

## JEI /OECS Association’s Joint Symposium 2013

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Within the criminal justice system practitioners are accustomed to the use of the word “fairness”. Much emphasis is usually placed on ensuring that persons who are suspects in the commission of criminal offences are treated in accordance with the rule of law and afforded a fair trial.

We as participants in this system whether as judges presiding over the criminal trial process or as attorneys prosecuting and defending persons suspected or charged with criminal offences pay a great deal of attention to ensuring that persons are treated fairly.

Yet the concept of what constitutes a fair trial, is an evolving concept, what was necessary to constitute a fair trial in the early 1990s would hardly be considered fair now. Developments in the law on areas such as good character, admissibility of hearsay witness statements in criminal proceedings and even admissibility of confessions are all examples of areas where there has been significant changes in the law that strike at the heart of what constitutes a fair trial.

This paper requires me to address the question of special safeguards for minors and vulnerable persons who may be either suspected or accused of an offence.

The term minor is usually used to refer to a person under the age of majority, in the context of this paper the term refers to a person who is not an adult. It is sufficiently broad to include children and young adults under 18 years.

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The term vulnerable person is more difficult to define...there appears to be a level of commonality among several jurisdictions.

In the United Kingdom the Police and Criminal Evidence Act in its Codes of Practice makes special mention of a number of groups as requiring special attention when being arrested and or interrogated. The groups include

Mentally disordered or mentally vulnerable persons (Rule 1.4 Code C)

Persons under 17 years - treated as juvenile (Rule 1.5 Code C)

Person who is blind, seriously visually impaired, deaf unable to read or has difficulty orally because of speech impediment (Rule 1.6 Code C)

Throughout Europe, the list of persons classified as vulnerable appears much wider. In a Communiqué issued by Fair Trials International Legal Experts Advisory Panel at a Meeting held in London, in November 2012) vulnerable groups included:-

- a. Foreign nationals, who are vulnerable by virtue of their nationality, linguistic disadvantage and other factors;
- b. Children defined as all persons under the age of 18;
- c. Mentally or physically handicapped persons;
- d. Persons who have children or dependants (such as pregnant women and single parents of young children);
- e. Persons who cannot read or write;
- f. Persons with a refugee status under the 1951 Refugee Convention, other beneficiaries of international protection and asylum seekers; and
- g. Persons addicted to alcohol or drugs.

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In Australia Dr Lorena Bartels in her paper titled “Police Interviews with vulnerable adult suspects” observed that there is no internationally agreed definition of vulnerable persons, she loosely defined vulnerable persons as including those adults who have a physical disability, mental or intellectual disability, indigenous status or non-English speaking background.

### **Why is it necessary to protect the interests of vulnerable persons in the Criminal Justice System**

According to Lord Carloway who was selected in 2010 to lead a review of among other things the law and practice of questioning suspects in a criminal investigation in Scotland:-

.....a special approach is justified where the quality of the evidence to be given by the vulnerable person will be diminished by reason of his vulnerability.

It is the ability of the vulnerable person to give complete and undiminished evidence which must be safeguarded. The same safeguards apply where the accused is a vulnerable person and he/she elects to give evidence at his/her own trial. But what are the interests of the vulnerable suspect which require to be safeguarded during the police investigation? The aim must be to safeguard the vulnerable person's Convention rights.

It may be said that that is done, in part, by safeguarding the ability of the vulnerable suspect to understand the proceedings and to engage in them in a meaningful way.

It is necessary that he/she understands his/her rights and is able to exercise them. It is essential that he/she understands not only the questions asked and the answers given but also the implications of what he/she is asked and what he/she says.

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According to Fair Trials International Legal Experts Advisory Panel in their Communiqué on “Vulnerable suspects in the European Union”

Criminal proceedings are a daunting prospect for all suspects. However, children and vulnerable adults are especially likely to be overwhelmed by the experience. They may be unable to understand or follow the content or the meaning of proceedings, which can seriously undermine their ability to receive a fair trial.

Dr Lorena Bartels in her paper on “Police Interviews with vulnerable adult suspects noted in relation to persons with mental and intellectual disability.....”

