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Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility

Felicity Gerry and Penny Cooper*

This paper explores recent international developments in judicial case management for vulnerable accused persons in adversarial trials. The authors discuss the definition of “vulnerable” and include examples of adaptations to the traditional adversarial process and appellate decisions. The authors emphasise the importance of specialist legal representation. They conclude that not only is it necessary for there to be bespoke, procedural adjustments in appropriate cases but also for there to be a fundamental review of laws which may be inappropriately criminalising certain vulnerable accused persons.

INTRODUCTION

Research and practice developments around judicial case management are slowly shifting the criminal justice process in relation to vulnerable suspects and defendants. In addition, in Europe the effective participation of vulnerable suspects has some significant impetus now that state parties must comply with the requirements of the Convention of the Rights of Persons with Disabilities (CRPD)¹ including the access to justice and reasonable accommodation requirements. A critical analysis of the current position of adjusting adversarial trial procedures in the context of vulnerable accused persons exposes the need for careful case preparation. This includes attention to how an accused person’s vulnerability is relevant to investigatory interviews, decisions to prosecute, fitness to participate in the trial, some currently available defences and the accused’s presentation in court. However, fair trials not only depend on proper arrangements that take into account the vulnerability of the accused in order to remove barriers to their effective participation, but also need to ensure that vulnerable people are not inappropriately the subject of criminalisation.

This article seeks to offer practical insight into the adaptation of court processes to accommodate persons with vulnerabilities accused of a crime and also to highlight how modern understanding of cognitive function and mental disability requires a rethink of criminal law concepts of responsibility. Vulnerability is rightly a

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¹ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

contested concept² since vulnerabilities are many and varied. The authors suggest that modern understanding of physical and mental disability and cognitive function, particularly those with reduced IQ and/or who have an Autism Spectrum Disorder (ASD) should lead to not only procedural adaptation but a re-determination of the concepts of criminal responsibility, towards fundamental change in criminal justice systems.

THE ADVERSARIAL SYSTEM

Criminal justice is a process in which the defendant is required to make a series of usually irrevocable decisions such as whether to answer questions, plead guilty or give evidence.³ It is not a tactical exercise nor should it be dictated by fear of being misunderstood or of not being able to understand what is being said at trial. The overriding objective of any criminal justice system must be acquitting the innocent and convicting the guilty.⁴ In England and Wales this is enshrined in r 1.1 of the *Criminal Procedure Rules 2015* (UK).⁵ It follows that to ensure this objective is maintained in cases involving vulnerable people, there needs to be an understanding of the particular complexities for those with vulnerabilities in an adversarial system. Although there should also be a clear and understandable definition of who is deemed “vulnerable” in the criminal justice system, recent appeal cases demonstrate that such clarity and understanding is⁶ not readily achieved in practice, at least in the jurisdiction of England and Wales.⁶

Gooding has argued for a human rights-based approach to supporting individuals with cognitive disabilities in the criminal justice system in the context of fitness to plead.⁷ The approach over the last six years of developing toolkits for The Advocate’s Gateway in the UK has been to encourage advocates to use communication practices informed by relevant research and taking into account specific vulnerabilities of an individual. Thus, the focus is on how to give a particular defendant the best opportunity to have access to justice through communication and special adaptations of court procedures. This accommodates both a human rights-based approach and common law concepts of fairness.⁸ Here, in using the label “vulnerability” we do no more than summarise the many and varied issues that may affect access to justice for an individual accused of a crime. In using the term “mental vulnerability” we encompass the concepts of mental and intellectual impairments in the CRPD but take a wider view which may encompass trauma or other, as yet undefined, vulnerabilities that might affect an individual’s ability to be treated fairly or with understanding.

² Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20(1) *Yale Journal of Law & Feminism* Article 2.

³ Penny Cooper and Felicity Gerry, “Vulnerability and Defences”, in Penny Cooper and Heather Norton, *Vulnerable People and the Criminal Justice System* (OUP, 2017).

⁴ *R v Smith* [2013] EWCA Crim 2388, [91]

⁵ *Criminal Procedure Rules 2015* (UK) rr 3.2–3.3.

⁶ Penny Cooper, “Case Comments: *R v SG* and *R v Hamberger*” (2017) *Criminal Law Review* (in press).

