TOOLKIT 1A

CASE MANAGEMENT IN CRIMINAL CASES WHEN A WITNESS OR A DEFENDANT IS VULNERABLE

REVISED—APRIL 2024

The Advocate's Gateway

CONTENTS

The Advocate's Gateway toolkits aim to support the early 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. The handling and questioning of vulnerable witnesses and defendants are specialist skills.

These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.

1. INTRODUCTION

This toolkit has been designed to assist with case management when a witness or defendant is vulnerable. The layout of the toolkit is designed to reflect the normal stages of the pre-trial and trial process.

The overriding objective of the criminal courts is that cases must be dealt with 'justly' (**Criminal Procedure Rules 2015 (CrimPR) 1.1**). Both the court and the parties are required to further the overriding objective through active case management (**CrimPR 3.2–3.3**), which includes the early identification of the needs of witnesses. Moreover, the court is required to take:

> *… 'every reasonable step' to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person including the defendant. This includes enabling a witness or defendant to give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his or her defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends.*
>
> **Criminal Practice Directions (CrimPD) [2015] EWCA Crim 1567, 3D.2**

Where a witness or defendant is vulnerable, careful and continuing case management will be necessary throughout the life of the case in order to meet these aims.

It is important to recognise, however, that individuals will vary hugely in their needs, wishes and preferences; any adjustments made must be tailored to respond to these individual requirements.

Early identification of vulnerability is essential if cases involving a vulnerable individual are to be effectively case-managed. The CrimPD states:

> *In respect of eligibility for special measures, 'vulnerable' and 'intimidated' witnesses are defined in section 16 and section 17 of the Youth Justice and Criminal Evidence Act (YJCEA) (as amended by the Coroners and Justice Act 2009); 'vulnerable' includes those under 18 years of age and people with a mental disorder or learning disability; a physical disorder or disability; or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case.*
>
> **CrimPD 3D.1**

CrmPD 3D.2 continues:

However, many other people giving evidence in a criminal case, whether as a witness or defendant, may require assistance.

Therefore, a vulnerable witness or defendant includes those who are under 18, those who have experienced trauma, those with autism spectrum disorder, attention deficit (hyperactivity) disorder, mental health needs or learning disabilities, as well as those who are elderly and those with physical disabilities or health conditions (such as deafness) which may negatively affect their ability to effectively participate in the trial process.

Parties should be alert to potential 'hidden' vulnerabilities that may not be immediately apparent (see **Toolkit 10 - Identifying vulnerability in witnesses and defendants** and **Toolkit 18 - Working with traumatised witnesses, defendants and parties**).

As important as the early identification of vulnerability is the early identification of issues. It is a key requirement of Better Case Management that parties co-operate with each other in the very early stages of every case so that the relevant issues can be identified at the Plea and Trial Preparation Hearing (PTPH) to assist the court to make the appropriate directions for an effective trial (**CrimPD 3A.1 and 3A.2**).

For case management issues relating to young defendants, see:

- **Toolkit 8 - Effective participation of young defendants**
- Judicial College, **Equal Treatment Bench Book 2013**, chapter 5, 'Children and vulnerable adults', and chapter 7, 'Mental disabilities, specific learning difficulties and mental capacity';
- Advocacy Training Council, **Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court 2011**; and
- Family Justice Council, '**Guidelines in relation to children giving evidence in family proceedings' 2011**.

In this toolkit, 'judge' equally applies to magistrates and district judges.

2. INITIAL STEPS

Disclosure

Cases in which either a witness or a defendant is vulnerable should be prioritised. This can mean that very short timescales apply, particularly where the witness is very young; for example, in accordance with the 2015 Protocol **to Expedite Cases Involving Witnesses under 10 Years** , the trial should take place within eight weeks from the date of plea.

In order to ensure that these shortened timescales can be met, third-party disclosure material will need to be identified, obtained, considered and – where appropriate – disclosed much earlier than has traditionally been the norm. Where the allegation is one of child abuse, disclosure issues will be predominantly covered by the 2013 Protocol **and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings** which came into force on 1 January 2014.

