules “be exercised with a view to securing that the civil justice system is accessible, fair and efficient.” However, the rules have become complex, lengthy and accompanied by multiple practice

⁵⁹ For example, research prepared for this Working Party found that the ‘Hong Kong Judiciary’s Resource Centre for Unrepresented Litigants’ (available online at <https://rcul.judiciary.hk/rc/cover.htm>), provides a ‘Guide to General Civil Proceedings in High Court and District Court’ produced by the Judiciary as well as links to third party organisations where further information can be found. However, it should be noted that it is somewhat difficult to find the link to the Resource Centre in the first place and the layout and formatting of the site is somewhat difficult to follow.

⁶⁰ The importance of a ‘multi-channel approach’ to providing help and support for users in the context of the HMCTS Reform Programme was identified in the JUSTICE working party report, *Preventing Digital Exclusion from Online Justice* (2018), at paras 3.14-3.17, see note 13 above.

⁶¹ L. Woolf, *Access to Justice: Final Report* (1996), para 2, available online at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm>

directions and notes, making it difficult for LiPs to identify relevant parts and navigate the vast volume of information.

2.14 Subsequent rules have the additional requirement to be simple and simply expressed.⁶² Nevertheless, all procedure rules promulgated are complicated for lay people to navigate, are lengthy, and continue to expand. The level of detail and the rule expansion may be necessary to cover all procedures that take place.⁶³ However, they are drafted by lawyers, with lawyers in mind. We consider that there is a strong argument for procedure rules to be made more accessible for non-lawyers, as originally intended. **A review by each procedure rule committee as to whether the rules are simple and simply expressed, and, where required, amendments to make them so, would contribute towards this.**

2.15 The overriding objective of each of the rules involves dealing with cases “justly,” which is then defined in a way that is relevant to each jurisdiction but includes principles of fairness, expedition and placing parties on an equal footing. However, the Tribunal Rules specifically include “ensuring, so far as practicable that the parties are able to participate fully in the proceedings”.⁶⁴ **The Working Party considers that there should be an expressly stated overriding objective across all jurisdictions that professionals should have as a primary consideration the effective participation of lay users. In other words, that the professionals adapt proceedings to ensure lay users comprehend the process.** Stating this at the outset of the rules may assist with ensuring that the rules themselves are simple and simply expressed – for the benefit of lay users.

⁶² For the Criminal Rules, s. 69(4)(b) Courts Act 2003; for the Family Rules, s. 75(4)(b) Courts Act 2003; for the Tribunals s. 22(4)(d) TCEA 2007. Section 82 of the Courts Act also makes the same requirement of the CPR, but this has not been brought into force.

⁶³ And yet the Tribunal Procedure Rules, in particular where they are chamber specific, are considerably shorter than the CPR which makes them easier to navigate. In addition, tribunals have fewer rules, which are interpreted broadly and consistently but with clear explanations as to how they apply such that they are more likely to accommodate the experience of unrepresented and vulnerable litigants. The overriding objective requires the tribunal to avoid unnecessary formality and seek flexibility in the proceedings (Rule 2(2)(b) of The Tribunal Procedure (Upper Tribunal) Rules 2008 and equivalent in other tribunal procedure rules).

⁶⁴ Rule 2(2)(c) of The Tribunal Procedure (Upper Tribunal) Rules 2008 and equivalent in other tribunal procedure rules.

2.16 We also consider that a simple guide to the Rules, which explains what they cover, how they are set out and how Practice Directions interpret the rules, would be a starting point to assist lay people in navigating through them. The *Handbook for Litigants in Person* attempts to do this⁶⁵ by providing “headlines” at the beginning of each chapter which summarise in plain English the main points covered and a glossary explaining some key terms. However, the preface to the handbook recognises it is “not a simple guide...[it] is designed for the litigant who is involved in a multi-track claim of some substance.” The handbook is also dense, with over 150 pages of descriptive text. There are ways to better manage this complex information. For example, LiPs would be aided in their engagement with the text by breaking it up with diagrammatic or image-based explanations and thoughtful design. The online version could be embedded in webpages and indexed to take users to the relevant pages, rather than requiring the entire PDF to be downloaded.⁶⁶

2.17 Another way to make the procedure rules more accessible would be to take discrete and regularly occurring topics, such as making an interim application, or entering a plea, and creating a simple guide that covers all the relevant rules in one place. It would also be helpful to consider an interactive design approach. For example, pop-up bubbles explaining, in plain English, what particular legal terms (such as “bail,” “warrant” or “default judgment”) mean.⁶⁷

⁶⁵ Civil Sub-committee of the Committee of the Council of Circuit Judges, ‘A Handbook for Litigants in Person’ (2012), available online at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/A_Handbook_for_Litigants_in_Person.pdf

⁶⁶ A better example of a current guide for litigants in person is the Chancery Division’s ‘Interim Applications in the Chancery Division: A Guide for Litigants in Person’ available online at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/chancery_lip_2013_2.pdf While recognising this covers a much more discrete subject area than the Handbook for Litigants in Person, the text is set out more clearly and is broken up with the use of different colours and pictures. It also contains boxes with large bold text setting out key points and checklists, for example, of what to include in a hearing bundle. Like the Handbook for Litigants in Person, it also includes a glossary of key terms. In addition, it has an example application notice, witness statement, skeleton argument and chronology. The Queen’s Bench Division has also produced ‘The Interim Applications Court of the Queen’s Bench Division of the High Court: A guide for Litigants in Person’ available online at <https://www.judiciary.uk/wp-content/uploads/2013/01/lip-guide-qbd.pdf> While the content is similar, we think that the layout and formatting of the Chancery Division guide makes it easier to read and understand.

⁶⁷ Each of the Civil, Criminal and Family Procedure Rules has a glossary page, which could be utilised for this purpose.

2.18 We further note that many of the consolidated versions of the rules currently available on the GOV.UK website are not up-to-date, despite subsequent amendments.⁶⁸ Even where amendments do not constitute major procedural alterations, users should be able to access a fully up-to-date version of the rules online.⁶⁹

Leaflets

2.19 In some courts, the number of leaflets is overwhelming, and in others there are none at all. Many leaflets are also out-of-date, with information that is insufficient in terms of content and substance. HMCTS should ensure that courts and tribunals are stocked with up-to-date leaflets relevant to that jurisdiction. It should also post relevant leaflets out to lay users who are due to attend hearings so that they can read in their own time and explore the online material that the leaflets direct them to.⁷⁰

Online information

2.20 The internet has become the primary source of information for any aspect of people's lives. It is logical that people would seek to inform themselves through an internet search, and should be rewarded by that search with relevant information.

2.21 Even if people have access to the internet, they often struggle to identify appropriate and quality sources of information about the court process. Search

⁶⁸ For example, the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 are as in force on 21 August 2015, but have been amended by the Tribunal procedure (Amendment No. 2) Rules 2017/1168, and the Tribunal Procedure (Amendment) Rules 2017/723. The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 are as in force on 6 April 2014, but have been amended by Tribunal Procedure (Amendment No. 2) Rules 2017/1168.

⁶⁹ It is also difficult to navigate the tribunal, family and criminal procedure rules, which are in pdf documents rather than embedded in the website like the civil procedure rules are. The Sentencing Guidelines have recently been made available in a digital format, making them immediately accessible, quick and easy to use, with drop down boxes and links to other guidelines: <https://www.sentencingcouncil.org.uk/news/item/sentencing-council-launches-online-sentencing-guidelines-for-use-in-the-crown-court/>

⁷⁰ We understand that HMCTS is currently working on a 'What to Expect at Court' leaflet, initially in the Immigration and Asylum Chamber, to improve the standard and to send out with all notices of hearing. If successful, this will extend to other jurisdictions.

results produce a long list of websites without any indication of which are trustworthy. Many users cannot easily analyse search results to find “quality” sites and many are not aware of jurisdiction-specific information.⁷¹ For example, from the position of a user who has a family or civil case, it may be confusing that many of the top results relate to US criminal courts. Coupled with prevailing images of the justice system in popular culture and television, this could give an incorrect impression of what will happen when a person goes to court.⁷² Volunteers from the Personal Support Unit (PSU) told us that some LiPs in civil and family cases do not understand the difference between criminal and civil courts, and mistakenly believe that they will face a judge in a wig with a gavel.⁷³

2.22 Interviewees said in a study of LiPs in Birmingham:

“A lot of websites came up, but I didn’t know which ones were relevant. So I just looked at a few. A lot of information did come up but I didn’t like really go out of my way to sort of like go through a lot of information.”⁷⁴

“I did [research the internet] but there was such conflicting matters and because I was all over the shop emotionally, I was kind of bouncing to and from different points... There was no kind of, ‘Step A, step B, step C, step D.’”

“It’s extremely complex... It was so hard. It was like another language.”⁷⁵

2.23 Conversely, for a victim or witness in a criminal case, the variety of websites may feel overwhelming and certain categories of user may find it difficult to locate information relevant for them. For example, there is little reference to the particular needs of defendants or defence witnesses.

⁷¹ M. Hagan, “The User Experience of the Internet as a Legal Help Service: Defining standards for the next generation of user-friendly online legal services”, *Virginia Journal of Law & Technology* (2016), Vol 20(2) pp.394-465.

⁷² See HMCTS, ‘Citizen User Experience Research’, (2018), note 17 above, at p. 6; and K. Vaughan, I. Parker and L. Bunt, ‘Responsive Justice: How citizens experience the justice system’, Citizens Advice (2015).

⁷³ See also Law for Life’s Advicenow project, ‘Meeting the information needs of litigants in person’, note 36 above, at p. 84.

⁷⁴ R. Lee and T. Tkacukova, see note 4 above, at p. 9. Just over one in five participants reported they had found all the information they needed for their matter online.

⁷⁵ *Ibid*, p. 14.

2.24 Typing ‘going to court’ into Google’s search engine, returns the following top results:⁷⁶

- (1) The Crown Prosecution Service (CPS) – ‘Going to Court’⁷⁷
- (2) Gov.uk – ‘Going to court as a victim or witness’⁷⁸
- (3) Advicenow – ‘Going to court or tribunal without the help of a lawyer’⁷⁹
- (4) Citizen Advice – ‘What will happen on the day of the trial as a witness’⁸⁰
- (5) Indirect (the official government website for Northern Ireland citizens) – ‘Going to court as a victim or witness’⁸¹
- (6) Victim Support – ‘Going to court’⁸²
- (7) Victims’ Information Service – ‘Going to court’⁸³

2.25 Taking the first one, the CPS website offers some basic information that may be useful to lay users. This includes explanations of the difference between a magistrates’ court and the Crown Court, what will happen before the trial, adjustments that can be made for vulnerable witnesses, the process of giving evidence, how sentencing decisions are made and what happens after the trial. However, the webpage is text-heavy and contains vocabulary that may be unfamiliar to people who have little or no experience of the criminal courts.

⁷⁶ These were up to date as at 26 October 2018.

⁷⁷ Available online at <https://www.cps.gov.uk/going-court>

⁷⁸ Available online at <https://www.gov.uk/going-to-court-victim-witness>

⁷⁹ Available online at <https://www.advicenow.org.uk/content/going-court-or-tribunal-without-help-lawyer>

⁸⁰ Available online at <https://www.citizensadvice.org.uk/law-and-courts/legal-system/going-to-court-as-a-witness1/preparing-to-go-to-court-as-a-witness/what-will-happen-on-the-day-of-the-trial-as-a-witness/>

⁸¹ Available online at <https://www.nidirect.gov.uk/articles/going-court-victim-or-witness>

⁸² Available online at <https://www.victimsupport.org.uk/going-court>

⁸³ Available online at <https://www.victimsinformationsservice.org.uk/the-justice-process/going-court/>

When describing who prosecutes the case, the CPS website states:

“In both Crown Court and magistrates’ court, there will be advocates who prosecute the case on behalf of the Crown. ...The Crown Prosecution Service has a statutory obligation to ensure that the prosecution advocate is introduced to you at court and answers your questions.”

Potential areas for misunderstanding include the meanings of ‘advocate’ and ‘statutory obligation’, and that cases are prosecuted on ‘behalf of the Crown.’ A clearer way of explaining this might be:

When someone tells the police that a crime has been committed, this is an issue that the State takes responsibility for resolving. Because it is a serious matter, the prosecution is handled by lawyers called prosecutors on behalf of the Crown. When lawyers are in court presenting evidence and arguing the case, they are called advocates. If you are asked to come to court as a prosecution witness, the prosecuting advocate must introduce him or herself to you before the hearing and answer your questions.

2.26 The gov.uk website – which is likely to be viewed by a user as an official source – similarly focuses on criminal cases. It provides a short overview of help getting to court, expenses that may be covered, help and support that is available in the court, and extra steps that may be taken to protect a victim or witness. There is a paucity of material regarding how the process actually works. It is also found through an A-Z list that includes a whole range of things unrelated to attending court. We understand that the HMCTS Online project is reviewing the current offering.

2.27 We are anxious to emphasise that existing guidance provided by some services constitute important sources of information and have often been developed with certain audiences in mind. Advicenow’s website is the first link from the search that provides information for LiPs about the family court, civil court and tribunals. The website is well laid-out with links to further guidance and videos that explain the process. It offers clear and detailed information aimed at LiPs and is invaluable in the post-LASPO⁸⁴ landscape. Kent and Nottinghamshire Police both have websites featuring “Going to court” pages that explain in simple language how criminal hearings work in practice, what victims, defendants and

⁸⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012, which significantly reduced the availability of legal aid.

witnesses can expect from the process and provide information about and hyperlinks to available support services, such as Victim Support and the Witness Service.⁸⁵ Such services and sites should be amplified and built upon.

2.28 For a lay user who has never experienced the court process before, having a step-by-step visual guide to what they can expect from trial is likely to make attending court much less stressful and promote user satisfaction and understanding. For example, You & Co, Victim Support’s youth programme, has produced an “interactive courtroom”, featuring cartoon images that proceed stage-by-stage through a magistrates’ or Crown Court hearing.⁸⁶ The images depict what a juvenile witness will experience when they go through the court process and include explanations of the content of the “Waiting room”, “Live link room” and layout of both the Crown Court and magistrates’ court. When a user drags their mouse onto a “Hotspot” located next to a person or a piece of court infrastructure, a pop-up box explains in plain English its role and significance. An “Extra help at court” drop down box at the “Courtrooms page” allows a user to select a particular type of special measure the court might deploy, such as video link or screens in the courtroom, which once ticked is visually depicted in the interactive courtroom. We note that Goal 5 of the Ten Year Vision of Public Legal Education⁸⁷ is to “harness technology and [for public legal education] to be delivered through innovative methods, both on and offline”. In our view, the You & Co “interactive courtroom” is an excellent example of doing just this.

2.29 We consider it the responsibility of Government to ensure that all lay users who either choose or are required to use our courts and tribunals understand what will happen while they are there. This is a service that should be accessible to all. **As such, we propose that HMCTS should provide one central source, promoted to appear as the top result when a user types key words, such as ‘going to court’, into a search engine. The source may be hosted on gov.uk webpages also built according to Government Digital Service principles, which aim to provide user-centric platforms. However, it should have a different look and**

⁸⁵ ‘Going to Court’, Kent Police, available online at <https://www.kent.police.uk/advice/going-to-court/> and ‘Going to court: What you can expect’, Nottingham Police, available online at <https://www.nottinghamshire.police.uk/court>

⁸⁶ Available online at <https://www.youandco.org.uk/courtroom/index.php?page=home>

⁸⁷ See note 25 above.

feel to emphasise constitutional independence from Government departments against which people are bringing or defending claims.⁸⁸

2.30 The gov.uk webpages should replicate the information in the HMCTS leaflets available at courts and wherever relevant provide curated hyperlinks to independent service providers such as Citizens Advice, Advicenow and Victim Support.⁸⁹ The site should be designed with a landing page so that lay users can easily identify information relevant to their case and situation. For example, a defence witness in a criminal court would find information aimed at them – perhaps from a landing page with buttons labelled ‘Criminal cases’, ‘civil cases’, ‘tribunal cases’ and so forth, and within that an option to click on ‘defence witness’. The jury service page should be accessible from the same landing page, and incorporate the video and leaflet given at court. A litigant in person in a family case would find information under a section entitled ‘family cases’, and then ‘representing yourself.’

2.31 HMCTS should have responsibility for regularly updating the webpages, including the links to external information. As all documents available from the HMCTS or any Gov.uk website currently do, the information should make clear when it was published and/or last updated in order to ensure that court users are using the most up-to-date information available. It would also be helpful to indicate, if it is known, when the information is next likely to be updated. For example, a traffic light system could be introduced indicating whether the information remains accurate (green), is currently or due to be reviewed (amber), or is inaccurate or out-of-date (red). The You & Co “interactive court” described above is a form of visual depiction and guide to the court process that ought to be replicated and embedded into HMCTS’ online presence.

Video

2.32 The proposed gov.uk webpages would contain written information but, crucially, should not be overburdened with written material. As other JUSTICE working parties have noted this year, video is increasingly used as a means of conveying

⁸⁸ The JUSTICE working party report *Preventing Digital Exclusion* was concerned to ensure this, observing that the Courts and Judiciary website and UK Supreme Court have very different styles to the Gov.uk site, see note 13 above, paras 3.36-3.38. HMCTS has also found in its citizen user experience research that people are anxious about going to the Gov.uk website given that the State may be a party in their case (see note 17 above).

⁸⁹ As the Hong Kong Judiciary website does, for example (see note 59).

important information.⁹⁰ We note that the MoJ has produced a video for witnesses in criminal cases.⁹¹ However, there are a number of problems with it. The video features animated figures, is 25 minutes long and split into approximately five-minute sections.⁹² The video was created in 2012 and has a relatively low picture quality. Although there is an option for subtitles, this is only available in English. It is also not easily locatable on the internet. As such, we consider that this video is outdated, insufficiently engaging and does not adequately convey the reality of the court process. However, the HMCTS video for jury service is an excellent introduction to the role, showing the trial process with a clear and straight forward explanation of what happens and of the juror's responsibilities. Much of what is contained in this video could be used as an introduction to criminal trials for all lay users. As we mention above, the video should be on the jury service section of the Gov.uk website so that it can be viewed ahead of the trial.⁹³

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

2.34 As we mention, some videos of this nature are already produced by HMCTS. There are more produced by NGOs. For example, Rape Crisis Scotland has a video which provides clear, step-by-step information for those considering reporting a sexual crime or those who already have a case in the Scottish justice

⁹⁰ JUSTICE, *Immigration and Asylum: a Fresh Look* (2018), see note 12 above, para 4.14, and JUSTICE Scotland, *Legal Assistance in the Police Station* (2018), paras 3.27-3.29, available online at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/JUSTICE-Scotland-Legal-Assistance-in-the-Police-Station.pdf>

⁹¹ 'Going to court – a step by step guide to being a witness', Ministry of Justice, Youtube, available online at <https://www.youtube.com/watch?v=aUOc0Sa1WMM>

⁹² The next part of the video does not play automatically after the first part has been viewed.

⁹³ To better disseminate information, HMCTS could also utilise social media, such as Twitter and Instagram, through an account called "Going to Court" or something similar.

system.⁹⁴ Also, Advicenow's video, 'How to Represent Yourself in Family Court in England and Wales',⁹⁵ offers clear information about what to expect from the process and how to prepare. A further video is being created for the Immigration and Asylum Tribunal by Asylum Aid.

2.35 It would be unwise to assume that all users will look online before their hearing or trial, or that lay users have access to or are able to navigate the internet, even if signposted to it by a leaflet or letter. Our discussion with PSU volunteers relayed the impression that many lay users may be in 'denial' about their situation and avoid looking online or engaging with the process until they enter the court building.⁹⁶

2.36 **Prominently displayed leaflets and videos at court would at least allow lay users to gain a better understanding of the process during the often long waits before a trial or hearing. Featuring videos across a range of locations can help ensure that all lay users are captured. We suggest that it should be available in all court waiting areas: including cells, vulnerable witness suites and public waiting areas.** By way of an analogy, the video shown in a waiting area would serve a similar function to screens at GP surgeries and Walk-in centres, which help impart useful information about health issues.

2.37 **HMCTS should conduct testing and research as to the best format for a video, taking into account the following considerations:**

- **Content:** that it covers the most important information enabling the lay user to understand the process and order of the hearing – who plays what role in the courtroom, how a user is expected to interact with the legal professionals, what the courtroom layout looks like, what the order of the proceedings is likely to be – including explanations as to why this format/procedure is adopted.
- **Mode of delivery:** **How the video should be displayed in the court waiting area** – should it play on a loop or should it have an interactive element, i.e. a

⁹⁴ 'RCS Survivors Guide to the Scottish Justice System', Rape Crisis Scotland, Youtube, available online at <https://www.youtube.com/watch?v=bG32uX2YFWQ>

⁹⁵ 'How to represent yourself in family court in England and Wales', Advicenow, Youtube, <https://www.youtube.com/watch?v=mwrA3Is27fg&feature=youtu.be>

⁹⁶ See also note 17 above.

button to press play? Would it best be displayed on a screen on the wall or on an encased tablet on a stand or handheld device?⁹⁷

Understanding substantive law

*There cannot be access to justice, unless the laws that govern us are first written in language that is intelligible and second organised in a way such as the laws on a particular subject can be found in one place and in an organised manner ...*⁹⁸

2.38 The focus of our work has been improving understanding of the process of going to court. However, we acknowledge that a fundamental obstacle to effective participation at court is the complexity of the substantive law. No one would expect the average court user to be able to navigate substantive law in the same way as a professional. That is why we have lawyers. Nevertheless, many LiPs have to attempt to do so. Statute law is available online, through www.legislation.gov.uk. But this is hard to follow and is not up-to-date.

2.39 This was acknowledged by the Cabinet Office Good Law initiative: “The digital age has made it easier for people to find the law of the land, but once they have found it, they may be baffled.”⁹⁹ ‘Good law principles’, established through the Good Law Initiative are now incorporated into the Office of Parliamentary Counsel legislative drafting practice: aiming to ensure that law is necessary, clear, coherent, effective and accessible. Despite these aims, almost all legislation is still inaccessible for most members of the public and lawyers continue to use professional legal databases to verify the law, which are expensive, subscription-based resources that lay users do not have access to.

⁹⁷ These kinds of devices are already available in other public places, such as museums and hospitals. Innovations to provide secure, self-service kiosks also being developed at certain prisons, such as HMP Thameside, HMP Dovegate and HMP Peterborough. See JUSTICE, Preventing Digital Exclusion from Online Justice (2018), at para 2.36.

⁹⁸ The Rt Hon The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, “The Role of the Judiciary in a Rapidly Changing Wales”, Legal Wales Conference (Cardiff, 11 October 2013).

⁹⁹ R. Heaton, ‘When Laws Become Too Complex’ (2013), available online at <https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex> Devolved legislatures are also endeavouring to make jurisdiction-specific laws more clear and accessible.