⁷ Piers Gooding et al, “Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change” (2017) *Melbourne University Law Review* 816 <http://law.unimelb.edu.au/__data/assets/pdf_file/0007/2359816/04-Gooding-et-al.pdf>

⁸ Penny Cooper and Linda Hunting (eds), *Addressing Vulnerability in Justice Systems* (Wildy, Simmonds and Hill Publishing, 2016).

At the suspect stage, police interview procedures with vulnerable people may impact on the admissibility of suspect interviews or the drawing of an adverse inference from silence (in jurisdictions where the right to silence has been abrogated). The taking of client instructions might be affected by the failure to identify vulnerability. Knowledge of a suspect's vulnerability might also be relevant to a decision to prosecute. Case preparation where the defendant has a recognised vulnerability might include the need for expert evidence on fitness to plead, insanity or automatism and/or (in a homicide) partial defences of diminished responsibility and loss of control/provocation. Modern approaches should also include evaluation of the defendant's presentation at trial and whether the court process itself needs to be adjusted to accommodate a disability or other vulnerability. Particular conditions might also affect mitigation and sentencing/disposal. These are all processes with which criminal practitioners ought to be familiar.

However, in criminal proceedings, even in an adversarial system, there is increasing focus on and drive towards more efficient case management.⁹ The advent of legislation in England and Wales providing a statutory regime of "special measures" for vulnerable witnesses¹⁰ has inevitably brought about comparisons with provision for vulnerable defendants.¹¹ The recognition of an accused person's "mental vulnerability"¹² and the adaptation of approaches and procedures required to manage cases involving vulnerable people has been driven by academic research and advocacy in criminal cases over two decades.

Justice system professionals and academics have worked together to produce research and practice informed "toolkits" for The Advocate's Gateway.¹³ Those toolkits have now been adopted in criminal practice directions¹⁴ and in the family courts¹⁵ in England and Wales. A recent Scottish High Court Practice Direction on taking evidence from vulnerable witnesses in criminal cases also recommends their

⁹ For example, Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales, 2015).

¹⁰ *Youth Justice and Criminal Evidence Act 1999* (UK) Pt II Ch I "Special measures directions in case of vulnerable and intimidated witnesses".

¹¹ See, eg, Jenny McEwan, "Vulnerable Defendants and the Fairness of Trials" (2013) 2 *Criminal Law Review* 100 and Penny Cooper and David Wurtzel, "A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales" (2013) 1 *Criminal Law Review* 4.

¹² The term "mental vulnerability" is used as a wide, umbrella term to cover various disabilities and disorders.

¹³ Toolkits for advocates working with vulnerable people were first produced in Advocacy Training Council, *Raising the Bar* (2011). Building on these original toolkits, new, more extensive toolkits can be found at <theadvocatesgateway.org>.

¹⁴ *Criminal Practice Directions* [2015] EWCA Crim 1567, 3D.5–3D.7 and 3G.10.

¹⁵ James Munby, "12th View from the President's Chamber: The Process of Reform: Next Steps", *LexisNexis*, 9 June 2014 <http://www.familylaw.co.uk/news_and_comment/12th-view-from-the-president-s-chamber-the-process-of-reform-next-steps#.WNmLfUrLIU>. See also Court of Protection Practice Guidance, "Facilitating Participation of 'P' and Vulnerable Persons in Court of Protection Proceedings" (2016) <http://www.familylaw.co.uk/system/froala_assets/documents/1245/Practice_Guidance_Vulnerable_Persons.pdf>.

use.¹⁶ The Advocate's Gateway Toolkit 17 also sets out necessary approaches in civil proceedings in England and Wales.¹⁷ The Advocate's Gateway material has also been referenced in Australia in the State of Victoria's Disability Access Bench Book.¹⁸

THE CRPD

There is now a wealth of literature on the Convention on the Rights of Persons with Disabilities (CRPD) which recognises the effect it has had to reframe the needs and concerns of persons with disabilities in terms of human rights, often expressed as "a paradigm shift", reflecting progressive attitudes and approaches to persons with disabilities.¹⁹ It moves away from the medical model of disability which views people with disabilities as objects (of suffering, treatment, management, protection, charity and sometimes pity and fear), and towards the social model of disability which regards people with disabilities as subjects of the full range of human rights on an equal basis with others, and where people's capacity to make decisions is presumed. The Convention requires practical measures and is enforced through reporting and complaints mechanisms. It is a valuable tool for persons with vulnerabilities to use to argue for better case management and special adaptations to court processes.²⁰ Access to justice must, in this context, mean the ability to seek and obtain an effective remedy for a violation of a person's rights or fundamental freedoms. The right to participate effectively is an important aspect coupled with the right to a fair trial reinforced by a number of international instruments and is expected in a common law system.