Ochoa and Rome in their study (2009: 132) have observed, that understanding the characteristics and rights of individuals with disabilities is critical for police officers, adding that by having a basic understanding of the common disabilities that they will encounter, police officers will be better prepared to respond to these individuals during the custodial interview process.

They noted in the context of intellectual disability that people with mental impairment are ‘typically passive, placid, and, important for police to note, highly suggestible’ (Ochoa & Rome 2009: 133). Other key challenges involve difficulties remembering information, focusing attention and regulating behaviour.

Ochoa and Rome (2009: 134) also noted that people with learning disabilities may be ‘misperceived by law enforcement as purposefully uncooperative or confrontational’, while some of the relevant challenges which may arise with a person who has autism include lack of eye-to-face gaze or eye-to-eye contact; difficulty with or complete lack of spoken language; an inability to understand consequences (including that they have broken the law); and an inability to understand basic social cues (which may include recognising the significance of a police officer’s authority).

In relation to persons with physical disability, Dr Bartels noted as follows:-

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There are a range of physical disabilities which may impact on a suspect’s ability to be questioned by police. One particular issue is hearing loss, with Ochoa and Rome (2009) arguing that the hearing limitations of deaf people put them in a uniquely disadvantaged position when taken into custody because they cannot hear spoken language and are therefore unlikely to understand the police officers; if they therefore become fearful, this increases the possibility that their fear might be interpreted by police officers as guilt. They argued that for people with such impairments, it is vital to have a translator who can communicate with the person; they also presented a number of other measures police officers should take in such circumstances.

In relation to persons with Non-English speaking backgrounds Bartels points out that:-

Suspects whose first language is not English may encounter difficulties when being interviewed by police. In one interview Dixon and Travis (2007) examined, for example, a suspect without an interpreter present did not understand the term ‘free will’, while another suspect did not understand the term ‘promise’. Dixon and Travis (2007) observed that although people may be competent in everyday English conversation, they may not be able to deal with more complex or unusual words which may be crucial in police interviews.

In presenting this paper I propose to first spend a short time addressing the present structures in place to provide safeguards for minors and vulnerable persons within the criminal justice system. Thereafter I will address how other “more developed and better resourced” jurisdictions are dealing with the treatment of vulnerable persons. Finally I propose to make some recommendations on how we can take steps to improve upon the safeguards that exist within the region.

It is convenient to begin our examination of existing safeguards for minors and vulnerable persons within the region by addressing the following issues

1. Special safeguards for Minors eg. Diversion and juvenile courts

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2. Interrogation of Suspects
3. The Criminal Trial process

### **Special safeguards for Minors eg. Diversion & Juvenile Courts**

UNICEF in their 1997 paper on “Juvenile Justice in the Caribbean” A rights Approach to Children in the Juvenile Justice System made the following observations:

There are two aspects to the principle of diversion from courts; one involves early intervention in the lives of children deemed to be ‘at risk’ to assist them in developing non-criminogenic attitudes; and the other refers to measures aimed at preventing juveniles, actually accused of an offence, from being subjected to criminal charges and court appearances.

The report then reviewed the programs in place throughout the OECS and wider region. It identified the following programs:-

In **Anguilla**, first time offenders are not taken before the court for minor offences. The practice is for the offenders to be warned by the police and subsequently referred to the Social Welfare Department for counselling.

In **Antigua and Barbuda**, the Citizens Welfare Division of the Ministry of Home Affairs and Social Services offers counselling, probation and rehabilitation, foster care placement and monitoring of youths at risk. Parenting programmes are also conducted by that Division.

**Dominica**<sup>1</sup> has in place a vibrant Social Welfare Division that provides care, counselling and financial assistance to families in need and investigates charges of child abuse. There is an organized foster care scheme as part of the Welfare Division’s Programmes. The Probation

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<sup>1</sup> Thompson – Ahye, Hazel, Children and Crime in the Caribbean, 1998.

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Department provides supervision, guidance and counselling for juvenile offenders. The Committee for the Concerns of Children co-ordinates programmes for the prevention of child abuse and provides training in care for abused children its members. Operation Youthquake is a community based rehabilitation programme run by an NGO and assists young people to continue their formal education and develop a variety of skills.