2.40 Specialist organisations such as Citizens Advice and AdviceNow, do admirable work trying to explain substantive law in plain and clear terms. An example of innovative and easy to follow advice is a YouTube channel created by current INQUEST Trainee Caseworker and future Pupil Barrister Christian Weaver, entitled “The Law in 60 Seconds”.¹⁰⁰ The recently updated JUSTICE guide *How to appeal: a guide to the criminal appeal system*, focuses on explaining procedural and substantive concepts to convicted people. It also sets out plain English guidance for people looking to appeal their conviction or sentence.¹⁰¹ The Law Society also produces a series of guides to common legal issues.¹⁰² However, more should be done within the justice system to improve the accessibility of the law. Current legislation should be more accessible to all and, as we suggest above with regard to the procedure rules, click through explanations and pop-up bubbles, should be utilised to help lay people read a statute.

2.41 Moreover, Acts of Parliament are not drafted to be a comprehensive code on a particular topic. The law is fragmented and hard to navigate, even for lawyers. The Law Commission promotes reforms that would make the law more accessible¹⁰³ and in its own consultation work on developing the law, pitches at a non-professional audience such as an intelligent 16 year old, and uses summaries, and easy-read versions. It has recently published a report on creating a single

¹⁰⁰ Weaver broadcasts minute long videos providing easy to understand legal advice and information on topics such as tenant and consumer rights and stop and search powers, which both the Bar Council and the Equality and Human Rights Commission have praised for promoting public understanding of the law in an easy to digest format. See <https://www.theguardian.com/law/2018/sep/21/want-to-know-your-rights-but-only-have-60-seconds>

¹⁰¹ JUSTICE, *How to Appeal: A guide to the criminal appeal system* (2018), available online at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/10/How-to-Appeal-2018-Brochure.pdf>.

¹⁰² The best of these use bright colours and plain language in “question and answer”, “top tips” and “how a solicitor can help me” infographics, though some guides, such as the guide to claiming asylum, are text heavy and available only in English. See <https://www.lawsociety.org.uk/for-the-public/common-legal-issues/>

¹⁰³ In comments to the House of Lords Constitution Committee, Professor David Ormerod, Law Commissioner for Criminal Law, explained that the “ultimate user of the legislation ... must have the capacity to understand that legislation.” Available online at <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/2707.htm>

Sentencing Code,¹⁰⁴ and is currently looking at ways in which the Immigration Rules can be simplified and made more accessible.¹⁰⁵

2.42 The project for a single Sentencing Code for England & Wales was initiated because sentencing principles were not “clear, transparent, accessible, or coherent”. Simplification into one code was thought necessary to maintain public confidence in the criminal justice system and to ensure defendants understand why a particular sentence has been imposed and whether they have a right of appeal.¹⁰⁶ While hundreds of thousands of, often life changing, decisions are made each year under the Immigration Rules, they are widely criticised for being long, complex, poorly drafted and difficult to use.¹⁰⁷

2.43 At the Welsh Government’s request, the Law Commission has also been considering the “Form and accessibility of the law applicable in Wales,” with respect to consolidation and codification of Welsh legislation¹⁰⁸ – which is now informing the Legislation (Wales) Bill.¹⁰⁹

2.44 Another means by which comprehension of the law can be promoted is by the court staff who proactively manage cases. The JUSTICE Working Party Report,

¹⁰⁴ ‘Sentencing Code’, Law Commission, available online at <https://www.lawcom.gov.uk/project/sentencing-code/>

¹⁰⁵ ‘Simplifying the Immigration Rules’, Law Commission, available online at <https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/>

¹⁰⁶ ‘Volume 1: Consultation Paper’, Law Commission, available online at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/07/The-Sentencing-Code-Consultation-Volume-1.pdf>

¹⁰⁷ See the Law Commission, ‘Simplifying the Immigration Rules’, note 105 above.

¹⁰⁸ It identified a number of obstacles to accessibility of the law in Wales that necessitated codification, including the volume of legislation creating a “patchwork of law”, the inherent difficulty of law-making in a complex devolution settlement, and the extent to which legislation in its updated and current form was freely available to the public in both English and Welsh, available online at <https://www.lawcom.gov.uk/project/the-form-and-accessibility-of-the-law-applicable-in-wales/>, at para 1.2.

¹⁰⁹ The Bill requires the Counsel General for Wales to keep the accessibility of Welsh law under review and obliges the Counsel General and the Welsh Ministers to develop a programme of activities designed to make the law more accessible. As well as consolidation, this will include initiatives for better promulgation of the law including through the Cyfraith Cymru / Law Wales website hosted by the Welsh Government. This process is being led by the Welsh Government’s Office of the Legislative Counsel in support of the Counsel General.

Delivering Justice in an Age of Austerity proposed the creation of “Registrars” for use in the civil courts. These would be court staff who would take an investigative approach toward case management.¹¹⁰ Registrars, or case workers,¹¹¹ would engage with parties to clarify further information or evidence needed to narrow substantive law issues between the parties, ensuring self-represented litigants would not be disadvantaged by a failure to understand processes associated with a claim.¹¹²

- 2.45** But while a pro-active approach to case-management by court staff may assist in narrowing the legal issues between the parties, court staff cannot offer a claimant legal advice to assist in identifying whether they have a legal claim and how to apply substantive law to their problem.
- 2.46** We have considered what more we can recommend to assist lay users to understand the law, especially those who are litigants in person. **Ideally, as a matter of future practice, we consider that areas of law should be codified and statutory amendments promptly added to the code.** Endeavours underway in Wales in this regard demonstrate that this is an important and necessary aim. We also consider that the availability of law online offers the opportunity for fuller accessibility and understanding of the law. For example, offering click through or drop down explanations written in plain English against legal terms. **Where advice is provided online, design and presentation ought to reflect the needs of lay-users. Material should reflect knowledge gaps of lay users, be presented in plain English and depicted in a manner that is**

¹¹⁰ JUSTICE, *Delivering Justice in an Age of Austerity* (2015), note 11 above, para 2.35; see also Sorabji, ‘The online solutions court – a multi-door courthouse for the 21st century’ (2017) 36(1) Civil Justice Quarterly, p. 53.

¹¹¹ The role of case worker has since been established in the tribunals, and Authorised Case Officers are anticipated across the courts, see notes 112 and 126 below regarding the expansion of this role.

¹¹² JUSTICE, *Delivering Justice in an Age of Austerity* (2015), note 11 above, para 3.1. The recommendation for the establishment of a “Registrar” system is reflected in the proposal for ‘Case Officers’ for the ‘Online Court’ from the Civil Courts Structure Review, see: Lord Justice Briggs, Civil Courts Structure Review: Final Report (Judiciary of England and Wales, 2016) para 7.22, available online at <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>>

easy to follow, for instance, through decision trees, icons, maps and highlight boxes.¹¹³

2.47 In the meantime, further efforts could be made by HMCTS to signpost the available simplified guidance on substantive law aimed at lay users.¹¹⁴ We consider signposting to be particularly important given the advice shortfalls caused by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the absence of an integrated portal as proposed in *Delivering Justice in an Age of Austerity*¹¹⁵ and that HMCTS “Assisted Digital” services propose to provide only *technical*, rather than *legal* assistance for users of digital court services.

2.48 In the next section we consider how court professionals can better assist unrepresented people with their cases.

Knowing what to do at the court or tribunal

2.49 In this section, we propose measures that would encourage all the professionals in the court or tribunal building – from the judges and advocates, to court and tribunal staff (such as clerks, listing officers and ushers) – to proactively assist lay users. Courts and tribunals feature a number of actors, court clerks, listings officers and ushers who may come into contact with or affect the experience of the lay user, and play an important role in forming their experience of the proceedings.

¹¹³ The JUSTICE Working Party report *Preventing Digital Exclusion* (see note 13 above) cited the online tool for consumer complaints and claims on the Resolver website, which uses decision trees and contextual rights guides, as an example of the presentation of advice and information likely to be intuitive and easy to navigate for lay users. Available online at <https://www.resolver.co.uk/>

¹¹⁴ The importance of signposting and access to legal advice and information was emphasised in two JUSTICE Working Party Reports, *Preventing Digital Exclusion from Online Justice* (see note 13 above) and *Delivering Justice in an Age of Austerity* (note 11 above). The former recommended HMCTS digital services provide adequate signposting to independent, authoritative legal advice and information services (see note 13 above, p. 73). The latter recommended the establishment of an integrated telephone and online platform delivered collaboratively through the MOJ, the advice sector, legal advisers and specialist IT companies, which would provide advice, information, assistance and appropriate referrals for those in need of legal help: JUSTICE, see note 11 above, para 3.27 & 3.44.

¹¹⁵ *Ibid*, see note 11 above.

2.50 Much of this can be achieved through the procedure rules and accompanying processes, which would be far more useful to lay users, if adapted as we recommend above.

Finding where to go

2.51 As noted in the JUSTICE Working Party report, *What is a Court?* the reduction in the number of staff in courts and tribunals has been to the detriment of all lay users, including those who are vulnerable and unrepresented.¹¹⁶ We reiterate the conclusions of that report that “the user should be able to speak to someone who can sign-post appropriately, and explain basic processes” when they enter a court or tribunal building.¹¹⁷ Recent research commissioned by HMCTS identified that “providing the right information in a timely manner” was an important factor in “perceptions of experience across all jurisdictions and at all stages of the user journey.”¹¹⁸

2.52 As a result of the Government’s austerity cuts, many court and tribunal centres now have unstaffed reception areas. A lay user is more likely to be welcomed by a security guard than a staff member when they enter a court or tribunal building. This is entirely unsatisfactory and sends the wrong message to the public about the importance of the justice system. It is difficult to think of other public services that one might access where there is no reception upon arrival and the public is expected to work out where to go by themselves. Not knowing where to go, who to talk to and facing an unstaffed reception desk makes the experience of attending a hearing or trial all the more unnerving, confusing and stressful. Being greeted by security guards might also be unexpected and may not help ease the anxiety of someone unfamiliar with court processes. The provision of information that we recommend in the previous section in advance of a lay user’s attendance at court may do much to familiarise the public with the procedures that they will encounter. But these cannot replace the value of a friendly and informed receptionist, nor direct them to where they need to go.¹¹⁹

¹¹⁶ JUSTICE, *What is a Court?*, see note 7 above, at para 2.28.

¹¹⁷ *Ibid*, at para 5.23.

¹¹⁸ See HMCTS, ‘Citizen User Experience Research’, note 17 above, p. 1.

¹¹⁹ We understand from PSU volunteers that Chelmsford County and Family Court has a reception desk where security sit, who are very helpful. They will direct LiPs up to the ushers’ desk, which the PSU office is behind, so the person can easily find them. The Medical

2.53 With this in mind, it is important to improve the information that is available within the building itself to guide lay users through the system and explain what support is available at each stage of the court process.

2.54 An audit of each court and tribunal building could identify gaps and where signs can be presented more clearly.¹²⁰ We are encouraged that this is an area that HMCTS is already considering. Its ‘Courts, Tribunals and Regional Tier Programme’ is looking at the provision of a seamless process so that people know where to go, what happens where and what they need to do next. **We consider that providing clear signs around the building and prominently displayed maps at the entrances would significantly assist lay users. Signs could also be used inside the court and tribunal hearing rooms themselves to indicate to lay users where they should sit and who other people in the room are.**¹²¹ We also think that HMCTS should reconsider the provision of staff at reception to assist the public entering the building – to be more like the service now available in many hospitals located at the entrances and ready to help people find their ward. HMCTS is currently looking at reinvigorating the “front of house” staff to be more user focused and we encourage this to be rolled out in all court and tribunal centres as soon as possible.¹²²

2.55 Court and tribunal staff should also be familiar with the information that is available online, in leaflets and on the video screens in order to signpost lay

Practitioners Tribunal Service has a much less formal approach and retains a reception desk: available online at <https://www.mpts-uk.org/>

¹²⁰ Such an approach has been recommended by Judicial Officers in the Trinidad and Tobago courts system. See Justice P. Jamadar JA and E. Elahie, *Proceeding Fairly: Report on the extent to which elements of procedural fairness exist in the court systems of the judiciary of the Republic of Trinidad and Tobago*, Judicial Education Institute of Trinidad and Tobago (2018) at p. 83, available online at http://www.ttlawcourts.org/jeibooks/books/Proceeding_Fairly_Report.pdf

¹²¹ We note that this is already being done in the First-tier Tribunal (Property Chamber) where it was observed that place cards stating “Landlord” and “Tennant” were used to indicate where individuals should sit. Other tribunals, such as the Asylum Support Appeals Tribunal, also use place cards. However, they use the terms “Appellant” and “Respondent”, which lay users may not understand. HMCTS has also recently developed “Who’s who in Court” posters, which are being rolled out in the criminal courts, with the intention of expanding these to other jurisdictions.

¹²² We understand that security contracts are also under review and security staff will be retrained with a refreshed attitude towards court users. We welcome these efforts.

users to this. Likewise, court professionals who come across a lay user who appears lost or confused should be courteous and helpful and direct users to this information. In particular, court familiarisation visits for vulnerable witnesses and parties (including defendants) should be a standard feature of pre-trial process and expand to all jurisdictions. If a video link is to be used, the familiarisation visit must incorporate how this will function. Court and tribunal staff should inspect the facilities for witnesses and parties ahead of trial, making sure they are away from the other parties and witnesses if this is important to them, that the waiting or video link rooms are suitable and that if adaptations are required, these can be made. This will require better liaison between court staff and other agencies. Often this takes place too late. As we heard from one judge consultee, often the police officer in the case is not aware that they should check if the video link works and that a child witness is entitled to have a practice so that they know what it's like – *“it should all have been thought through, but the officer won't have arranged it.”* Witnesses should not be left to worry about what they will face at court when this can be shown and explained in advance. We consider the role of support for vulnerable lay users in more detail in **Chapter 4**.

2.56 Another feature of this includes court professionals being responsible for the witnesses that they are calling and taking the time to make introductions to witnesses ahead of their evidence. The CPS introduced guidance a few years ago on how professional court users should assist lay users with the process of giving evidence by ‘managing their expectations’ and ‘ensuring they feel involved’ in the process. The Guidance explains that, *“meeting the prosecutor in advance or on the day of their appearance and having their questions answered, can help a witness to feel prepared for their court experience and able to give their best evidence.”*¹²³ This has had varied application, due to resources and a concern about how to broach the nature of the evidence with a witness while avoiding coaching or discussing the detail. We have heard that some members of the profession regard the guidance as impractical to implement in longer cases involving multiple witnesses,¹²⁴ which may be why it is not always applied in

¹²³ Crown Prosecution Service, ‘Speaking to Witnesses at Court: CPS Guidance’ (2016) available online at <https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court> at para 2.1.

¹²⁴ Two judges and one senior practitioner we spoke to were sceptical of the guidance and the possibility of practitioners being routinely able to implement it with the current demand on their time and resources.

practice.¹²⁵ However, **advocates in all jurisdictions should make sufficient time for such introductions to be made in the case of significant witnesses and lay parties in all jurisdictions, as this is an important way of facilitating participation. Similarly, judges should introduce themselves to significant witnesses, particularly where they are or may be vulnerable, in order to get a sense of the vulnerabilities that may exist and how they can best be accommodated.**

Facilitating proceedings

2.57 When a hearing commences it is the role of the judge to facilitate the efficacy of the proceedings for all parties. In each jurisdiction, the procedure rules set out an overriding objective for judges to deal with cases fairly, justly and efficiently and afford case management powers to give effect to the rules. As already noted we suggest that this overriding objective should encompass an express requirement to ensure that lay users can effectively participate in those proceedings to the degree that their role requires.

2.58 The introduction of procedural rules and guidance has increased the case management role that judges and court staff¹²⁶ play in our courts and tribunals.¹²⁷ Furthermore, the presence and increase in LiPs – especially in the civil and family courts and in tribunals – has also prompted many court professionals to be

¹²⁵ One intermediary who completed a questionnaire designed by the Working Party stated, “The CPS guidance states that the prosecutor should meet the witness in advance of the trial and give them the main elements of the defence case – I have never witnessed this. Most commonly the judge and advocates will ‘pop into’ the live-link room immediately prior to cross examination and that will be the extent of their rapport building.”

¹²⁶ Caseworkers and case officers in certain jurisdictions have powers to carry out judicial functions, many of which relate to administrative matters. Section 3 of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 proposes an expansion of the functions of authorised court and tribunal staff: that they may “provide legal advice to judges of the family court and justices of the peace” and that they may “exercise judicial functions where procedure rules so provide.” It is important that the procedure rules committees provide clarity for the lay user, over how powers will be split between different levels of authorised court officers and judges, and particularly as to their right of review or their right to request a hearing before a judge or magistrate if the matter is decided out of court. As more case management takes place outside of court, it will be important to ensure that LiPs can participate effectively in the process.

¹²⁷ For example, Judiciary of England and Wales, ‘The Better Case Management (BCM) Handbook’, 2018, available online at <https://www.judiciary.uk/wp-content/uploads/2018/02/bcm-guide-for-practitioners-20180207.pdf>

more proactive.¹²⁸ These developments have naturally improved the degree to which court professionals engage and explain process to lay users. In particular, the Equal Treatment Bench Book¹²⁹ is a fantastic source of guidance to judges and magistrates, which aims to ‘enable effective communication’ in all courts and tribunals and ‘suggests steps which should increase participation by all parties’. Its focus is on LiPs and people who might be uncertain, fearful or feel unable to participate. However, we consider that much of the guidance regarding communication, case management hearings, timetabling, case preparation, and expedited timescales equally apply to cases involving the average lay user who may be represented or may not have particular characteristics that set them apart from other lay users.

2.59 Nevertheless, many of these measures have focused on achieving greater efficiency in the process rather than greater understanding for lay people, although in some cases this is a happy side effect.¹³⁰ Moreover, despite the range of powers available and the encouragement provided in case law, guidance and rules, many judges still seem unwilling to or unduly reticent about making interventions and exercising more robust case management.¹³¹ The approach to case management varies,¹³² or does not go as far as it should. PSU volunteers told us that some judges in the civil and family cases in which they had assisted are very good, clear and appropriate during most of the hearing. But they also told us that some don’t know how to speak to people. They suggested that some judges

¹²⁸ See also JUSTICE, *Delivering Justice in an Age of Austerity*, note 11 above, at para 1.19.

¹²⁹ The Judicial College (February 2018), available at <https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/>

¹³⁰ In a First-Tier Tribunal (Property Chamber) hearing observed by a JUSTICE lawyer in October 2018, the absence of legal representation for any of the parties to a Houses in Multiple Occupation licensing matter necessitated the panel to take an involved approach to the hearing, in order to progress the case. The presiding judge took an active role in the questioning of witnesses and went to some length to facilitate parties’ understanding of the proceedings by “signposting” their thinking to the parties. They explained out loud why a particular piece of evidence was important, the significance of further evidence that needed to be adduced and who held the respective burdens. Notwithstanding that the hearing involved sensitive questions of fact and law, the parties were able to follow and effectively participate in the proceedings.

¹³¹ See also E. Henderson, ‘Taking control of cross-examination: judges, advocates and intermediaries discuss judicial management of the cross-examination of vulnerable people’ [2016] Crim LR 186-187; and Kei Takeshita ‘Overcoming judicial reluctance to secure effective case management’ (2014) 33 Civil Justice Quarterly 281.

¹³² See for example Darbyshire, ‘Judicial case management in ten Crown courts’, note 55 above.

need to speak more slowly and avoid the use of jargon. They also felt that magistrates tend to be good at keeping eye contact, but judges rarely do so. Instead, they focus on the case papers, which gives the impression to lay people that they don't seem to know the details of the case. While judges are naturally involved in more complex matters, which require consideration of the court documents, this is concerning to us as eye contact is crucial for verifying that the parties can understand what is happening, and also can be understood in their arguments or evidence.

2.60 We appreciate that some judges are reluctant to intervene during proceedings as this may be seen to be descending into the arena of the dispute or compromising their independence and impartiality. Equally, more active case management has sometimes been seen as a move away from the adversarial tradition. In our view, however, the responsibility on the judge to encourage effective participation and prevent practices that might obstruct this, means that active case management will often be appropriate.

2.61 We do recognise that many judges already use case management powers well. As we observe in the introduction and throughout this report, the rise in LiPs and recognition of the needs of vulnerable lay users has demanded better engagement by judges with lay people. This is particularly the case in the tribunal system. Although we do not suggest conversion of courts to the flexibility of the tribunal process, tribunals tend to adopt an approach that is enabling or active.¹³³ This varies from tribunal to tribunal and often depends upon the circumstances of the case, such as whether the parties are represented. As the example from the First-Tier Tribunal (Property Chamber) illustrates,¹³⁴ tribunals tend to seek to create a framework for proceedings that allows parties who are inexperienced with the procedures to participate to their fullest extent, without compromising the tribunal's impartiality.¹³⁵ This includes more active involvement to identify the

¹³³ Robert Thomas, 'From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Administrative Tribunals' (September 10, 2012). Available at SSRN: <https://ssrn.com/abstract=2144457> p. 3. Eduard Jacobs in *Tribunal Practice and Procedure - Tribunals under the Tribunals, Courts and Enforcement Act 2007* (4th edn, Legal Action Group 2016), distinguishes between "enabling approach" and "inquisitorial approach" both of which he argues are adopted by tribunals to some extent. However, here we use the term 'enabling' to include the characteristics of both of these approaches described by Jacobs.

¹³⁴ See note 130 above.

¹³⁵ Jacobs, *Tribunal Practice and Procedure* (note 133 above), para 1.46; Sir Andrew Leggatt stated in his Review of Tribunals (*Tribunals for Users* 2001, see note 21 above, Paras 7.4-7.5), that this approach should in particular be adopted where tribunals are mediating a dispute

issues and taking steps to ensure that the tribunal has the necessary basic information on which to decide the case before it.¹³⁶ It is not just lay users who benefit from a more explicable and involved approach to decision making. The job of an advocate is made significantly easier where a decision-maker “signposts”, by explaining out loud, the legal and factual matters they need explored to reach a decision. The relative simplicity, informality and flexibility of tribunals’ procedures and processes assists with this approach.¹³⁷

The Traffic Penalty Tribunal is a particularly interesting example of this, utilising telephone hearings for most appeals, which makes accessing the Tribunal convenient for users.¹³⁸ In the hearings one of our rapporteurs rang into, the adjudicator gave an introduction to the process, and asked if the appellant understood – including that he was an independent adjudicator and not connected with the issuing authority. In one case, this revealed that the appellant had not

between the citizen and the State, where the State department is represented by an official or advocate who is familiar with the law, the tribunal and its procedures: *“In these circumstances tribunal chairmen may find it necessary to intervene in the proceedings more than might be thought proper in the courts in order to hold the balance between the parties, and enable citizens to present their cases. All the members of a tribunal must do all they can to understand the point of view, as well as the case, of the citizen. They must be alert for factual or legal aspects of the case which appellants may not bring out, adequately or at all, but which have a bearing on the possible outcomes. It may also be necessary on occasion to intervene to protect a witness or party, to avoid proceedings becoming too confrontational. The balance is a delicate one, and must not go so far on any side that the tribunal’s impartiality appears to be endangered.... We are convinced that the tribunal approach must be an enabling one: supporting the parties in ways which give them confidence in their own abilities to participate in the process, and in the tribunal’s capacity to compensate for the appellants’ lack of skills or knowledge.”*

¹³⁶ In *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495. Thomas L.J. also suggests in the same case that the fact that a member of the public is not entitled to legal aid may be a factor to be taken into account in determining the extent of the inquisitorial duty that the tribunal has at [59]. See also *W v Gloucestershire County Council* [2001] EWHC Admin 481 at [15].