CASE MANAGEMENT

Victims' rights have gained greater recognition in recent years with some significant protections, particularly for the vulnerable and traumatised witnesses through special measures. The framing of the context for suspects with similar vulnerabilities is weaker and still sits in the context of trial procedure rather than independent rights to be promoted.

Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2011 provides procedural safeguards for children who are suspects or accused persons in criminal proceedings or subject to a European arrest warrant: the Directive establishes minimum rules on the protection of procedural rights of children who are suspects or accused persons.²¹ In relation to vulnerable adults, the

¹⁶ High Court of Justiciary, "Taking Evidence of a Vulnerable Witness by a Commissioner" (Practice Note No 1 of 2017) <<http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts---practice-note---number-1-of-2017.pdf?sfvrsn=4>>.

¹⁷ Felicity Gerry, "Vulnerable Witnesses and Parties in Civil Proceedings – Dignity, Respect and the Advocate's Gateway Toolkit" in Penny Cooper and Linda Hunting (eds), *Addressing Vulnerability in Justice Systems* (Wildy, Simmonds and Hill Publishing, 2016).

¹⁸ Judicial College of Victoria, *Disability Access Bench Book* (2017) [5.8] and [5.11] <<http://www.judicialcollege.vic.edu.au/eManuals/DABB/index.htm#59240.htm>>.

¹⁹ Rosemary Kayess and Philip French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" (2008) 8(1) *Human Rights Law Review* 1.

²⁰ Taken in part from the training pack produced by MDAC in an EU Commission funded project to train lawyers across all EU member States on the CRPD.

²¹ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2011 provides procedural safeguards for children who are suspects or accused persons in criminal proceedings <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0800>>.

Council of the European Union adopted a Resolution on a Roadmap for strengthening the procedural rights of all suspected or accused persons in criminal proceedings in 2009.²² Some procedural rights have been adopted through the following Directives:

- 2010/64/EU²³ on interpretation and translation;
- 2012/13/EU²⁴ on right to information;
- EU 2013/48/EU²⁵ on access to a lawyer and having persons informed of arrest; and
- 2016/343/EU²⁶ on strengthening the presumption of innocence and the right to be present at trial.

These are framed in the Roadmap as “measures” which included safeguards such as interpretation, translation, information, legal advice, legal aid, communication with relatives and, importantly, special safeguards for vulnerable suspects.²⁷ Those special safeguards appear to equate to the adaptation to court processes engendered by the rise in “special measures” for vulnerable witnesses. In England and Wales those safeguards have been driven not by rights-based discourse but by concepts of “case management” which have gained momentum through the criminal procedure rules.²⁸ In this context, the line between an adversarial system and an inquisitorial system may appear very faint indeed. Johnston has commented that this departure from traditional adversarial processes has shifted to a new form of process, driven by a managerial agenda focused on advanced case preparation but capable of accommodating the need for access to justice for vulnerable witnesses.²⁹

In Australia, there are legislative procedures for vulnerable witnesses and guidance, particularly to accommodate vulnerable Aboriginal people. In Victoria, the Judicial College of Victoria has produced a Bench Book on how to approach the situation facing people with disabilities in court using CRPD terminology:³⁰

²² **Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.**

²³ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

²⁴ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

²⁵ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

²⁶ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

²⁷ Suzan Van Der Aa, “Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law” (2016) 7 *New Journal of EU Criminal Law* 39.

²⁸ The *Criminal Procedure (Amendment) Rules 2017* (UK), the *Criminal Procedure (Amendment No 2) Rules 2017* (UK) <<https://www.justice.gov.uk/courts/procedure-rules/criminal>>.

²⁹ Ed Johnston, “All Rise for the Interventionist: The Judiciary in the 21st Century” (2016) 80(3) *Journal of Criminal Law* 201.