However, it should be noted that the protocol only covers the disclosure of material that is held by the police, Local Authority and Family Court; medical records (unless previously obtained) and education records for schools outside Local Authority control do not fall within the terms of the protocol and an application for a witness summons to produce these records will have to be made to the court if disclosure of any such identifiable material is required. Any applications for third-party material, or public interest immunity should be made at an early stage.

On the PTPH Form, directions for applications for disclosure of third-party material are placed between the sections for Stage 1 and Stage 2. Participants (which includes, where appropriate, those who have listing responsibilities including the judge) are under a duty to comply with the protocols referred to in this toolkit.

Intermediary assessment

Assessment by an intermediary should be considered for any child or young person under 18 who seems:

… liable to misunderstand questions or to experience difficulty expressing answers, including those who seem unlikely to be able to recognise a problematic question (such as one that is misleading or not readily understood) and those

who may be reluctant to tell a questioner in a position of authority if they do not understand.

CrimPD 3F.26

In a former iteration of the CrimPD, there was a presumption that an intermediary assessment should be considered for all children under the age of 11; that presumption has been removed from the current version of the CrimPD. Instead, the decision whether an intermediary is required is one that should be made on a case-by-case basis taking into account the particular needs of the child or young person and the context of the case. The fact that an intermediary was not present during the Achieving Best Evidence (ABE) interview does not mean that an intermediary is not required for trial (see ***R v Boxer*** [2015] EWCA Crim 1684).

It is important to consider whether an intermediary may be required at the earliest possible stage. Intermediaries, particularly registered intermediaries, are a limited resource. The intermediary should have the qualifications and skills which most closely match the needs of the particular witness or defendant. The earlier an appropriate intermediary can be identified and an intermediary assessment carried out, the better-informed and prepared the parties and the court will be to make whatever adjustments are necessary to the process and procedures to enable the fullest participation by the vulnerable person concerned.

There is currently no statutory provision in force allowing for a defendant to be assisted by an intermediary. Although the court may use its inherent powers to direct the appointment of an intermediary, there is no presumption that it will do so, even where it is accepted that an intermediary would improve the trial process (**CrimPD 3F.12**; and see R ***v Cox*** [2012] EWCA Crim 549). **CrimPD 3F.13** provides that it will be rare for an intermediary to be appointed for an adult defendant and extremely rare for it to be for the entire trial, so such an appointment is likely to be only for a defendant's evidence. However, it will be for the judge to decide in each case whether to grant the appointment of an intermediary and, when doing so, the judge should take account of the observations by the Court of Appeal in ***R v Rashid*** [2017] EWCA Crim 2 at [80]:

In considering what is needed in a particular case, a court must take into account that an advocate will have undergone specific training and must have satisfied himself or herself before continuing to act for the defendant or in continuing to prosecute the case, that the training and experience of that advocate enabled him or her to conduct a case in accordance with proper professional competence. Such competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions … [An advocate would be] in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks.

The restrictions on the use of intermediaries for vulnerable defendants will lead to more responsibility on defence counsel to support such defendants. Where the court has taken steps to ensure that the defendant has a fair trial, it will not be held to be unfair because a defendant did not have an intermediary, even though one might have been of assistance.

Where the court declines to allow an intermediary for a vulnerable defendant, or an intermediary is unavailable for other reasons, the court should adapt the trial process as necessary to meet the defendant's communication needs. In order to take such steps, early provision of any assessment report that has been prepared, or other information about the defendant's communication needs, is very important.

Where an intermediary has been appointed – whether for a witness or a defendant – he or she will undertake an assessment of the vulnerable person's communication needs and abilities and recommend strategies and question types to achieve the best communication with that individual with the aim of improving the coherence, completeness and accuracy of the evidence they provide (and, for defendants, to enable their participation throughout the trial). The intermediary can also provide guidance on settling the individual, keeping their attention and responding to their emotional state (Crown Prosecution Service (CPS), Special **Measures: 'Intermediaries';** Judicial College, Bench **Checklist 2012: 'Young witness cases'**; Ministry of Justice, **Achieving Best Evidence in Criminal Proceedings 2011**).

See also **Toolkit 16 - Intermediaries: step by step**.

