

Mapping the Changing Face of Cross-Examination in Criminal Trials

Interim Report for the Nuffield Foundation

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Aims

This is a three-year collaborative research project between the University of Nottingham (UoN) and Nottingham Trent University (NTU). Funded by the Nuffield Foundation, it commenced on 1 April 2020. Professor John Jackson in the School of Law (UoN) is the Principal Investigator and the Co-Investigators are Professor Jonathan Doak at Nottingham Law School (NTU), Dr Candida Saunders in the School of Law (UoN) and Dr David Wright, in the School of Arts and Humanities (NTU). Dr Debbie Cooper has been employed as a research fellow on the project since July 2021. The overarching aim of the project is to ascertain whether legal, policy and attitudinal approaches to cross-examination are affecting the ways that vulnerable witnesses (including vulnerable defendants) are questioned in criminal trials.

Methodology

As the first study of its kind using a mixed methodology, combining trial observation, linguistic analysis of trial transcripts, interviews with stakeholders and an international survey of best practice, the research is designed to map the precise nature and extent to which new approaches towards cross-examination are producing change on the ground in the legal jurisdictions of England and Wales, Scotland, Northern Ireland and the Republic of Ireland. We are aiming to identify specific issues and problems and develop evidence-based solutions that enhance the capacity of vulnerable people to participate within the trial. This is being achieved through six separate, though interlinked, work-packages:

- **Overall project management**
- **International best practice**
- **Courtroom observation**
- **Interviews with stakeholders**
- **Corpus linguistic analysis**
- **Dissemination and impact**

Overall project management

This work package is concerned with the overall management of the project, including access to the research sites, judicial permissions, research ethics, monitoring activities of the research team, data management, quality assurance, data analysis, synthesis and dissemination. An advisory group which consists of practitioners and academic representatives from each of the jurisdictions has been advising the research team throughout the project. Members of the group have proved very helpful to date in facilitating introductions to stakeholders across the four jurisdictions, including judges, counsel and

intermediaries, and assisting in the drafting of interview schedules with stakeholders. The project has been hampered somewhat by the Covid pandemic and as a result we were granted a six month extension by the Nuffield Foundation. We have now collected almost all of our data, and we are starting the analysis stage of the project with a view to publishing our findings and recommendations by the end of July 2023.

International best practice

A comprehensive review of the law, policy and practice of cross-examination across common law jurisdictions has been completed and was published on our website in November 2021. See: https://irep.ntu.ac.uk/id/eprint/44924/1/1497281_Doak.pdf

The survey includes jurisdictions that are the primary focus of the research project - England & Wales, Scotland, Northern Ireland and the Republic of Ireland – but also those that are further afield – for example, Australia and New Zealand and Scandinavian jurisdictions. The survey identifies discernible trends and assesses the operation of new and innovative practices.

Courtroom observation

While the courtroom observations include a range of criminal charges, they were focused on the most serious cases, and sexual cases in particular, as this is where concerns about the impact of cross-examination on vulnerable witnesses have been most focused. Criminal trials were observed in their entirety so that we could observe not only how cross-examination is actually being conducted in practice, but also to deepen understanding of the nature and scope of cross-examination in a given case by contextualising it within the dynamic forensic process of the trial as a whole. To date, 42 trials have been observed involving the cross-examination of vulnerable and non-vulnerable witnesses in jury trials in seven research sites; four in England and one each in Scotland, Northern Ireland, and the Republic of Ireland. In addition to the trial data, other pre-trial proceedings, including, for example, a small number of section 28 hearings involving pre-recording of cross-examination, have also been observed. Although the number of trials running was reduced during the Covid 19 pandemic, courtroom observations were able to proceed with the relevant researcher either present in court, in accordance with the courts' strict Covid restrictions, or observing trials remotely via the court's Cloud Video Platform or other (similar) platform.

Interviews with stakeholders

Our interviews with stakeholders have explored the extent to which practices such as 'best evidence' cross-examination, so-called 'ground rules hearings' before trial, and the use of intermediaries and pre-recorded cross-examination, where applicable, are being received and effecting change on the ground as to how vulnerable witnesses should be questioned. To

date, we have carried out 60 semi-structured interviews with judges, prosecuting and defence advocates and intermediaries who practice in each of the research sites.

Corpus Linguistic Analysis

A corpus linguistic analysis of court transcripts from a sample of cross-examinations observed across the research sites is currently being carried out. Central to this technique is the ability to not only quantitatively analyse the cross-examination of vulnerable witnesses for the first time, but to compare language and discourse patterns across the examination of vulnerable and non-vulnerable witnesses. As it stands, we have transcripts of the cross-examination of witnesses in 31 trials. The linguistic analysis has started with a qualitative examination of the transcripts, identifying salient instances or patterns across trials, with regard to the (cross-examination of witnesses. Part of the purpose of this initial analysis is to provide context for the interpretation of any quantitative patterns emerging from the corpus results. At the same time, plans have begun to anonymise the trial data in a way consistent with the notes from trial observations, to ensure individuals are not identifiable in any way.