³⁰ Judicial College of Victoria, n 20.

Courts can be a disabling environment, requiring targeted support and adjustments to ensure people with a disability can participate on an equal basis with others and realise their rights. This Bench Book recognises the important role of judicial officers in facilitating this and provides practical guidance on matters to consider when a party or witness has a disability.

The Bench Book represents excellent leadership on such issues for the rest of Australia but also risks confining adaptations to those who fall within a classification of disability.

In England and Wales, the *Criminal Procedure Rules 2015* remain focused on vulnerability and require “active” case management. This applies equally to witnesses and suspects. The 2015 Criminal Practice Direction requires the court

to take “every reasonable step” to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant ... This includes enabling a witness or defendant to give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his or her defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends.³¹

It follows that individuals will vary hugely in their needs, wishes and preferences and any adjustments made must be tailored to respond to these individual requirements. Rule 3.2 states that “many other people giving evidence in a criminal case, whether as a witness or defendant, may require assistance” thus requiring parties to be alert to potential “hidden” vulnerabilities that may not be immediately apparent.³² The mantra is “Better Case Management”.³³ The expectation is that parties cooperate with each other in the very early stages of every case so that the relevant issues can be identified at early short hearings to assist the court to make the appropriate directions for an effective trial.³⁴

Ideally courts would prioritise cases in which either a witness *or a defendant* is vulnerable. In England and Wales, protocols exist for the expediting of cases where the witness is very young³⁵ or fast-tracking where there are third party disclosure

³¹ *Criminal Practice Directions* [2015] EWCA Crim 1567, 3D.2.

³² See Penny Cooper and Clare Allely, “You Can’t Judge a Book by Its Cover: Lawyers’ Evolving Professional Responsibilities and Judgecraft when a Party has Asperger’s Syndrome” (2017) 68(1) *Northern Ireland Legal Quarterly* 35. See also The Advocate’s Gateway, “Toolkit 10 – Identifying Vulnerability in Witnesses and Parties and Making Adjustments” (20 March 2017).

³³ Courts and Tribunals Judiciary, “Better Case Management Newsletter (11)” (5 October 2016) <<https://www.judiciary.gov.uk/publications/better-case-management-newsletter-11/>>.

³⁴ *Criminal Practice Directions* [2015] EWCA Crim 1567, 3A.12.

³⁵ For example, in accordance with the Courts and Tribunals Judiciary, “Judicial Protocol: Expedition of Cases Involving Witnesses Under 10 Years” (13 March 2015) <<https://www.judiciary.gov.uk/publications/judicial-protocol-expedition-of-cases-involving-witnesses-under-10-years/>>.

issues.³⁶ A crucial element in relation to vulnerable witnesses or defendants is a Ground Rules Hearing (GRH) where the judge can hear evidence and lay down procedural requirements for a particular hearing.³⁷ The GRH approach has spread to Northern Ireland, Australia and most recently New Zealand.³⁸

In England and Wales the GRH includes the use of intermediaries to assist with communication where an intermediary has been appointed. Assessment by an intermediary should be considered for any child or young person who seems

<blockquote>

liable to misunderstand questions or to experience difficulty expressing answers, including those who seem unlikely to be able to recognise a problematic question (such as one that is misleading or not readily understood) and those who may be reluctant to tell a questioner in a position of authority if they do not understand.³⁹

</blockquote>

Applications for intermediaries are dealt with on a case-by-case basis, taking into account the particular needs of the person and the context of the case. The fact that an intermediary was not present during an interview does not mean that an intermediary is not required for trial.⁴⁰ There is a similar intermediary scheme in Northern Ireland⁴¹ and a limited similar system for child witnesses in New South Wales.⁴² However, save for in Northern Ireland, there is no legislative provision in force allowing for a defendant to be assisted by an intermediary.⁴³ Although it is accepted in England and Wales that the court may use its inherent powers to direct the appointment of an intermediary, there is no presumption that it will do so, even where it is accepted that an intermediary would improve the trial process.⁴⁴ There is a good argument for intermediaries for vulnerable defendants under the EU Roadmap. Unfortunately, while the courts recognise the need for adaptation

³⁶ The Crown Prosecution (UK), "2013 Protocol and Good Practice Model: Disclosure of Information in Cases of Alleged Child Abuse and Linked Criminal and Care Directions Hearings" (October 2013) <http://www.cps.gov.uk/publications/docs/third_party_protocol_2013.pdf>.