Special measures

'Special measures' may be available for prosecution or defence witnesses who are eligible for assistance under **section 16 YJCEA** (youth, or mental or physical impairment); or **section 17 YJCEA** (witnesses whose quality of evidence is likely to be impaired by reason of fear or distress).

The special measures available include:

- preventing a prosecution witness from seeing the defendant (in reality, preventing the defendant from seeing the witness);
- allowing a witness to give evidence by live link – this may include being accompanied by a supporter in the live link room (see **section 102 Coroners and Justice Act 2009** inserting sections **24(1A) and s24 (1B) YJCEA)**;
- hearing a witness's evidence in private;
- dispensing with the wearing of wigs and gowns;
- admitting video-recorded evidence;
- questioning a witness through an intermediary; and
- using a communication aid

(**sections 23–30 YJCEA**).

A live link direction may also be given in respect of a defendant's evidence if the defendant qualifies for such a measure under **section 33A YJCEA** and the court considers that it would be in the interests of justice to make such a direction. Other measures – such as the use of communication aids, the removal of wigs and gowns – may be applied using the court's inherent powers.

Detailed guidance on establishing and using a live link is set out in appendix 1 of **Amendment No 3 to the Criminal Practice Directions 2015** which came into effect on 31 January 2017.

Where a live link is sought as a special measure, CrimPR **18.10** and **CrimPR 18.15** respectively require, among other things, that the applicant must identify someone to accompany the witness or defendant while they give evidence; must name the person, if possible; and must explain why that person would be an appropriate companion for that witness. The court must ensure that directions are given accordingly when ordering such a live link. Witness Service volunteers are available to support all witnesses, prosecution and defence, if required.

Defence representatives and the court must keep in mind that special measures under the **YJCEA** and **CrimPR Part 18,** including the use of a live link, are available to defence as well as to prosecution witnesses who meet the statutory criteria. Defence representatives should always consider whether their witnesses would benefit from giving evidence by live link and should apply for a direction if appropriate, either at the case management hearing or as soon as possible thereafter: see **CrimPD 3N.11**.

Particular considerations for child witnesses: where a witness is a child, as defined in **section 16(1)(a) YJCEA**, or was under 18 at the time a relevant recording was made (the ABE interview), the 'primary rule' applies, by which the court must make a special measures direction for evidence to be given by way of pre-recorded evidence in chief, and otherwise by means of a live link (**section 21 YJCEA**). Where the child witness expresses a wish to opt out of the primary rule, the court may instead direct that evidence be given from behind screens in court, provided that it is satisfied that this would not diminish the quality of the child's evidence.

Timetable for special measures applications: **CrimPR 18.3** states that any application for a special measures direction must be made within 28 days of entry of a not guilty plea in the magistrates' court and within 14 days in the Crown Court. However, these time limits can be shortened or extended (even after expiry). The digital PTPH Form includes applications for special measures at Stage 1 (50 days after sending in custody cases, 70 days after sending in bail cases). Further, the form provides as a 'standard order' that 'any application for screens or a live link shall be made after a court visit and shall include the witness's reasons for the preference'. Given that a 'court familiarisation' visit is unlikely to be helpful if it is carried out too far in advance of the trial, the reality is that special measures applications will rarely be made within the short timescales set out in **CrimPR 18.3.**

It is important nevertheless that special measures are considered at an early stage and kept under review up to the date of trial as some may present a logistical challenge.

Prosecution witnesses who do not want the defendant to see them: many vulnerable witnesses who would otherwise qualify to give their evidence over a live link fear being seen by the defendant. In such circumstances, in principle, arrangements should be made to prevent the defendant seeing the witness on the court screens. This may be possible to achieve by, for example, covering or turning off particular monitors, or positioning the defendant in such a way that he or she cannot see the court screens. In some courts, however, the configuration of the court furniture, the dock and the screens may make this impossible. Whilst in such a situation an adult witness may prefer to come into court and give evidence from behind a screen, this may not always be a satisfactory or appropriate outcome and will rarely if ever be so if the witness is a child. Therefore, where this issue arises it is essential that it is brought to the attention of the court at the earliest opportunity. Advocates should work with the judge and court staff to resolve the problem using the available technology at their court centre.

