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Witness Statements for Employment Tribunals in England and Wales: What are the 'Issues'?

Michelle Mattison [a] & Penny Cooper[b]

[a]Centre for Forensic and Family Psychology, School of Medicine,
University of Nottingham

[b]Institute for Crime and Justice Policy Research,
Birkbeck, University of London

Abstract

In England and Wales, Employment Tribunals (ETs) hear claims from persons who believe that an employer, or potential employer, has treated them unlawfully. Witness statements form part of the evidence considered by ETs, but research is lacking with regards to the methods used to produce ET witness statements. This study presents the findings from 40 semi-structured interviews with ET judges, panel members, employment lawyers (solicitors, barristers, advisers) and litigants. Our data revealed six themes: professional processes, enabling through case management, presentation preferences, challenges for litigants in person, availability and quality of resources, and lack of training. Participants felt that the quality of witness statements varied amongst those prepared by professional advisors and by litigants in person. Our interviews revealed almost no evidence of practitioner training on how best to prepare a witness statement. We make recommendations about guidance and training for those tasked with drafting witness statements.

Keywords: Witness Statement, Witness Evidence, Employment Tribunal, Drafting

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Witness Statements for Employment Tribunals in England and Wales: What are the ‘Issues’?

Employment Tribunals (ETs) in England and Wales are responsible for hearing claims from persons who believe that an employer, or potential employer, has treated them unlawfully. Issues may concern unfair dismissal, discrimination and matters concerning pay (HM Courts and Tribunals Service, 2020). If a claim is issued in the ET, the tribunal will decide when the case will be heard and determine (or ‘direct’) what the parties must do to prepare for that hearing. The ET’s directions will usually include instructions to the parties about preparing witness statements. Witness statements are likely to come from the person making the claim (‘the claimant’) and their supporting witnesses as well as from witnesses for the employers (‘the respondent’). It is not unusual for a party, particularly a claimant, to represent themself, which renders potential for inequality of arms if a claimant is unrepresented and a respondent has substantial resources in terms of in-house expertise (e.g., human resources) and/or external legal advice.

Witness statements can influence the ways in which disputed issues are interpreted, thus they can have a bearing on litigation costs, efficiency of the courts and tribunals, and overall decision-making outcomes (Pender & Heatley, 2018). The ability to produce witness statements in compliance with the legal rules and directions, is fundamental to any party seeking access to justice in the civil courts and tribunals. There is a consensus that legal professionals strive to obtain statements which are considered to be both complete and accurate (Brackmann et al., 2017). Achieving good quality witness statements has, for a number of decades, been a particular focus within the area of criminal law. Here, a plethora of theoretically based best practice, informed by scientific evidence, has guided the gathering of witness evidence and the production of witness statements. Empirical research has not, however, investigated and scrutinised the methods adopted by practitioners to gather information for witness statements in civil cases, and in particular, in ETs.

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Factors that can affect Witness Statements

Much of the witness research is in the field of psychology and has focused upon internal and external factors that influence witness accounts. Internal factors include a witness's memory for an event, their ability to recall and narrate these memories, and the impact of individual characteristics such as age as well as developmental level – also referred collectively as 'estimator variables' (Wells, 1978). There is a consensus that memory, in particular, witness memory, can be fallible, thus causing significant consequences in the legal system as a whole (Wixted et al., 2018). Multiple internal factors influence witnesses' recollection of past events. One of the most prominent internal factors that can affect witness recall is memory fade or 'decay'. In most cases, this is caused by the passage of time (Cowan & AuBuchon, 2008). Separately, interference can occur – a process whereby memories are present, but inaccessible via one or multiple traces (Hardt et al., 2013).

Overall, it is very well established that witnesses' recall of past events is not literal and not an entirely objective account of their experiences because memory is reconstructive in nature and influenced by one's own prior knowledge (Hemmer & Steyvers, 2009). When recollection does occur, events are constructed using whatever retrievable information was encoded at the time of the event, as well as an individual's prior knowledge which can serve the function of subconsciously filling in 'gaps' (errors of commission; Tuckey & Brewer, 2003). These theoretical principles are well established but are not always widely known by legal professionals. For instance, previous research has found that student populations are just as aware of memory phenomena as legal professionals are (Benton et al., 2006). Interestingly, reference to any of these principles is overwhelmingly omitted from all of the guidance currently available about the production of witness statements in ETs.

Witness accounts are long known to be heavily influenced by external factors (including system variables, in the case of the justice system; Wells, 1978). A plethora of empirical research has focussed upon the external factors that influence the accuracy and completeness of eyewitness memory and reports of such memories. Most remarkable, was the discovery by Elizabeth Loftus in the 1970s that memory is malleable – highly vulnerable to 'misinformation effects' (Loftus & Palmer, 1974; Loftus

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et al., 1978). Misinformation effects are defined as impairments in recall of events that occur after a witness is exposed to misleading or false information (Loftus, 2005). The phenomenon of misinformation effects has been investigated for over 40 years, and has been found to be more prevalent after the passage of time, where memory fade has occurred, and the event memory is weakened – thereby reducing a witness's ability to identify misinformation and resist its effects (Loftus, 2005). The source of misinformation, primarily, has received a great deal of attention from the scientific community

Misleading information can emanate from many sources. Discussions with a co-witness results in greater misinformation effects, especially if the witness is previously acquainted with the co-witness as opposed to having no prior acquaintance (Hope et al., 2008). Misinformation effects from co-witnesses are also greater when misleading co-witnesses are particularly confident in their memory of events (Goodwin et al., 2017). Further, misinformation effects are not only found to occur as a result of co-witnesses discussing matters with one another, but they can also emanate from information provided indirectly by a third party (Paterson & Kemp, 2006). As previously outlined, contemporaneous documents typically form the basis for witness statements in ETs (Pendler & Heatley, 2018), but it may be possible that these documents, on occasion, contain inaccuracies. There is currently no guidance about how to minimise possible misinformation effects from co-witnesses, and also from contemporaneous documents, in ETs.

Gathering Witness Evidence

The reconstructive and malleable nature of memory means that incorrect information from a variety of sources can affect a witness's accounts of past events. Within the legal arena, there is great emphasis on the accuracy of witness statements. However, accuracy of recall often comes at the expense of the quantity (completeness) of witness testimony (known as the quantity-accuracy trade-off; see Koriat & Goldsmith, 1994, 1996). Although accurate witness statements are highly sought, so are statements that are regarded as full and complete. It is long established that witness statements can lack all of the information required by legal professionals, and often

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do not contain all of what was encoded by the witness at the time of the event(s) in question. Information encoded and stored by witnesses, but left out of event recall, is regarded as errors of omission. These are most prominent in statements produced by young witnesses, and previous research suggests that these omissions occur because witnesses are uncertain about what information should be reported and what they believe to be important (Larsson & Lamb, 2009).