³⁷ See The Advocate's Gateway, Toolkits 1 and 1a <<https://www.theadvocatesgateway.org/>> and Penny Cooper, Paula Backen and Ruth Marchant, "Getting to Grips with Ground Rules Hearings – A Checklist for Judges, Advocates and Intermediaries" (2015) 6 *Criminal Law Review* 420. Ground Rules Hearings are now also recommended by the Judicial College of Victoria, n 20, [5.8].

³⁸ Penny Cooper and Michelle Mattison, "Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model" (2017) *International Journal of Evidence and Proof* (in press).

³⁹ *Criminal Practice Directions* [2015] EWCA Crim 1567 (Amendment No 1, April 2016) 3F.26.

⁴⁰ *R v Boxer* [2015] EWCA Crim 1684.

⁴¹ Penny Cooper and David Wurtzel, "Better the Second Time Around? Department of Justice Registered Intermediaries Schemes and Lessons from England and Wales" (2014) 65(1) *Northern Ireland Legal Quarterly* 39.

⁴² Penny Cooper, "A Double First in Child Sexual Assault Cases in NSW: Notes from the First Witness Intermediary and Pre-recorded Cross-examination Cases (2016) 41(3) *Alternative Law Journal* 191.

⁴³ Only Northern Ireland had introduced the accredited intermediary for vulnerable defendants as well as vulnerable witnesses. See Cooper and Wurtzel, n 43. See also Cooper and Mattison, n 40.

⁴⁴ *Criminal Practice Directions* [2015] EWCA Crim 1567, 3F.12; *R v Cox* [2012] EWCA Crim 549.

(even when an intermediary is not available)⁴⁵ the provision of intermediaries for vulnerable defendants in England and Wales is framed in the criminal practice direction as “rare” or “extremely rare”,⁴⁶ which has some illogicality and potential for unfairness.

Nonetheless, it will be for the judge to decide in each case what adaptations are necessary and whether to grant the appointment of an intermediary.⁴⁸ Whether this is an issue of access to justice or trial management, it requires specialist advocates and judges.⁴⁹ Assistance from an intermediary should not be granted if it is solely required to make up for the communicative shortcoming of the advocate.⁵⁰ As a case management exercise, a GRH may be ordered (and save in exceptional circumstances should be ordered) by the judge in order to give directions for the fair treatment and effective participation of vulnerable witnesses and defendants at trial.⁵¹

Aside from limitations on the manner and scope of questioning, necessary adjustments to enable the vulnerable person effectively to participate in the trial process might include breaks, meeting advocates and the judge in advance, use of technology or non-verbal communication aids/tools.⁵² Where the defendant is a young person or has communication difficulties, their understanding of any explanations given should be checked.

The following are examples from The Advocate’s Gateway (numbered 1 to 3 below) and the Equal Treatment Bench Book⁵³ (numbered 4 to 6 below) for England and Wales. These examples are part of non-binding guidance and are based on examples of what has been regarded as good practice in a given case. It is stressed that these are case specific examples and are used to illustrate the degree to which courts have adapted traditional procedures when necessary.

- (1) Allowing “Post-it” notes in the dock to help a defendant who has difficulty understanding the order of events – these are stuck onto the glass screen and show the order of events during the trial and can be changed around and also removed once a particular event has happened.⁵⁴
- (2) Out of court hours, [a defendant] being allowed to practise walking towards the witness box while his favourite music was played, then answering questions from

⁴⁵ *R v Cox* [2012] EWCA Crim 549.

⁴⁶ *Criminal Practice Directions* [2015] EWCA Crim 1567, 3F.13; See also *R v Rashid* [2017] EWCA Crim 2.

⁴⁷ Penny Cooper and Clare Allely, “The Curious Incident of the Man in The Bank: Procedural Fairness and a Defendant with Asperger’s Syndrome” (2016) 180(35) *Criminal Law and Justice Weekly* 632; Larua Hoyano and Angela Rafferty, “Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction” (2017) 2 *Criminal Law Review* 93.