In certain cases – for example, domestic violence cases where the vulnerable witness is in protected accommodation out of the court area for their protection, or where there are other particular anxieties about the possibility of intimidation or of contact between the witness and the defendant or their supporters at court – consideration should be given to the use of a remote live link (away from the trial court) from another court, remote witness suite, or by using mobile equipment. This may also be an option for those who are fearful of the court environment or whose anxiety levels are severely affected by travel. The parties should co-operate and consider in advance what practical arrangements are required and what evidence or other material needs to be taken to the remote site (see **Toolkit 9 - Planning to question someone using a remote link**).

Care should be taken to ensure that the needs of witnesses are properly assessed, that they are given clear information and that their expectations are carefully managed. There should be clear lines of responsibility for decision-making on special measures applications and the various interested agencies should establish effective communication with each other. A vulnerable witness – depending on the circumstances – may have involvement from any combination of witness care, an independent sexual violence advisor (ISVA), an independent domestic violence advisor, an intermediary and witness support. The potential for overloading or confusing the witness needs to be guarded against. It should be clearly understood that, whilst such agencies are responsible for assessing which special measures – if any – should be applied for, the decision about what special measures would maximise the quality of the witness's evidence is the decision of the judge.

3. PRE-TRIAL SUPPORT

Familiarisation visit to court

It is generally extremely helpful for vulnerable witnesses to have a pre-trial familiarisation visit to the court as this can reduce anxiety for the witness concerned and in, turn, improve their ability to communicate. A defence witness should be afforded the same facilities and treatment as a prosecution witness, including the same opportunity to make a pre-trial visit to the court building in order to familiarise him or herself with it.

As noted above, it is in any event a 'standard order' made at the PTPH that 'any application for screens or a live link shall be made after a court visit and shall include the witness's reasons for the preference'. Prosecuting counsel should meet all prosecution witnesses before trial. See below for meetings between prosecuting counsel and prosecution witnesses (and see also the guidance from the CPS, Speaking **to Witnesses at Court 2016**).

The familiarisation visit should normally be supervised or conducted by appropriately trained and skilled court staff or the Witness Service, with the officer in charge and any ISVA or intermediary, if appointed, in attendance. The intermediary should provide brief guidance to those conducting the visit on how best to communicate with the person to aid their understanding. The intermediary will also facilitate communication with the vulnerable witness and should indicate if they believe that the vulnerable person has not understood any element of the visit – particularly where the person has been asked for their views on available special measures.

Witnesses are likely to give better quality evidence when they choose how it is given; a pre-trial court familiarisation visit in advance of the court hearing will help the witness to make a properly informed decision about which special measures might assist them to give their best evidence.

During the visit, the Witness Care Unit, Witness Service or prosecutor, where in attendance, should explain the available measures, the advantages and disadvantages of these and ask for the witness's views (Witness **Charter 2013, standard 11**). Where the Witness Care Unit carries out a full witness care assessment, which includes discussion about special measures, this is passed first to the police who pass it on to the CPS who should then make the special measures application, ideally after discussing the position with prosecuting counsel at a case conference.

Vulnerable witnesses (or a vulnerable defendant for whom a live link direction has been given) should be given the opportunity to practise using the live link and should see screens in place if possible (**Witness Charter 2013, standard 17**).

Counselling/therapy

Whether a witness should seek pre-trial counselling or therapy is not a decision for the police or prosecutor; the best interests of the witness are the paramount consideration. Nevertheless, prosecutors should be alive to the fact that counselling records may be disclosable and it is essential therefore that there is careful recording of any counselling or therapy that takes place.

See:

- Ministry of Justice, Achieving **Best Evidence in Criminal Proceedings 2011**, sections 4.58–4.59;
- CPS, '**Provision of therapy for child witnesses prior to a criminal trial**', sections 4.3–4.4 and 5.4;
- CPS, '**Provision of therapy for vulnerable or intimidated adult witnesses prior to a criminal trial**', sections 4.3–4.4 and 6.5;
- **Equal Treatment Bench Book 2013** , chapter 5, 'Children and vulnerable adults', para 48 .