While the field of empirical research specific to ET witness statement production is almost non-existent, other areas of law have informed the practice of gathering accurate and full accounts of events. In the area of criminal law, the most common method to gather information is by way of an investigative interview. Practitioners who, at the initial stage, prepare witness evidence (whether in written format or by way of a video-recorded interview) are tasked with the following objectives: (i) gather information about who did what, when and where, (ii) gather information which informs an investigation and (iii) obtain a truthful account (Milne & Bull, 1999). However, there is agreement that witness statements are not always able to meet the quality and quantity demands of legal professionals (Fisher & Geiselman, 2010), and this issue has been subject to vigorous and extensive research in order to inform practitioners about how to encourage optimal memory retrieval in order to achieve both quality and quantity. The field of investigative interviewing offers the most scientifically informed guidance on how to gather accurate and complete witness statements. Here, the primary focus is on the techniques used by practitioners, in particular, the information presented to witnesses at the time of recall.

Numerous recommendations and comprehensive guidance documents have been produced both nationally and internationally with the purpose of providing methods for professionals to be appropriately trained to gather the most accurate, detailed, complete and reliable accounts from witnesses. Available guidance (and training) is based upon scientifically tested approaches and methods, often comprising of interviewing frameworks and models. Examples of such include the PEACE framework (Baldwin, 1993; Bull & Milne, 2004; Clarke & Milne, 2001; Moston et al., 1992), Cognitive Interview (Fisher & Geiselman, 1992), Sketch-Reinstatement of Context (see Dando, 2013; Dando et al., 2009; Dando et al., 2020); Self-Administered Interview (Dando et al., 2020; Gabbert et al., 2009), and for use with vulnerable

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witnesses, Achieving Best Evidence (Ministry of Justice, 2011) and the National Institute of Child Health and Human Development Investigative Interviewing (NICHD) protocol (Lamb et al., 2008). The majority of these approaches begin with a focus on rapport building and the setting of interview ground rules, before concentrating on methods to safely obtain event-related information (Brackmann et al., 2017).

Those tasked with conducting evidence gathering interviews in the criminal justice settings are often subject to formal training and assessment. In England and Wales (as well as in other countries) training is underpinned by psychological literature and scientifically tested approaches from which the available guidance is based upon. The PEACE framework, a mnemonic acronym referring to the phased approach of interview (planning and preparation, engage and explain, account, closure, evaluation), is regarded as the world leading approach. Consequently, the PEACE framework (which also advocates the use of the Cognitive Interview), has been incorporated into interviewer training manuals since the 1990s. Effective training of the PEACE framework has been shown to improve the quality of evidence gathered (although there are valid concerns about the efficacy of interviewer training; see Oxburgh & Dando, 2011; Smith et al., 2009). From the available literature, it is not apparent what training legal practitioners receive about preparing witness statements for the purpose of ET. If formal training does exist, it ought to be based on sound theoretical principles.

Questioning Styles

There has been much academic consideration about the techniques recommended for obtaining complete and accurate witness statements in criminal proceedings, and the impact of misinformation effects and suggestive influence. The most prominent assertion throughout the guidance aimed at criminal justice practitioners, is that interviewers can facilitate the production of the ‘best’ witness evidence with the use of ‘appropriate’ questioning styles (Oxburgh et al., 2010).

The research focussing upon questioning styles is vast, but there is an acceptance that interviewers should begin gathering evidence with the use of ‘free recall’ prompts

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and open questions (e.g., “tell me what you have come to talk to me about today”). These prompts and questions are proven to encourage witnesses to provide the most accurate narrative of their experience(s). The majority of studies which concentrate on question types used during interviews have also found that open questions yield longer and more detailed responses than closed questions, regardless of witness age or cognitive capacity, event type and the delay between the event and interview (Oxburgh et al., 2016). The desired outcome from using open questions is that witnesses will provide a fully detailed and comprehensive account of events. In practice, this is not often the case. Interviewers are therefore also advised about the best ways to elicit further detail with the use of more targeted follow-up prompts and questions.

Such follow-up questions or prompts should preferably be open (e.g., “tell me more about X”). In practice, this is challenging for interviewers and not often not achieved. Studies exploring criminal law practitioners use of questions has often revealed that closed and probing questions are most widely asked (Snook & Keating, 2011), and in earlier research findings, interviews were dominated with closed questions (Clarke & Milne, 2001). Practitioners commonly revert to inappropriate questioning styles and these can have an error-inducing effect, and unfortunately, the information contained within questions and the way that they are structured, is a prominent source of misinformation. Error-inducing approaches include presenting misinformation within a question (known broadly as ‘leading’ questions), asking sequence of closed questions or very specific questions, encouraging witnesses to speculate or guess without proving the option to omit a response, and repeated questioning about the same event (Clarke & Milne, 2001). Nonetheless, the quality of information presented in a witness statement is determined not only by the ability and motivation of the questioner to ask the most appropriate and relevant questions, but by the interviewer’s cognitive capacity for holding/maintaining relevant information and documenting it accordingly (Launay & Py, 2015).

Existing Guidance for the Preparation of Witness Statements

Witness statements should provide information relating to specific legal issues and should add to the evidence provided within contemporaneous documents, rather than

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simply regurgitate the contents of the documents or to provide a running commentary on the documents (Harrison, 2019; Pender & Heatley, 2018).

Guidance emanates from the President of the Employment Tribunals (England and Wales) about 'General Case Management' (Courts and Tribunals Judiciary, 2018) and about 'vulnerable parties and witnesses' (Courts and Tribunals Judiciary, 2020a). ETs in England and Wales 'must have regard to such Presidential Guidance' but they are not bound by it.