¹³⁷ Jacobs, *Tribunal Practice and Procedure* (see note 133 above), para 1.49; Rule 2(2)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and equivalent in other rules. See also case management powers at Rule 5 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and equivalent in other rules.

¹³⁸ The Tribunal recognises that this won’t work for all types of hearing but for the nature of the proceedings it hears, offers a convenient way of dealing with appeals.

logged into the online platform to view the documents. A few minutes were allowed for this. Both hearings involved an exchange between the appellant and the adjudicator that felt more like a natural conversation than examination since both were interrupting each other. However it remained respectful and clear that the adjudicator was in charge and directing the issues to be decided. The adjudicator concluded the hearings by saying whether he found in favour of the appellant or not and that he would load a written decision onto the online platform later in the day or the next day, and checked if the appellant understood.¹³⁹

2.62 We think that all judges can intervene more to engage lay users where it is helpful and appropriate to do so. At the very least, court professionals should explain the many well embedded conventions in operation.¹⁴⁰ Judges are likely to assume that represented parties have had the procedure explained to them by their legal representatives. However, increasingly busy practitioners undertaking routine cases may not give a step-by-step explanation of the court process in terms that their clients can understand, as best professional practice indicates they should. The role of the judge in explaining procedures is therefore important, irrespective of whether the person is represented. When only one side is, PSU volunteers suggested that it would be really helpful if judges routinely explained to an unrepresented litigant that they should not worry that the other side has legal representation; this will not be used against them, the judge will try

¹³⁹ The Traffic Penalty Tribunal (TPT) slogan is “Easy and Convenient, Fair and Informal”, and its principal objective is “to provide independent, impartial and well considered decisions...in a way that is user-focused, efficient, timely, helpful and readily accessible,” see: <https://www.trafficpenaltytribunal.gov.uk/complaints-procedure/> The focus for the development of the TPT’s service is ease of access to the tribunal (see: Traffic Penalty Tribunal England and Wales ‘Report of the Traffic Penalty Tribunal Adjudicators 2008-2010: Easy and convenient, fair and informal’, available at https://www.trafficpenaltytribunal.gov.uk/docs/TPT_Annual_Report_2008_2010.pdf, p. 7).

¹⁴⁰ For example, court professionals rarely, if ever, explain why the defendant is in the dock in a criminal trial. They also rarely explain who else is in the dock, which might risk distracting speculation. One of our number recently undertook jury service and on the first sitting, jurors were confused about which of the four people in the dock was actually the defendant. When the defendant stood to confirm his plea, one thought that the defendant was the interpreter. Court professionals also never explain why barristers and the judge are wearing robes and solicitors are not. Nor is it made clear whether lay people are expected to stand and/or bow when the judge enters, or who is who in the courtroom.

to ensure that they are not disadvantaged and the trial will be fair. Some have had this experience, but not always. This should be standardised.¹⁴¹

2.63 The consequence of these varied attitudes and approaches is that every day, lay users are bewildered by what happens at hearings, despite the fact that court professionals have the ability to allay that lack of understanding. For example, the Financial Times reported the case of Anna, who could not afford legal assistance for her divorce but came across the manuals for LiPs on the Advicenow website. Her experience was as follows:

*At the first hearing...the judge was very patient, good at explaining what was going on....[The second judge] was impatient to get through the hearing...She clearly thought I was ridiculous. She told me, 'You need to get more information about domestic violence, go away and learn about it...' For her it was just another court case...For me it was about whether my children could stay with me.*¹⁴²

2.64 In pre-trial hearings or processes judges could better assist LiPs by pointing them to the relevant cases they should look at, or other sources of substantive law online that might assist them to decide if they have an arguable case. As we set out at paragraph 2.44 above, this may be a role that trained court staff could perform.¹⁴³ In criminal cases, steps should be taken to

¹⁴¹ Family justice reforms training for all family magistrates (and legal advisers) has included training on supporting LiPs to understand and engage in court proceedings so that, as far as possible, the court can ensure a just and equal hearing. The training will be enhanced by eLearning on diversity matters that all magistrates will complete over the next training year. The training also assists magistrates to familiarise themselves with the Equal Treatment Bench Book and the Family Court Bench Book, which highlight issues that may be faced by LiPs and approaches that can be used to assist them. The Judicial College is currently working with the Family Justice Council to produce training videos and supporting materials, specifically relating to LiPs in the Family Court. The first module for magistrates is likely to be available shortly.

¹⁴² J. Croft and B. Thompson, 'Justice for all? Inside the legal aid crisis' *Financial Times Weekend Magazine* (London, 27 September 2018) available at: <https://www.ft.com/content/894b8174-c120-11e8-8d55-54197280d3f7>

¹⁴³ Currently Tribunal Caseworkers in some jurisdictions are able to exercise various case management powers, including the power to give directions as to issues on which the Tribunal requires evidence or submissions and the nature of the evidence and submissions required. These powers could perhaps be used to perform this role. (Practice Statement authorising Tribunal Caseworkers First-tier Tribunal (Social Entitlement Chamber) to carry out functions of a judicial nature, 16 July 2018; Practice Statement authorising Registrars, Tribunal Caseworks and authorised Staff Members First-tier Tribunal (Health, Education and Social Care Chamber

identify early on in the proceedings what the issues are so that the judge can shut down irrelevant questioning by the defence during trial.¹⁴⁴

2.65 We believe that case management powers properly used require judges and authorised court and tribunal staff to explain the hearing process to lay users – both at the outset of a matter and throughout the hearing – to enable them to understand the process and fully engage with it, and take steps to ensure that this is understood. Progressive initiatives and examples of good practice should be shared and universally applied, with the needs of the lay user and their understanding at the forefront of all professionals’ considerations.

2.66 We have received evidence of a number of judges and court centres being proactive in changing the culture of the court. This is particularly so of courts piloting the section 28 YJCEA hearings.¹⁴⁵ Such efforts have been centred on the principle that a joined-up approach and communication between all court staff can help to identify where there may be gaps that lead to lay users feeling confused or frustrated.

For example, one Crown Court was closed by the resident judge for an afternoon to brainstorm issues and solutions with all staff. The session considered how to support witnesses and a registered intermediary was invited to attend as a critical friend. The issues covered included:

- Receiving earlier and fuller information regarding the needs of child witnesses from the CPS;
- Early and routinely identifying when an intermediary is required;

(SEND/Care Standards /Primary Health Lists)) to carry out functions of a judicial nature, 5 June 2018; Practice Statement authorising Tribunal Caseworkers First-tier Tribunal (War Pensions and Armed Forces Compensation Chamber) to carry out functions of a judicial nature, 15 May 2018; Practice Statement: First-tier Tribunal (Tax Chamber), 27 March 2017).

¹⁴⁴ This was a recommendation of the Leveson Review (see note 52 above), is a requirement of the subsequent Better Case Management process, and was also echoed in the JUSTICE Working Party report *Complex and Lengthy Criminal Trials* (see note 8 above). Furthermore, a study interviewing advocates and intermediaries in serious sexual offence cases found that a series of directions in Court of Appeal judgments has had a powerful impact on advocates’ practice. See Henderson, ‘Taking control of cross-examination’ (note 131 above), p.185.

¹⁴⁵ See para 3.50 below for information on these pilots.

- Getting advocates to confirm whether they really require all witnesses to attend the trial;
- Judges highlighting to the defence at the Pre-Trial Preparation Hearing (PTPH) the importance of ensuring the needs of defence witnesses are identified and properly met;
- All staff encouraging defence advocates to utilise Criminal Practice Directions to assist vulnerable defendants;
- Making clear and detailed orders for what special measures are required at the PTPH to help the List Office;
- Knowing ahead what oath or promise witnesses want to make; and
- Communicating to Witness Support when witnesses are coming to court so they can meet them, when witnesses are needed in court and when they are allowed to leave.

2.67 We encourage all courts and tribunals – regardless of jurisdiction – to take a similar approach. Informal court centre meetings can help to identify issues and provide opportunities to discuss solutions. These meetings are likely to be all the more useful within the context of the increasing number of LiPs and the increasing use of video link technology. **Informal and regular meeting opportunities should be held at court centres for court user groups, where available, and otherwise, between advocates, judges, court staff, academics and experts.**

2.68 Likewise, training providers should offer more joint discussion between legal professionals. Meetings should focus on effective participation of lay users and share learning, aid reflection, foster cooperation, and improve efficiency.

2.69 All court professionals should be encouraged through training, continuing professional development and reflective processes to put themselves regularly in the lay user’s shoes, involving both active and observational methods such as sitting in the witness box and dock, using the video link, sitting in court to observe a trial that is not their own, and shadowing intermediaries and support volunteers.

2.70 Another well used method of affecting change is by supplementing rules and initiatives with checklists and guidance, and differing approaches take place at

the local court and tribunal level.¹⁴⁶ With the aim of fostering a uniform approach, there are also examples at national level, most notably through the forms and practice directions that accompany the Procedure Rules. Annex 2 to the ‘Better Case Management’ guide sets out a protocol for case progression monitoring by HMCTS.¹⁴⁷ **We encourage the creation of a checklist that would provide judges and court and tribunal staff with practical prompts to explain the procedure for lay users and verify understanding. Court centres, and ideally judicial leads for each jurisdiction, should develop these, in consultation with lay courts users about their needs.**

A general checklist would set out the judicial responsibility to promote participation. From our conversations and experience we would suggest that this might include the following communication prompts:

- Ensure that each lay user understands who is in the courtroom and the role of each professional.
- Explain each stage of the process to the lay user.
- Explain concepts and terminology in as simple terms as possible – even if they have to consider technical matters during the hearing.
- Check understanding of important aspects of the process – ask the lay user to explain in their own words.
- Recognise that judges should intervene to reproach advocates when they use jargon, complex questions, or are aggressive in their approach.
- Where there is an LiP, the judge must give their directions in a simple oral summary, and follow up in writing; setting out what the lay user needs to do and by what date.
- Where a video link is being used, check position of screens, go through process with person appearing on the link and location of other professionals (interpreters/intermediaries, etc.) or supporters.

¹⁴⁶ Checklists are an important way for professionals to deal with the increasing complexity of their responsibilities, see for example A. Gawande, *The Checklist Manifesto: How to Get Things Right* (Metropolitan Books, 2010), in particular in relation to safe surgery checklists, and for pilots and building contractors.

¹⁴⁷ See note 127 above.

2.71 Jurisdiction-specific checklists should be produced and embedded into existing guidance. In criminal cases, for example, a judicial check list of functions must include attending to the needs of witnesses, ensuring that they are informed of what will happen, when and why. This could be incorporated into the Better Case Management case progression protocol. Case management forms could also incorporate a check to ensure that victim impact statements have been taken early and are available for an early guilty plea. The Equal Treatment Bench Book should incorporate the general checklist and remind judges and magistrates on a regular basis of what they should be checking.¹⁴⁸

Facilitating proceedings in the future

2.72 While video links have been used in the criminal justice system for some time,¹⁴⁹ the HMCTS Reform Programme envisions a large expansion of the use of video technology across all jurisdictions.¹⁵⁰ The use of video may take the form of

¹⁴⁸ The Equal Treatment Bench Book already includes a helpful checklist for case management hearings where there is an LiP. The Equal Treatment Bench Book Alert, which is sent to judges and magistrates almost monthly by email, draws attention to particular aspects of case management and a link to where guidance can be found in the Book. This is a very helpful way of reminding judges and magistrates of responding appropriately to lay users.

¹⁴⁹ For witnesses to give evidence, but Kent has also been using video link for first appearances in court for some years, all heard at Medway Magistrates' Court, for which there is a Standard Operating Procedure, available at <https://www.kent.police.uk/policy/operational-and-partnerships-policies/q01-custody/q01t-video-remand-hearing/>. It also has a good network of video links for witnesses at venues away from police stations (such as Compass House in Ashford). Kent Police have been at the forefront of digital initiatives including taking tablets/laptops to witnesses in hospital or at home.

¹⁵⁰ The Ministry of Justice in its consultation "Transforming our justice system – summary of reforms and consultation" (September 2016) envisages the increased use of video link and video conferencing technology in criminal, civil and tribunals jurisdictions (pp. 7, 8 and 14), available at https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf. The Reform Programme includes a cross-jurisdiction video hearings project which is developing fully video hearings, and has recently conducted a small scale video-hearings pilot in the First-tier Tribunal (Tax Chamber). It is developing brand new technology that will allow participants to access video hearings without using specialist equipment. This will in turn support wider use of video across all jurisdictions. The Programme also includes a video remand hearings project which ultimately aims to enable suitable proceedings to be held fully by video. The Autumn 2018 Reform Programme update also envisages that some criminal case progression will take place via video and that the Employment Tribunals and Immigration and Asylum Chamber will develop the ability to resolve cases via video (HMCTS Reform Update Autumn 2018, September 2018), available at:

video-conferencing or virtual hearings. By video-conferencing we mean hearings which involve some participants communicating by video link in an otherwise physical hearing (which HMCTS terms “video enabled”). By virtual hearings we mean hearings in which all participants communicate by video link; none of the parties are physically co-located (which HMCTS terms “fully video” – and will be used as appropriate at the discretion of the presiding judge).

2.73 We recognise that the use of video technology has the potential to considerably enhance participation and understanding including by making it easier for individuals who would find it difficult to travel to a court or tribunal to attend a hearing, creating a less intimidating environment for participants and reducing delays.¹⁵¹ However, the use of video-conferencing in hearings can also compound problems of effective participation and understanding. Very little research has been carried out on the impact of participating in a hearing by video. What research that has been conducted raises a number of potential issues with video participation in terms of effective participation and understanding, which accords with our own experience.¹⁵² **Further research into these potential issues and**

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744912/HMCTS_Reform_Update_2_Oct_2018.pdf Sussex Police and Crime Commissioner is currently leading a Home Office funded Video Enabled Justice programme, which has installed video links at 14 police bases across Sussex so that police witnesses can provide evidence by video link and set up video links in six custody suites and one medium secure hospital in Sussex so that defendants can appear via video link for remand, first appearance and bench warrant hearings, see <https://www.sussex-pcc.gov.uk/about/news/sussex-pcc-secures-11m-for-regional-video-enabled-justice-programme/>

¹⁵¹ The London School of Economics and Political Science (LSE) conducted a process evaluation of user experience of the HMCTS video-hearings pilot in the First-tier Tribunal (Tax Chamber). In their interviews with users the majority commented on the practical advantages of a video hearing, including the time and money saved by not travelling to a physical hearing or having to take time off work. Other feedback suggested that appellants felt more at ease in their own surroundings (Meredith Rossner and Martha McCurdy ‘Implementing Video Hearings (Party-to-State): A Process Evaluation’ (Ministry of Justice, 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740275/Implementing_Video_Hearings_web_.pdf p.18).

¹⁵² Penelope Gibbs ‘Defendants on video – conveyor belt justice or a revolution in access?’ (Transform Justice 2017) available at: https://www.barrowcadbury.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf, p.2. The LSE evaluation of the video-hearings pilot in the First-tier Tribunal (Tax Chamber) relates only to virtual hearings which may be less problematic in terms of user engagement and understanding than video conferencing. The University of Sussex is also undertaking an evaluation of the Video Enabled Justice programme,

how to avoid them is required before the widespread adoption of video hearings.

2.74 JUSTICE’s recently published Working Party Report, *Immigration and Asylum Appeals – a Fresh Look* examined the use of video-conferencing and virtual hearings in the First-tier and Upper Tribunals (Immigration and Asylum Chamber). It sets out a number of principles to be applied to the use of video technology, which we believe have general applicability across jurisdictions and which we endorse.¹⁵³ Two of those principles are of particular relevance to this report: (i) lay users appearing by video *must be in no worse position* than they would be in a physical hearing/appearance; and (ii) HMCTS must ensure the *practical effectiveness* of hearings involving the use of video. Each of these is discussed in further detail below.

2.75 Users appearing on video may have greater difficulty engaging in or understanding the proceedings, and may feel alienated, stressed or fatigued.¹⁵⁴ This is likely to be particularly acute in hearings involving video-conferencing which are centred around the physical hearing and those participating in the hearing in person. In comparison, in virtual hearings where the “rules of the game” are tailored to the use of video and all participants are appearing via video we would expect there to be fewer of these issues.¹⁵⁵

which will, among other things, consider the effect of appearing by video on the behaviour of those that do so. However, the research will not be completed until the end of 2019. While we welcome this research, there is still a need for broader evaluation.

¹⁵³ JUSTICE (2018), *Immigration and Asylum Appeals*, note 12 above, paras 5.4 – 5.13.

¹⁵⁴ C. McKay, ‘Video Links from Prison: Court “Appearance” within Carceral Space’, *Law, Culture and the Humanities* (2015), Vol.14, issue 2, pp. 242-262 and Gibbs, ‘Defendants on video’, at note 152 above, pp. 17-18. We have heard anecdotal reports of judges and magistrates’ legal advisers muting the video link when the defendant appearing is being more vocal than the court would like.

¹⁵⁵ A recent evaluation of HMCTS’s Tax Tribunal virtual hearing pilot found that appellants felt that they were able to participate effectively in the video hearing, that they could see and hear the other parties well and that they were confident that the others could hear and see them and that they did not have any problems with distractions or fatigue. Turn-taking conventions were clearly described by the Judge at the outset and well managed throughout, with only rare instances of parties talking over each other, interrupting or appearing unsure about when to speak: Rossner and McCurdy, ‘Implementing Video hearings’, note 151 above, pp. 18-19. However, there were less than ten participants who had opted for a video process.

2.76 Further research is also required to understand the impact of video on the client-representative relationship.¹⁵⁶ This may be a more acute issue for video-conferencing than for virtual hearings. For hearings in which video-conferencing is being used, representatives are faced with a dilemma of either consulting with their client in person but also participating in the hearing via video link, or attending court in person but only communicating with their client via the link. This may be preferable not only due to practical reasons,¹⁵⁷ but also because they feel better able to defend their client in person, for the same reasons that lay users may feel less able to participate in the hearing when appearing via video.¹⁵⁸ However, it may make interaction with the client more difficult.¹⁵⁹ Representatives consider that clients seem remote and it is more difficult to

¹⁵⁶ Carolyn McKay argues that there are advantages of this technology in lawyer-client interactions, especially where there already is an established lawyer-client relationship. However, for some prisoners it represents a poorer means of communicating and the technology becomes a barrier. She also raises a concern that in visiting prisons less frequently, there is less independent scrutiny of prisoners and prison conditions: ‘Face-to-face interface Communication: Accessing Justice by Video Link from Prison’ in A. Flynn & J. Hodgson (eds) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (2017: Oxford, Hart Publishing), pp. 103-121.

¹⁵⁷ Representatives often need to deal with more than one client or case in the same court in one day.

¹⁵⁸ See also Gibbs, ‘Defendants on video’, see note 152 above, pp. 10-11. The evaluation of a video-link magistrates’ court first appearance pilot highlights concerns about procedural fairness of this nature, which have not yet been addressed in the continued use of video-link first appearance/remand hearings, bail review and sentencing hearings. In particular, it revealed unexplained differences in legal representation uptake, plea and sentence outcomes that require further research, see M. Terry, S. Johnson and P. Thompson, ‘Virtual Court Pilot Evaluation’, MoJ Research Series 21/10, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/193633/virtual-courts-pilot-outcome-evaluation.pdf

¹⁵⁹ There can be some real practical problems with how video-conferences are arranged. For example, when an advocate needs to consult their client during the hearing, the court has to adjourn and everyone leave the courtroom so instructions can be taken in private. This is a waste of court time and casts further doubt on the value of the exercise. In the Court of Appeal, new booths have been set up to enable a client-representative meeting ahead of an appeal (as prisoners are no longer brought to court unless the circumstances require them to be). However, they are too small to enable more than one person into the booth to speak to the client. As such, practitioners have to leave the door open with consequent effects on confidentiality. Meetings are also only allocated 15 minutes of time prior to the hearing, whereas much longer meetings were possible when appellants were brought to the court cells.

convey emotions which are essential to cultivating a good client-representative relationship.¹⁶⁰ Representatives play a key role in explaining the hearing process to their client and if a person lacks trust and rapport with their representative this is problematic. By contrast, in virtual-hearings, because all participants are participating via video, representatives can be co-located with their clients without the disadvantages of appearing by video in an otherwise physical hearing.

2.77 Of particular concern is the fact that anecdotal evidence suggests that it may be more difficult for representatives to identify court users' vulnerabilities or disabilities via video link.¹⁶¹ While the use of video may facilitate participation for some vulnerable court users, it may hinder participation for others. Even where vulnerabilities and disabilities are known there is currently no guidance as to what criteria should be used to assess whether video is suitable for that person and/or what reasonable adjustments should be made to facilitate their participation.¹⁶² **Further research is required on how the use of video impacts the participation of court users with disabilities and vulnerabilities.**

¹⁶⁰ See also Gibbs, note 152 above, p.11.

¹⁶¹ JUSTICE, *Mental Health and Fair Trial*, see note 10 above; M. Cowe 'The Human cost of digital justice', *Counsel Magazine*, October 2018, pp.26-27; Charles De Lacy, Clinical Nurse Specialist and Liaison and Diversion Officer at the Central Court considers that there is a greater chance of people with significant mental health issues being missed in a virtual process. See also F. Gerry, and others, 'The drive for virtual (online) courts and the failure to consider obligations to combat human trafficking – A short note of concern on identification, protection and privacy of victims,' *Computer Law and Science Review*, Vol 34, Issue 4, August 2018, pp. 912-919, available online at <https://www.sciencedirect.com/science/article/pii/S0267364918302401>

¹⁶² Gibbs, note 152 above, pp. 20-21. Kent Police recognises that particular vulnerabilities may be a reason why the court would rescind its direction to hear the case via video link. However, its Standard Operating Procedure does not contain any guidance on what circumstances would make the use of video-link inappropriate ('Q01t Video Remand Hearing', Kent Police, available online at <https://www.kent.police.uk/policy/operational-and-partnerships-policies/q01t-custody/q01t-video-remand-hearing/>). Charles De Lacy (see *ibid*) believes that defendants with certain mental health problems may be less able to participate in proceedings via video link. In his opinion there are a number of circumstances in which it would not be appropriate for a defendant to appear via video link, including where it is likely the defendant may have significant mental health issues but there is a lack of collateral information to be sure, where the defendant has known mental health issues and is representing themselves, where the defendant is elderly (over 70), an adult defendant entering the criminal justice system for the first time whose fitness or mental health is unknown and where the defendant's representative(s) think it is desirable for their client to appear in person. He recommends increased training for solicitors

2.78 Due to the issues highlighted above, it is all the more important for judges and magistrates to clearly explain to participants in hearings involving video what will happen at the start of the hearing and what is happening throughout the course of the proceedings. We know from video enabled remand hearings that the use of video can become routine for magistrates. However, judges and magistrates must bear in mind that both the proceedings, the use of video and the implications of appearing on a link will most likely be unfamiliar to the person on the screen. We are not aware of any specific guidance on running a video link court. As such, **we also consider that guidance and training on whether a video hearing is appropriate and how to run a video hearing is necessary for all court professionals, but magistrates in particular.**¹⁶³

2.79 As highlighted in the JUSTICE *Immigration and Asylum Appeals – a Fresh Look* Working Party Report, **the use of video raises a number of practical issues that will need to be addressed before its expansion.** These include:

- ensuring that both court users participating by video and the courts and tribunals themselves have the appropriate technology and internet speeds to enable sound and vision to be transmitted as accurately as possible;¹⁶⁴
- ensuring that the hardware in courts and tribunals is sufficient, including having screens that are a sufficient size, with sufficient resolution and

and barristers in the identification and management of vulnerabilities and making sure information is available to defendants and the public (their families and friends) on the right to have vulnerabilities appropriately managed through any court process, including making people aware of the availability of mental health teams to carry out assessments on those appearing virtually or otherwise. The JUSTICE *Mental Health and Fair Trial* working party report concluded that online and virtual procedures are inappropriate where a person has mental health difficulties (see note 10 above).