Ongoing assessment and review

During the pre-trial period, information may emerge – for example, from medical or educational records, or from family members – which may be relevant to how witnesses should be enabled to give their best evidence and what adaptations may be required. Communication difficulties, cultural and religious practices and language barriers which may not have been initially apparent may all become more relevant than they at first appeared and give rise to the need for further adaptations. Moreover, witnesses themselves may experience a change in their attitude to the prospect of giving evidence and may change their mind about the level of support required at trial to do so. The police or Witness Care Unit will have carried out an initial needs assessment for every witness, but that assessment should be kept under review throughout.

Judges also have safeguarding responsibilities. They should be alert to vulnerabilities that may not have been previously identified and ask for relevant information to be obtained and provided (**Equal Treatment Bench Book 2013** , chapter 5, 'Children and vulnerable adults', Key Points).

Keeping the witness or defendant informed

All witnesses, but particularly those who are vulnerable, should be kept informed of any changes to the schedule or proposed arrangements (including special measures) for the hearing. Each stage of the trial should be explained to them in appropriate language and they should be informed of what is happening next and their understanding of this checked. If an intermediary has been appointed, he or she can assist with this. Any steps that can reasonably be taken to reduce the anxiety of a witness or defendant should be taken as this will be likely to increase the quality of the individual's communication throughout the trial (CPS, **Speaking to Witnesses at Court 2016**).

4. THE PLEA AND TRIAL PREPARATION HEARING

Key to Better Case Management and an effective and purposeful PTPH is early engagement between the parties. Even if a defence case statement has not been produced and uploaded by the date of the PTPH, the parties should be in a position to clearly set out what the relevant issues are in the case. The listing of trials involving vulnerable persons, whether witnesses or defendants, should be prioritised; shorter timescales may therefore be put in place than

might otherwise have been imposed. Unless the parties co-operate from the outset, these time constraints may make essential steps, such as the identification and disclosure of third-party material, more difficult to achieve. Trials that have to be adjourned to a later date due to faults in disclosure or because the parties are for any other reason not 'trial-ready' can cause significant distress to vulnerable witnesses.

It is important to address timetabling and other vulnerable witness issues at the PTPH (or equivalent early hearing in the magistrates' court). The form should be completed using up-to-date information about the witness and their needs.

Most cases involving vulnerable witnesses or defendants will justify a fixed trial date and will certainly do so where the vulnerable witness or defendant is a child, or where an intermediary has been appointed.

Whether fixed for trial or not, cases involving vulnerable people should be given priority listing. Where the case involves a witness under 10 years old, the 2015 Protocol **to Expedite Cases Involving Witnesses under 10 Years** requires courts to list such cases for trial within eight weeks of the date of plea. Where the Protocol applies, the parties should bring that fact to the attention of the judge and those responsible for listing.

When fixing a date for trial, particular care should be taken in ascertaining not just the witness's availability, but also dates that should be avoided, such as birthdays, public exams or other important dates – for example, the anniversaries of significant events.

Where the witness has given a video-recorded interview (an ABE interview), there is a presumption that that interview shall stand as that witness's evidence in chief unless otherwise ordered (PTPH Form: Standard Orders for Witnesses). A timetable will be set for agreeing any edits to the interview. Lengthy and repetitive interviews are unlikely to assist either side or be helpful to the jury or other tribunal of fact.

The prosecution should be in a position either to make any special measures applications necessary, or to indicate which special measures may be sought. Formal applications for special measures for children which accord with the 'primary rule' are not required. Where there is to be an application for special measures for the defendant or defence witnesses, this will normally be required to be served by the Stage 2 date.

Where the case involves an allegation of child abuse, the **2013 Protocol and Good Practice Model** will apply. Under the terms of this Protocol, by the date of the PTPH most disclosure issues will be well in hand. Whether the Protocol applies or not, however, the parties must be in a position by the PTPH to notify the court what third-party material has been identified, what efforts have been or are being made to obtain it, and by which date any disclosable material can be served.

At the PTPH provision may be made for further pre-trial hearings. These may include one or more of a ground rules hearing (GRH), **section 28 YJCEA** cross-examination hearing, and/or a pre-trial review (PTR). The judge will make directions at the PTPH for the service of any intermediary assessment and/or report and for any cross-examination plan ordered to be served on the court, parties and intermediary prior to the GRH.

