

The Advocate's Gateway

Ground rules hearing checklist

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The Advocate's Gateway toolkits aim to support the identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process.

'Advocates must adapt to the witness, not the other way round.' Lady Justice Hallett in [R v Lubemba; R v JP](#) [2014] EWCA Crim 2064, para 45.

The handling and questioning of vulnerable witnesses and defendants is a specialist skill. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

'We confirm, if confirmation is needed, that the principles in Lubemba apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness. We also confirm the importance of training for the profession which was made clear at paragraph 80 of the judgment in R v Rashid (Yahya) (to which we have referred at paragraph 111 above). We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.' Lord Thomas of Cwmgiedd, CJ in [R v Grant-Murray & Anor](#) [2017] EWCA Crim 1228, para 226.

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This checklist is based on the article ‘Getting to grips with ground rules hearings’ by P Cooper, P Backen and R Marchant published in [2015] 6 *Criminal Law Review*.

The checklist should be read in conjunction with [Toolkit 1- Ground rules hearings and the fair treatment of vulnerable people in court](#). It is written with criminal proceedings in mind, however, it may be a useful step to consider in other courts where the ground rules approach is applied for vulnerable witnesses and parties, e.g. the family court, the Court of Protection and employment tribunals.

This is not an exhaustive checklist; it suggests key matters which the judge and advocates should consider at a ground rules hearing (GRH) in relation to a vulnerable defendant or witness.

NB: **Section 28 ground rules hearings** have their own form which should be used in every case ([Equal Treatment Bench Book 2018](#), page 2-27, para 118). The intermediary may provide advance indications of the topics for discussion, which in any event must include the overall length of cross-examination and any restrictions on the usual duty to “put the defence case” ([CPD 18E.35](#)). The Directions specifically cite the possible instance of the judge and advocates being in the witness suite with the witness if they have particular communication needs ([CPD 18E.39](#)).

The checklist is written in three sections. One or more of the three parts will be relevant dependant on whether or not there is an intermediary and whether or not there is a vulnerable defendant or witness.

1. SECTION 1: FACILITATING THE ROLE OF THE INTERMEDIARY

If there is an intermediary they must be included in the GRH discussion. Some cases will require an addendum to the original intermediary report, particularly if the witness's/defendant's needs have changed since the initial assessment and the report is many months old by the time of the trial. For more information on intermediaries, see Toolkit 16 Intermediaries: step by step. The intermediary is not a witness and is not required to be in the witness box for the GRH. The hearing is a discussion and the hearing is not for cross-examination of the intermediary. The intermediary is not required to make the intermediary declaration at this stage.

At the GRH, where relevant, discuss:

	GRH points for discussion	Notes
1.	Whether advocates have shown the intermediary the wording of their proposed questions and taken advice on the suitability of the wording and communication style.	
2.	Where the intermediary will stand/sit during the trial during the vulnerable person's testimony so that the intermediary is able to observe and intervene to assist with communication whilst all the time being visible to the judge, advocates and jury.	
3.	If for a defendant during a trial, where the intermediary will sit in relation to other defendants (if any) and officers in the dock.	
4.	Where and when the intermediary will make the intermediary declaration (Youth Justice and Criminal Evidence Act 1999 (YJCEA), section 29(5) , requires the	

	GRH points for discussion	Notes
	intermediary to make the declaration as specified). See Toolkit 16 - Intermediaries: step by step .	
5.	If the intermediary and witness will be in a remote location, practical issues such as who will administer the oath(s) and how exhibits would be made available to the witness. See also Toolkit 9 - Planning to question someone using a remote link .	
6.	How the intermediary will be addressed in court in front of the vulnerable person – for example, it might be by the intermediary’s first name if that is how the witness knows them.	
7.	How the intermediary will intervene/get the judge’s attention if there is a communication issue or the intermediary needs to discuss a communication issue with the judge and counsel in the absence of the jury.	
8.	How the role of the intermediary will be explained to the jury in a way that makes clear that the intermediary is not a witness but that their role is to assist everyone in achieving complete, accurate and coherent communication with the vulnerable person. See the Crown Court Compendium Part 1 (Judicial College, 2018) 3-31 – 3-33 for suggested wording.	
9.	If communication aids are to be used, how the intermediary will assist with these.	
10.	Which toolkits the advocates should consult (if they have not done so already) to assist with questioning.	