**St. Kitts and Nevis**<sup>2</sup> has a Probation and Child Welfare Board which seeks to protect children who are abused or vulnerable to abuse, by providing and maintaining centres, counselling parents and children and placing children in foster homes and supervising them. A Juvenile Delinquency department was set up as part of the Police Force to offer counselling and sensitize the public about child abuse.

In **St Lucia**,<sup>3</sup> in addition to the options of fit persons orders, supervision and foster care, the police have initiated various programmes. The Community Relations Branch of the Royal St. Lucia Police Force provides counselling sessions and lectures at schools and clubs in the community and holds seminars and workshops for parents, young persons and police officers. They have also initiated the School Suspension Programme for the rehabilitation of students suspended from school.

The Drug Abuse Resistance Education Programme involves provided by probation service, The certified law enforcement officers, educators, students, parents and community in a drug prevention and violence reduction programme. The Intake Counsellor at the Family Court refers parties for counselling sessions with counsellors attached to the court, and can thus deflect parties from the court system.

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<sup>2</sup> Thompson – Ahye, Hazel , “ Children and Crime in the Caribbean”

<sup>3</sup> Williams, Lorraine, Juvenile Justice in St. Lucia. Also See Thompson – Ahye” Children and Crime in the Caribbean” in Caribbean Journal of Criminal and Social Psychology, Centre for Criminology and Criminal Justice, University of the West Indies, St. Augustine, and Situational Analysis of Children in Especially Difficult Circumstances in St. Lucia, Unicef, Barbados..

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The Upton Garden Girls Centre operates a non- detention day programme for girls between ages twelve to eighteen. Courses are offered to teach social skills, life skills, career guidance, remedial education secretarial studies, home economics, craft and agriculture. Counselling is also given.

In **St. Vincent and the Grenadines**<sup>4</sup>, diversion is mainly through the avenue of counselling. Counselling is conducted by Government’s Social Welfare Department and by Marion house, a government assisted NGO. Marion house also conducts parenting programmes for young persons. The Social Welfare Department also runs a foster care programme for abandoned or neglected children. Educational and vocational programmes are carried out at the Liberty Lodge Boys’ Training Centre.

## **Juvenile Courts**

On the issue of juvenile courts, the UNICEF Report makes to following observations:-

The Convention on the Rights of the Child mandates States Parties to “promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law”<sup>5</sup>.

Regional governments in the Belize Commitment vowed to: “Establish or strengthen family courts or similar judicial institutions, that will be supported with the funds necessary to ensure their effective management and be staffed with qualified and appropriate personnel”.

It is well established that a family court is the best institution to serve the needs of children and their families and fulfil the goals of the CRC as it will take a holistic view of family situations including that of juvenile delinquency.

Family courts have been established in Belize, St. Lucia and St. Vincent and the Grenadines. Jamaica, which is outside the scope of this study, is the only other Caribbean State with a Family

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<sup>4</sup> Cuffy, Victor, Juvenile Justice in St. Vincent and the Grenadines.

<sup>5</sup> Article 40. 3 of the CRC



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court. Grenada passed the Family Court Act in 1994 to establish a family court but subsequently repealed that legislation by the Family Court (Repeal) Act, 1996. There are plans to establish family courts elsewhere in the region.

Juvenile Courts are provided for in the other jurisdictions, which do not have a family court. The relevant respective legislation contains in many respects, identical provisions. They all provide that the juvenile courts should be courts of summary jurisdiction and for such courts to be held in “a different building, or room from that in which the ordinary sittings of the court are held, or on different days or at different times.”<sup>6</sup>

All of the legislation also charges the Commissioner of Police with the responsibility of preventing so far as is practicable a child or young person, while being detained in a police station from associating with an adult, who is not a relative charged with an offence.<sup>7</sup> Another provision that States have in common is one which prohibits the association of juveniles with adults charged with offences, while the juveniles are being conveyed to or from court or they are waiting before or after their attendance in court.<sup>8</sup>

As in the Family courts legislation referred to earlier, juvenile court legislation generally provides for ‘in camera’ proceedings and prohibits publication of material which will facilitate the identification of the juvenile. The regional studies indicate all of these safeguards against the preservation of the right of privacy of the juvenile and the necessity to avoid their contamination by adult prisoners are “honoured more in the breach than in the observance

### **Judges Rules**

Throughout the majority of territories the interrogation of persons suspected of criminal offences is governed by the Judges Rules. This remains the gold standard within the region in guiding police officers who interrogate suspects. In so far as minors are concerned the

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<sup>6</sup> Section 87(1) of the Children Act, Chapter 46:01 of the Laws of the Republic of Trinidad and Tobago.