The Presidential Guidance (Courts and Tribunals Judiciary, 2018) includes:

- 'It is easier for everyone if the statement is typewritten or word-processed (although a clear and legible handwritten statement is acceptable) with each page numbered.' (Note 3: Witnesses and Witness Statements, para. 15);

- 'The witness statement should be in a logical order (ideally, chronological) and contain numbered paragraphs. It should cover all the issues in the case. It should set out fully what the witness has to tell the Tribunal about their involvement in the matter, usually in date order.' (Note 3: Witnesses and Witness Statements, para. 16);

- 'The statement should be as full as possible because the Tribunal might not allow the witness to add to it, unless there are exceptional circumstances and the additional evidence is obviously relevant.' (Note 3: Witnesses and Witness Statements, para. 17);

While the Presidential Guidance (Courts and Tribunals Judiciary, 2018) offers some guidance for the drafting of witnesses statements (as outlined above), it is not clear what, if any, the theoretical underpinnings are. For instance, it is not apparent from the available guidance why chronological order is advocated as an approach to witness statement production. The Presidential Guidance does give some indication in its use of the phrase 'logical order' – that is, presenting the statement in chronological order

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may be related to comprehension and understanding of the evidence, perhaps by those tasked with making sense of it, testing it, and case related decision making. However, this is not explicitly stated, and only inferred.

Further, guidance forms are provided by HM Courts and Tribunal Services (which is intended directly for parties in involved in ETs), but none of these forms provide information that comprehensively guides witnesses (or practitioners) on the best way(s) in which to prepare a witness statement. Citizens Advice provides litigants in person with free guidance in the preparation of statements. In addition to the free resources available on the internet, there are a number of publicly purchasable texts (see Cunningham & Reed, 2014; Curwen, 2018; Waite et al., 2017). None of these resources set out techniques practitioners should use in order to aid witness recall of events, ensuring that complete and accurate accounts are achieved. Nor does the literature guide witnesses themselves about the most appropriate ways to recall and document their experiences.

The Current Study

To-date, there has been no empirical evaluation of the witness evidence in ETs (and in civil courts), and the guidance available does not appear to account for the psychological literature regarding eyewitness memory and interviewing questioning styles. Nonetheless, judges have expressed their concerns about witness statements and how they are prepared. For example:

- ‘The process of civil litigation itself subjects the memories of witnesses to powerful biases…Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute.’ Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm).
- ‘The true voices of the witnesses, and the extent of their real recollection, which became apparent when they were cross-examined over a number of days each, are notably lacking from the witness statements.’ Fancourt J in Estera Trust (Jersey) Ltd & Anor v Singh & Ors [2018] EWHC 1715 (Ch)

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In light of the scarcity in empirically based guidance relating to the production of witness statements for the purpose of ETs, this study adopted a qualitative approach to address the following exploratory research question: What methods, law and guidance do lawyers and litigants in person use to prepare witness statements? Further, we also aimed to explore the perceived quality of witness statements in ETs.

Method

Adopting a qualitative approach, this project sought to investigate methods of preparation of witness statements and the perceived quality of witness statements for ETs. We used semi structured interviews and applied thematic analysis (Braun & Clarke, 2006) to explore the experiences and views of those who working in ET settings and those who themselves have produced a witness as a litigant in person.

Research Participants

A key consideration of recruitment was to engage a range of ET experience in our participant group. We sought to recruit participants who considered themselves to be ET (i) practitioners (i.e., solicitors/barristers/legal advisors), (ii) panel members, (iii) ET judges or (iv) litigants in person ('LiPs').

A variety of methods were used to invite potential participants to contact us if they were interested in taking part: (i) The Office of the President of the Employment Tribunals (England and Wales) emailed all judges and non-legal members of the panel on our behalf with our invitation to contact us for more information about being interviewed; (ii) The lead researcher published an article in the journal of the Employment Lawyers' Association (Cooper, 2019); (iii) We published information on the website of The Institute of Crime and Justice Policy Research, Birkbeck College (the link was subsequently tweeted by the College and the University of Chester); (iv) barristers and solicitors who had published articles on employment law (based on an internet search for employment lawyers) were emailed; (v) the lead researcher emailed solicitors and barristers who she knew to be practising in ETs; and (vi) The ET President's Office agreed to ask regional tribunal offices to contact LiPs identified

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by the lead researcher from the most recent publicly available tribunal decisions published on a government website.

Forty-one participants took part in our interviews. Professions and experience varied. The judges recruited in this study had been sitting for a range of 6 to 15 years. All had previously, or still, worked in practice as a solicitor or barrister. The 18 practitioner participants worked in various professions. Eight practitioner participants were barristers, six were solicitors, two worked in employment law support services, and one worked as a paralegal. Experience ranged from six months to 27 years. Panel member participants had been sitting for between six months and 42 years. One panel member participant identified themself as having dual experience of ETs as both a panel member and as a former LiP in their own ET claim. See Table 1 for a description of professions, number of years of experience (including means and standard deviations).

Table 1. Main profession of interviewees, including number of years of experience (M and SD).

	Profession						
	Judge	**Panel Member**	**Panel Member and Litigant Person (dual position)**	**Practitioner (Barrister)**	**Practitioner (Solicitor)**	**Practitioner (Paralegal)**	**Practitioner (ET Support Service Worker)**
N	7	13	1	8	6	1	2
Number of Years of Experience in Profession M (SD)	11.43 (5.03)	16.96 (11.56)	18 (0)	15.25 (7.63)	17.00 (4.23)	2 (0)	6.25 (8.13)

Two LiPs contacted us having seen information about the study on the web (this included details of a £25 Amazon voucher as a reimbursement for their time). Both

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LiPs were interviewed. Insurmountable difficulties arose recruiting additional LiPs when from spring 2020, due to Covid-19 'lockdown', courts and tribunals were no longer operating as normal. For instance, the regional offices no longer had the resources to contact LiPs on our behalf. Also, access to the public to law centres and tribunals/court centres became extremely limited thus we lost the opportunity to use these spaces to display posters and distribute leaflets to recruit LiPs to our study.

Several of our England and Wales interviewees commented that Scottish employment cases handled witness evidence very differently, in particular there are no witness statements. We therefore interviewed one experienced Scottish employment lawyer (taking our grand total of interviews to 41) in order to increase our understanding of how employment tribunals in Scotland receive witness evidence. In Scotland, since no statements are exchanged in advance, the witnesses are taken through their narrative account in examination-in-chief.

Procedure

An interview schedule was developed which emanated from the existing guidance on the production and use of witness statements, relevant to the field of ET and in line with the research questions.

The interview schedule was reviewed by a senior ET judge, and proposed questions were appropriately amended and refined as a result of feedback. Adopting a qualitative approach was important because it allowed for detailed consideration of personal experiences in an appropriate way (Forrester, 2010). Further, our approach afforded a degree of flexibility to explore topics and issues that arose throughout the interviews (Runswick Cole, 2011). This was regarded as particularly important due to the lack of previous research studies in this area, and the importance of developing new knowledge (Mason, 2018). Ethical approval was obtained from the School of Law Research Ethics Committee of Birkbeck, University of London, in 2019.