	GRH points for discussion	Notes
11.	Any other recommendations in the intermediary's report.	

2. SECTION 2: PARTICIPATION OF THE VULNERABLE

DEFENDANT

If the defendant is vulnerable and, in so far as this has not been covered above, discuss (including with the intermediary if there is one):

	GRH points for discussion	Notes
12.	Whether an interpreter is required for the trial.	
13.	Where the defendant will sit during the trial, for example, in the dock or next to the defence lawyers/if anyone will accompany the defendant in the dock – if they need the support of a nurse, for example.	
14.	Whether the vulnerable defendant will need assistance in the dock to access/follow written evidence and, if so, how this will be achieved.	
15.	Start and end times of the trial days.	
16.	Scheduled breaks during the trial day, including, for example, time to take medication, extra time to go through papers with a defendant who cannot read and extra time to allow counsel to take instructions. (Criminal Practice Directions (CPD) 2015 Amendment No 1 , 3F.22) How a request for an unscheduled break will be notified, if required.	
17.	Whether all testimony should be adduced using modified questions and answers: ‘... to help the defendant follow proceedings the court may require evidence to be adduced by simple questions, with	

	GRH points for discussion	Notes
	witnesses being asked to answer in short sentences.'. (CPD 2015 Amendment No 1, 3F.22).	
18.	Use of communication aids, for example, iPad/tablet, hearing loop, stress/concentration aids, break cards, visual timetable and writing/drawing materials.	
19.	Whether it will be necessary to provide the jury with an explanation about the defendant's condition and its effect on his or her behaviour so as to avoid that behaviour being misinterpreted (for example, see <i>R v Thompson</i> [2014] EWCA Crim 836 and the defendant with Asperger syndrome). This might be achieved by calling expert witnesses or prosecution and defence agreeing a set of simple and clear agreed facts which can be read to the jury.	

GOOD PRACTICE EXAMPLE

Ground rules may need to be revisited if during the trial the defendant's effective participation is still not being achieved. Then, if the defendant later elects to give evidence, there would normally be a further GRH specifically to discuss how questioning should be conducted (see section 3).

3. SECTION 3: FAIR QUESTIONING OF A VULNERABLE PERSON (WITNESS OR DEFENDANT)

Discuss (including with the intermediary if there is one):

	GRH points for discussion	Notes
20.	Whether an interpreter is required for the person's testimony.	
21.	Whether it is necessary to appoint a lawyer for an unrepresented defendant to conduct any cross-examination on behalf of the defendant. (YJCEA, sections 34–40.)	
22.	Whether the person will give evidence on oath or not and any assistance they might need to take the oath.	
23.	Whether the person will give evidence in court or over a live link. (YJCEA, section 33A, for an eligible defendant, and YJCEA, section 24 , for an eligible witness.)	
24.	How other special measures which may have previously been directed for a witness, will be implemented – for example, a screen, evidence given in private, evidence pre-recorded, wigs and gowns removed by judge and advocates, a witness supporter, use of communications aids (see Toolkit 14 - Using Communication aids in the criminal justice system), such as models of maps, timelines, charts, pictures etc. Use of communication aids, such as body maps, for trial of a sexual offence (CPD 3E.6) should also be considered.	