¹⁶³ Judges and magistrates also need to be made aware of their powers to bring a vulnerable person to the court if they are of the view that the person is not able to participate effectively using the link, see for example Crim PR 3.2(4). Some magistrates are not aware of this rule. There needs to be a clear understanding of who has assessed the person as being capable of appearing over a link and what criteria has been used. Charles de Lacy also recommends the development of a Virtual Court Guidelines Council to monitor and assess how vulnerable people are advantaged or disadvantaged by the use of video and how these issues may be addressed.

¹⁶⁴ During a recent pilot of virtual hearings in the First-tier Tribunal (Tax Chamber) the majority of hearings experienced technology difficulties, some of which could not be resolved. This clearly indicates that there are still hurdles to overcome to ensure that the technology is robust and usable: Rossner and McCurdy, ‘Implementing Video hearings’, see note 151 above.

contrast focus, appropriate camera angles, and a zoom function where appropriate;

- making provision for client conferencing before, during and after the hearing and ensuring that there is sufficient time for this. For example, currently court users are given a 15 minute pre-hearing consultation slot with their representative before prison-video link hearings, which is often insufficient;¹⁶⁵
- ensuring that those participating via video can be provided with any missing documents both in advance of, and during, the hearing. This will require access to a computer or other electronic device which is connected to the internet so that video participants can be sent documents to a secure email address or access an e-bundle. This is a particular problem for certain groups including individuals in prison, immigration detention or National Asylum Support Service (NASS) accommodation; and
- providing video participants with suitable IT and other support. First-tier Tribunal (Tax Chamber) participants reported satisfaction with the video hearings pilot despite numerous technological difficulties. However, they received a very high level of support from HMCTS. Both the evaluators and participants questioned whether such a level of support was sustainable.¹⁶⁶

2.80 To reiterate, our recommendations are not for a change to an inquisitorial system whereby the judges take charge of case investigation and preparation. The role of the advocate or LiP remains central. The purpose of enhanced judicial case management is to ensure a clear process where all the parties understand as much as possible what the proceedings are about and what is expected by way of their participation in them.

¹⁶⁵ Gibbs, note 152 above, p.11; The Secret Barrister, ‘Digitising documents, yes. Digitising clients no.’, *Counsel Magazine*, October 2018, p.30.

¹⁶⁶ Participants received pre-hearing calls by a video hearings administrative team which helped them with ‘impression management’ – ensuring that their lighting and camera angle was adequate, that they were centred on the screen, and that they were suitably located and had an appropriate background in which to conduct their hearing. For the hearing itself, support consisted of a video hearings administrative team located remotely whose role was to resolve technology issues with users and ensure that they had successfully logged into the hearing, a clerk at the tribunal to log the judge into the hearing, a technical support person at the tribunal, a project manager also in the tribunal and additional HMCTS technical staff available remotely if further support was necessary. Rossner and McCurdy, see note 151 above, pp. 15-17 and 23.

Understanding the outcome

2.81 At the end of a hearing or application when it is time for a judge to give an oral decision, often proceedings take on a more formalised character – even if careful effort has been made to navigate an LiP through the process. When making a ruling or delivering a judgment, judges may resort to legal formula and use complicated technical language that stands in stark contrast with the language utilised in the proceedings. We understand that judges are required to explain their reasons for a decision in sufficient detail to ensure the conclusion and that there is no risk of appeal created by mere oversight. The law and the issues for determination may well be complex. However, we consider it is possible to give reasons that both comply with the law and are understandable to a lay user. The consequence of a failure to do so is that too often lay users leave a hearing or trial without a proper understanding of the decision that has been taken in their case or what to do next.¹⁶⁷ PSU volunteers told us that litigants in person regularly emerge from the courtroom and ask the volunteer questions such as: “Did we win? What happened?”. This may even happen in criminal proceedings. The following was observed by an intermediary:

...One day I was waiting for the next case, and observed the last five minutes of a magistrates’ trial. A young man in the dock was asked to stand while the magistrate read out the verdict. At the end of a long narrative, the magistrate said ‘...so you are acquitted.’ The family sat quietly, the defendant stayed standing. The magistrates picked up their papers and left the court. Clearly the young man had not understood. The security officer piped up ‘You are being let off!’, and the family cheered and everyone left the court.’¹⁶⁸

2.82 It is obviously imperative that every lay user understands the outcome of their case, the reasons why a particular decision was reached, and what, if anything, is going to happen next. There are plenty of good examples of judges and magistrates providing comprehensible decisions across court and tribunal jurisdictions. It simply requires the tribunal to think about who they are communicating with and to adapt their approach accordingly.

¹⁶⁷ This is also the case where a decision is appealed and lay users receive a written judgment which may be difficult to understand, especially where there are language barriers or the person has learning difficulties or is unrepresented.

¹⁶⁸ Paula Backen, *They just don’t get it: Communication and the work of an Intermediary with Vulnerable People in the Justice System* (2017) p. 118.

- 2.83** A telephone hearing that our rapporteur listened in to at the Traffic Penalty Tribunal demonstrated this. At the end of the hearing, the adjudicator explained in clear and understandable terms that he was making a decision, what his decision was, what the decision meant, and what the appellant’s next steps would be. He asked if the appellant had any questions about the judgment and whether the appellant understood the decision. Finally, he explained that the judgment would be available online in a written form through the online portal, which can be easily accessed by appellants.
- 2.84** An example of a written judgment tailored to the audience is the decision handed down by High Court judge Mr Justice Peter Jackson to a 14-year-old boy in a Family Court case, *Re A (Letter to a Young Person)* [2017] EWFC 48. This was given in the form of a letter and explained the judge’s reasons for giving an order and what he took into consideration. Mr Justice Jackson took a similar approach in *Lancashire County Council v M and Others* [2016] EWFC 9, where a written judgment was “as short as possible so that the mother and the older children can follow it”.
- 2.85** Further examples of good practice include press summaries issued by the Supreme Court, or summaries produced by other courts in high profile cases, which set out the key points in the decision and reasons for the judgment.¹⁶⁹
- 2.86** The practice of providing summaries should be standard and uniform across all courts and tribunals. **We consider that in order to ensure that lay users understand directions, orders and judgments made in proceedings that affect them, judges should clearly and simply state the outcome and give a brief summary of the reasons.** This should be the case whether the decision is given orally or in writing. When and how such a summary is given will depend on the type of case being heard and its complexity. It may be appropriate to provide an executive summary to a lengthy written judgment. Or, it may be sufficient to draft a short and simple explanation to accompany a written order. An oral summary might be best left until the end of a sentencing decision so that the defendant’s attention is maintained. Alternatively, in a civil dispute, it might be helpful to give a brief announcement of the decision at the outset of an oral

¹⁶⁹ See the Supreme Court latest judgments page <https://www.supremecourt.uk/news/latest-judgments.html>. Most tribunals are also required to provide written reasons for a decision, even if a decision is given orally: for example, Rule 31(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Health Education and Social Care Chamber) Rules 2008 and Rule 38(1) and (2) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

determination and then go on to provide the detailed reasons for the decision to ensure that it is correct in law. In every case, the focus when delivering a judgment (whether orally or in writing) should be on making the outcome comprehensible to the lay users involved so that everyone can understand: (1) what decision the court or tribunal has made; (2) what the consequences of that finding are; and (3) what the reasons are. Plain English should be used to enable effective communication, and judges should be careful to speak slowly and avoid, or explain, technical jargon to help lay users follow the reasoning.¹⁷⁰ In particular, important dates and procedural steps required of LiPs should be clearly stated and understanding of these verified by the judge.

2.87 In the next chapter we go on to focus in more detail on the language necessary to effectively communicate in hearings.

¹⁷⁰ This is especially so where English is not the lay party's first language, which is a regular feature in some courts.

III. COMMUNICATING WITH LAY USERS

The biggest problem with the more senior judges is that they think that they know how to talk to people. The biggest problem is actually understanding our own limitations. I think we all think of ourselves as very good communicators but I don't think any of us would recognise that 50% of witnesses don't actually understand the question they are being asked. Crown Court judge and trainer.

- 3.1** The complexity of the law and legal terminology is well known. The law is often criticised for its remoteness and its, sometimes, impenetrable language. We make suggestions in the previous chapters to limit the complexity of the law, but this can only go so far: statute law and case law is complex and does have its own vocabulary. The role of legal professionals is therefore crucial to ensuring that lay users can understand the language used in proceedings. Over the years, effort has been taken to make the law more understandable for the public: few Latin maxims or phrases are now relied upon in favour of their nearest English translations; the introduction of procedure rules and active case management has narrowed the issues in trials and emphasised the need for succinct and focused submissions on what is important. High profile cases in which the examination of child witnesses was heavily criticised have focused attention on the need to adapt questioning techniques to enable the best evidence of witnesses to be taken.
- 3.2** In many jurisdictions, it is the norm for people to represent themselves. This creates additional challenges, as, although intended for unrepresented parties, in many jurisdictions, such as the Employment Tribunal, LiPs have always had to contend with a lawyer on the other side. Legal aid cuts have led to a significant increase in LiPs. This has made it all the more likely that professional advocates across all court and tribunal jurisdictions have to engage directly with lay users as opponents rather than another experienced professional, which adds a further complication to the role.
- 3.3** The Bar Standards Board's (BSB) 'Professional Statement for Barristers' was introduced in 2016 and states that good communication skills and the ability to adapt language and non-verbal communication to suit their audience forms part of a barrister's competences. These skills should be exercised "in all engagements with others, including meetings, conferences and in court (whether conducted face-to-face or remotely)."¹⁷¹ The Solicitors Regulation Authority's

¹⁷¹ Bar Standards Board, 'Professional Statement for Barristers: Incorporating the Threshold Standard and Competences', (2016) at para 1.9, available online at

(SRA) competence statement similarly sets out the need to communicate effectively and avoid unnecessary technical terms.¹⁷² The Bar Council, CILEx and the Law Society have jointly produced guidelines offering practical advice for lawyers who face LiPs in the civil courts and tribunals.¹⁷³ The Equal Treatment Bench Book for judges also explains in its introduction:

*Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed.*¹⁷⁴

- 3.4** We are encouraged that regulators and professional bodies have recognised that there is a need for legal professionals to communicate effectively with lay users and have made these core principles of professional practice. New training requirements and approaches are currently being set by both the BSB¹⁷⁵ and SRA,¹⁷⁶ which provides an opportunity to prioritise communication skills. We set out further guidance in this chapter which provides good practice to court professionals.
- 3.5** Nevertheless, there are still too many instances where lay users feel ignored, disrespected and confused by the proceedings, a primary cause of which is the use of language that they cannot understand and inappropriately confrontational

<https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/becoming-a-barrister/professional-statement/> The Professional Statement describes the knowledge, skills and attributes that all barristers will have on ‘day one’ of practice.

¹⁷² Solicitors Regulation Authority, ‘Statement of solicitor competence’, (2015) at para C1, available online at <http://www.sra.org.uk/solicitors/competence-statement.page>

¹⁷³ These contain helpful sections on communicating with LiPs both in and outside of the courtroom (*Litigants in person: guidelines for lawyers* (2015), available online at <https://www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015/>).

¹⁷⁴ Judicial College, ‘Equal Treatment Bench Book’, (2018) at p. 4, available online at <https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/>

¹⁷⁵ See the explanation at <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/future-requirements/>, which sets out that Authorised Education and Training Organisations will have to satisfy the Authorised Framework to provide training routes to the Bar.

¹⁷⁶ The Solicitors Qualifying Examination will create uniformity to the assessment process, incorporating study and practical work experience, available online at <https://www.sra.org.uk/solicitorexam/>

and forceful questioning. We do not suggest that professionals must attempt to paraphrase or explain every legal provision. Nor can we expect that lay users will be able to understand all that lawyers and judges can. Nevertheless, greater effort must be taken to enable lay users to effectively participate, and that means affording as much understanding as possible. Good forms of communication need to be clearly identified and accepted by court professionals as the norm, and bad forms phased out. In this chapter we explore how this might be achieved.

Complex language and legal jargon

*I recall asking a barrister to replace the word ‘obtain’ with ‘get’ as the former was not in the witness’s vocabulary. The barrister replied that he did not mean ‘get’, and needed to be more specific in his language. I tried hard to explain that using a word that was not understood was similar to speaking in a foreign language. I believe it is not an easy move, but an essential one that needs to be grasped. Intermediary.*¹⁷⁷

*They [the judges and lawyers] would talk among themselves in legal-type language, and I was just sat there waiting for it to be translated. Litigant in Person.*¹⁷⁸

3.6 Technical language and practices in the courtroom are a natural consequence of being in a professional environment – especially one that is steeped in tradition. To professionals, the courtroom is a place of work. While legal professionals may try to make themselves comprehensible, we have seen and been given many examples of where this has failed. This is entirely understandable: advocates on their feet are navigating through complex law, and juggling multiple pieces of evidence as well as evidential rules when they are questioning a witness. When addressing the judge, it will often be because a matter of law has arisen that necessarily involves legal terminology. Sometimes there may be a particularly sensitive issue that the advocate or judge is trying to avoid spelling out in open court. We also recognise that advocacy requires the considered application of language to make an argument persuasively.

3.7 The vast majority of hearings take place in a public venue, and all are designed to solve the problems and concerns of lay people. Sometimes language is unnecessarily complex, too sophisticated or may require prior legal knowledge,

¹⁷⁷ Backen, note 168 above, p. 58.

¹⁷⁸ LiP interviewee to Jess Mant, lecturer-in-law at Cardiff University, reported in J. Croft and B. Thompson, ‘Justice for All?’, *The Financial Times Weekend Magazine*, 29/30 September 2018. Available online at <https://www.ft.com/content/894b8174-c120-11e8-8d55-54197280d3f7>

all of which might exclude lay users and make it hard for them to follow or feel part of what is happening. As witness supporters have told us, this is compounded where a lay user is unrepresented,¹⁷⁹ does not have English as a first language or has a disability. Intermediaries, who are highly skilled speech and language specialists, regularly observe that legal professionals are often not aware of how much legalese and jargon they use, and that simplification would not only benefit vulnerable users, but the wider public.

3.8 For example, Paula Backen highlights a comment by a solicitor to a young man with learning difficulties: *“the court was minded to adjourn the case so it may be re-listed”*. She simplified this to: *“they might stop today and get another date.”*¹⁸⁰ Although this lay user had particular language difficulties, most people would find the alternative form of words easier to follow and less excluding. Other examples have been identified by those we consulted with, such as that witnesses don’t understand what they are being “released” from and that metaphors are overused, and risk alienating the tribunal, witnesses and lay parties.

3.9 Even in cases where a lay user understands much of what is being said in the proceedings, the type of language used by the professionals creates a perception of elitism. This can be compounded for people from lower socio-economic areas, ethnic minority backgrounds or immigrant communities.

3.10 These concerns have been recognised by the legal professional bodies, The joint Bar Council, CILEx and Law Society guidelines for lawyers facing LiPs state: *“You should take care to communicate clearly and to avoid any technical language or legal jargon, or to explain jargon where it cannot be avoided: a LiP who is already feeling at a disadvantage may be further intimidated and antagonised by the use of such language.”*¹⁸¹ In relation to communication in court *“Lawyers should take care to avoid using language that might confuse a LiP, including the use of abbreviated terms or legal jargon. A LiP might not only*

¹⁷⁹ See also Lee and Tkacukova, note 4 above; E. Dugan, ‘The Government Tried To Bury This Research Showing Judges’ Concerns about The Rise In People Defending Themselves in Court’, *BuzzFeed News* (30 April 2018), available online at https://www.buzzfeed.com/emilydugan/the-government-tried-to-bury-this-research-showing-judges?utm_term=.jILr30dQ6Q#.il8Zej6pJp (See the follow up report here: https://www.buzzfeed.com/emilydugan/the-government-tried-to-conceal-this-testimony-from-judges?utm_term=.ddadKagN6N#.oh6RdOaoxo).

¹⁸⁰ Paula Backen, note 168 above, p. 79.

¹⁸¹ *Litigants in person: guidelines for lawyers* (2015), see note 173 above, at para 21.

*find it confusing, but may also resent the case being conducted in a way that means he or she cannot understand what is happening.”*¹⁸²

- 3.11** The development of legal language starts during legal training, and this is where emphasis can be placed on ensuring communication is clear and simple. The Advocacy Manual for the Bar Professional Training Course (BPTC) identifies as part of the advocacy training criteria that each student should: “deliver your submission clearly and fluently, using appropriate language and manner.”¹⁸³ It goes on to explain that:

*“Our aim, when talking, is to communicate with our listeners and we will do so most effectively when our vocabulary is a shared one... The competent advocate should always use a vocabulary that is suited to both the listener and the situation. So you should ask yourself, who am I talking to, who is listening to me?”*¹⁸⁴

- 3.12** The Manual discourages the use of legal jargon, distinguishing between hearings where there are only professional court users, making ‘shorthand’ more acceptable, and where there are lay people present. It observes that there may be, “*your client perhaps, or a witness, or even people in the public gallery in court and all these people are entitled to understand and follow what you are saying.*” This is important advice for new advocates. However, it is not the focal point of the guide and is underutilised in BPTC courses where students have only each other to practice with.

- 3.13** Moreover, in attempting to provide examples of how to speak plainly, the Manual also falls into the familiar trap of using words that have become commonplace for lawyers but are not used generally by the public:

“Do you recall an occasion when you spent a weekend in Manchester?” rather than *“Have you ever spent a weekend in Manchester?”*

And *“How would you describe Mr Green’s demeanour at that time?”* rather than *“What kind of mood was Mr Green in?”* ‘Demeanour’ is a particularly good example of a word that all legal professionals deploy but is almost never used in other situations.

¹⁸² *Ibid*, para 38.

¹⁸³ R. McPeake (ed.), *Advocacy (18th edition)*, (Oxford University Press, 2016), p. 25.

¹⁸⁴ *Ibid*, pp 45-46.

- 3.14** If legal professionals cannot use their language and advocacy skills to make the process comprehensible to the public using our courts, we consider that they are failing in their role. As we recognised in **Chapter 2**, in the context of summaries for decisions, the nature of the proceedings will dictate in what way and to what degree language needs to be adapted. For example, the language used in the social security and child support tribunal, or during a housing repossession case in the county court where an unrepresented person faces severe detriment, will be very different to that used during an appeal on contractual terms. Many courts and tribunals have to grapple with highly complex technical matters. For the most part, members of the public will not attend these hearings. A trial before a jury requires straightforward language throughout the process to ensure that the lay members can follow the arguments being made.
- 3.15** The Working Party considers that it is not enough for lay users to only understand the outcome of a case. They must be able to understand key elements of the proceedings, feel that they have been treated with respect, be able to give their account of what has happened and understand why the outcome was reached. This is participating effectively.
- 3.16** It is the responsibility of the court professionals to ensure that parties and witnesses can effectively participate, and that the overall purpose of the hearing can generally be followed by any public attending. In almost all cases it will mean using plain English and avoiding legalese as much as possible. Where a witness is being questioned, the language used should be tailored to them and avoid legal jargon. If complex terms are used by an expert witness in such a trial, these must be explained simply for the other lay users to follow, whether by provision of a glossary of technical terms, or follow-up questions in non-technical language. As we recommend in **Chapter 2** in relation to simple summaries for decisions, where legal argument is made in a trial concerned with ordinary people, a simple summary of what it is about should be given. Routes to verdict, which are now routinely used in jury trials, offer an example of how it is possible to convert complicated legal concepts into plain English.
- 3.17** The Working Party believes that **careful consideration should be given to communication in the courtroom to ensure that – as much as possible – the proceedings can be fully understood by lay users. Therefore, we recommend that there be a judiciary-led consultation with the profession into modes of address, and commonly misunderstood terminology, and whether they continue to serve a useful purpose when set against any alienating impact they may have.**

- 3.18** Furthermore, we recommend that **new and continuing practitioner training should reflect the findings of the consultation, and build upon current initiatives, to encourage lawyers and judges to communicate effectively with court users.** From our conversations with professional bodies we have found that students are currently (and understandably) strictly taught to correctly apply legal terminology and convention. There is an impression – especially among students and junior barristers – that a deviation from what is deemed to be “appropriate” language would lead to a dressing down by the judge. This, therefore, perpetuates the use – and perhaps at the outset of practice, overuse – of archaic terms, language and attitude. The development of new legal qualifying criteria by the BSB and SRA will help with this.
- 3.19** Students also lack interaction with lay people during their training, and often have their first proper experience of communicating with a LiP on their feet. Given the increase of LiPs, we consider that **training providers should make witness handling and communication with lay people key components of legal professional training. They must also do more to provide opportunities to speak with lay people about their experiences of courts, to instil in students from the outset of their training that they should not leave their ordinary ability to communicate with non-lawyers at the door of court, but take it in with them and apply it. Teaching – at all stages of professional training – should harbour a culture of respect for, and communication with, lay people.** As we set out in **Chapter 2**, joint discussion between lawyers and the judiciary would also enable court professionals to share good practice.

Modes of address

When you’ve got to address the judge [do you say] ‘Your Honour’, I can’t even remember, [or] ‘Your Majesty?’¹⁸⁵

- 3.20** A particular feature of the justice system is the specific titles and terms of address used for legal professionals – counsel, advocates, barristers, solicitors, magistrates, justices of the peace, judges, panel members. These can be explained in the information provided ahead of proceedings. Indeed, HMCTS is currently devising and rolling out posters across the courts as to “who’s who” in the process. This is to be welcomed. What is trickier is knowing how to speak to each of these people during a hearing. In particular, the mode of addressing the

¹⁸⁵ Kirby, ‘Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts’, see note 14 above, at p. 952.

judge varies depending on the court or tribunal and the level of hearing. It may also vary according to the seniority and position of the judge. The Courts and Tribunal Judiciary website helpfully offers a useful breakdown of what to call the judge.¹⁸⁶ However, this also highlights how addressing the judge may be unnecessarily complex. For example, the website explains that a magistrate should be called ‘Your Worship’, or ‘Sir’ or ‘Madam’.