Participants who expressed an interest in the research were provided with detailed information about the project via email. Those who wished to take part were asked to

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complete and return a consent form before a convenient time and date was scheduled for the interview. All interviews were audio recorded and conducted by the PI via telephone. The semi-structured nature of the interviews meant that participants were all asked ten questions, with further questions developing from individuals' responses. Before the interview was concluded, participants were also encouraged to share with the researcher any additional information they felt was relevant. The duration of interviews was between 18 minutes and 74 minutes (with an average of 41.9 minutes).

Data Analysis

All participant interviews were transcribed verbatim. Due to the nature of the participants' background profile and their involvement in ET cases, issues of confidentiality and anonymity were crucial. During the transcription review process, care was taken to ensure that any details which might reveal personal identities or party/case participant identities were redacted (e.g. ET locations, organisations). This process was especially important when participants were providing case examples to illustrate their experiences and perspectives. The data were analysed using Braun and Clarke's (2006) six-stage model of thematic analysis. This process involved reading all transcripts several times to develop familiarity. The transcripts were then coded for individual units of meaning, before a review of these codes revealed shared meanings (themes).

Findings

Our thematic analysis revealed six themes in relation to the production of witness statements for the purpose of ETs. These were: (i) professional processes, (ii) enabling through case management, (iii) presentation preferences, (iv) challenges for litigants in person, (v) availability and quality of resources, and (vi) lack of training.

Theme 1: Professional processes

All interviews with participants included discussions around the professional practices which are adopted in order to draft witness statements. These discussions provided

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insight into participants' perceptions of professional approaches, as well as their views on the effectiveness of practices adopted.

There was variability in some participants' perceptions of the professional processes used to prepare witness statements. While it was widely understood by all participants that solicitors play a fundamental role in the drafting of witness statements, one practitioner participant suggested that methods were not always clear:

> *"With some solicitors I have no idea how they go about doing it, their methodology is quite mysterious to me."* [Practitioner 13]

Conversely, other practitioners indicated that telephone, email and face to face consultations were variously described as methods of creating a first draft. Participants suggested that the method chosen may depend on the complexity of the case, but there was preference for face-to-face drafting:

> *"… complex ones, I prefer not to do them remotely. Basic cases, yes, I'm happy to do that but I just feel that sometimes having a client opposite [me in the same room] – maybe I'm a bit old school to some degree – you to sit down and go through [the evidence] sometimes is quite different to doing it on the phone. I'm not saying it can't be done. It can be done. It just depends. It depends on the client as well."* [Practitioner 11]

Some interviewees expressed concerns about the drafting process:

> *"The solicitor or the person drafting it may be imposing structure on it, may be asking the right questions, may be getting the information out and putting it in a useful order, may be excluding irrelevant material and may be trying to put it together in a way that tells a pervasive story, but, fundamentally, all the material has to come from the witness..."* [Practitioner 5]

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> *"…one of the things that happens is that the witness statements end up being drafted by committee… what should happen is that the solicitor interviews the witness, covers the areas with the witness that he or she thinks needs to be included in the witness statement, prepares a draft, sends it back to the witness. The witness corrects it and that's the statement."* [Judge 5]

> *"And with some cases there's sort of a factory production line. People who take on bulk litigation for major clients, where there's almost a proforma witness statement. You read it and you look at it and you say, 'Well, how much thought's gone into this?' It's always obvious when the typeface is different for different parts of the same paragraph. The blanks have been filled in. So that's sometimes irritating."* [Judge 3]

> *"Sometimes, if I'm really honest with you, the witness statement has been duplicated, because it's come as directed by the solicitor… They just change who they're talking about for the third party. So there's a quality about them there. I'm not saying it's a good quality; I'm just saying there is a standard quality when they've been fill-in-the-gaps type documents."* [Panel Member 13]

> *"I dislike having witnesses discussing their evidence together, because it's just not how it's supposed to happen."* [Practitioner 14]

One practitioner participant made reference to instructions regarding discussing matters with co-witnesses:

> *"Yes, it's in our template thing we send out. 'Don't talk to each other until we've all got draft witness statements together.' And then you might say, 'I know you think that happened, but it didn't, it wasn't.' And then they say, 'Actually, yes, you're right there.' In which case one might change it."* [Practitioner 4]

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Several participants made reference to the importance of having the documents in the case to hand when preparing the witness statement. Indeed, according to one practitioner, referencing the bundle (of documents) and focusing on the issues is what makes a good quality witness statement:

> *"I think what makes a good witness statement a) is the bundle but then I think b) is focusing on the issues."* [Practitioner 11]

Theme 2: Enabling through case management

Many but not all cases will have a preliminary case management hearing during which the judge will engage the parties to identify the issues in the case. Our interviews, with all participants, therefore explored experiences of directions and case management decisions made by ETs. We focused specifically on directions and decisions which were directly relevant to the production of witness statements.

Almost all judges, panel members and practitioners highlighted the importance of 'the issues' being addressed in the witness statements. Where case management hearings occur, practitioners suggested that the issues in the case will usually be identified and agreed:

> *"In a very large group of types of case, there will be a preliminary hearing for case management and a case management order will be sent out…What is crucial is the list of issues in a case. We spend a lot of our time, preliminary hearings, refining lists of issues, getting parties to join us in identifying the issues...in shorter cases or one-day unfair dismissals, we wouldn't have a preliminary hearing."* [Judge 4]

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However, practitioners did not view this as common practice. Noting that in 'smaller' cases, only standard directions might be set.