Dissemination and impact

A crucial aspect of the research project is to engage with stakeholders to ensure that they are fully informed of our research as it has developed and communicate our findings and recommendations as they emerge through our web-site, practice-facing outlets and social media. A list of presentations and publications to date can be found in the Appendix.

As well as benefiting from the engagement of the advisory group which consists of practitioners and academics across the jurisdictions studied, we have already held two face-to-face stakeholder conferences in Nottingham where local practitioners and members of the advisory group have been able to share their thoughts on best cross examination practice and the use of intermediaries to improve communication with vulnerable witnesses and defendants in the courts.

The keynote address at the first event on 1st October 2021, *Cross-Examination on Trial: Practitioners' Perspectives and Debates* was given by HHJ Sarah Whitehouse QC, a recently appointed Circuit Judge based at Woolwich Crown Court and Honorary Professor at Nottingham Trent University. Two members of the advisory group, Tim Jebb a practising barrister in Northern Ireland and Prof Penny Cooper of Birkbeck College London gave presentations on changing cross-examination practice. Two intermediaries, Alison Cousins and Sallie Mellors gave presentations on how the role of the intermediary had evolved over the years. See further: <http://www.nlscl.org.uk/cross-examination-on-trial-practitioners-perspectives-and-debates/>

The second event on 28th November 2022 focused on *Participation, Vulnerability and the Legal Process: International Perspectives* and featured a presentation from the research team on some of our emerging findings on the use of intermediaries. Presentations were also given by Prof Penny Cooper on vulnerability in the coroner's court, Prof Takuro and Darren Weir on vulnerable witnesses in Japan, Prof Hernandez Galilea on vulnerable witnesses in Spain and Dr David Plater, Dr Cerain Griffiths and Olga Pandos on vulnerability experiences in South Australia.

We are preparing further presentations on our research findings at a further stakeholder event in Nottingham in the spring of 2023 and at a major international conference at the University of Limerick in June 2023.

Appendix

Research Team Presentations and Publications

J Doak and J Jackson, "Cross-Examination: In Search of a New Normal" (2021) *The Barrister Magazine*: <https://www.barristermagazine.com/cross-examination-in-search-of-a-new-normal/>

J Jackson, "The effects of the pandemic on the criminal justice system" via Teams. Presbyterian Mackenzie University in Sao Paulo, Brazil. 11 February 2021

J Jackson, "The Impact of Covid-19 and the rise in video-technology on criminal trial procedures" via Teams. Sao Paulo University. 20 October 2021

J Doak, J Jackson, C Saunders, D Wright, B Gómez Fariñas and S Durdiyeva, *Cross-Examination in Criminal Trials: Towards a Revolution in Best Practice? A Report for the Nuffield Foundation* (2021): <https://www.ntu.ac.uk/research/groups-and-centres/projects/mapping-the-changing-face-of-cross-examination>

J Doak and J Jackson, "Cross-Examination on Trial: Practitioners' Perspectives and Debates" 24 November 2021 Blog. See: <http://www.nlscl.org.uk/cross-examination-on-trial-practitioners-perspectives-and-debates/>

J Doak, J Jackson and D Cooper, "Pre-recorded Cross-examination in the fast lane" 165 *Solicitors Journal* No 4 p 13. April 2022

D Cooper and J Jackson, "Outsider Perspectives on the Role of the Intermediary in Cross-Examination". Paper presented at the Ministry of Justice annual conference for the Witness Intermediary Scheme on 22 March 2022

J Jackson, "Rethinking the Orality/Confrontation Paradigm in a Virtual Justice World". Conference on the *McDonaldization of Justice*. University of Warwick. 19-21 May 2022

J Doak, "Mapping the Changing Face of Cross-Examination". Paper presented at *Forensic Linguistics: scoping for synergies in language, law, crime and evidence at NTU*. Inter-disciplinary conference. Nottingham Trent University. 20 June 2022.

J Doak, D Cooper and J Jackson, "Outsider Perspectives on the Role of the Intermediary in Cross-Examination". Paper presented at stakeholder event, *Participation, Vulnerability and the Legal Process: International Perspectives*. Crowne Plaza Hotel Nottingham. 28 September 2022

J Doak, D Cooper and J Jackson, "Outsider Perspectives on the Role of the Intermediary in Cross-Examination". Paper presented at Ministry of Justice event for intermediaries. 4 November 2022

J Jackson, "Cross-Examination in Criminal Trials: Towards a Revolution in Best Practice?" Lecture presented to the 23rd Annual National Prosecutors' Conference. Dublin. 19 November 2022