The witness should be updated after the PTPH, with any relevant information explained in simple language and with an opportunity for questions.

5. PRE-TRIAL HEARINGS

Ground Rules Hearings (GRH)

Where directions for appropriate treatment and questioning are required, the court must set ground rules for the conduct of the questioning at a GRH: **CrimPR 3.9(7)**.

A GRH must be held in all cases in which:

- **section 28 YJCEA applies**, so that there is pre-recorded cross-examination; and
- there is an intermediary: **CrimPD 3.E2**.

A GRH is good practice in any case in which, even if there is no intermediary, a witness is young or the witness or defendant has communication needs: **CrimPD 3E.3**. (See ***R v Lubemba*** [2014] EWCA Crim 2064, at [42]).

When a GRH should be held will depend upon the particular circumstances of the case. In a straightforward case where either there is no intermediary or where the intermediary has been unavailable to attend an earlier hearing, the GRH may if necessary be held on the day of trial (for example, the GRH may be held in the morning with the trial scheduled to start in the afternoon); but in most cases, and particularly where directions are likely to be made about the nature and length of questioning, the GRH should be held at an earlier stage, allowing sufficient time for the advocates to adjust their approach if so ordered and prepare for trial accordingly.

If the case is one to which **section 28 YJCEA** applies, the advocates will have been required to complete the appropriate section 28 Defence GRH Form (the form for a case with a 'single defendant' or the form for a case with 'multiple defendants'); in other cases, the judge may order that cross-examination questions should be provided to the judge, the intermediary and – where it is necessary and in the interests of justice to do so – to the other parties, in advance.

The questions should be formulated having regard to the appropriate Advocates' Gateway toolkits for questioning different types of young and vulnerable people.

Prosecution and defence counsel should work collaboratively and consult the intermediary (where there is one) for advice on how best to formulate their questions (see ***Re FA*** [2015] EWCA Crim 209). The intermediary may advise on the appropriate wording of the questions, but the decision on the scope of questioning and whether restrictions on it should be imposed are matters for the judge.

All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. For adult non-vulnerable witnesses, the advocate will usually put the case so that the witness will have the opportunity of commenting upon it and/or answering it. Where the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the extent of cross-examination. In some cases, this may extend to a restriction preventing the advocate from 'putting the case' where there is a risk that the witness will either fail to understand, become distressed, or acquiesce to leading questions (**CrimPD 3E.4**). However, in most cases, with the assistance of the intermediary, it should be possible to craft questions in such a way that the defence case can properly be put to the witness so that the witness can have the opportunity to respond to it.

Where any restrictions are imposed on cross-examination, they must be clearly defined and explained to the jury at trial by the judge (***R v Lubemba*** [2014] EWCA Crim 2064).

As well as restrictions on the scope of questioning, the judge may also give ground rules on breaks, the duration of questioning, and the extent to which topics should be divided between advocates where there is more than one co-defendant (**CrimPR 3.9(7)(b)**). The duration of cross-examination should be developmentally appropriate (Equal **Treatment Bench Book 2013** , chapter 5, 'Children and vulnerable adults', para 27c) and the judge is 'fully entitled' to impose reasonable time limits (**CrimPR 3.11(d)**). See, further, ***R v Sandor Jonas*** [2015] EWCA Crim 562.

Other topics that may form part of the GRH include the use of special measures, memory refreshing, timetabling of witness's evidence and support at trial.

A trial practice note should be produced setting out clearly any directions given at the GRH.

See, further, **Toolkit 1 - Ground rules hearings and the fair treatment of vulnerable people in court.**

Section 28 YJCEA: pre-recording of cross-examination and re-examination of vulnerable witnesses

Following pilots in three Crown Court areas, it is expected that **section 28 YJCEA**, which provides for the pre-trial cross examination of witnesses, will be rolled out to all courts during 2017.

The judge will make directions for the timetabling of the section 28 hearing at the PTPH.

A GRH will be required in all section 28 cases, which should be attended by the intermediary and the officer in the case.