<sup>7</sup> Section 73 of the Children Act of Trinidad and Tobago

<sup>8</sup> Section 87 (3) Ibid.

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“administrative directions on interrogation and the taking of statements” produced in 1965  
requires

....as far as practicable children(whether suspected of an offence or not) should only be interviewed in the presence of a parent or guardian or in their absence some person who is not a police officer and who is of the same sex as a child- a child or young person should not be arrested nor even interviewed at school if such action can be avoided. Where it is essential to conduct an interview at school , this should only be done only with the consent and in the presence of the head teacher or his nominee...

There are no provisions within the Judges Rules that specifically address the question of mental issues and learning disabilities. There is however a single provision under Appendix B of the Judges Rules which relates to the interrogation of foreigners which pre supposes there being an interpreter who will take down a statement in the language it is made and an official English translation is made in due course .

### **The Trial Process:**

The greatest safeguard for minors and vulnerable persons is unquestionably the trial process. Judges and Magistrates are able through the management of the plea and arraignment process, ruling on admissibility of evidence and sentencing options to protect the interest of minors and other vulnerable persons before the court system.

This is facilitated by the courts under its inherent jurisdiction making enquiries in appropriate cases of accused persons to determine whether they are able to follow proceedings.

In cases of non nationals whether they need interpreters, in cases where a court has before it a vulnerable person the court has at its disposal where a person cannot read or write and is

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unrepresented the court can take steps to have representation put in place to assist the person either by a dock brief or by asking a practitioner to assist.

Within the criminal justice system it is not unusual to find persons charged with serious offences before the courts where diversion is not an option. Recently in Grenada we had two young ladies between 13-16 years charged with murder arising out of separate incidents. The court was able through the use of bail provisions to create opportunities for the accused persons to continue to access education facilities, access the necessary counseling and ensure that the trial process was expedited to take into account their respective needs in preparing their case for trial.

Equally another safeguard open to the courts in dealing with minors and vulnerable persons is to rely upon the vulnerability in so far as it presents itself as a mitigating factor.

In relation to mentally ill and other vulnerable persons with learning disabilities the traditional court system of Magistrates and High courts are required to deal with these cases in accordance with the prevailing laws.

There are many provisions that guide judicial officers in dealing with vulnerable persons who are found insane or who may be unfit to plead. Yet the landscape today is far more complicated and persons do not fit neatly into the category of sane and insane. Today persons may suffer from diminished responsibility, mental sub normality and other learning disabilities such as autism, that may impact upon the individuals liability in criminal proceedings.

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The trial process works well when there are overt signs of vulnerability. Where these signs are not overt the potential for miscarriages of justice become real. No where is this point better illustrated than in relation to persons with mental disorders and learning disabilities.

A number of cases from the Judicial Committee of the Privy Council within the last 5 years highlight the emerging difficulties with trials in which accused persons with forms of mental illness and or other forms of learning disability.

In the case of **Winston Solomon v The State, TT Cr App 36/98**, the issue of non disclosure arose where a person convicted of murder, had his conviction quashed when it turned out that at the time of the offence he may have been mentally unwell but because of a number of factors this issue of his mental state at the time of the offence never became an issue at trial. It was only when the case went to the Privy Council that London solicitors discovered that at the time of the commission of the offence the accused had recently left the local mental hospital.

More recently the case of **Lester Pitman v The State** 2008 UKPC 18 is of assistance, a brutal killing of a family, two persons were arrested and convicted for these murders. One of the convicted men on appeal to the Judicial Committee was able to secure assistance of several prominent psychologist and psychiatrists who having examined Pitman found that he was for lack of a better description mentally subnormal in that he had significant learning disability and mental impairment.

The Judicial Committee remitted the matter to the Court of Appeal for the court to hear the fresh evidence and determine the following issues:-

1. Whether the Applicant was fit to plead and stand trial

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2. whether there is a sufficient doubt about the Applicant’s ability to understand and participate in the joint venture
3. whether the Applicant’s statement should have been admitted and, if necessary,
4. whether there is sufficient evidence to raise the defences of unsoundness of mind or diminished responsibility.