	GRH points for discussion	Notes
25.	How special measures and other adjustments may be combined: <i>'[a] combination of special measures may be appropriate. For example, if a witness who is to give evidence by live link wishes, screens can be used to shield the live link screen from the defendant and the public, as would occur if screens were being used for a witness giving evidence in the court room.'</i> (CPD 18A.2)	
26.	Where the advocates will be when they conduct their questioning, for example, in court over live link or in the live link room.	
27.	How long cross-examination is likely to take and how long it will be permitted to last, taking into account relevant matters such as the witness's concentration abilities, effects of prescribed medication etc.	
28.	When there will be scheduled breaks during the trial day, including duration and nature of breaks.	
29.	How a request for an unscheduled break will be notified, for example, arising from an urgent medical need.	
30.	Whether all breaks should involve adjourning the court or whether brief breaks may speed proceedings for all. Many courts have agreed breaks of up to three minutes for young children; during a short, non-adjourned break (the court stays sitting), the microphones and cameras to the live link room are temporarily made visible only to the judge, enabling the witness to take a few minutes in the live link	

	GRH points for discussion	Notes
	room to re-orientate or calm themselves. This avoids the need for the jury to be sent out and brought back which would be unnecessarily time-consuming.	
31.	Whether the judge has seen the advocates' proposed questions and determined if they are appropriate (if there is an intermediary they should also have been reduced to writing and shown to the intermediary).	
32.	How repetitious questioning will be avoided when there are separately represented defendants (CPD 3E.5).	
33.	<p>If limitations are going to be placed on cross-examination, how these will be explained to the jury (CPD 3E.4).</p> <p><i>'...the identification of any limitations on cross examination should take place at an early stage. We assume that this will occur at the ground rules hearing where the judge will discuss with the advocates the nature and extent of the limitations imposed and whether they are simply as to style or also relate to content.'</i> Lady Justice Hallett VP, in R v YGM [2018] EWCA Crim 2458, para 21.</p>	
34.	<p>In light of any limitations, have the parties ensured that all relevant material is put before the jury to consider?</p> <p><i>'Advocates must adapt to the needs of the witness and ask questions in the manner and form approved by the judge, but as this court has stated on several occasions, it does not follow from that fact that a defendant cannot have a fair trial. There are many</i></p>	

	GRH points for discussion	Notes
	<p><i>ways in which the parties can ensure that all relevant material is put before the jury for them to consider by way of admissions and the calling of any other witnesses.</i>’ Lady Justice Hallett VP, <i>R v PMH</i> [2018] EWCA Crim 2452, para 19.</p> <p>See also <i>R v YGM</i> [2018] EWCA Crim 2458 on the importance of ground rules hearings, clarifying limitations on cross-examination and agreeing directions to the jury.</p>	
35.	<p>How and when the vulnerable person will be familiarised with the court and the witness box/live link room/remote live link site, if this has not happened already. This should include practising communicating over live link – see CPD 18B.4 (witnesses) and 3G.4 (defendants).</p>	
36.	<p>How and where and when the person will have their memory refreshed by watching the DVD recording of their achieving best evidence (ABE) interview, if any (CPD 18C). Note that there is no requirement for the witness to watch their ABE at the same time as the jury.</p>	
37.	<p>Whether and how the judge and advocates (preferably together) will meet the vulnerable person beforehand. Discussion may include matters such as whether the judge/advocates will be robed. <i>‘In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties. This seems to us to be an entirely reasonable step to take to put the witness at</i></p>	

	GRH points for discussion	Notes
	<i>their ease where possible.</i> (<i>R v Lubemba</i> [2014] EWCA Crim 2064 para 43)	
38.	The best time of day for the person's testimony to start.	
39.	Whether the person will need assistance during testimony, for example, referring to/accessing written material, maps, photos, diagrams, transcripts etc.	
40.	How the court will be enabled to access the person's non-verbal communication, for example, indicating, pointing, drawing, writing.	
41.	In the case of a 'section 28' pre-recording, who will gain access to the disc containing the recorded cross-examination in time for them to see it and check it before the trial continues. (In <i>R v PMH</i> [2018] EWCA Crim 2452 this did not occur and problems were only identified much later.)	

In due course, consideration should be given to whether or not this [ground rules hearings] approach may sensibly be extended to other areas of cross-examination in which it may take place (for example, with expert witnesses).

Review of Efficiency in Criminal Proceedings by The Rt Hon Sir Brian Leveson, President of the Queen's Bench Division (2015), para 8.3.1 'Ground rules approach'.

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