> *"I think judges are quite good at getting to grips with the issues, even in smaller cases, but they can often let it slip. In very small cases, they just set standard directions, which doesn't always include agreeing a list of issues, and how could it if the other side's a litigant in person? ... The smaller cases, they won't define a list of issues, but the smaller cases are less likely to have legal representation, so the witness statements, conversely, are longer, or can be longer, because they don't know what to put in them."* [Practitioner 3]

Since the tribunal will be considering 'the issues' when the matter comes to trial, it was suggested by participants that the consequences of not addressing the issues in a witness statement may be damaging to a case. However, according to one panel member, it is unlikely to be completely 'disastrous':

> *"I've never seen a statement being so disastrous that we couldn't go ahead with a case. They're generally sufficiently well anchored in the issues, even if the witness doesn't know that's what they're doing, that you can try and build a narrative from there."* [Panel Member 10]

Theme 3: Presentation preferences

Overall, participants felt that the quality of witness statements varied both amongst those prepared by legal practitioners and by litigants in person:

> *"But even those prepared by professional advisors vary a great deal. I was thinking about my experiences in the last three months, and in fact I've seen some good ones in the last three months. Litigants in person have kept to the point, structured their witness statements chronologically, referred to the relevant documents in them, not gone into sort of unnecessary argument..."* [Panel Member 5]

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Overwhelmingly, the most prominent message about the quality of witness statements, was that a good quality witness statement must address 'the issues'. The majority of judges and panel members and practitioners expressed this view, and it is summarised clearly and concisely by a practitioner participant:

> *"What makes for a good witness statement is one that is...addressing squarely the issues, the list of issues in the case."* [Practitioner 16]

Identifying the list of issues in a particular case looks like might challenge some legal practitioners and litigants in person:

> *"It surprises me sometimes that professional advisors don't understand what a list of issues looks like… But because there are so many litigants in person in tribunals, it is just sensible to have that encapsulated in one place so that everybody understands what they are arguing about...I describe a list of issues to litigants in person, as questions that the court needs to answer, and they derive from the legal principles we have to apply and the factual disputes that you want to raise.* [Judge 5]

Interviewees who mentioned technology spoke only of word-processing and audio recording devices. For instance, a number of practitioners made comments about the formatting of a word-processed statement, suggesting that they should be 'reader-friendly':

> *"…it's very useful to have one that you can read quickly, so if something is densely written, sort of very small font or squished up paragraphs or great long paragraphs, that's not very useful because it's hard to see the salient points."* [Panel Member 2]

It was noted by several participants that the structure should be 'logical'; this might be chronological, according to the issues, or a combination of the two:

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> *"So what I'm next hoping for is that they will tell me the story, and hopefully in a chronological order, and hopefully I can make some sense of that with reference to the list of issues."* [Judge 2]

Judges and panel members participants were consistently clear that the length of the statement is important. There was agreement that a witness statement should address the 'issues' (as previously outlined) but it should not be overly long. Participants who worked as judges expressed preference for both brevity and necessary detail, one judge noting that advisors influence statements in a negative way with regard to statement length:

> *"...our problem with professional advisors is that their witness statements tend to be far too long."* [Judge 5]

There was no consensus about the value of directions to parties to keep witness statements within set word limits.

> *"I think, rather than put a limit on the amount of words you can use, what we need to do is focus on what the issues are. How do you interpret that to an individual without any legal experience? That's the issue. It isn't about the words. It's about the content. It's about have you said all you want to be saying about the issues that we've got to look at?"* [Panel Member 8]

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Theme 4: Challenges for litigants in person

A focus of this research was to explore witness statements drafted by litigants in person (those who represent themselves in court without a solicitor). Discussions around litigants in person with all participants generated the theme which relates to challenges in witness statement production.

A judge participant commented that some litigants in person do not always realise that they need to produce a statement of their own:

> *"[Some LiPs think] "Oh, a witness is somebody other than me." So, they don't come along with a witness statement themselves, and then they look blankly at me when you say, "Where's your witness statement?" Yes, I mean that happens quite a lot."* [Judge 2]

Many differences in the quality and content of statements drafted by litigants in person were noted:

> *"[The quality of witness statements is] just such a mixed bag really, I think it partly depends on how emotional the claimant is as well because some people are very, very aggrieved when they're in a tribunal, I think in a way they can't see the wood for the trees. For example, you might get a witness statement that has the first three pages about their professional qualifications so we can see their dignity has been affronted..."* [Panel Member 2]

A number of participants noted that statements provided by litigants in person, do not always address the issues:

> *"…Because employment law is quite complicated, in the beginning, litigant in person witnesses often go off on tangents or address matters that the tribunal doesn't have jurisdiction to consider, or that don't go directly to the issues."* [Practitioner 15]

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> *"His statement was, in one sense, very, very good and very detailed. But often, because of emotion, he'd put several paragraphs in of things that he believed had happened, that actually didn't relate to the specific issue that had been identified by his ET1, and also in the preliminary hearing that he'd had, to sort of try and narrow down the issues."* [Panel Member 11]

Theme 5: Availability and Quality of Resources

During all interviews, we explored participants' views and experiences in relation to the law and guidance available. When asked about what guidance was available, most judges made reference to the Presidential Guidance on witness statements, but most practitioners did not:

> *"I'm sure there are all sorts of stuff on there, unofficial stuff, of very variable quality, but the Presidential Guidance is about it in terms of official."* [Judge 2]

> *"There really isn't much by way of accessible guidance for someone trying to put a statement together, unless they're going to maybe a Citizens Advice Bureau."* [Practitioner 13]

There was also a view that support and guidance for litigants in person was variable:

> *"If they were very lucky, they [litigants in person] might be in a region where there was an employment specialist who would help them prepare their case. If they were really, really lucky, although much less so now, they might find they are in a region where the Citizens Advice person went along to represent them, although I think the funding for that has pretty much gone now…You'd have to be lucky to get, at your local Citizens Advice, someone who knew what they were doing."* [Judge 5]

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> *"Anyone with a bit of common sense and the facilities, that can get online, can do a bit of research, and quite easily find out the way that it works. Some of the ACAS documentation is quite useful. You wouldn't believe how often…we [as panel members] get phoned up by people that have employment-related issues saying, "Oh, what do I need to do? Can you give us some advice?" And of course, you've got Citizens' Advice. The first thing we always say to people is, "Check your house insurance to see if you've got legal cover." Quite often, people have."* [Panel Member 5]

When respondents expressed a view about the 'official' i.e., Presidential Guidance, some suggested that it could be improved/more user-friendly. However, no consensus emerged on what improved guidance would look like. More detailed guidance, templates and examples of statements were some suggestions offered:

> *"It's got a lot of practice directions, and when you go to the website it all looks a little bit scary. I wonder whether a template there, even if it doesn't say much, if it just had numbered paragraphs and an indication that it should be chronological and deal with the facts, not the arguments, and be as brief as possible without missing out important facts... Some kind of good, very user-friendly guidance on the website rather than the rather more formal practice directions."* [Judge 5]

> *"[The Presidential Guidance] is helpful, but it doesn't – it tells you what you're supposed to do, but it doesn't give people a template or a structure."* [Practitioner 12]

Theme 6: Lack of Training

A final theme which emerged from our data concerned how the process of witness statement production could be improved. All judges, panel members and practitioners

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were asked if they had had any training about witness statements. Responses were varied and not consistent across or within professions:

> *"Does the Law Society not do that as part of solicitor training? I don't know. But no, I'm not. I'm not aware of any, but that's probably because I came through a route where I wouldn't be aware of any."* [Judge 5]

Only one of our interviewees referred to specific training on taking witness statements.