- 3.21** From our experience, conversations and research, we know that the way to address the judge is a source of anxiety for many lay users. Though this may appear to be a minor barrier to communication, it sets the tone for the conduct of proceedings.¹⁸⁷
- 3.22** Members of the judiciary have told us that most judges do not object to an incorrect mode of address by an LiP. The only imperative is that the user show respect towards the judge and the process. With this in mind, **information on how to address the judge should be prominently available at court and tribunal centres. It would also assist if judges and magistrates could indicate at the beginning of the hearing: “You may call me...” to alleviate any concerns a user may be harbouring. The simplest way of avoiding the problem would be for all judges and magistrates, wherever they are sitting, to accept and endorse being addressed by lay people as “judge.”**
- 3.23** Advocates, particularly in the criminal courts, conventionally address each other as “my learned friend” for a barrister and “my friend” for a solicitor. These modes of address are at best out-dated conventions and at worst very confusing for lay users – we can imagine people unfamiliar with courtroom dramas wondering why are they talking about the fact that they are friends during my hearing? **In our view to reduce the risk of exclusion and suspicion it would be sensible to strip away these modes of address and replace them with “the other side’s solicitor/barrister”, or the “prosecutor” or “Mrs Smith.”**

Culture and practice

- 3.24** As much as language and terminology can be alienating for lay users, so also can culture and practice. The manner in which court professionals address each other

¹⁸⁶ ‘What do I call a judge?’, Courts and Tribunals Judiciary, available online at <https://www.judiciary.gov.uk/you-and-the-judiciary/what-do-i-call-judge/>

¹⁸⁷ A. Kirby, see note 14 above, at p. 952.

and lay people can often exclude lay users, due to the technical nature of the interaction and their different roles in the process.¹⁸⁸

- 3.25** There is a balance to be struck on-the-one-hand between the need to preserve the solemnity of proceedings and the need to communicate in a manner that is comprehensible and encourages the effective participation of lay users. Finding the right approach requires the support of the judiciary and the legal profession. The demands of the role – its urgency, complexity, pressure and responsibility – impacts legal professionals in different ways.
- 3.26** The adversarial system positions advocates as opponents who are required to present their case fearlessly¹⁸⁹ and forthrightly. However, that should not manifest in aggressive, rude or dismissive conduct. This is especially a concern when conversing with or questioning lay users. Court professionals should also carefully avoid being patronising towards lay people. The BSB Professional Statement at paragraph 3.3 requires barristers to “[d]emonstrate a good awareness of their additional responsibilities in cases involving direct access and litigants in person.”¹⁹⁰
- 3.27** PSU volunteers that we spoke to felt that the barrister acting for the other party can often be very helpful; approaching the LiP outside of the court to introduce themselves and can be very pleasant, sometimes explaining what the case is about. They have generally found it to be positive interaction; “some are quite

¹⁸⁸ See J. Hodgson ‘Conceptions of the Trial in Inquisitorial and Adversarial Procedure’ in A. Duff, L. Farmer, S. Marshall and V. Tadros (eds.), *Judgment and Calling to Account* (Oxford: Hart Publishing, 2006), pp. 223-42: she discusses the way that the defendant becomes the object, rather than the subject, of her own trial – she has a walk-on part when everyone else knows their lines as repeat players.

¹⁸⁹ Bar Standards Board (2018), *The Bar Standards Board Handbook* (3rd ed.), (2018) p. 33, rC15, available online at https://www.barstandardsboard.org.uk/media/1933294/bsb_handbook_version_3.3.pdf

¹⁹⁰ The Law Society, CILEx and the Bar Council have produced guidelines which offer practical advice for lawyers who face LiPs in the civil courts and tribunals, which are supplemented by notes for the LiP explaining what they can and can’t expect from the other side’s legal representative and for the client explaining how their lawyer will deal with someone who is unrepresented on the other side (see <https://www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015/>). Much of the guidance for lawyers on communicating with the LiP on the other side is applicable when dealing with lay users more generally. The note aimed at the client is helpful as clients may be confused if they perceive their own lawyer to be “assisting” the other side in some way.

pushy, but most are good.” A survey of LiPs at the Birmingham Civil Justice Centre found that, from the answers given, judges appear to handle hearings in a manner that is accessible to LiPs before them and LiPs had a good impression of the way judges conducted hearings, irrespective of the outcome.¹⁹¹ However, a number of LiPs experienced communicative challenges with legal representatives for the opposing party, describing bullying and hostile conduct.¹⁹² As the authors indicate, this may well have been a reflection of usual conduct in a litigious environment, but suggests that these legal representatives made few adaptations for the lay users they were acting against.

3.28 There are a number of reasons for the distinction found in that survey between judicial conduct and that of the legal representatives. Naturally, the judge’s focus is on progressing the case and in civil and family proceedings where LiPs are routinely appearing, judges have necessarily had to adapt to their presence. More broadly, judicial communication may be improving due to the programme of judicial training aimed at conducting cases with litigants in person, vulnerable witnesses and parties, and communicating clearly. Training for magistrates in the Youth Court is particularly impressive at helping lay magistrates adapt their language and approach to conducting a hearing with children.¹⁹³ All criminal courses have developed in the last few years to contain an element of vulnerable witness and defendant handling. Trainers we spoke to considered that they had seen a significant change in judicial attitude in recent years towards making appropriate adaptations for vulnerability. The Business of Judging and Judge as Communicator course applies across jurisdictions, currently running twice a year for 36 judges each time. As a result of positive feedback from delegates, from 1st

¹⁹¹ Lee and Tkacukova, see note 4 above, p. 12.

¹⁹² One interviewee described a legal representative as “nasty, very nasty” and disrespectful. Others described pre-hearing conversations and tactics as unfair and taking advantage. One interviewee suggested “Fine, she’s paying you and she’s your client, but there is humanity out there and respect does not kill anyone,” pp. 12, 14-15.

¹⁹³ The *Communication Skills in the Youth Court Training Guide*, in conjunction with practical training, contains many helpful suggestions, including: “A lot of difficulties with engagement with individuals with communication difficulties can be avoided by simple common sense. However, we all become familiar with the court and its rituals. Jargon can be misunderstood and it can be very easy to fall in to the trap of thinking that language and communication are being adapted to assist an individual with difficulties, whereas in fact they are not. With this in mind, whilst many of the suggestions that follow may seem obvious, try to keep them to the forefront of your mind when in the youth court (or any court, dealing with an individual with communication difficulties).”

April 2019 the course will be compulsory for all newly appointed judges as part of their induction. The course includes role-plays in small groups for a range of scenarios in small groups in which judges will need to address communication issues that may arise during hearings.

3.29 However, we are aware that in the course of proceedings, lawyers can behave discourteously towards lay users. For example, one of JUSTICE’s lawyers observed an urgent application at Court 37 of the Royal Courts of Justice in October 2018. The application was brought by a litigant in person, opposed by a party represented by both barrister and solicitor. During the barrister’s submissions, the applicant started saying “yes, yes” in response to remarks made by the presiding judge which clarified the nature of the application and the orders that were likely being sought, to which the barrister abruptly responded in the fashion of an old school master: “Please don’t interrupt me while I am speaking.” The manner in which he responded to the applicant was condescending and suggested irritation. A PSU volunteer also recalled to us an incident where a person with Asperger syndrome needed to sit on a particular side of the court, otherwise she was thrown. Both the clerk and the barrister did not accept this, despite the PSU volunteer explaining. The barrister said: “Just go and sit where you’re told.”

3.30 For the most part, we expect that lawyers adhere to their professional rules, and are courteous and professional. One regular failure in this is with eye contact. As we mention in **Chapter 2**, this is crucial for the judge to maintain with the parties. It is a noticeable feature of court proceedings that lawyers always make submissions just to the judge and never speak to the opposing person during the hearing. While this is intended to ensure respect and formality of the process, for LiPs it diminishes their role in the process.¹⁹⁴ Advocates examining witnesses often fail to maintain eye contact while asking questions, as they locate documents or make notes. This may also come across as dismissive of the witness’s account.

3.31 Though they thought it rare, PSU volunteers also gave us examples of judges being unsympathetic in cases, and not alive to sensitive issues, such as domestic

¹⁹⁴ JUSTICE’s legal director experienced this while on jury duty in October, when the presiding judge over what was to be a lengthy trial invited prosecuting counsel to outline the nature of the case to the jury-in-waiting so as to allow them to appreciate whether they had any prior knowledge of the incident being tried. Counsel did not once look at the jurors in doing so, addressing his summary to the judge.

violence.¹⁹⁵ It is frustrating for them to have to explain why the judge is unsympathetic to the LiP. They told us that some judges are brilliant with cooling stressful situations, but the approach is incredibly variable.

3.32 Over-familiar interactions can also exclude lay users, such as banter and in-jokes between advocates and judges. Good relations between professionals serve an important function as they can help proceedings to advance efficiently.¹⁹⁶ We have all experienced occasions where a joke or wry comment can alleviate tension during particularly complex or harrowing evidence. However, court professionals must always be conscious of the effect of their behaviour on others. A defendant interviewed by the authors of *Inside Crown Court* said:

*If you're a defence lawyer... you should always fight as in, if your client is saying, 'I'm not guilty,' you should fight for him like he's not guilty... [but] they're pally pally as well, with the prosecution. I see them coming in and they're laughing and joking. I'm thinking: What's this? Like you're going for some drinks or something.*¹⁹⁷

3.33 In the same vein, judicial pronouncements can become routine for court professionals. In busy lists, advocates may enter and leave court, talking with each other as they go about their cases while a decision is being handed down.¹⁹⁸ But in doing this, professionals forget that lay users are experiencing court, not just as evidence, but as a memory of something serious that has happened in their lives. And a decision may take away their liberty, child or property, causing

¹⁹⁵ One volunteer described an incident where the judge came in, clapped his hands together and asked: “What’s all this nonsense?”

¹⁹⁶ While overt and excessive collegiality between the Bench and the Bar is likely to alienate a lay user from the process, it is equally true that the use of conversational tone between the decision-maker and either advocates or LiPs is likely to make those appearing before the court more comfortable and make it easier for participants to follow the proceedings. It is a matter of degree; the tone in which decision-makers engage with those appearing before them is likely to determine whether the approach is exclusionary or not.

¹⁹⁷ Jacobson et al (2015), *Inside Crown Court*, see note 2 above, p. 98.

¹⁹⁸ A JUSTICE intern observed proceedings in the Westminster Magistrates Court in October 2018 where a defendant was being denied bail and was distracted by barristers conversing on another matter at the back of the courtroom. Throughout his note of the visit he recorded: “lawyers talking.”

profound impact and hardship. As one LiP explained: “It’s like a big play that we’re not in that you’re watching but it’s about your life.”¹⁹⁹

3.34 The requirement to treat all people with respect and courtesy is set out in the BSB’s ‘Professional Statement’, at para 3.4; in the SRA’s ‘Competence Statement’, at para C2; and throughout the Equal Treatment Bench Book. In a recent study of judicial perceptions in the criminal court, these qualities were identified as being part of the skillset of a good advocate.²⁰⁰ More must be done to embed these principles. We consider that every effort must be taken to remember that the courtroom is not just the place of work for legal professionals, but a public arena in which serious disputes and problems are resolved for lay people. **As most professionals would acknowledge, comments and banter may be a way of de-stressing but are, in almost all cases, best dealt with away from court. This is easy to achieve, if at all times, legal professionals are aware of the lay user’s presence and that they must tailor their approach to the public rather than each other.**²⁰¹

3.35 It is harder to engage with lay people in a way that they can understand, but, as we set out above, this is a fundamental aspect of the role of legal professionals. This is why we consider that there needs to be an **overriding objective, across all jurisdictions, that court professionals should have as a primary consideration the effective participation of lay users.**

Taking evidence

3.36 Despite the introduction of greater judicial case management in pre-trial hearings and different forms of receiving evidence such as pre-recorded testimony, the emphasis in a British trial is still placed on the oral testimony of witnesses at the final hearing as the primary means of presenting and testing the reliability of evidence.²⁰² In our adversarial system, the parties in the proceedings are

¹⁹⁹ A. Kirby, see note 14, p. 952.

²⁰⁰ ICPR, ‘Judicial Perceptions of the Quality of Criminal Advocacy’, see note 27 above, section 2.4.2.

²⁰¹ It is also helpful to retain a respectful approach between professionals.

²⁰² Although, in the civil jurisdiction, and in criminal cases where there is no challenge to the witness’ account, witness statements almost always stand for evidence-in-chief. Given that these statements are usually drafted by lawyers or police officers and may not reflect the witness or party’s own words, this raises other concerns about whether the person is participating effectively in the proceedings.

essentially relied upon to set out the issues, identify and introduce the relevant evidence, test it and make submissions on its relevance to the issues in dispute in the case.

3.37 The BSB Code of Conduct, while positive in its obligations towards the client and the court, says little about a barrister's active or positive role towards other lay users save that they must act with honesty and integrity, and "must not make statements or ask questions merely to insult, humiliate or annoy a witness or any other person."²⁰³

Adversarial questioning

3.38 Cross-examination by the opposing party has long been the major feature of adversarial questioning. Cross-examination is regarded as an important investigatory tool – the means in which to test the veracity and credibility of the witness and explore alternative lines of enquiry. The mere fact that witnesses have promised to tell the truth, the whole truth and nothing but the truth, does not mean that they will always do so.²⁰⁴ However, cross-examination is also "an opportunity for advocacy... to persuade the jury of their case both directly through the content of their questions and their manner in asking, and indirectly by manipulating the witness to give only certain responses or to react in certain ways."²⁰⁵

²⁰³ Bar Standards Board, *Handbook*, (2018), version 3.4, rule C7, available online at https://www.barstandardsboard.org.uk/media/1968430/bsb_handbook_version_3.4.pdf

²⁰⁴ "[C]ross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story" per Viscount Sankey LC, in *Mechanical and General Inventions Co Ltd and Lehwess v Austin and the Austin Motor Co Ltd* [1935] AC 346 at [35], quoting the Master of the Rolls in the Court of Appeal.

²⁰⁵ E. Henderson, 'Theoretically Speaking: English Judges and Advocates Discuss the Changing Theory of Cross-examination' [2015] Crim LR 929, 931. The rule in *Browne v Dunn* (1893) 6 R. 67 requires that before an advocate may invite the court to reject the witness's evidence they must give the witness the opportunity, in cross-examination, to address conflicting evidence, known as 'putting one's case to the witness'. See also in *Hardy's Trial* (1794) 24 How St Trial 199 at 745, Chief Justice Eyre stated: "[Y]our questions ought not to be accompanied with...comments: they are the proper subjects of observation when the defence is made. The business of a cross-examination is to ask to all sorts of facts, to probe a witness as closely as you can, but it is not the object of a cross-examination to introduce that kind of periphrasis."

3.39 There are established common law rules limiting ‘protracted and irrelevant cross-examination’²⁰⁶ and to prevent offensive or oppressive questioning.²⁰⁷ These are reflected in the Advocacy Manual for the BPTC, which confirms that advocacy includes control of the witness and eliciting evidence using appropriate questioning techniques.²⁰⁸ It clarifies that:

Contrary to popular belief, cross-examination is not, nor should it be, ‘cross’ in the sense of angry, confrontational, or controversial... There is no need to shout or adopt an unpleasant, sneering manner in cross-examination. Nor is it necessary to harangue a witness in order to be effective... While you must exercise control over the witness, the most effective way is often to adopt a polite, courteous approach, use a combination of closed and leading questions and deliver them in the spirit of an inquiry. Appear business like and quietly confident.”

3.40 Despite this sensible advice, which at least all student barristers will have had access to, the attempt to persuade through cross-examination can, on occasion, lead to confrontational or insensitive questioning,²⁰⁹ use of inappropriate language that merely abuses or demoralises the witness, and/or the making of comments rather than the asking of questions. A particularly extreme example is *R v Farooqi* [2013] EWCA Crim 1649, in which the defence counsel’s conduct was described as so “unprofessional and provocative” that it made his own client’s defence unfair – with specific reference made to “prolix, extensive, irrelevant and aggressive cross-examination” of undercover police officers, in defiance of the trial judge’s interventions.

3.41 In the past few years, significant criticism has been made of inappropriate questioning, such as that conducted in the child grooming trials. Concerns about the length, tone and substance of some cross-examination, particularly of young

²⁰⁶ *Mechanical and General Inventions Co Ltd and Lehewss*, see note 203 above, at [360].

²⁰⁷ *Wong Kam-ming v R* [1980] AC 247 at [260].

²⁰⁸ These techniques will be overt in cross-examination by the use of leading, closed questions, and more subtle in examination-in-chief, usually through selection of topics and interventions when a witness strays into inadmissible or irrelevant evidence. In general terms, examination-in-chief is about trust, the advocate allowing the witness the freedom to tell their story in their own words but cross-examination is about control: R. McPeake *Advocacy*, see note 182, p. 128.

²⁰⁹ The Victims’ Commissioner recently proposed the introduction of cameras in court to curb ‘aggressive barristers’: O. Rudgard, ‘Let Cameras into Court to Tame Aggressive Barristers’, *The Telegraph*, 19 August 2018. Unfortunately, specific examples were not provided.

and vulnerable witnesses, has led to statutory²¹⁰ and appellate intervention. For example, in *R v Lubemba* [2014] EWCA Crim 2064 the Court held that ‘advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right “to put one’s case” or previous inconsistent statements to a vulnerable witness.’²¹¹ Rather, the jury can be made aware of these ‘without intimidation or distressing a witness.’²¹² Further, in *R v Barker* [2010] EWCA Crim 4 at [42], the Court held that ‘[c]omment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.’

3.42 Though much of the criticism of adversarial questioning styles is made within the context of criminal cases, similar concerns can also be found in other jurisdictions. For example, many large civil trials concerned with allegations of dishonesty may involve more cross-examination than criminal trials. Witnesses in such proceedings may be subject to many days of cross-examination on matters that have serious implications for their professional reputation. Even short trials that come before district judges in the county court, such as road traffic disputes, involve challenging the truth of one party’s assertion against the other. One of the most frequent problems is the advocate who feels obliged to put each detail of his/her client’s case. This may pose a problem even when it is not adversarial in tone. As well as lengthening proceedings, this often causes confusion for LiPs and other witnesses, both because they have often given their version of events in-chief and plainly don’t agree with the other party’s version, and because they may be asked about matters which are not disputed. Frequently, the advocate or the judge ends up explaining to a baffled witness that this is what is occurring, but it should not be necessary.

3.43 In family cases the conduct of one of the parties or harm suffered by children may be in issue and cross-examination in these circumstances may very well be

²¹⁰ Inappropriate, repetitive and lengthy cross-examination in the Stafford and Oxford grooming trials involving young and vulnerable witnesses finally pushed through the section 28 YJCEA pilot (pre-recorded cross-examination) in 2013 for vulnerable witnesses. Defence counsel were criticised for rebuking the witnesses in those cases and for comments to the jury such as, “Were these girls victims from the start or were they naughty girls doing grown up things they bitterly regret?”, quoted in ‘Pre-recorded Cross-examination Pilot’, *Counsel Magazine*, June 2013, available at www.counselmagazine.co.uk/articles/pre-recorded-cross-examination-pilot

²¹¹ At [45].

²¹² *Ibid*, however, see *R v RK* [2018] EWCA Crim 603 and para 3.51 below.

stressful and emotional, particularly if carried out by a litigant in person whose conduct has been called into question.²¹³

3.44 By contrast, in many tribunals, little or no use is made of cross-examination, either because the issues do not require it, or because the parties are not legally represented.²¹⁴ Often, where cross-examination is necessary, it is “inappropriate for there to be cross-examination as practised in the courts.”²¹⁵ As described in **Chapter 2**, under the procedural rules, tribunals are free to regulate their own procedure in the light of the issues and the overriding objective and, where appropriate, are able to take a more active role in identifying the facts and issues, with the aim of ensuring that parties can participate fully in the proceedings.²¹⁶ However, we have heard examples from a range of tribunal and disciplinary bodies of aggressive and lengthy questioning by advocates.

3.45 Many lay users report that being questioned in court is a negative experience. This is unsurprising given the nature of legal proceedings. But it need not be quite so uncomfortable an experience. Judges that we spoke with said that far fewer barristers are now aggressive and rude during questioning, particularly given the developing approach to vulnerable witnesses, but that it does still happen, and that they do not tolerate it. However, they thought that this would remain a problem in criminal cases while the pay remained too low to attract the best advocates for trials. One judge that we spoke to considered that there are also still some areas of practice where advocates may be under pressure ‘to keep their client happy’ by using an ‘aggressive style’. Those consultees that we spoke with felt that there is a need to dispel, through better professional

²¹³ Currently, alleged abusers acting in person are able to cross-examine their partners. We support calls for the introduction of legislation to prevent this from taking place. See JUSTICE, Prisons and Courts Bill 2017, House of Commons Second Reading Briefing, March 2017, available at <https://justice.org.uk/prisons-courts-bill-justice-briefing/> pp. 6 and 7, and also speech by the recently retired President of the Family Division, Sir James Munby ‘Because it is the right thing to do’ (24 July 2018), available online at <https://www.judiciary.uk/wp-content/uploads/2018/07/pfd-speech-fjypb.pdf>

²¹⁴ It should be noted that the practice in relation to cross-examination varies greatly between tribunals. For example, in the Immigration and Asylum Chambers, the Employment Tribunals and the Competition Appeals Tribunal cross-examination often occurs, whereas in the Social Security and Child Support Chamber there is little need for cross-examination.

²¹⁵ E. Jacobs, *Tribunal Practice and Procedure*, see note 132 above, paras 1.60-61 and 1.63.

²¹⁶ TCEA 2007, ss. 2(3)(a) and 24(2)(b) and The Tribunal Procedure (Upper Tribunal) Rules 2008.

development, the emphasis that some advocates continue to place on overly forceful, or worse, aggressive, questioning. The responsibility for ensuring that questioning is appropriate and fair falls on both the advocates in the case and the presiding judge.

3.46 The discretionary nature of common law powers restricting oppressive or repetitive cross-examination have been characterised as problematic for trial judges to enforce. They may not recognise when problems arise²¹⁷ and may be concerned about descending from the impartiality of the bench into the arena and possible challenge on appeal,²¹⁸ as inappropriate judicial intervention and questioning may render a trial unfair.²¹⁹ As a result, until recently there has been limited guidance in the case law on judicial use of discretionary powers to control questioning.²²⁰

3.47 However, it is now recognised that it is always the judge's duty to ensure that cross-examination is fair, confined to questions that are short and relevant, and that the obligation to put a case to a witness for response does not degenerate into making a speech. Few advocates would now get away with inappropriate questioning, with judges intervening and requiring questions to be adapted. Nevertheless, approaches between judges are different and some judges intervene more than others. We welcome this kind of intervention – aimed solely at supporting the witness's understanding. This is not the same as judges descending into the arena and unduly interrupting advocates by commenting on the way that they are developing their questioning, which is unhelpful and creates confusion for the witness.

²¹⁷ E. Henderson, 'Alternative Routes: Other Accusatorial Jurisdictions on the Slow Road to Best Evidence' in J. Spencer and M. Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012), p.43.

²¹⁸ *R v Howes* [2007] EWCA Crim 3219 at [27] and also *R v Roncoli* [1998] Crim LR 584; *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281; [2006] HLR 33, [145]-[146]. See also P. Bowden, T. Henning and D. Plater, 'Balancing Fairness to Victims, Society and Defendants in the Cross-examination of Vulnerable Witnesses: An Impossible Triangulation?' (2014) *Melbourne University Law Review* 37(3), 539.

²¹⁹ See for example, *R v Cole* [2008] EWCA Crim 3234; *R v Malcolm* [2011] EWCA Crim 2069; [2011] 9 WLUK 1.