⁴⁸ See The Advocate’s Gateway, “Toolkit 16 – Intermediaries: Step by Step”.

⁴⁹ *R v Rashid* [2017] EWCA Crim 2, [80].

⁵⁰ Penny Cooper, “Case Commentary: R v Rashid” (2017) 5 *Criminal Law Review* 418.

⁵¹ Cooper, Backen and Marchant, n 39.

⁵² See generally examples of good practice in Toolkits on <theadvocatesgateway.org>.

⁵³ Courts and Tribunals Judiciary, *The Equal Treatment Bench Book* (2013) Ch 5 “Children and Vulnerable Adults”, [41] <<https://www.judiciary.gov.uk/publications/equal-treatment-bench-book/>>.

⁵⁴ The Advocate’s Gateway, Toolkit 10, [1.6] <theadvocatesgateway.org>.

the box about his favourite subject. This relaxed him and enabled him to give evidence from the witness box.⁵⁵

(3) Being allowed to give evidence with the witness box screened.⁵⁶

(4) Seating a defendant with impaired vision near the jury while they were empanelled, to enable him to object to jurors if necessary; and seating a defendant with a hearing problem in the body of the court (such defendants have particular difficulty following proceedings from the dock because advocates speak with their backs to them).

(5) Agreeing that a defendant with mental health issues be given brief pauses during cross-examination to manage his emotional state and remain calm enough to respond to questions.

(6) Allowing a defendant with autism to have quiet, calming objects in the dock to help him to pay attention.

It is now understood that the court has a continuing duty to ensure that the defendant understands what is happening.⁵⁷ The fundamental principle is to enable vulnerable people to give the best evidence they can. This may mean departing radically from traditional cross-examination and thus changing traditional practices often regarded as hallmarks of the adversarial process while still testing the evidence. The changes in process are the subject of scrutiny in the sense that where any restrictions are imposed on cross-examination, they must be clearly defined and explained to the jury at trial by the judge.⁵⁸

SPECIALISED KNOWLEDGE

Expert evidence will be necessary where the nature and impact of the defendant's vulnerability is outside the experience and knowledge of the fact-finder, whether that is a jury or a judge.⁵⁹ In Australia the Uniform Evidence provisions reflect this in concepts of specialised knowledge.⁶⁰ The obtaining of expert assessments may be unarguable in complex mental disability, but understanding a borderline learning disability may not be specialised in the sense that it may be within the experiences of a jury.⁶¹ As with suggestibility,⁶² and where the learning disability is more profound and relates to an issue in the trial (such as duress), expert opinion is likely to be relevant and admissible.⁶³ It is for this reason such cases require specialist advocates who are trained to identify when a vulnerable person needs to be medically assessed by an expert particularly as, in some cases, the accused will have multiple difficulties relevant to the issues and to meaningful understanding of the trial process.⁶⁴

⁵⁵ The Advocate's Gateway, Toolkit 3, [3.2.2] <theadvocatesgateway.org>.

⁵⁶ The Advocate's Gateway, n 57.

⁵⁷ *Criminal Practice Directions* [2015] EWCA Crim 1567, 3G.9.

⁵⁸ *R v Lubemba* [2014] EWCA Crim 2064.

⁵⁹ *R v Turner* [1975] QB 834.

⁶⁰ *Velevski v The Queen* (2002) 76 ALJR 402; [2002] HCA 4.

⁶¹ See *R v Masih* [1986] Crim LR 395 and *R v Henry* [2005] EWCA Crim 1681.

⁶² *R v Jackson-Mason* [2014] EWCA Crim 1993. See also *R v Masih* [1986] Crim LR 395; *R v Henry* [2005] EWCA Crim 1681 and *R v Turner* (1974) 60 Cr App R 80.

⁶³ *R v Antar* [2004] EWCA Crim 2708; *Pora v The Queen* [2015] UKPC 9, [45]; *Ikarian Reefer* [1993] 2 Lloyds Rep 68; *R v Harris* [2005] EWCA Crim 1980.

⁶⁴ For example, *R v Cox* [2012] EWCA Crim 549.