In addition to the usual issues covered at a GRH, at this hearing any issues of law such as bad character, hearsay or applications under **section 41 YJCEA** should also be determined. Directions may be given or confirmed (if given at the PTPH) for the witness to have a court familiarisation visit, to try out the relevant equipment and to refresh their memory of the ABE interview prior to the section 28 hearing.

When listed, the section 28 hearing should take precedence over all other cases listed at the relevant court.

Neither the original ABE interview nor the recording of cross-examination at the section 28 hearing may be edited without the leave of the judge.

Pre-trial review

Where a PTR is required, the date will have been set down at the PTPH. It should be held close enough to the trial date to ensure that the most up-to-date information is obtained prior to trial, but far enough in advance to enable any directions given to be carried out and any identified problems to be resolved. The PTR may, and usually will, be combined with the GRH.

By the date of the PTR, both parties should have viewed the ABE interview, any edits should have been agreed and carried out and the recording checked to ensure that it is playable using the technology available in the relevant court and that it is audible.

Where there are any difficulties with playback, the court must be informed so that appropriate directions can be given in advance of trial – for example, for the preparation and use of transcripts.

Any special measures directions should be reviewed. Up-to-date information about the witness should be available for the court. Consideration may need to be given as to whether the special measures ordered are still appropriate or need to be varied. The judge should check that the witness (or vulnerable defendant) has had a court familiarisation visit and, if not, when it is to be held.

Decisions should be made as to how and when the witness's memory should be refreshed. Arrangements for memory refreshing are a police responsibility, but should be judicially led.

The PTPH Form provides as a standard order that any witness who has provided an ABE interview should view it in the week preceding the trial in the presence of the officer in the case or other suitable police officer (or investigator equivalent); notwithstanding this direction, the timing should be decided on a case-by-case basis, taking into account any views expressed by the intermediary or other specialist supporter about the needs of the witness, for example:

- Depending upon the individual concerned and their memory attention span, it may be more appropriate and enable them to give their best evidence if they refresh their memory closer to trial.
- For some vulnerable witnesses, watching the ABE interview can be distressing; viewing it in an informal setting may help familiarise the witness with his or her own image. Where a witness is likely to become distressed by viewing the ABE interview, memory refreshing should not take place just before the witness is expected to give evidence.
- For some vulnerable witnesses, it may be appropriate to combine the memory refreshing exercise with the court familiarisation visit; for others, there is a risk that such a course will result in 'information overload'.
- Some vulnerable witnesses may prefer to read a transcript or listen to, but not watch, the ABE interview. If a witness has reading difficulties, the transcript can be read to them by a member of the Witness Service.

There is no legal requirement that the witness should watch his or her DVD evidence at the same time as the jury views it.

The officer (or investigator equivalent) present during the memory-refreshing exercise should record any comment that the witness makes when viewing the ABE interview and pass that record to the prosecutor.

Directions should be given for timetabling the witness's evidence to ensure that the witness gives evidence at the expected time; delays are likely to cause

unnecessary anxiety which may adversely affect the quality of the evidence given. Sufficient time should be allowed for deciding any necessary preliminary applications that cannot be dealt with in advance of trial, for empanelling the jury, for opening the case and for playing the ABE interview.

The timing of testimony should be that which is best for the young or vulnerable witness. In most cases, particularly if the witness is a child, this will be early in the day before the witness becomes too tired or anxious. In some cases, however, a later start time may be more appropriate. Information about the witness's circumstances and preferences should be available to the judge at the PTR to enable the most appropriate directions to be given. For example, a witness may have to take medication at certain times of the day which might affect the person's concentration, anxiety or mood.

Consideration should be given to the likely length of the witness's concentration span, which will usually be shorter than in an assessment situation because of the high-pressure environment of the court, and break times should be factored in.

Advice may be sought from the intermediary or witness supporter.

The judge should check that consideration has been given and appropriate arrangements made to bring the vulnerable witness to court and to ensure that the witness can access and exit the court building without the risk of either deliberate or inadvertent contact between the witness and the defendant and any supporters at court.