²²⁰ E. Henderson, 'Best Evidence or Best Interests? What Does the Case Law Say About the Function of Criminal Cross-examination?' (2016) *International Journal of Evidence and Proof*, 20(3), p.183, para 188.

3.48 There is much work already being done to minimise inappropriate questioning; we have received evidence that advocacy training on progressive witness handling, including training on vulnerable and intimidated witnesses, is creating greater awareness among legal practitioners of more effective and ethical questioning techniques. We have also heard that the culture of witness handling and advocacy is changing as new advocates enter the profession. However, there is still some way to go. There are many examples in the appeals cases of legal professionals accepting a line of questioning which should be considered inappropriate by all. We consider that more needs to be done to ensure that the process of testing disputed testimony is fair and appropriate for *all* court users. We set out our recommendations at the end of this chapter.

Adapting questions for vulnerable witnesses

The Ground Rules Hearing is an essential part of the trial process involving use of intermediaries. It is very important to get an idea of the witness and it's of great assistance in trial management – also to set the boundaries of intervention. A Crown Court Judge.²²¹

3.49 Over the last two decades there has been growing acceptance that witnesses classed as ‘vulnerable and intimidated’ (under the YJCEA 1999 in particular) may need questions to be adapted to enable them to understand and give their best evidence in court. The approach to the questioning of vulnerable witnesses has been described as departing ‘radically from traditional cross-examination’²²² and the culmination of a ‘revolution’.²²³ The Family Courts,²²⁴ and tribunals in which cross-examination takes place,²²⁵ have made similar adaptations.

²²¹ Interviewed for J. Plotnikoff and R. Woolfson, *Intermediaries in the criminal justice system* (Policy Press 2015), pp.99 – 100.

²²² Crim PD 3E.4. See also Crim PR 3.9(3) and (6).

²²³ I. Judge ‘The Evidence of Child Victims: The Next Stage’ (Bar Council Annual Law Reform Lecture, 21 November 2013).

²²⁴ Family Practice Direction 3AA paragraph 5.5.

²²⁵ The First-tier and Upper Tribunal Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses requires tribunals to consider how to facilitate the giving of any evidence by a child, vulnerable adult or sensitive witness. This may be achieved by any “means directed by the Tribunal” or by directing that a person be appointed for the purpose of the hearing who has the appropriate skills or experience in facilitating the giving of evidence by a child, vulnerable adult or sensitive witness. In the Immigration and Asylum Chamber, Presidential Guidance Note 2 of 2010: Child, vulnerable adult and sensitive appellant guidance contains guidance on the

However, there are no procedure rules or guidance on the questioning of vulnerable witnesses in the civil jurisdiction.

3.50 One key change to procedure is through the Ground Rules Hearing (GRH). The criminal courts have developed the GRH to enable the fair treatment and effective participation of vulnerable witnesses and defendants.²²⁶ The aim is to air all the issues affecting the witness or defendant before the evidence starts, so that appropriate adjustments are made to the way the evidence is taken, and the evidence flows without interruption or interventions. It is recommended for any vulnerable witness and it is considered obligatory if an intermediary has been appointed.²²⁷ Prior to the GRH, advocates should submit the questions and topics they intend to cover with the witness in writing to the judge, and intermediary, if instructed. At the GRH the judge will consider whether the proposed questions will be understood by the witness or suggest adaptations. Where an intermediary has been instructed, they should be present to assist the judge, though frequently this does not happen. The intermediary will also submit a report to suggest what adaptations to the trial process the witness may need, such as communication aids (which might be dolls or visual depictions to point out something hard to describe, some kind of stress toy to hold, or an induction loop so that the person can hear proceedings), breaks and the place from which the witness will give

questioning of vulnerable witnesses, paras 10.2 (iii) and (iv), available at <https://www.judiciary.uk/wp-content/uploads/2014/07/ChildWitnessGuidance.pdf>).

²²⁶ “We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances... The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked. So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance.” *R v Lubemba*, para 43. See also TAG, Ground rules hearings and the fair treatment of vulnerable people in court, Toolkit 1 (2016), available at <https://www.theadvocatesgateway.org/images/toolkits/1-ground-rules-hearings-and-the-fair-treatment-of-vulnerable-people-in-court-2016.pdf> and see Crim PR r. 3.9(7) for the requirement for appropriate treatment and questioning, procedure and range of rules.

²²⁷ Criminal Practice Direction I 3E. Ground Rules Hearings are also used in family proceedings whenever the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence, Practice Direction 3AA; FPR, 5.2-5.7. However, there is little data on the number of GRHs currently conducted, MOJ ‘Report on Review of Ways to Reduce Distress of Victims in Trials of Sexual Violence’ 2014.

their evidence. The GRH enables the advocates and judge to discuss these adaptations and also the prompts for stopping questioning where something is causing a communication problem.

- 3.51** When the witness gives evidence, the judge should be aware of whether the witness can understand the questions or if they are having any difficulty with the process. Where an intermediary is present, they can monitor this and advise the judge if there is any communication difficulty. A report on the development of the role of the intermediary records the first attempt to engage an intermediary and why the GRH process is so useful:

*The first pilot to use an intermediary... was a textbook illustration that 'communicative competence' concerns not only the abilities of the witness but also those of the questioner. From the outset, the defence advocate spoke quickly, using complex questions...The judge saw no problem with the defence counsel's pace or questioning style but thought that the intermediary should have repeated all of the boys' answers...R and G told us the intermediary had been "brilliant" but R would have liked to say to the defence lawyer: "Slow down, slow down, slow down."*²²⁸

- 3.52** This approach to the questioning of vulnerable and intimidated witnesses has developed further with the piloting of section 28 YJCEA 1999 on pre-recorded cross-examination, which involves the videotaping of the cross-examination prior to the trial. This is then played at the trial. We discuss this further in **Chapter 4**.²²⁹ Advocates and judges involved in Ground Rules Hearings used in section 28 pilot cases say that the task of having to formulate questions in advance has concentrated advocates' minds on the process of adapting to the witness and focusing on the issues in the particular case, removing verbiage, ambiguity and unnecessary questions. This has resulted in a more investigative, effective and efficient cross-examination²³⁰ and provides better evidence for the court.

²²⁸ J. Plotnikoff and R. Wolfson, note 220 above, pp. 100-101.

²²⁹ In these cases, the GRH takes place prior to the section 28 hearing (when the pre-recorded cross-examination takes place) and covers proposed questions, the length of cross-examination, the cross-examination by a single advocate in a multi-handed case and restrictions on the advocate's usual duty to put the defence case to the witness, if necessary.

²³⁰ See also G. Hunter, J. Jacobson and A. Kirby, *Judicial Perceptions of the Quality of Criminal Advocacy*, (ICPR and Birkbeck University of London 2018) at para 3.4, available online at <https://www.sra.org.uk/sra/how-we-work/reports/criminal-advocacy.page>

3.53 Adapting to the needs of the witness will be different in every case. In some trials involving children or witnesses with mental health difficulties, a desire to protect the witness has sometimes resulted in advocates not putting the case to the witness or not questioning them on anomalies that may have arisen. However, the professional court users we spoke to confirmed that witnesses often want to be given the chance to deal with inconsistencies in their account rather than this be left to comment and assumption. It is a matter of concern that a witness is not given the opportunity to address an issue that will be relied on to undermine their reliability, and the Court of Appeal has confirmed that vulnerability is not a reason for a party not to put forward a case in a manner that enables a response.²³¹

3.54 The requirement to adapt to the witness is confined to cases where witnesses have been formally identified as ‘vulnerable’ or ‘intimidated’. Similarly, current training and guidance on adaptive styles of questioning and treatment tends to concentrate on ‘vulnerable’ and ‘intimidated’ witnesses. For example, the 20 Principles of Questioning Vulnerable Witnesses sets out that: ‘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.’²³² Training and guidance is targeted at experienced practitioners, post-qualification, rather than law students and junior members of the legal professions.²³³

3.55 Continuing professional development training courses on vulnerable and intimidated witnesses, such as the *Advocacy and the Vulnerable Training Programme*²³⁴ and guidance on questioning vulnerable witnesses in toolkits

²³¹ *R v RK* [2018] EWCA Crim 603.

²³² The Inns of Court College of Advocacy, ‘Advocacy and the Vulnerable National Training Programme: 20 principles of Questioning, A guide to the cross-examination of vulnerable witnesses’ 2018, available at <https://www.icca.ac.uk/images/download/advocacy-and-the-vulnerable/20-principles-of-questioning.pdf>

²³³ Lead trainers of the Advocacy and the Vulnerable Course consider that younger professionals taking the course seem more able to adapt their questioning techniques than those who have been practising for longer, which commends the course as a core element of the New Practitioner Training requirement for pupil barristers.

²³⁴ The Advocacy and the Vulnerable Training Programme has been 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: see ICCA website,

produced by The Advocates' Gateway (TAG)²³⁵ provide excellent guidance for legal professionals on how to approach the questioning of vulnerable witnesses. These initiatives are seen by the Inns of Court College of Advocacy as sending out a message that the approach to and culture around advocacy has to change. The Judicial College has also sought to embed vulnerable witness training in its continuing development programme offered to new and experienced judges. The Family Procedure Rules Practice Direction 3AA also requires that advocates be familiar with and to use the techniques employed by the TAG toolkits.²³⁶

3.56 In consequence: “...most members of the profession now recognise that there is no longer any place for the traditional robust cross-examination of a child or a vulnerable witness...”²³⁷ Furthermore, it is now considered to be misconduct for

<https://www.icca.ac.uk/advocacy-the-vulnerable> It is envisaged that the course will become mandatory at some stage, aiming to reach around 14,000 advocates, but currently is voluntary. Rigorously researched with the involvement of judges and experts, the course involves a first stage of online preparation, viewing video and written materials, and preparation of cross-examination questions in a sample case and then a face to face course of about three hours where the cross-examination will be considered. An exemplar video of the cross-examination is then made available, together with follow up best practice materials.

²³⁵ The Advocate's Gateway provides free access to practical, evidence-based guidance on vulnerable witnesses and defendants. It currently has 18 toolkits, for criminal, civil and family jurisdictions, and cross-cutting general guidance, such as “Intermediaries: step by step” and “planning to question a child or vulnerable person.” See <https://www.theadvocatesgateway.org/>

²³⁶ PD 3AA FPR para 5.7. This Practice Direction supplements Part 3A on Vulnerable persons: participation in proceedings and giving evidence. A toolkit on ‘Vulnerable witnesses and parties in the Family Courts’ was published by The Advocate's Gateway in November 2014. An example of good practice provided is “A 13-year-old girl with autism had already given an ABE interview to the police. Cross-examination questions were agreed by all parties in care proceedings and the judge and put to the child by an independent interviewer, who had permission from the court to adapt the questions in line with the child's understanding and also her responses. This was recorded and transcribed for court.” The Advocate's Gateway, *Vulnerable witnesses and parties in the family courts: Toolkit 13* (2014), available at <https://www.theadvocatesgateway.org/images/toolkits/13-vulnerable-witnesses-and-parties-in-the-family-courts-2014.pdf>, para 5.15.

²³⁷ S. Drew and L. Gibbs ‘A United Approach’ *Counsel* (March 2017), available at www.counselmagazine.co.uk/articles/united-approach

an advocate to take on a case involving a vulnerable or intimidated witness without having first received specific training.²³⁸

Adapting questioning for all participants

3.57 Some legal professionals have observed that the Court of Appeal’s guidance through the cases set out above is merely reinstating the investigatory purpose of ethical cross-examination first elucidated in *Mechanical and General Inventions Co Ltd v Austin*, reaffirming cross-examination as a means of producing ‘best evidence’ for the court. These developments are ‘merely a logical extension of the ordinary rules’ and ought, in fact, to be applicable to witnesses generally, not just those classed as ‘vulnerable and intimidated’.²³⁹

3.58 As Professor Hoyano has identified,²⁴⁰ it is problematic to assume that only specific types of lay users, for example, victims or witnesses, may have learning or communication difficulties. For example, there is no vetting process for jurors to determine their intellectual or emotional intelligence.²⁴¹ Among the practitioners we spoke to, there was also concern regarding the lack of screening to identify defendant vulnerability in the criminal justice system. This confirms the view of the JUSTICE working party on *Mental Health and Fair Trial*.²⁴² As one practitioner we spoke to suggested, defendants may equate being vulnerable with being ‘stupid’ and therefore are unlikely to want to be portrayed as

²³⁸ The Lord Chief Justice observed that “...It is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training,” *R v Grant-Murray* [2017] EWCA Crim 1228, at [226]. There is a requirement for barristers upon renewing their practising certificate to confirm that they are trained in child questioning if they are undertaking youth court proceedings.

²³⁹ See also E. Henderson, ‘Bigger Fish to Fry: Should the Reform of Cross-Examination be Expanded Beyond Vulnerable Witnesses?’ (2015) *International Journal of Evidence and Proof* 83.

²⁴⁰ Presentation given to the Criminal Bar Association Conference, May 2018.

²⁴¹ Although judges may ask jurors-in-waiting to consider if they are able to handle complex documents and technical details prior to empanelling them on a long trial.

²⁴² See note 10 above. That working party recommended screening of every suspect by mental health professionals at the police station stage to ensure the accurate identification of vulnerability and necessary reasonable adjustments (by liaison and diversion services), which would be added to the case file and flagged for court. See recommendations 7, 23 and associated recommendations.

vulnerable, especially if tried alongside their peers, so even if they are aware of their lack of understanding, they may not want to be forthcoming about it.

3.59 There is emerging evidence to suggest that training on vulnerable witnesses and involvement in Ground Rules Hearings and conducting section 28 cases is having a broader impact on questioning generally. For example, judges involved in section 28 pilot hearings have told us that the advocates involved are successfully adapting their questioning style and applying their training to be more mindful of pitching their questions appropriately and communicating with the witness in non-section 28 cases. The process also provides a more collaborative working environment among professional court users, including between the defence and prosecution, and between professional and lay users.²⁴³ Though the full implementation of section 28 is likely to take some time and pre-recorded cross-examination will only be available in criminal courts and for certain cases, there is no reason why progressive principles and techniques emerging in conjunction with this practice should not be disseminated more widely across courts and tribunals to aid comprehension and understanding for all lay users.

3.60 What the Ground Rules process demonstrates is that advocates can and should adapt their questions according to the particular witness when devising their questions and that it is possible to do so if the needs of the lay user are at the forefront of their mind.

3.61 In our view these principles are relevant for lay users generally. All witnesses are more likely to give a fuller, accurate account if questions are clear, short, follow a logical order and avoid comment or rebuke. Signposting to witnesses what subject is going to be covered and moving on to a new subject, which is part of basic training for new advocates, is important to reinforce here. So is explaining the role of the cross-examiner prior to commencing questions.²⁴⁴ A cross-examination which focuses on aiding the witness to provide an accurate account of the matters in issue rather than simply discrediting their account is also likely

²⁴³ GRHs show that courts are becoming more willing to adapt the process to fit the people involved. This is a huge step forwards. A few years ago, judges would have required witnesses to watch their ABE at the same time as the jury because that was how it is done. Now, they realise that to do so is pointless and can even be damaging for the witness.

²⁴⁴ One of our members tends to explain that they cannot chat to a witness, their role is to question and for the witness to answer. This tends to make the witness understand that they are not under attack from the lawyer but being cross-questioned on their evidence. Some judges dislike this, but it reduces the feeling of confrontation for the witness.

to be more cooperative, courteous and less combative. This is not to suggest that advocates should not be probing or get to the nub of the issue in their questioning. There is a clear distinction between the duty to challenge a witness and suggest that they are lying through firm cross-examination, and aggressive questioning. As one judge interviewed as part of a study of cross-examination in criminal cases stated: *“If it’s just designed to bamboozle the witness into saying something they don’t mean then that’s not useful and should be stopped.”*²⁴⁵

3.62 To apply these principles more broadly, we consider that a cultural or professional shift is required to increase awareness among professional court users of how they treat lay users and their experience of procedural justice. This requires court and legal professionals to appreciate that people giving evidence may not be officially “vulnerable” according to legal definitions,²⁴⁶ but nevertheless may be having to recount an incident that was violent or traumatic. Moreover, the anxiety of giving evidence makes all witnesses inherently vulnerable – and by varying degrees – to the process of questioning, to which advocates must not become desensitised. Though a cultural shift will undoubtedly take time, it is already being assisted through the work of professional regulatory bodies, training organisations and peer-to-peer dissemination. In order to embed this as standard practice, the support of leaders of the respective court professionals is needed.

3.63 The BSB has recognised the need for broader culture change and the necessity to adapt communication and language to the needs of lay users. To some extent, this is reflected in the BSB Professional Statement at 1.15:

When delivering submissions and questioning witnesses, [advocates] will be able to communicate audibly, using both pace and language that are appropriate to the tribunal. They will be able to handle witnesses in accordance with the rules of the court. They will ask questions which assist the court, focus on the real issues in the case and avoid the irrelevant. They will listen to the answers and demonstrate appropriate conduct towards the witness.

3.64 However, the Statement focuses on what is appropriate to the *tribunal* rather than lay users. An express responsibility on advocates to clearly and fairly formulate

²⁴⁵ E. Henderson ‘Theoretically speaking: English judges and advocates discuss the changing theory of cross-examination’ [2015] Crim LR 929, 936.

²⁴⁶ Which we explore further in the next chapter.

and deliver their questions in order to assist lay users to give their best evidence is needed. Embedding the principle that advocates should adapt to the witness more widely may also go some way in responding to criticisms we heard from practitioners, section 28 judges and delegates of the annual Intermediaries for Justice conference about the failings of police, local authorities, practitioners or courts to identify vulnerability, as well as disparate treatment of vulnerable witnesses compared to vulnerable defendants and other lay users.

3.65 While questioning which is incisive, clear and strongly aligned with the main issues in the case has benefits for the immediate witness under questioning, it is also easier to follow for the other lay users directly involved in the hearing. For example, other witnesses, family members and community in the public gallery, and their ability to respond to the evidence in the trial and engage with the process.²⁴⁷ This is essential to ensuring that open justice can operate properly.

3.66 In our view, the principles elucidated from the development of the GRH process should feed into the core duty of the advocate's professional obligations to test evidence ethically, taking into account the needs and experience of court users. Questioning should be done in a way that makes the process as fair as possible. What matters is that the court hears reliable evidence, which comes from witnesses who have understood the question and are giving a meaningful reply. **We recommend that the questioning of witnesses should always be adapted to the needs and understanding of the witness to ensure that they can give their best evidence and to promote comprehension on the part of participants to the hearing.**²⁴⁸ This principle should be applicable across all

²⁴⁷ In October 2018, one of JUSTICE's lawyers observed a First Tier Tribunal (Property Chamber) hearing of a House in Multiple Occupation licence dispute. None of the parties were represented and a number of difficult evidential and legal issues arose in the hearing, necessitating questioning of the respective parties. The presiding judge took a central role in examination, asking simple, chronologically ordered questions that proceeded page by page through bundles submitted by the parties. As explained in **Chapter 2**, the presiding judge took further measures to ensure the parties understood and followed the proceedings; explaining out loud the panel's impression of the significance of a particular piece of evidence and verbalising the need for the tribunal to obtain certain further information to make its decision. The lawyer, as a public observer with no experience in housing law, found the proceedings and the decision making of the panel explicable and easy to follow.

²⁴⁸ This recommendation is also closely aligned with our recommendation that court professionals should be encouraged through training, continuing professional development and reflective processes to regularly put themselves in the lay user's shoes, involving both active and

jurisdictions and in respect of all witnesses, not merely in cases where witnesses are formally identified as ‘vulnerable or intimidated’ or pre-recording under section 28 YJCEA is available. It should also have in mind all lay users in the courtroom when formulating questions.

- 3.67** Although this inevitably requires practitioners to be more attuned to witnesses and lay users, this recommendation is designed to aid lay users’ understanding of the questioning process and give them a meaningful opportunity to answer the opposition’s case. We do not suggest that all of the principles regarding the specific handling of children or the most vulnerable witnesses should also apply by extension, such as all cross-examination questions be written or vetted in advance.²⁴⁹
- 3.68** In order to achieve this, we recommend that **new and continuing practitioner training providers and regulators should train advocates to adapt the style of their questioning routinely to the needs and level of understanding of the lay user being questioned.** In particular, BPTC and Higher Rights Advocacy training should embed these principles in the criteria for witness examination assessments.

observational methods such as sitting in the witness box and dock, and shadowing intermediaries and support volunteers.

²⁴⁹ However, Cooper et al suggest there is no reason why the majority of the 20 Principles for Questioning Vulnerable Witnesses should be confined to vulnerable witnesses: “... we submit it is unhelpful to advocates to present these within a set of rules specifically for vulnerable witnesses”, P. Cooper et al, ‘One step forward and two steps back? The “20 Principles” for Questioning Vulnerable Witnesses and the Lack of an Evidence-based Approach’ (2018) *International Journal of Evidence and Proof* 22 (2).

IV. CONSISTENCY OF SUPPORT AND REASONABLE ADJUSTMENTS FOR LAY USERS

The intermediary was brilliant – a diamond. I would recommend this to anyone. Without her, he wouldn't have coped. He cracked up when he got to court – I was surprised he didn't cry during his evidence. He said there were some questions that he couldn't understand but he turned to her and she helped. Mother of an 11-year-old boy with cerebral palsy.²⁵⁰

It is frightening to go into Court, but knowing I had support from the PSU made it easier. PSU client at the Central Family Court in London²⁵¹

- 4.1** So far we have focused on the role of the courts and court professionals in ensuring that lay users can effectively participate. There are, however, many people accessing our courts as parties or witnesses who need additional support in order to take part, irrespective of how well they are informed of the process in advance, or how well professionals communicate with them. These people have a range of needs, which might be specific – such as a physical or mental disability, or that they speak a foreign language – or a more general, as yet unidentified concern – such as anxiety or confusion about their case, which is most often experienced by LiPs.
- 4.2** In a study of LiPs, researchers observed that: “It was noticeable [i]n distributing the forms in the Civil Justice Centre that while some litigants in person were accompanied by friends or family or were with a PSU volunteer, the vast majority were in court on their own.”²⁵² The researchers also commented that: “It is hard to escape the impression, often conveyed in the court waiting areas, that appearance in court was lonely and a little scary.”²⁵³
- 4.3** This part of the report evaluates the extent to which support services and reasonable adjustments are available in different jurisdictions and are working effectively.

²⁵⁰ Quoted in J. Plotnikoff and R. Woolfson, see note 220 above, p. 15.

²⁵¹ PSU ‘Report and financial statement for the year ended 31 March 2018’, 2018, p.5, available at <https://www.thepsu.org/media/1888/psu-annual-report-2018.pdf>

²⁵² Lee and Tkacukova, see note 4 above, p. 8.

²⁵³ *Ibid.*

4.4 By support service we mean a service providing practical, informational and emotional support for lay users rather than providing legal advice. Support services tend to be provided by voluntary sector organisations which rely on volunteers, such as the Witness Service in the criminal courts and the PSU in the civil and family courts.