More recently in **Marcus Daniel v The State** 2012 UKPC 15, the Privy Council remitted this matter back to the Court of Appeal based on fresh evidence of doctors based on examinations of the prisoner while in custody which seemed to raise the question of diminished responsibility. Once again the Court of Appeal is to consider the fresh evidence and rule whether to order a retrial.

Similarly the case of **Marlon Taitt v The State** 2012 UKPC 38 similar applications to adduce fresh evidence before the Privy Council seeking to raise issues on fitness to plead.

It seems that in these and many other similar cases, these issues which should have been raised at the trial level were not and because the London solicitors dealing with death penalty cases are able to access some of the best experts in the field of mental health these very important and necessary issues are only being raised post conviction and this needs to change.

Accordingly in **Nigel Brown v The State** 2012 UKPC 2 at paragraph 68 the Board expressed its concern at the fact that reports as to the appellant’s ability to instruct counsel were produced ex post facto and without any explanation as to why medical evidence on the issue of fitness had not been produced in the courts below. Accordingly the court made clear:-

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It wished to make clear that it should not be assumed that even highly persuasive evidence produced for the first time at the final appeal stage would be admitted: para 70. The fresh evidence has been admitted in this case so that it may be scrutinised. But the Board is just as anxious to make it clear that it will only be in an exceptional case that it will entertain the argument that the appellant was not fit to stand trial because he is of low intelligence due to a learning disability when the point was not taken on his behalf by counsel at his trial.

It is the responsibility of counsel to assess whether his client is fit to stand trial. He is in the best position to judge at first hand whether his client is able to understand the charge that has been brought against him and to give instructions for his defence.

His conclusion that his client is fit to plead will normally be given great weight. The Board will not permit the introduction of the issue for the first time at the final stage unless the evidence points very clearly to the fact that there has been a miscarriage of justice

Having examined our local structures in place it would be useful to examine how some other jurisdictions have been approaching the question of provisions of safeguards for minors and vulnerable persons within the criminal justice system.

In the interests of saving time I can summarise some of the safeguards introduced in other jurisdictions. These safeguards include:-

### **1. The use of Diversion**

Diversion into treatment away from criminal justice system, it should be noted that the use of this mechanism is not confined to minors or juveniles alone but extends to all potential categories of vulnerable persons particularly persons with mental disorders and learning disabilities. The limitation on this mechanism is that it works well on relatively minor

“Special Safeguards for Minors and Vulnerable Suspects or Accused Persons/ Defendants before the Court” offences and tend to be less suitable for persons involved in more serious criminal cases. For this to be a viable safeguard, police officers are required to have a considerable degree of discretion to determine whether to divert a case and when such diversion should take place. Additionally there is a critical need for supporting institutions that can provide avenues for vulnerable persons to be diverted.

## **2. Using “appropriate adults”**

It is fair to say that in all the jurisdictions outside that were considered, there is a level of commonality in their use of “appropriate adults” as safeguarding the interests of vulnerable persons.

In relation to mentally ill and persons with learning disorders, the role of the appropriate adult is to facilitate communication between a mentally disordered person and the police and, as far as is possible, ensure understanding by both parties. The use of an appropriate adult is extended to all categories of interview - witness, victim, suspect and accused.

Appropriate adults are selected for their experience in the field of mental health, learning disabilities, dementia and/or acquired brain injuries. It is their role to pick up on 'clues' and indicators that a person has not fully understood what they are being told or what they are being asked. One of the most important aspects of this is the caution given to people by officers, which may be followed by an interview and/or charge.

An appropriate adult is allowed to intercede for the purposes of checking understanding and conferring with the interviewee or police officers about their understanding. It is anticipated that given the background experience of an appropriate adult they would have the communication skills and tools necessary to assist a person with a mental disorder to understand more fully what is being said/asked of them. Further to this it is anticipated that

“Special Safeguards for Minors and Vulnerable Suspects or Accused Persons/ Defendants before the Court” they would lend their experience to the police officers conducting the interview; this may be regarding understanding but could also include opinion about the anxiety levels an interviewee is experiencing and how these may be impacting on the quality of their answers and level of understanding.