The case management procedures in England and Wales provide for advance notification of expert evidence⁶⁵ and duties fall to both parties to identify a participant's mental vulnerability at the earliest opportunity,⁶⁶ although for defence advocates, exercising judgment on disclosure of expert reports can be a difficult decision where complex vulnerabilities can also disclose behaviour that may go to state of mind for the offence.⁶⁷ Expert evidence may therefore be relevant to understand the vulnerability generally, to the issues at trial (such as fitness to plead, and defences or partial defences) and to explain any atypical presentation of a vulnerable individual at court.⁶⁸ For example, for a defendant with ASD, proper explanation to the fact-finders about any unusual traits or pre-occupations could avoid prejudice against the defendant on account of the way he or she appears or answers questions.⁶⁹

CRIMINAL RESPONSIBILITY

The development of toolkits for advocacy with vulnerable people and the management of such cases have created a change in the way that trial processes are approached in England and Wales. Australia is beginning to follow, certainly in relation to witnesses, although practice in relation to suspects differs. In the Northern Territory of Australia, for example, there are some standing orders for police officers for communication with Aboriginal suspects based on the guidance in *R v Anunga*⁷⁰ but no statutory code of practice to regulate the detention, treatment and questioning of suspects. Across Australia there are also protocols for lawyers which deal with some specific vulnerabilities and guidance through defence organisations. However, the exercise of judicial discretion is still largely only used for poorly conducted interviews⁷¹ and the wider issues of suspect and defendant vulnerability at trial are not yet being formally widely addressed from either an access to justice or rights-based perspective.⁷²

Equally, even in England and Wales where the toolkits have had such influence, there remains much to be done with respect to addressing criminal responsibility in the context of a defendant's mental vulnerability. The test of the defendant's criminal liability for the alleged offence may be based on objective and/or subjective criteria. The former is much more resistant to accommodating particular vulnerability. It is axiomatic that state of mind is relevant to intention. Recklessness may have both subjective and objective criteria and even negligence tests may require a comparative exercise with other people's behaviour. This means that courts are often, but not always, required to consider the defendant's own characteristics and this gives an impetus to consideration of criminal responsibility

⁶⁵ *Criminal Practice Directions* [2015] EWCA Crim 1567, 3A.12(f).

⁶⁶ *R (on the application of DPP) v Chorley Magistrates Court* [2006] EWHC 1795 (Admin), [26]; *R v Blackman* [2017] EWCA Crim 190.

⁶⁷ *R v Smith* [2013] EWCA Crim 2388.

⁶⁸ *R v Sultan* [2008] EWCA Crim 6, [8].

⁶⁹ *R v Thompson* [2014] EWCA Crim 836, [33].

⁷⁰ *R v Anunga* (1976) 11 ALR 412.

⁷¹ *R v BM* [2015] NTSC 73.

⁷² See, eg, the indefinite detention of those with cognitive and psychiatric impairment: Criminal Lawyers Association of the Northern Territory, "Submission to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia" (7 April 2016) <http://clant.org.au/images/images/Senate_Inquiry_on_cognitively_impaired_submission.pdf>.

when a defendant was mentally vulnerable at the time of the alleged offence. The defences of insanity and sane automatism, which arise out of mental vulnerability, create a complex area of law which the UK Law Commission has recognised as being in need of reform.⁷³ Though the effects of long-term abuse have led to reduced liability, reducing murder to manslaughter in common law jurisdictions, formal legislative recognition of mental vulnerability has not been extended to other offences or defences.⁷⁴ The *Modern Slavery Act 2015* (UK) provides, in England and Wales, a defence for slavery or trafficking victims who commit an offence in certain circumstances, but the Court of Appeal recently refused to extend the defence of duress to human trafficking victims.⁷⁵ No such protection for such victims applies in Australia at all, although there is an ongoing Senate inquiry.⁷⁶

The adjustment of common law principles has been of particular concern where defendants have been diagnosed with ASD; the Court of Appeal in England and Wales has begun what we suggest is a process of re-evaluation:

- In *R v Reynolds*,⁷⁷ decided in England before provocation became “loss of control” under s 52 of the *Coroners and Justice Act 2009* (UK), the accused person was convicted of murdering with a claw hammer a pharmacist at the shop where he worked. He was 17 years old at the time.⁷⁸ Sometime after conviction, experts diagnosed Asperger's Syndrome (a form of ASD) capable of amounting to an abnormality of mind within s 2 of the *Homicide Act 1957* (UK). The Court of Appeal reduced his conviction to one of manslaughter.⁷⁹
- In *R v Thompson*⁸⁰ and *R v Stewart*⁸¹ the defendants were diagnosed with Asperger's Syndrome after conviction. The Court of Appeal recognised that evidence of the condition could have been relevant to the defendant's alleged sexually motivated conduct and this evidence contributed to the quashing of convictions in both cases. It has been argued that a defendant's ASD is similarly relevant when considering criminal liability for the downloading of child sexual abuse material.⁸²

⁷³ Law Commission (UK), “Criminal Liability: Insanity and Automaton: A Discussion Paper” (23 July 2013).

⁷⁴ See, eg, *R v GAC* [2013] EWCA Crim 1472.

⁷⁵ *R v Joseph* [2017] EWCA Crim 36.

⁷⁶ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia* (commenced 15 February 2017).

⁷⁷ *R v Reynolds* [2004] EWCA Crim 1834.

⁷⁸ *R v Reynolds* [2004] EWCA Crim 1834, [6].

⁷⁹ *R v Reynolds* [2004] EWCA Crim 1834, [8].

⁸⁰ *R v Thompson* [2014] EWCA Crim 836.

⁸¹ *R v Stewart* (unreported, Court of Appeal (Criminal Division), 11 December 2015).

⁸² Mark Mahoney, “Asperger's Syndrome and the Criminal Law: The Special Case of Child Pornography” (2009). See also Tony Attwood, Isabelle Henault and Nick Dubin, *The Autism Spectrum, Sexuality and the Law* (Jessica Kingsley Publishers, 2014) and Lawrence Dubin and Emily Horowitz, *Caught in the Web of the Criminal Justice System: Autism, Developmental Disabilities, and Sex Offences* (Jessica Kingsley Publishers, 2017).

In *R v Sultan*⁸³ Asperger's Syndrome was relevant to a defendant's reasonable belief in consent in an alleged rape. Although in *B v The Queen*⁸⁴ this was qualified on the basis that

unless and until the state of mind amounts to insanity in law, then under the rule enacted in the Sexual Offences Act beliefs in consent arising from vulnerabilities such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness [so that a] delusional belief in consent, if entertained, would be by definition irrational and thus unreasonable, not reasonable.⁸⁵

While there is a clear difference between cases involving objective or subjective state of mind,⁸⁶ the path to wider recognition of vulnerabilities to criminal responsibility has begun.⁸⁷ The issue is whether the vulnerability impairs functioning, not the label, and discussion at legislative level needs to begin. In *R v Smith*,⁸⁸ the Court of Appeal reaffirmed its view that the overriding objective requires issues of mental vulnerability to be dealt with at trial and not left for an appellate decision.

For nations to comply with their obligations towards people with vulnerabilities, such issues should not be left to piecemeal decisions in criminal cases but ought to be the subject of wholesale reform. Fair procedures will count for nothing if the process to determine criminal liability does not react to modern knowledge of cognitive function, mental illness and other disabilities which impact on state of mind.⁸⁹ This requires a framework for a multilayered approach to defending a vulnerable person that goes far beyond determination of fitness to plead and procedural adjustments such as the use of interpreters or intermediaries. This is an issue which goes beyond "Better Case Management". It is an issue that suggests removal of certain cases from the system altogether through a recognition that some vulnerabilities do not and should not lead to criminalisation.

⁸³ *R v Sultan* [2008] EWCA Crim 6.

⁸⁴ *R v B* [2013] EWCA Crim 3.

⁸⁵ *R v B* [2013] EWCA Crim 3, [35].

⁸⁶ *R v Keane* [2010] EWCA Crim 2514, [4].

⁸⁷ As with the test for dishonesty; see, eg, J Spencer, "Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would Have Thought: *R v Ghosh*" (1982) 41(2) *CLJ* 222 and Penny Cooper, Colleen Berryessa and Clare Allely, "Understanding What the Defendant with Asperger's Syndrome Understood: Effective Use of Expert Evidence to Inform Judges and Juries" (2016) 180(44) *Criminal Law and Justice Weekly* 792.

⁸⁸ *R v Smith* [2013] EWCA Crim 2388.

⁸⁹ Cooper and Gerry, n 5.