4.5 By ‘reasonable adjustment’ we mean any practice that puts lay users at ease, helping them to understand, communicate and feel included in the proceedings as well as helping them to provide fuller, franker, more accurate evidence. This is a term favoured by the Equality Act 2010 and, as such, we consider it suitable to describe the necessary adaptations required to enable effective participation.²⁵⁴ We intend ‘reasonable adjustment’ to encompass what are formally known as ‘special measures’²⁵⁵ - which has a particular meaning and eligibility criteria, such as ‘vulnerable and intimidated’ witnesses in certain criminal trials under the YJCEA 1999.²⁵⁶ The term ‘special’ may also be associated with special needs or the notion that there is an ‘ordinary’ or typical court user who is autonomous, independent and capable of navigating the hearing. We know that most lay users find the court system to be an alien, intimidating environment.²⁵⁷ The Family

²⁵⁴ The Equality Act 2010 envisages innovative adaptations for a broad range of attributes or characteristics. The reasonable adjustment duty under the Equality Act requires public authorities to take positive steps to ensure that a disabled person can fully participate in a given activity. HMCTS has produced guidance on how court and tribunal users with disabilities might be supported, such as the provision of large print forms, hearing enhancement systems or ramps and lifts, see <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/equality-and-diversity>

²⁵⁵ The range of special measures provided for by ss. 23-30 YJCEA 1999 includes screens, video-recorded evidence-in-chief, live television link, clearing the public gallery, removal of wigs and gowns, the use of communication aids, video-recorded pre-trial cross-examination and re-examination and the use of intermediaries.

²⁵⁶ Eligibility for special measures is dependent on whether witnesses fall under the definition of ‘vulnerable’ (under s. 16 YJCEA 1999) or ‘intimidated’ (under s. 17 YJCEA 1999). Witnesses classed as ‘vulnerable’ are children under 18 and those suffering with a learning, mental or physical disability. An intimidated witness will qualify “if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress...” The term ‘special’ measures also implies that the measures are automatically advantageous and welcomed by the witness when evidence gathered from the Working Party suggests that not all witnesses wish to take advantage of special measures.

²⁵⁷ The Home Office Report, *Speaking Up for Justice*, which led to the introduction of special measures under the YJCEA 1999, concluded in 1998 that only 7-10% of all witnesses are either

Procedure Rules have adopted the term ‘measures’, to describe the range of assistance available to vulnerable persons,²⁵⁸ which, in our opinion, is preferable to ‘special measures’.

4.6 The term ‘special measures’ is also associated with formal, physical aids contained within the YJCEA 1999. However, there have been a number of advancements since 1999 in our understanding of mental health and vulnerability and a whole range of flexible approaches adopted to accommodating the lay user, including using dogs in court to help settle witnesses’ nerves and informal practices such as practitioners playing with Play-doh while questioning child witnesses.²⁵⁹ As already discussed in **Chapter 2**, perhaps the most significant development since the enactment of the YJCEA 1999 has been the introduction of common law rules and best practice regarding the treatment of witnesses during cross-examination in criminal cases and the development of the Ground Rules Hearing.

4.7 Therefore, we do not intend ‘reasonable adjustment’ to have a limited definition. Rather, it should include whatever formal or informal aid or adaptation is deemed necessary in the particular case, in the interests of justice, and where the needs of a fair trial demand it.

vulnerable or intimidated and therefore the YJCEA 1999 provisions and related guidance is premised on the assumption that vulnerable or intimidated witnesses form a distinct yet small minority of witnesses (Home Office, *Speaking Up for Justice: report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998). However, Burton et al have criticised the sharp distinction between ‘normal’ witnesses on the one hand and vulnerable or intimidated witnesses on the other and suggest, rather, that there is a spectrum of vulnerability, M. Burton, R. Evans and A. Sanders ‘Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales’ (2007) *International Journal of Evidence and Proof*, 11 (1): 1, 23.

²⁵⁸ Family Procedure Rules 3A.8.

²⁵⁹ For example, s. 51 Criminal Justice Act 2003, which fully came into force in 2010, enables the court to allow witnesses (other than the defendant) in the United Kingdom to give evidence by video link if the court is satisfied that giving evidence in this way is in the interests of the efficient or effective administration of justice. The witness does not have to be a special ‘category’ of witness (for instance ‘vulnerable’ or ‘intimidated’ as defined by the YJCEA). CPS guidance suggests that video links will be particularly helpful for witnesses with limited availability, such as professional witnesses, or those with mobility issues who do not qualify for video links under the ‘special measures’ provisions of the YJCEA, see <https://www.cps.gov.uk/legal-guidance/live-links>

Reasonable adjustment

4.8 Guidance on measures to assist vulnerable parties and witnesses has developed in recent years and is now present in Procedure Rules and Practice Directions,²⁶⁰ TAG Toolkits,²⁶¹ the Equal Treatment Bench Book, and academic or practitioner textbooks.²⁶²

4.9 In the criminal courts, special measures allow for ‘vulnerable’ and ‘intimidated’ witnesses to pre-record their evidence-in-chief rather than having to give evidence live in court from the witness box on the day of the trial. It is standard practice to play the witnesses’ pre-recorded Achieving Best Evidence (ABE) interview in court. There is also the possibility of pre-recording cross-examination pursuant to section 28 YJCEA 1998, if the case is scheduled to take place at one of three pilot court centres²⁶³ and where the witness falls within the s. 16 YJCEA definition. Though the piloting of pre-recorded cross-examination was due to be extended to adult complainants in sexual offence cases and witnesses in modern slavery cases,²⁶⁴ this has so far not been possible. According to those involved in the pilot, this is due to problems with video technology and storing digital recordings. There is also provision for communication aids and intermediaries under the YJCEA 1999 for witnesses in criminal cases who have learning, developmental or communication difficulties.

4.10 If such witnesses cannot pre-record their evidence or do not wish to do so, or if they are to be cross-examined live in court, there are other special measures

²⁶⁰ CrimPR Part 18; CrimPD I General matters 3E: Ground Rules Hearings to Plan The Questioning of A Vulnerable Witness Or Defendant; CrimPD V: Evidence; FPR Part 3A - Vulnerable persons: participation in proceedings and giving evidence; FPR PD3AA - Vulnerable persons: participation in proceedings and giving evidence and the Tribunals Child, Vulnerable Adult and Sensitive Witness Practice Direction.

²⁶¹ See www.theadvocatesgateway.org/toolkits

²⁶² For example, P. Cooper and H. Norton *Vulnerable People and the Criminal Justice System* (2017 Oxford: OUP).

²⁶³ Kingston upon Thames, Leeds and Liverpool.

²⁶⁴ The Government announced the national roll out of s. 28 in 2017, see MOJ ‘Transforming Our Justice System: Summary of Reforms and Consultation’ Cm 9321, 2016. This announcement was subsequently corrected by the Lord Chief Justice who clarified the position that there would be a phased introduction of s 28 rather than a national roll out, see <http://pbs.twimg.com/media/C7hwCdZW0AAVsyS?format=jpg&name=large>

available when giving live evidence, including screening the witness from the defendant, giving evidence via a video link from a remote location or another room in the court building, and removing the public from the public gallery.²⁶⁵ Defendants who meet the definition of vulnerability may give their evidence via a video link.²⁶⁶ The Criminal Procedure Rules and Practice Direction also make clear that the court is required to take ‘every reasonable step’ to encourage and facilitate the participation of any person, including the defendant, and sets out measures to be taken with vulnerable defendants.²⁶⁷

4.11 The Family Procedure Rules also provide for a vulnerable party and/or witness to have access to some of the formal adjustments available in the criminal courts, e.g. screens, intermediaries, video link, communication aids, GRHs and also the opportunity to have their evidence transcribed or use pre-recorded evidence in place of their evidence-in-chief, where pre-recorded testimony is available.²⁶⁸ Part 3A and supporting Practice Direction 3AA provide helpful guidance on the factors that the court must consider but still address only some of the problems of participation faced by vulnerable parties and witnesses.²⁶⁹ In the tribunal context, the First-tier and Upper Tribunal Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses makes provision for reasonable adjustments to be made; if evidence is required at all from children, vulnerable adults or sensitive witnesses, the First-tier and Upper Tribunals must consider how to facilitate the giving of such evidence and can adopt “any means” to do so.²⁷⁰ In the civil

²⁶⁵ The range of measures are provided for by ss. 23-30 YCJEA. Special measures directions are set out in Crim PR rules 18.8-18.13. See also CrimPD V Evidence 18A: Measures to assist a witness or defendant to give evidence.

²⁶⁶ Pursuant to s. 33A YJCEA.

²⁶⁷ CrimPR 3.9(3)(b) and CrimPD I 3D.

²⁶⁸ FPR 3A and Practice Direction 3AA: Vulnerable Persons: Participation in Proceedings and Giving Evidence, which states, at para 5.4 that “The court must consider the best way in which the person should give evidence, including considering whether the person’s oral evidence should be given at a point before the hearing, recorded and, if the court so directs, transcribed, or given at the hearing with, if appropriate, participation directions being made.” It also provides, at para 5.6, considerations should be given to whether, and how, the person gave evidence in criminal proceedings.

²⁶⁹ See, for example, J. Delahunty ‘Vulnerable Clients and The Family Justice System’ (Gresham College, 1 February 2018), pp. 10-17, available at www.gresham.ac.uk/lectures-and-events/vulnerable-clients-and-the-family-justice-system

²⁷⁰ The definition of a sensitive witness is the same as an intimidated one pursuant to s. 17 YCJEA, see note 255 above. Further guidance is provided in the Immigration and Asylum

jurisdiction, while there are no specific procedure rules, there have been a number of cases in which the court has directed the use of adjustments that are used in the criminal jurisdiction to aid the participation of vulnerable individuals.²⁷¹

4.12 Despite the range of these measures in criminal cases, access to them remains uneven due, in part, to the narrow eligibility criteria under the YJCEA 1999. For example, it is unclear why statutory provision for defendants is not equal to that for witnesses, and unacceptable that courts, at their discretion, determine what provision will be made. In particular, access to registered intermediaries for defendants is limited.²⁷² Intermediaries for Justice is a body for intermediaries trained to work in the courts and drawn from a number of professions having specialist knowledge of vulnerability and communication.²⁷³ It is concerned that

Chambers in the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance. Note that although the guidance states that there is no provision in the First-tier Tribunal (Immigration and Asylum Chamber) for a Tribunal-appointed guardian, intermediary or facilitator (para 5.2(iv)), in the recent case of *AM (Afghanistan)* [2017] EWCA Civ 1123 it was held that the Tribunal does have the power to appoint an intermediary or litigation friend where necessary at [38] and [44]. See also *Duffy v George* [2013] EWCA Civ 908 where it was held that Employment Tribunal's case management powers were broad enough to enable it to consider, and if necessary make, various procedural adjustments to enable a vulnerable claimant to give evidence. The measures available in a criminal trial to support vulnerable witnesses would be relevant to the Employment Tribunal when considering the exercise of its case management powers in similar circumstances.

²⁷¹ For example, see *Kimathi and others v Foreign and Commonwealth Office* [2015] EWHC 2684 (QB) in which it was accepted that the claimants required (unspecified) "special measures" and that there should be a ground rules hearing to address these measures (paragraph 2) and *Ajayi v Abu and Abu* [2017] EWHC 1946 (QB) in which the judge ordered that the trial should take place: (i) in a courtroom which provided separate entrances and exits for the Claimants and Defendants; (ii) with screening during cross-examination; and (iii) with separate waiting areas for the two sides. However, we query how well set up the civil court system is to deal with such measures as Master McCloud noted that the "Court system struggled to meet those requirements" (paragraphs 6-7).

²⁷² The statutory scheme to enable defendants to have access to intermediaries has not been brought into force, which leaves facilitation and provision to individual judges and court budgets to determine. For a summary of this issue, see L. Hoyano and A. Rafferty, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' [2017] Crim LR 93.

²⁷³ The primary purpose of Intermediaries for Justice is to increase awareness of the role of the intermediary and promote its use with vulnerable victims, witnesses and defendants. See <http://www.intermediaries-for-justice.org/>

vulnerable defendants are not receiving intermediary assistance in the same way as witnesses and complainants. This is exacerbated by lack of funding, and the absence of recruitment and training requirements for defence intermediaries,²⁷⁴ but also by the different role of defendant and witness in trial.²⁷⁵

4.13 Although TAG has helpfully produced toolkits specifically on vulnerable witnesses in the family courts and vulnerable witnesses in civil hearings, presently, the majority of guidance concentrates on children or mentally vulnerable witnesses in criminal trials. Nevertheless, more guidance is needed on the adjustments that should be made for intimidated witnesses, as there has been confusion between the approaches to vulnerable or intimidated witnesses.²⁷⁶

²⁷⁴ See J. Plotnikoff and R. Woolfson, note 220 above. The JUSTICE *Mental Health and Fair Trial* working party report note 10 above, explains that “There is no statutory right to an intermediary for vulnerable defendants and detainees. The Ministry of Justice has a Registered Intermediary Scheme for vulnerable witnesses. However, the scheme, pursuant to the Youth Justice and Criminal Evidence Act 1999 (YJCEA), specifically excludes defendants. Its Matching Service also only applies to witnesses” at para 2.56. For further detail on the difficulties of obtaining intermediary support, see paras 4.19-4.26. The report welcomes the important role of the intermediary and we agree with its recommendations for expansion of the service for defendants: “*Intermediaries can be crucial to enabling a defendant to understand and communicate with their legal representatives and during trial. However, the model needs revising and, as recommended above, should be part of the MoJ [registered intermediary] scheme. Intermediaries should be embedded in courts through a duty scheme. A regulatory body with training obligations should be established.*” See Recommendation 30, p. 101.

²⁷⁵ For example, on the one hand, very young child witnesses and adults with severe communication difficulties may be assisted to give evidence in circumstances where suspects of crime would not be deemed to have criminal responsibility. On the other hand, where defendants have communication difficulties but are deemed fit to plead, they may need assistance for the duration of the trial, which requires a significant investment of intermediary time and funding.

²⁷⁶ See *R v Dinc* [2017] EWCA Crim 1206; P. Cooper, *R v Dinc*: Case Comment, [2018] Crim LR 263. An intimidated witness is more widely defined under the YJCEA 1999 than a vulnerable witness. A witness will qualify ‘if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress...’ In practice, the nature of the offence may determine whether the witness is vulnerable. For example, complainants in sex offence cases automatically fall into this category unless they wish to opt out (s. 17(4)). CPS Guidance on special measures also suggests that witnesses in cases involving guns and knives, domestic violence, racially motivated crime and repeat victimisation are likely to be considered ‘intimidated’, although the characteristics of the victim may also be relevant, including their age, social and cultural background, ethnic origins, domestic and employment circumstances, religious beliefs or political opinions and the behaviour towards the witness by accused, family or associates or other witness in the case will also be taken into account, see <https://www.cps.gov.uk/legal-guidance/special-measures>

Criminal practitioners are also concerned that there is a lack of awareness among the profession and practical guidance on how to assess vulnerability in defendants, and how to successfully apply for communication aids or ensure other reasonable adjustments are forthcoming.²⁷⁷ Criminal practitioners we spoke to found it difficult to access information pertinent to defendants dispersed across the different toolkits and practice directions and would appreciate a consolidated version.²⁷⁸ The ICCA has produced a fantastic, freely available online resource for the dissemination of these toolkits and we welcome this important guidance. However, we invite the TAG Management Committee to consider whether the toolkits may require some revision – perhaps in conjunction with the Criminal Bar Association – to provide one toolkit on vulnerable defendants, which covers identification, including different statutory definitions of vulnerability, use of intermediaries and strategies for assisting vulnerable defendants.²⁷⁹

4.14 Lay users in other types of hearings would also benefit from ‘reasonable adjustments.’ For example, where a victim of abuse (physical or sexual) is suing their perpetrator (either an individual or institution), in some personal injury and clinical negligence cases, perhaps also by virtue of the physical and/or mental injuries suffered. There are also lay users whose needs and vulnerabilities often require special consideration regardless of whether they are giving evidence in civil, tribunal or criminal proceedings, such as where they suffer from a mental disorder, learning disability or other type of physical disability, which would suggest that they may require a reasonable adjustment whatever the nature of the hearing may be.

²⁷⁷ Whereas there are a number of statutory agencies involved in identifying, working with and supporting vulnerable witnesses at various stages of the criminal process (e.g. police, Witness Care Units, CPS, Witness Service), defence lawyers take most of the responsibility for identifying or flagging vulnerability in defendants, often just before or during the trial. This was raised by the *JUSTICE Mental Health and Fair Trial* working party report, note 10 above, which recommended greater provision of liaison and diversion services, screening of all suspects in the police station, mental health leads in the CPS and judiciary and a court checklist to aid all court professionals in understanding what should be done to aid vulnerable defendants.

²⁷⁸ For example, the toolkit on vulnerable defendants is currently aimed at effective participation of young defendants but identifying vulnerability is dealt with in a separate, generic TAG document.

²⁷⁹ Which might include fitness to plead submissions and advice on obtaining psychologist reports regarding the defendant’s level of understanding and ability to participate in the trial.

4.15 Practitioners also impressed upon us that there should not be a blanket approach or assumptions made about the adaptations that particular witnesses require. One practitioner gave the Working Party the example of a deaf complainant in a case alleging child sexual abuse, who found they had problems using the video link and wanted to give evidence in court. Likewise, a support service that we spoke to suggested that, in their experience, complainants in domestic abuse and sexual offence cases, on the whole, prefer to give their evidence in court (with the use of screens), rather than use the video link. These examples show how better understanding and awareness of the suitability of reasonable adjustments can enhance a lay users' experience of giving evidence. As we have suggested in **Chapter 1**, another lesson learnt from the section 28 pilot is that it is good practice for judges and advocates to meet, introduce themselves and talk with witnesses and other lay users prior to the hearing. Since practitioners are expected to understand and pick up lay users' vulnerabilities and needs, one practitioner said that an informal conversation with a witness prior to the hearing which has nothing to do with the case can help them pitch their questioning and may help identify if they have any particular needs.

4.16 Therefore, we recommend that reasonable adjustments to enable lay users to provide their best evidence should be available in all courts and tribunals where the needs of a fair trial demand it.²⁸⁰ This includes an obligation to consider whether any party or witness has a particular vulnerability or other need for an adjustment. In order to achieve this, we consider that best practice should generally be consolidated and promoted across different courts and jurisdictions. Bearing in mind that in the majority of small claims and in a substantial proportion of fast-track trials at least one party is an LiP, **the Civil Procedure Rules should be amended along the lines of the Family Procedure Rules and similarly require that courts have regard to the civil TAG Toolkit.**²⁸¹ In particular, expert assistance from the Ministry of Justice

²⁸⁰ The recommendation that we make in **Chapter 2** that the questioning of witnesses should always be adapted to the needs and understanding of the witness to ensure that they can give their best evidence, may also be regarded as a reasonable adjustment to be exercised in all courts and tribunals.

²⁸¹ The overriding objective of the Tribunal Procedure Rules, which requires so far as practicable that the parties are able to participate fully in the proceedings, in conjunction with the requirement to consider how to facilitate the giving of any evidence by a child, vulnerable adult or sensitive witness contained in the Child, Vulnerable Adult and Sensitive Witness Practice Direction, is already sufficient in this regard.

Registered Intermediary Scheme should be available for all lay users who need it, across all jurisdictions.²⁸²

4.17 Guidance on how to identify the need for, and how to source, reasonable adjustments should be easy to locate and navigate for both lay and professional court users. Currently, guidance contained in procedure rules and TAG Toolkits is in downloadable PDF format and written with professional court users in mind. In accordance with the recommendations set out in **Chapter 2**, we consider that legal information should be fully interactive and contain electronic links to other relevant guidance and references so that professional and lay users can navigate between documents, websites and services more easily. Guidance on reasonable adjustments and the treatment and questioning of witnesses should also be accessible from the HMCTS website that we recommend be established in **Chapter 1** and tailored according to type of lay user and hearing.

4.18 Evidence from court professionals suggests that there could be more prompts for helping professional court users identify need in a range of witnesses and contexts, and this information could be shared more effectively among relevant professionals, whether inserting additional check-boxes or flags in police, local authority, CPS or court forms, updating policy guidance or augmenting procedural rules. **We also recommend that courts, tribunals and relevant agencies should continue to review the way that vulnerability is flagged, disclosed and recorded to prompt court professionals to consider the needs of lay users.**

Support services

4.19 In addition to reasonable adjustments, the Working Party heard evidence that, despite the move towards greater digitisation, the need for human contact and support in negotiating the process of attending court and giving evidence was of paramount importance to lay users. The Working Party heard that too many witnesses generally do not understand what giving evidence requires of them, what will happen to their witness statements or pre-recorded evidence and, if

²⁸² Adapted in line with the JUSTICE working party report *Mental Health and Fair Trial* recommendations, see note 10 above.

they are formally regarded as ‘vulnerable or intimidated’, what options are available to them.²⁸³

4.20 Litigant and witness support services help lay users practically and emotionally prepare and organise themselves for the hearing as well as attend the hearing with them. Therefore, they provide an invaluable service to lay users in both helping them understand the hearing as well as empowering them to participate more fully. Currently, support services are offered by the Citizens Advice Bureau, Law Centres, specialist independent advocate services available in relation to certain cases or courts (such as domestic violence victims and asylum seekers), the Witness Service²⁸⁴ and the PSU.²⁸⁵ As one organisation explained to the Working Party, if the lay user is not anxious about when to talk and how to conduct themselves because they have received practical information or a pre-court visit with a support service, they can concentrate on providing their evidence.²⁸⁶ This is particularly important in view of the increase in LiPs in both civil and criminal courts.²⁸⁷

²⁸³ For example, one support service told us, “In the youth courts where regular ABEs are taken for most young people, most parents/appropriate adults were shocked to realise when attending court that the other side may have seen the ABE already and will also have a visual during the trial. Often the very first time they realise this is when they attend the PTV (pre-trial visit)”.

²⁸⁴ The Witness Service describes itself as offering free, independent, emotional support and practical information to help prosecution and defence witnesses feel more confident when giving evidence in every criminal court across England and Wales: <https://www.citizensadvice.org.uk/about-us/citizens-advice-witness-service/>

²⁸⁵ The PSU offers broader support than the Witness Service. It offers practical and emotional support to people facing court without a lawyer. Their volunteers ‘explain how the court works, help fill in forms, organise papers, and discuss settling issues without going to court. They also help lay users plan what they want to say in court and will attend court to provide support, take notes and help afterwards. They may also provide details of other specialist advice agencies. Importantly, PSU volunteers are not legally trained and do not offer legal advice. See <https://www.thepsu.org/get-help/how-we-help/>

²⁸⁶ 74% of PSU clients reported that they felt less anxious after getting PSU help and that the volunteer helped make the procedures clearer in 99% of cases, PSU Annual Report 2017/18, see note 250 above, p.5.