The presence of the appropriate adult is about trying to ensure equality for the person being interviewed. It is not about advocacy or speaking on behalf of a person with a mental disorder, rather it is about an independent third party checking that effective communication is taking place and that the person being interviewed is not disadvantaged in any way due to their mental disorder.

### **3. Written Guidelines for police officers on arrest, detention and interrogation of vulnerable persons**

Again there was a great deal of commonality among the jurisdictions on written codes that were very detailed in the procedural steps necessary when dealing with the arrest detention and interrogation of vulnerable persons. One that is a useful model is Annexure E of Code C of the Police and Criminal Evidence Act (UK)

Some of the emerging trend include

- making it mandatory for custody officers to seek clinical attention for detainees who appear to be suffering mental disorders or learning disabilities whether the detainee requests it or not
- having tests done in appropriate cases to determine (i) fitness to be detained (ii) fitness to be interviewed (iii) competence to answer questions.
- Videotaping of interviews of vulnerable witnesses
- Mandating legal representative to be present whether requested or not.



#### **4. Statutory objections to Confession Evidence**

The introduction of statutory grounds for excluding confession evidence from trial where such confessions are obtained by undue pressure or where there has been a failure to comply with safeguards. This approach was suggested in a paper by Prison Reform International and is an important safeguard to ensure that protective measures are enforced.

Arguable whether we need to do that since it may be suggested that there are enough in built mechanisms to exclude involuntary and unfair confessions. It is therefore necessary to look at how the law on admissibility of confessions is evolving.

#### **Recommendations and Conclusions:-**

We have spent a great deal of time examining and exploring some of the issues relating to minors and other vulnerable suspects and accused persons and the mechanisms to safeguard them.

It would be remiss of me if I was not to make some closing observations in relation to the steps that we as a region need to take to ensure that those who are considered vulnerable are adequately protected.

1. As a matter of policy we need to determine the categories of persons who we consider vulnerable. There is as we have seen a disparity between the European approach of fixing vulnerability on to the persons ability to effectively participate and other countries where it has been limited to minors, mentally ill, persons with learning disabilities and language barriers.
2. Secondly there must be clear and detailed guidelines by prosecuting and police authorities that lay down practical procedures to identify and treat with vulnerable persons.

3. There is a critical need to boost the infrastructure necessary to support these safeguards, these include:-
  - a. Provision of trained persons to act as “appropriate adults”
  - b. Interpreters, persons skilled in learning disabilities, mental issues who can carry out meaningful assessments to determine and advise on how to treat with such vulnerability.
  - c. Legal aid to support legal representation for vulnerable persons both at the police station and at court where accused persons would need assistance.
  - d. Diversionary options for appropriate vulnerable persons that may take them out of the criminal justice system.
  
4. Training in a number of areas will also go a long way to safeguarding vulnerable persons, there should be training for:-
  - a. Police authorities to recognise the vulnerabilities of those suspected or accused of a criminal offence. Whilst some vulnerabilities are hard to identify, it is important that procedures are in place to identify any issues that may affect the suspect’s ability to participate effectively in the key elements of the trial process, including during police interviews.
  - b. Police officers and prosecutors on “diversionary options both for minors and mentally ill.
  - c. for judicial officers, prosecutors, police or defence lawyers to undergo training on how to handle cases against children and vulnerable adults. There is need for a system of accredited professionals. Accreditation for court staff could also be introduced, although any such scheme must ensure that the

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people involved understand their role and do not try to replace that of a lawyer

- d. Health professionals, there is an urgent need to ensure that persons who do psychiatric assessments are trained in the latest techniques and are kept current on the way the law is developing.
5. Audio and video taping of police interviews with vulnerable suspects

Finally it is suggested that audio and video taping should be introduced in cases involving both children and vulnerable adults as it is a good way of assessing how well suspects have understood the proceedings and provides a record of what is said during interviews. This practice also ensures that there is a record of the questions that vulnerable suspects are asked.

Ladies and gentlemen allow me to conclude by reminding us all of the words of Pope John Paul II when he said

"Any society, any nation, is judged on the basis of how it treats its weakest members ; the last, the least, the littlest."

Thank You