> *"We've had bespoke training within our firm. There are a few people who do training…We do our own training in-house as well because of the peculiarities of some of our cases, as I said, having to use interpreters and vulnerable clients we've had."* [Practitioner 7]

Some respondents said they had received training about preparing witness statements when studying for their law qualifications, but could not remember it specifically. Others said they had received no training. Several practitioners said they had learned on-the-job or picked up the skill as they have gone along.

> *"I haven't actually been on a course designed to prepare witness statements itself. My knowledge comes from my legal practice course and what I learnt there. A lot of it is through experience, reading, speaking to colleagues, even statements from the other side sometimes when they come. They're always helpful."* [Practitioner 11]

Some practitioners emphasised the advantages of learning about statement writing in the context of practice and the importance of ongoing learning:

> *"I think we have a long period of training, but I think it needs to carry on well beyond the date that you finish your training contract because*

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> *you need to be under somebody to watch and learn, and to have an attitude that you're going to submit to that continued learning. It's not just CPD, it's not just checking boxes. It's about awareness, isn't it, that you're dealing with people, you're dealing with, potentially, situations that greatly affect people's lives, that it has a very traumatic effect."* [Practitioner 8]

> *"If I have [had training on preparing witness statements], I have absolutely no recollection of it. …I have learnt this in practice. If someone had taught me formally about it right at the very beginning of my career and before I'd really done it, I'm not sure it would have stuck. If someone tried to teach me about it a few years in, that might have been more use. It might have accelerated my learning process quite a bit."* [Practitioner 5]

Discussion

We set out to explore the methods and resources used to produce witness statements in ETs. We also examined the perceived quality of witness statements. By interviewing a diverse range of professionals and litigants in person, a number of themes emerged.

The theme 'professional processes' focussed primarily on the methods adopted to produce witness statements. Based on the available literature, it was unsurprising that participants suggested solicitors play a fundamental role in the drafting process. Of course, this only applies when a witness has representation. Here, some variability in solicitors' methods were revealed. Participants indicated that telephone, email and face-to-face consultations were adopted as approaches of creating a first draft. A number of participants suggested that the method chosen may depend on the complexity of the case. While there was a general preference for face-to-face interviewing, participants did not make any specific reference to psychological theory or other guidance which formed the basis of their preference. The use of telephone and email to produce a witness statement is typically in contrast to the methods used

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to produce witness statements for the purpose of criminal cases. In the context of criminal law, witness statements are currently produced only via face-to-face meetings. This approach, arguably, minimises possible effects of co-witness or third-party effects during the drafting process and cultivates integrity and transparency in the process.

Legal representatives who assist in the preparation of witness statements, should, in line with Presidential Guidance (Courts and Tribunals Judiciary, 2018), strive to ensure that any statement drafted is comprehensive and provides a full account of the facts. This is in line with the approach in criminal law, where legal professionals seek to obtain statements which are considered to be both complete and accurate (Brackmann et al., 2017). Further, witness statements in ETs should add to the evidence provided within contemporaneous documents (Harrison, 2019; Pender & Heatley, 2018). Lacking from participants responses, however, was clarity about the questioning methods used with witnesses during an interview/consultation. The absence of detail on this particular topic may be a consequence of the lack of guidance available to practitioners with regard to questioning techniques (as previously identified). A further confounding factor possibly relates to the lack of empirical research in the field of questioning for the purpose of witness statements in contexts outside of criminal law. Thus, current guidance available to solicitors does not have any tribunal-specific empirical evidence to form the basis of questioning techniques.

Participants made it clear that the content of a witness statement needs to emanate from the witness and that witness ownership of the statement should be achieved. This consensus is in line with guidance provided by Cunningham and Reed (2014), where it is suggested that the vocabulary should be in keeping with that of the individual witness. However, there was no apparent consensus how this is accomplished in practice. Rather, many participants highlighted factors that can inadvertently affect content. Some factors highlighted included co-witness misinformation effects or indeed, the effects of solicitor drafting, with one judge making reference to possible coaching. While there was no specific reference to particular law, guidance or training in this regard, it was apparent that participants did not advocate witnesses discussing their evidence together before or during the drafting process, but it was apparent that this approach to drafting does take place. For instance, it was

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noted that in some cases, solicitors appear to produce a 'proforma' witness statement, with content duplicated across witnesses. These approaches are in stark contrast to the practice adopted in the field of criminal law and the well-established psychological theory outlining the consequences of misinformation effects (Goodwin et al., 2017; Hope et al., 2008; Loftus, 2005).

The current literature makes consistent reference to the function of documents when preparing witness statements (Cunningham & Reed, 2014; Curwen, 2018; Pendler & Heatley, 2018; Waite, Payne, Meredith, Moss & Goss, 2017). In line with this literature, participants made clear reference to the role that hearing bundles play in the drafting process. We note the Presidential Guidance (Courts and Tribunals Judiciary, 2018) on hearing bundles. It is usual for the ET to require the parties to co-operate to prepare a set of documents (known as 'the bundle') for the final hearing. Access to these documents was regarded as essential when preparing a witness statement due to the view that the statement is a means of drawing key documents to the attention of the tribunal. Indeed, one practitioner suggested that referencing the bundle (of documents) and focusing on the 'issues' is what makes a good quality witness statement.

The topic of 'issues' being addressed throughout witness statements, is one which featured heavily in the theme 'enabling through case management'. As noted, many but not all cases will have a preliminary case management hearing. During this hearing, the judge will seek to identify the issues in the case. Almost all participants in this study highlighted the importance of 'the issues' being addressed in the witness statements. This is not surprising because there are two prominent references to 'the issues' in the 'Overriding Objective' within Rule 2 (emphasis added):

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of **the issues**;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;

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(d) avoiding delay, so far as compatible with proper consideration of **the issues**; and

(e) saving expense.