²⁸⁷ In 2017/18 the PSU helped clients on 65,456 occasions, up 17% on the previous year and in the past ten years has grown exponentially from under 5,000 occasions of help. The PSU helps a range of individuals. In 2017/18, 23% did not speak English as a first language, 23% had a serious health problem, 54% were not employed, some were homeless, some struggled with

4.21 However, the provision of litigant and witness support services is disjointed and patchy. For example, though organisations such as PSU have a presence in certain county and family courts, they are not currently funded or staffed to provide a consistent service to LiPs in all courts.²⁸⁸

4.22 In particular, although there are voluntary and state organisations providing support services to prosecution and defence witnesses in criminal courts, this does not extend to defendants.²⁸⁹ Among defendants there is a lack of basic information about the criminal justice process, custody and the prison service. Appropriate adults must be provided in the police station for child or vulnerable suspects.²⁹⁰ However, there is no support for defendants at the trial, despite the fact that some defendants have low IQs and lack understanding of key basic concepts regarding the trial, including understanding what a barrister is.²⁹¹ The Working Party heard that defendants are often at court alone (especially if they are in custody). Defendants may not need the assistance of a specialist, like an intermediary or interpreter, but they may still need support.²⁹² This support is not

literacy issues and many did not have phone or internet access, see PSU Annual Report, 2017-18, note 250 above, pp.3 and 4.

²⁸⁸ Although there are around 700 PSU volunteers, they are only currently located in 23 court venues in the biggest cities and towns in the UK and there are large areas where support is either fragmented or non-existent.

²⁸⁹ And in practice few defence witnesses access this support. This may be because their involvement is arranged late and/or that they are unaware that the service is available to them.

²⁹⁰ The JUSTICE *Mental Health and Fair Trial* working party considered the role of the appropriate adult, and concluded that the range of volunteers able to carry out this role made it a helpful welfare role, but not a specialist service. It recommended mandatory training through the National Appropriate Adult Network, and a change of title (the current one being ‘meaningless if not patronising’) to Approved Welfare and Support Assistant, see note 10 above, report paras 2.36-2.46.

²⁹¹ The developing liaison and diversion scheme provides greater opportunity for support needs to be identified and provided for defendants, but is not itself able to provide that support, see JUSTICE *Mental Health and Fair Trial*, note 10 above, chapters 2 and 4.

²⁹² Crim PD 3G.8 on Vulnerable Defendants states that “[t]he court should ensure that a suitable supporting adult is available throughout the course of the proceedings” for vulnerable defendants. Crim PD 3F.12 was also recently amended in July 2018 to reflect this and suggests that support be considered: “[The Court] will rarely exercise its inherent powers to direct appointment of an intermediary but where a defendant is vulnerable or for some other reason experiences communication or hearing difficulties, such that he or she needs more help to follow

replicated by having legal representation. Defence advocates are likely to be too busy to also attempt to fulfil this role and rarely will a solicitor now accompany counsel to court given cuts to legal aid. If family or friends are not present, there is no one to support defendants emotionally at the trial.

4.23 Moreover, access into the service may not be uniform or consistent. It may depend on whether the lay user is aware of the support service and, if so, whether the support service is based or has an office in the area that the lay user lives or will be attending court. It may also depend on whether the lay users' support needs are appropriately identified by a relevant agency. For example, police Witness Care Units (WCUs) in criminal cases liaise with witnesses as to whether they would like a pre-court visit or a referral to the Witness Service. We heard that the approach of WCUs varies considerably across police stations, which means that witnesses may not be fully informed of the opportunity to have Witness Support, or that it might not be accurately arranged for the person's needs or in time for their evidence. As such, only a minority of witnesses access the Witness Service for a court supporter or pre-trial visit.²⁹³

4.24 Likewise, though support services are separate from and in addition to reasonable adjustments, they are also ideally placed to inform lay users about the availability and nature of reasonable adjustments, both formal and informal, available now and in the future. For example, support services in criminal trials help witnesses make informed decisions about the use of special measures. If the witness is referred to them prior to the hearing they may attend the court building in advance and try out the various methods of giving evidence, such as behind screens or via video link, to decide which method works best for them.

the proceedings than her or his legal representatives readily can give having regard to their other functions on the defendant's behalf, then the court should consider sympathetically any application for the defendant to be accompanied throughout the trial by a support worker or other appropriate companion who can provide that assistance." However, we understand that this is not a service Witness Support can routinely provide because of the conflict between service users. The JUSTICE working party report on *Mental Health and Fair Trial* recommended that support assistants be available for vulnerable defendants, see note 10 above, recommendation 29 and report para 4.12.

²⁹³ Although the CPS guidance for prosecutors on Speaking to Witnesses at Court includes providing witnesses with an outline of what to expect of the cross-examination and the defence case, there is still a need for well-informed support services to provide consistent and accurate information and support throughout the trial.

4.25 Therefore, we recommend that provision should be made for practical and emotional court supporters in all courts and tribunals and for all lay participants. The court supporter's primary role would be to provide practical information, help lay users think through what they might want to say, discuss their concerns, help them to find their way around the court building and court room and to attend court with them. It would not be to provide legal advice.²⁹⁴ In some instances, this can be done by extending current services and ensuring that organisations who currently provide this service, such as PSU at hearings in county and family courts, are aided to provide a more consistent service throughout the country. Where PSU assistance is not available, the gaps need to be filled. **Unpaid McKenzie Friends are one possibility (subject to guidance and training); joint initiatives between local university law schools and legal professionals might be another. There is a considerable need for a comprehensive account of what is available and what is needed, and for cooperation between agencies and legal professionals to address this problem.**²⁹⁵

²⁹⁴ In 2016, the Lord Chief Justice of England and Wales issued a consultation on reforming the courts' approach to McKenzie Friends. JUSTICE's consultation response suggested that McKenzie Friends have the potential to increase access to justice where providing *valuable emotional and practical support* to LiPs. However, professional fee-charging McKenzie Friends, who sit outside the regulatory (legal training and code of conduct) and remedial (insurance and access to legal professional negligence claims) requirements of the legal profession risk subjecting users to "poor quality or agenda driven advice" delivered without regard to the "proper limitations of their role". JUSTICE recommended that the Practical Guidance governing McKenzie Friends be replaced with codified rules of court, as well as the introduction of a standard form notice to be filed with the court, which would include a "Code of Conduct for McKenzie Friends". JUSTICE 'Consultation on reforming the court's approach to McKenzie Friends' 2016 available at https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/05/McKenzie-Friends-Consultation_JUSTICE-Response.pdf In September 2017, the Judicial Executive Board established a judicial working group to review the original proposals of the consultation paper in light of responses received, an approach which JUSTICE welcomed, given the need for a nuanced approach to McKenzie Friends, see 'Consultation: reforming the courts' approach to McKenzie Friends Update September 2017', available at <https://www.judiciary.uk/publications/consultation-reforming-the-courts-approach-to-mckenzie-friends/> This working group has not yet formulated recommendations for the approach to McKenzie Friends and we encourage it to do so as soon as practicable. The concerns and considerations with regard to who may provide support at court could guide the development of consistent support for all.

²⁹⁵ The JUSTICE report *Innovations in personally-delivered advice: surveying the landscape* (2018), available at <https://justice.org.uk/innovations-personally-delivered-advice-surveying->

4.26 If users are not made aware of support services, which the anecdotal evidence supplied to the Working Party suggests that the majority may not be,²⁹⁶ they cannot access them. Therefore, it is important that **the HMCTS online resource that we recommend in Chapter 1 also provides links to jurisdiction-specific emotional and practical support services and that HMCTS and the Witness Care Unit in criminal cases make all parties and witnesses aware of these services.**

[landscape/](#) looks at innovative projects and practices in personally-delivered civil legal advice post-LASPO. It assesses whether these are effective, efficient and ethical from the perspective of prioritising user convenience; experiential learning; and alternative business models. We suggest that some of the developments mentioned might offer scalable models for future development – but importantly, much more independent academic research is needed to assess “what works”. These include law clinics and co-location of free legal services within existing services, such as doctors’ surgeries and job centres and trusted places, such as libraries, in partnership with other service providers.

²⁹⁶ From our conversation with Witness Service staff and volunteers they thought that only around two out of ten witnesses are actually referred to the service and that they see very little of the totality of witnesses attending court.

V. CONCLUSION AND RECOMMENDATIONS

[T]hey kept saying ‘sentence’ which I thought meant prison... I didn’t understand my sentence; I didn’t know what I was getting.

*I had one judge who put everyone at ease. I still remember him now. Young adults’ experiences of the Youth Court.*²⁹⁷

- 5.1** Knowing how to start a legal dispute can be a daunting process for lay people. Where do you begin? Where can you find a good lawyer? Are you eligible for legal aid? Once a claim or defence is underway, keeping track of its progress and what you need to do to make out your case continues to be complex and difficult to understand.
- 5.2** This report seeks to place the lay user at the heart of the justice system – across all courts and tribunals – so that these are places not simply where legal professionals work but where the public can participate effectively in the resolution of their legal problems and feel that they have fully received access to justice. Courts and tribunals are arenas in which the public resolve legal disputes. If they cannot understand and feel connected to the legal process, access to justice is undermined.
- 5.3** There are many good practices that seek to achieve these aims already operating in our courts and tribunals. Indeed, tribunals were established to enable unrepresented people to resolve their legal disputes. Yet there are repeated examples of lay people being confused, distressed and overwhelmed by how our justice system operates. We can and must do better.
- 5.4** The report considers the large number of unrepresented people who have to navigate the legal system and often find that their opponent is a lawyer; the range of vulnerabilities already recognised by the system, yet for which there could be a broader range of adjustments and support made across the different jurisdictions; and the important fact that everyone is inherently vulnerable when faced with a legal problem, whether represented or not. It also considers the broad range of lay people entering our legal system – be they as parties,

²⁹⁷ J. Thomas and C. Ely, *The voices of young adult defendants* (The Centre for Justice Innovation, 2018), available at http://justiceinnovation.org/wp-content/uploads/2018/11/CJI_YOUNG-VOICES_DIGITAL.pdf

witnesses, jurors or observers in the public gallery – and that their level of participation and needs will vary widely case by case.

- 5.5** We recognise that a huge amount of work is already underway to help lay users to understand the legal system – from the clear and simple guides and tools developed by NGOs to the training in vulnerable witness handling for judges and advocates. However, these efforts are currently piecemeal and targeted at certain categories of lay user. We consider that a change in approach is required by HMCTS, lawmakers and court professionals to place *all* lay users at the heart of legal process, so that every effort is taken to enable lay people – according to their role – to understand and take part in legal process. As the title of this report, *Understanding Courts*, implies, a two way process is required: lay users need to understand what is happening in court and courts need to understand why the position of lay users, especially the unrepresented and vulnerable, needs thoughtful consideration and adjustment of practise.
- 5.6** Our recommendations focus on what effective participation should mean in practice: lay people informed about what will happen at their hearing through advance information provided in different modes; court professionals recognising that lay people should be their primary focus and adapting their approach accordingly; case management that checks for and assists understanding; the avoidance of legal jargon and confusing modes of address for plain English alternatives; change in culture that can exclude lay people; appropriate adaptations to enable participation for children and those with disability; and support for all users who need it.
- 5.7** These are aimed at legal professionals, who can make small changes to big effect in their approach to conducting cases. They are also aimed at Government, which we consider should provide far more support to lay users so as to empower them to be able to effectively participate in legal proceedings.

Recommendations

Understanding the process

1. Comprehensive information on court processes, in simple and accessible language, should be provided for each jurisdiction. The information should include practical details such as: what to expect at a hearing or trial, the roles of the legal professionals, the order of proceedings, the process of giving evidence and the courtroom layout. The content formatting and channel of presentation (paper, website, mobile app etc.) should be developed based on research and testing with user groups, and draw on best practice. To ensure that it is accurate, information on court processes should be prepared by, or at the very least with input from, the lead judiciary from across the range of court and tribunal jurisdictions and, to ensure that it is accessible for all lay users, should be reviewed for ease of understanding by linguistic specialists. The Ministry of Justice should have responsibility for regularly updating the information. The information should also include references to any other relevant sources of information from non-governmental organisations.
2. HMCTS should provide one central source, promoted to appear as the top result when a user types key words, such as ‘going to court’, into a search engine. The source may be hosted on gov.uk webpages also built according to Government Digital Service principles, which aim to provide user-centric platforms. However, it should have a different look and feel to emphasise constitutional independence from Government departments against which people are bringing or defending claims.
3. The gov.uk webpages should replicate the information in the HMCTS leaflets available at courts and, wherever relevant, provide curated hyperlinks to independent service providers such as Citizens Advice, Advicenow and Victim Support. The site should be designed with a landing page so that lay users can easily identify information relevant to their case and situation.
4. HMCTS should have responsibility for regularly updating the webpages, including the links to external information.
5. The webpage for each jurisdiction should be followed by a prominently featured, engaging, clear and high quality production video entitled ‘What to Expect at Court’. It should include court professionals explaining their roles and lead viewers through actual court locations, to give a realistic picture of court processes. This should be produced by HMCTS and cover practical and procedural information. Consideration should be given, based on user testing, to whether it would be possible to have an overview video that applies irrespective of jurisdiction.

6. Prominently displayed leaflets and videos at court would allow lay users to gain a better understanding of the process during the often long waits before a trial or hearing. Featuring videos across a range of locations can help ensure that all lay users are captured. Jurisdiction-specific videos should be available in all court waiting areas: including cells, vulnerable witness suites and public waiting areas.
7. HMCTS should conduct testing and research as to the best format for a video, taking into account the content and mode of delivery.
8. Procedure rules should be made more accessible for non-lawyers, as originally intended. A review should be conducted by each procedure rule committee as to whether the rules are simple and simply expressed, and, where required, amendments should be made.
9. There should be an expressly stated overriding objective – across all jurisdictions – that professionals should have as a primary consideration the effective participation of lay users. In other words, that the professionals adapt proceedings to ensure lay users comprehend the process.
10. Ideally, as a matter of future practice, areas of law should be codified and statutory amendments promptly added to the code.
11. Where information on the law is provided online, design and presentation ought to reflect the needs of lay users. Material should reflect knowledge gaps, be presented in plain English and depicted in a manner that is easy to follow, for instance, through decision trees, icons, maps and highlight boxes.
12. HMCTS should signpost to simplified guidance provided online by NGOs on substantive law aimed at lay users.
13. Clear signs around court buildings and prominently displayed maps at the entrances would significantly assist lay users. Signs could also be used inside the court and tribunal hearing rooms themselves to indicate to lay users where they should sit and who other people in the room are. HMCTS should reconsider the provision of staff at reception to assist the public entering the building.
14. Court and tribunal staff should also be familiar with the information that is available online, in leaflets and on the video screens in order to signpost lay users to this. Likewise, court professionals who come across a lay user who appears lost or confused should be courteous and helpful and direct users to this information.
15. Court familiarisation visits for vulnerable witnesses and parties (including defendants) should be a standard feature of pre-trial process and expand to all

jurisdictions. If a video link is to be used, the familiarisation visit must incorporate how this will function. Court and tribunal staff should inspect the facilities for witnesses and parties ahead of trial, making sure they are away from the other parties and witnesses if this is important to them, that the waiting or video link rooms are suitable and that if adaptations are required, these can be made.

16. Advocates in all jurisdictions should make sufficient time for introductions to significant witnesses and lay parties, as this is an important way of facilitating participation. Similarly, judges should introduce themselves to significant witnesses, particular where they are or may be vulnerable, in order to get a sense of the vulnerabilities that may exist and how they can best be accommodated.
17. All judges can intervene more to engage lay users where it is helpful and appropriate to do so. At the very least, court professionals should explain the many well embedded conventions in operation.
18. In pre-trial hearings or processes judges could better assist Litigants in Person by pointing them to the relevant cases they should look at, or other sources of substantive law online to help them decide if they have an arguable case.
19. Informal and regular meeting opportunities should be held at court centres for court user groups, where available, and otherwise, between advocates, judges, court staff, academics and experts to identify issues for lay users and discuss solutions.
20. Likewise, training providers should offer more joint discussion between legal professionals. Meetings should focus on effective participation of lay users and share learning, aid reflection, foster cooperation and improve efficiency.
21. All court professionals should be encouraged through training, continuing professional development and reflective processes to put themselves regularly in the lay user's shoes, involving both active and observational methods, such as sitting in the witness box and dock, using the video link, sitting in court to observe a trial that is not their own, and shadowing intermediaries and support volunteers.
22. We encourage the creation of a checklist that would provide judges and court and tribunal staff with practical prompts to explain the procedure for lay users and verify understanding. Court centres, and ideally judicial leads for each jurisdiction, should develop these, in consultation with lay courts users about their needs.

23. The use of video hearings raises a number of practical issues that will need to be addressed before its expansion. We agree with recommendations made by the JUSTICE Immigration and Asylum Appeals – a Fresh Look Working Party Report that: (i) lay users appearing by video must be in no worse position than they would be in a physical hearing/appearance; and (ii) HMCTS must ensure the practical effectiveness of hearings involving the use of video.
24. Further research is required to understand the practical problems that video creates, the impact of video hearings on the client-representative relationship and how the use of video impacts the participation of court users with disabilities and vulnerabilities.
25. Guidance and training on whether a video hearing is appropriate and how to run a video hearing is necessary for all court professionals, but magistrates in particular.
26. In order to ensure that lay users understand directions, orders and judgments made in proceedings that affect them, judges should clearly and simply state the outcome and give a brief summary of the reasons.

Communicating with lay users

27. Careful consideration should be given to communication in the courtroom to ensure that – as much as possible – the proceedings can be fully understood by lay users. There should be a judiciary-led consultation with the profession into modes of address, and commonly misunderstood terminology, and whether they continue to serve a useful purpose when set against any alienating impact they may have.
28. New and continuing practitioner training should reflect the findings of the consultation, and build upon current initiatives, to encourage lawyers and judges to communicate effectively with court users.
29. Information on how to address the judge should be prominently available at court and tribunal centres. It would also assist if judges and magistrates could indicate at the beginning of the hearing: “You may call me...” to alleviate any concerns a user may be harbouring. The simplest way of avoiding the problem would be for all judges and magistrates, wherever they are sitting, to accept and endorse being addressed by lay people as “judge.”
30. To reduce the risk of exclusion and suspicion legal professionals should avoid the terms “learned friend” or “friend” and replace them with “the other side’s solicitor/barrister”, or the “prosecutor” or “Mrs Smith.”

31. As most professionals would acknowledge, comments and banter may be a way of de-stressing but are, in almost all cases, best dealt with away from court. This is easy to achieve if, at all times, legal professionals are aware of the lay user's presence and that they must tailor their approach to the public rather than each other.
32. Training providers should make witness handling and communication with lay people key components of legal professional training. They must also do more to provide opportunities to speak with lay people about their experiences of courts, to instil in students from the outset of their training that they should not leave their ordinary ability to communicate with non-lawyers at the door of court, but take it in with them and apply it. Teaching – at all stages of professional training – should harbour a culture of respect for, and communication with, lay people.
33. The questioning of witnesses should always be adapted to the needs and understanding of the witness to ensure that they can give their best evidence and to promote comprehension on the part of participants to the hearing.
34. New and continuing practitioner training providers and regulators should train advocates to adapt the style of their questioning routinely to the needs and level of understanding of the lay user being questioned.

Consistency of support and reasonable adjustments for lay users

35. Reasonable adjustments to enable lay users to provide their best evidence should be available in all courts and tribunals where the needs of a fair trial demand it. This includes an obligation to consider whether any party or witness has a particular vulnerability or other need for an adjustment.
36. Courts, tribunals and relevant agencies should continue to review the way that vulnerability is flagged, disclosed and recorded to prompt court professionals to consider the needs of lay users.
37. The Civil Procedure Rules should be amended along the lines of the Family Procedure Rules and similarly require that courts have regard to the civil TAG Toolkit. In particular, expert assistance from the Ministry of Justice Registered Intermediary Scheme should be available for all lay users who need it, across all jurisdictions.
38. Guidance on how to identify the need for, and how to source, reasonable adjustments should be easy to locate and navigate for both lay and professional court users, should be fully interactive and contain electronic links to other relevant guidance and references so that professional and lay users can navigate between documents, websites and services more easily. Guidance should also

be accessible from the HMCTS website that we recommend be established and tailored according to type of lay user and hearing.

39. Practical and emotional court supporters should be available in all courts and tribunals and for all lay participants. The court supporter's primary role would be to provide practical information, help lay users think through what they might want to say, discuss their concerns, help them to find their way around the court building and hearing room, and to attend the hearing with them. It would not be to provide legal advice.
40. A comprehensive account of what is available and what is needed should be undertaken by HMCTS, to include cooperation between agencies and legal professionals to address the problem. Unpaid McKenzie Friends could provide this support (subject to guidance and training), as could joint initiatives between local university law schools and legal professionals.
41. The HMCTS online resource that we recommend should also provide links to jurisdiction-specific emotional and practical support services, and HMCTS and the Witness Care Unit in criminal cases should make all parties and witnesses aware of these services.

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Paula Backen, Registered Intermediary

Alison Bergin, Head of Customer Innovation, HMCTS

Julie Brannan, Director of Education and Training, SRA

HHJ Sally Cahill QC, lead s. 28 Pilot Judge, Leeds Crown Court

HH Peter Collier QC, former Resident Judge, Leeds Crown Court and Deputy HCJ, Family Division, Better Case Management Programme working group, s. 28 Pilot Judge

David Connolly, Acting Team Manager (criminal law), Law Commission

Dr Vanessa Davies, Director General, Bar Standards Board

HHJ Rosa Dean, Resident Judge, Harrow Crown Court, Lead Facilitator judicial Vulnerable Witness Training Programme

Lynda Gibbs, Programme Director at the Inns of Court College of Advocacy

Penelope Gibbs, Transform Justice

Rohan Grove, Head of Insight and User Research Division (Deputy Director), HMCTS

Theresa Harris, Head of Information and Digital Innovation (AdviceNow), Law for Life

Linda Harlow, Citizens Advice Witness Service, Central Criminal Court

HHJ Andrew Hatton QC, Director of Training for Courts, Judicial College

Paul Heigl, Head of Channel Mix & Optimisation, HMCTS

Jan Jones, Registered Intermediary

Fatima Khanom, Witness Service Westminster (Victim Support London)

Hayley Langan, Senior Training Supervision Officer, Bar Standards Board

Oliver May, Senior Policy Officer for Equality and Diversity, Bar Standards Board

Maxine Monks, Courts Reform Policy, HMCTS

Sue Newfield, Service Manager, Video Hearings Project, HMCTS

Catherine O'Neil, Registered Intermediary, Chair of Intermediaries for Justice

Professor David Ormerod QC, Law Commissioner for Criminal Law

Athena Panteli, Customer Innovation Team, HMCTS

Angela Rafferty QC, former chair, Criminal Bar Association

Rosemary Rand, Deputy Director, Cross-cutting Services, HMCTS

HH Peter Rook QC, former Senior Circuit Judge, Central Criminal Court, co-devisor Advocacy and the Vulnerable Training Programme

Caroline Sheppard OBE, Chief Adjudicator, Traffic Penalty Tribunal

HHJ Shaun Smith QC, Derby Combined Court, judicial trainer, Vulnerable Witness Training Programme, former ICCA Governor

Victoria Stec, Head of Training Supervision and Examinations, Bar Standards Board

HHJ Susan Tapping, s. 28 Lead Pilot Judge, Kingston Crown Court

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Sir Wyn Williams, President of Welsh Tribunals, former HCJ, Queen's Bench Division and former Senior Presiding Judge for Wales

A handwritten signature in black ink, appearing to read 'Nicholas Blake', written in a cursive style.

Sir Nicholas Blake



JUSTICE

59 Carter Lane, London, EC4V 5AQ
www.justice.org.uk