The significance of the issues being addressed within witness statements is also present within wider literature (Cunningham & Reed, 2014; Curwen, 2018; Waite, Payne, Meredith, Moss & Goss, 2017). Further, it was suggested by participants in this study that the consequences of not doing so may be damaging to a case. Interestingly, while this topic was a prominent feature of participants views, there is no published guidance, nor an emerging opinion from our participants, as to how addressing the 'issues' can be optimally achieved when consulting with witnesses and drafting a statement. In particular, there was no clarity from participants about whether or not questions were specifically framed around the issues or whether the issues emerge from the witness statement and case documents. The majority of our participants expressed the view that a statement which addresses the 'issues' significantly enhances the perceived quality of the statement. In this context, it was considered that the 'issues' refer to the questions that the tribunal has answer and what the judge hearing the case has to address. However, it was suggested that professional advisors to litigants in person do not always recognise 'issues' in order to present a clear and comprehensible case.

Several participants suggested that the structure of a statement needs to be 'logical', according to the issues, and where possible, chronological. These presentation preferences are in keeping with the published guidance available to both practitioners and litigants in person (Courts and Tribunals Judiciary, 2018). Having a witness statement presented in a manner that is 'logical' and in chronological order is likely to aid coherency for the reader and, of course, for the tribunal tasked with decision making. It is possible that these presentation preferences influence the manner by which an account is gathered from a witness. For instance, practitioners may be more likely to apply a restrictive structure to their interviews/consultations and may be more likely to use closed and specific questioning methods. Evidence from empirical research does not provide support for these approaches when interviewing witnesses. Rather, psychological theory recommends that witnesses are interviewed with open questions and are enabled to provide a free and uninterrupted account (Oxburgh et

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al., 2010). The current guidance relating to ETs does not feature such recommendations.

Participants were consistently clear that the length of the statement is important. Overall, there was a preference for both brevity and necessary detail, with recognition that it takes skill and time to produce concise yet appropriately balanced statements. Some participants believed that hearing directions which stipulate a word limit on witness statements was a good thing, but others thought it was not. While the available guidance does not stipulate a word limit on witness statement, it is advised that statements should be concise without superfluous detail. However, litigants in person may not be positioned to assess whether or not a statement is too long or too short, and whether or not it contains the necessary detail which addresses the 'issues'.

As expected, participants felt that the quality of witness statements varied both amongst those prepared by legal practitioners and by litigants in person. Statements produced by practitioners, were generally considered to be of better quality. Our research did reveal, however, that advisors are not always perceived by the judiciary as aiding the production of statements that are of an appropriate length. For instance, one judge noted that statements created with the assistance of an advisor are often too long. Equally, while study revealed no strong preference for the use of technology/particular types of technology to support the presentation of witness statements participants consistently noted that statements should be word processed, presented in a font that is not too small, and with appropriate use of paragraphs and formatting.

A focus of the current study was to explore witness statements drafted by litigants in person. Discussions generated the theme 'challenges for litigants in person'. Here, participants noted that many litigants in person were unclear about the terminology used in the legal system. This finding was unsurprising; however, a consequence was that some litigants in person did not realise that they themselves were considered to be a 'witness' and were required to produce a statement of their own. A number of participants considered the level of detail provided by litigants in person was not always appropriate for consideration by an ET. Further, participants expressed the view that litigants in person lacked other comprehensive knowledge, such as the need

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to address the 'issues' and not to focus on matters that were outside of the remit of ETs. Understandably, these factors present challenges for persons without representation because the quality of the statements produced is affected. As noted in the theme 'presentation preferences', quality was assessed participants with the application of metrics including statement length, detail and linkage with the 'issues'. While these metrics are noted in published resources (e.g., Courts and Tribunals Judiciary, 2018; Cunningham & Reed, 2014; Curwen, 2018; Waite et al., 2017), this finding suggests that litigants in person may not find such resources accessible and appropriately tailored to their needs.

In line with the aims of this study, we explored participants' views and experiences in relation to the law and guidance available. Open questions with participants generated the theme 'availability and quality of resources'. There was some inconsistency across groups with regard to perceptions of what guidance is available and what guidance is utilised. Judges who participated in this study made consistent reference to their use of the Presidential Guidance (Courts and Tribunals Judiciary, 2018), and they regarded this as the only source of 'official' guidance. Practitioners, in contrast, did not make spontaneous reference to the Presidential Guidance (Courts and Tribunals Judiciary, 2018). When respondents were asked their views about the 'official' i.e., Presidential Guidance, some suggested that it could be improved and be more user-friendly. However, no consensus emerged on what improved guidance would look like. Practitioner participants more frequently made reference to sources such as Citizens Advice. However, such reference was relevant to unrepresented persons producing a statement, and here, it was noted that the level and quality of support provided (geographically) was variable. Overall, participants did not make common reference to resources they use themselves.

A final theme which emerged from our data was 'improving training'. All judges, panel members and practitioners were asked if they had had any training about witness statements. As described within the findings of this study, responses were varied and not consistent across or within professions. Our interviews revealed almost no evidence of practitioner training on how best to prepare a witness statement. Responses in this regard were vague and lacking detail. Indeed, for many, any such training was not memorable. For instance, some believed that they may have been

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trained when they were studying for legal qualifications, but were unable to recall the content, duration or stage in their education when this may have taken place. Other participants said they had received no training, including stating that the topic wasn't covered at all in bar school. Though solicitors usually prepare statements, our study revealed examples of junior barristers being tasked with taking witness statements (in cases where they were not instructed as the advocate).

Some solicitors noted that in-house trained was provided within firms. The most consistent view was that practitioners had learned how to produce statements while in practice, developing their own skills from experience. In this context, there was a view that such learning was beneficial because exposure to different cases and clients (who present with a variety of needs) presented better opportunities to develop a skill set. While training in practice can bring about benefits, research suggests that specialist training for the purposes of evidential interviewing is paramount due to the high level of skills and competencies necessary (Powell, 2002).

There was recognition from participants that ongoing learning is important and witness statement production is a high-level skill. These findings are in line with the current literature, where there is a very clear lack of published literature and research with regard to the training of lawyers in this area. However, witness evidence training in other areas of law is, in contrast, a topic that has received a significant amount of attention.

Recommendations for Future Improvements

Having identified practices which enhance, and detract, from the production of the best quality witness statements and shared examples of good practice. Based on the findings of this study, we recommend (i) improved guidance and sign-posting of resources to support practitioners and litigants in person and (ii) mandatory CPD training for legal practitioners who prepare or oversee the preparation of witness statements.

There is limited guidance available for those tasked with producing a witness statement for the purpose of an ET. The guidance which is currently available, and

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which was discussed by participants in this study, focusses upon: (i) the structure and formatting of statements, (ii) the content, including addressing of the identified issues and reference to the claim bundle, and (iii) the use of language, including the witness's own words. We suggest updating the Presidential Guidance (Courts and Tribunals Judiciary, 2018) to reflect the findings of this study and psychological research which informs current best practice on interviewing witnesses. Such revision should include:

1. Clarification about determining the case 'issues', what is meant by 'issues', how and when they should be identified and agreed (including in cases when there is no preliminary case management hearing) and how they should be addressed by a witness statement;
2. Relevant principles from psychological research (as discussed in this article) about effective production of witness statements e.g., the effects of different question types on eyewitness memory.

We note parallels between our findings and those of another recent project conducted for the Business and Property Courts. In that study, one of the proposals that 'gathered the support of a majority' was that 'specific issues should be identified at the [case management conference] and factual witness statements limited to those issues' (WEWG, 2019, 10). The WEWG also concluded that for the Business and Property Courts there is very little guidance regarding the process of drafting witness statements (WEWG, 2019, 11). The WEWG universally agreed that 'an authoritative statement of best practice in relation to the preparation of witness statements would be of assistance to practitioners' as well as trainers and teachers and guidance should be 'conscious of the risk of corrupting memory through the process [of preparing a witness statement]' (WEWG, 2019, 12).

Practice Direction 57AC, 'Trial Witness Statements in the Business Property Courts', requires a statement of compliance from the witness and the statement must be endorsed with a certificate of compliance by the relevant legal representative. Practice Direction 57A). Appendix to Practice Direction 57AC, 'Statement of Best Practice in relation to Trial Witness Statements', describes the approach of the court to human memory (para 1.3) and what the contents of witness statements should be

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limited to. The guidance for practitioners on the preparation of witness statements is brief and includes for example:

> ‘Any trial witness statement should be prepared in such a way as to avoid so far as possible any practice that might alter or influence the recollection of the witness other than by refreshment of memory...’ (para 3.2)
>
> ‘Particular caution should be exercised before or when showing a witness any document they did not create or see while the facts evidenced by or referred to in the document were fresh in their mind.” (para 3.4(3)
>
> ‘The preparation of a trial witness statement should involve as few drafts as practicable. Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection.’ (para 3.8).

Such guidance is innovative and a welcome development. However, we would recommend more detailed guidance for practitioners based on established witness interviewing practices; such guidance should underpin mandatory training for practitioners who interview witness and draft statements.

Litigants in person in our study suggested that the available guidance did not meet their needs with regard to the required content of statements, particularly in terms of speaking to the issues. Practitioners made greater use of their own and colleagues' experience of drafting statements, rather than referring to published sources of support.

While none of the identified published sources were explicitly informed by psychological research, our review recognised that many sources attempt to enable the creation of *good quality* statements. At present, some material is freely available on the internet, but some is only available behind a paywall or in books (for which there is a fee). The costs associated with accessing resources may indirectly affect access to justice for many litigants in person.

It may also be the case that the way materials are presented (currently mostly written) could be more engaging, more effective and more accessible to members of the

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public. We suggest that the value of current and proposed sources of support (organisations and publications) identified in this project are reviewed in greater depth. For example, this might be achieved by surveying practitioners and lay people about their frequency of use of current sources and the perceived effectiveness of current and proposed sources. Further, we recommend that sources (or potential sources) of support and guidance for those preparing witness statements are presented in an ‘official’ list maintained by, and available on, the gov.uk website alongside other information about ETs.

Participants in this study revealed scarce evidence of professional training which specifically focussed upon how best to prepare a witness statement, including the questioning methods used and the approaches used to establish rapport with witnesses. We therefore suggest that future research could consider an in-depth review of witness statement training is conducted. This review may take the form of qualitative research which explores programme content and materials (where available). We also recommend that a wider review of legal practitioners’ training needs is conducted. This review may take the form of a survey which captures the perceptions, experiences and training needs of legal practitioners in respect of preparing witness statements.

The Business and Property Courts report (WEWG, 2019, 17) includes a call for an ‘authoritative statement of best practice regarding the preparation of witness statements…based on the principles identified in this report’ and a call for ‘harmonisation’ of the guides of the Commercial Court, Chancery Division and TCC’ (WEWG, 2019, 18). We go further and call for harmonised guidance to be created that would represent good practice for the preparation of witness statements for *all* civil courts and tribunals in England and Wales. Such guidance should be taught to lawyers pre and post-qualification and be grounded in sound psychological principles for good interviewing to promote complete and accurate witness memory recall.

Whilst new guidance, training and open access to reliable, supporting resources (which might include statement templates and training videos) is a first step, we also encourage software developers to consider intelligent systems that support witnesses and practitioners in the preparation of witness statement evidence. Whilst outside the

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scope of this research, we acknowledge the possibility of future technology having a significant role to play in recording the process of preparing witness statements, recording witness evidence, guiding witness interview questions and producing witness evidence for courts and tribunals.

Conclusions

Based on our study about the preparation of witness statements for Employment Tribunals, we recommend improved rules and guidance, better signposting of existing resources and mandatory training for practitioners. Although our study focusses primarily on Employment Tribunals, much more could be done to improve training and guidance on witness statement preparation in the civil justice system as a whole.

This study shows that preparing a good quality witness statement for the Employment Tribunal (England and Wales) is a complex task, the quality of witness statements varies and the implications for the justice system and those who use it are immense. We believe our recommendations, if implemented, will increase access to justice and better quality decision making; witness statements are more likely to contain evidence that is complete and accurate if guidance, support and training on the preparation of witness statements improves. Whilst this study is rooted in the Employment Tribunal process, we believe our recommendations are relevant to all civil courts and tribunals in England and Wales.

Limitations of this Research

The impact of the coronavirus, Covid-19, drastically reduced our opportunities to recruit and interview litigants in person. Only three interviewees in this study had experience themselves of being litigants in person in the Employment Tribunal, however this does not detract from the evidence-base for the recommendations made in this study. Nonetheless, we strongly support and encourage further research which engages lay users of the Employment Tribunal.

Covid-19 and national requirements for social distancing have necessitated a reduction in in-person meetings with legal practitioners and a corresponding increase

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in the use of video technology for meetings. Our study focussed on practices before the impact of Covid-19. How practitioners have utilised/further utilised technology to take witness statements and what impact this might have on the process or quality of the witness statement is not covered by this study. We strongly advocate further research in this area including analysis of the interaction between practitioners and witnesses when they prepare statements. For example, recording and analysing statement preparation processes could bring fresh and valuable insights.

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