The judge should check who will be in the live link room with the vulnerable witness. In addition to the intermediary (where there is one) and a member of the Witness Service or court staff, a neutral supporter trusted by the witness may be present. This person can be anyone who is not a party to the case and has no detailed knowledge of the evidence, such as the person preparing the witness for court (for example, the ISVA), but others may be appropriate (**CrimPD 18B.2** and appendix 1 of **Amendment No 3 to the Criminal Practice Directions 2015**). The court must take the witness's views into account.

6. TRIAL

Practical issues

Every effort should be made to ensure that the timetable laid down at the PTPH or PTR is adhered to. Short hearings in other matters that may delay any part of the trial should be avoided where at all possible.

The advocates, with the assistance of court staff if necessary, should have ensured in advance of the trial that they are familiar with any technological equipment necessary for the presentation of evidence, that it is working, and that any pre-recorded interview or other evidence to be shown to the jury (for example, CCTV footage) is compatible with the court equipment.

The advocates should check that the Witness Service and court staff are appraised of any special needs that the witness has and any directions that have been ordered to facilitate that witness's evidence.

The advocates should double check that all material that may be required to be shown to the witness (copies of statements/transcripts, photographs, exhibits) has been taken to the live link room or external location.

Where a remote link is being used, connections should be checked.

Meeting the witness

Prosecutors are expected to meet all child witnesses and, inevitably, defence advocates will also do so. Such meetings can help a witness to feel prepared for their court experience and able to give their best evidence. Such a meeting should take into account the witness's needs and the amount of interaction they wish to have. If the witness has an intermediary or other supporter, then they should be at the meeting in order to assist the witness.

Where the meeting is between the witness and the prosecutor, he or she should provide the witness with assistance to prepare them for their evidence in chief and cross-examination and ensure that they are updated on progress thereafter.

A note of the fact that the prosecutor has spoken to the witness should be made by the prosecutor or by the CPS paralegal in the Crown Court (Speaking **to Witnesses at Court 2016**, paras 2.1 and 3.4). At the meeting, the prosecutor should do the following:

- Ask the witness what they have already been told by the court-based Witness Service and other support services about procedure.
- Ask the witness to confirm any special measures arrangements. The prosecutor should make sure the witness understands and is content with them and, where applicable, that arrangements are in place for the supporter of their choice to accompany them when giving their evidence.
- Explain the court's procedure (including the roles of the judge/magistrate), oath-taking and the order in which questions are asked by the advocates.
- Explain the role of the defence advocate – that it is their job to put their client's case and challenge the prosecution's version of events, including by suggesting the witness is mistaken or lying. The witness should be informed that they should listen carefully to any such suggestion and clearly say whether they agree or disagree with it.
- Tell the witness that he or she should not be afraid to ask for a break if they genuinely need one, such as when they feel tired, are losing concentration or if they want to compose themselves emotionally.
- Explain to the witness the importance of listening to all questions carefully and making sure they understand each one before answering it. Witnesses should be encouraged not to be afraid to ask the advocate asking the question or the judge to repeat or rephrase any question which they do not understand.
- Tell the witness to answer all questions truthfully, however difficult they may be. They should be informed that it is not a sign of weakness if they do not know or do not recall the answer to a particular question and, if this is genuinely the case, they should not be afraid to say so.
- If the witness has provided a witness statement or video testimony, explain the importance of the witness refreshing their memory from such a statement before going into court. Encourage them to do so. However, the witness should also be reassured that giving evidence is not a 'memory game' and that in certain circumstances they may be able to refresh their memory from their witness statement whilst giving evidence. A witness should be told that they should not hesitate to ask to see their statement when giving evidence if they think their memory would be assisted by it.
- Inform the witness of the general nature of the defence case where it is known (for example, mistaken identification, consent, self-defence, lack of intent). The prosecutor must not, however, enter into any discussion of the factual basis of the defence case. Prosecutors should not speculate on potential defences and, where the general nature of the defence is not clear, the prosecutor should speak to the defence advocate(s) to clarify the defence case before speaking to the witness.
- Where third-party material about a particular witness has been disclosed to the defence as being capable of undermining the prosecution's case or assisting the defence case (such as social services, medical or counselling records), then that particular witness should be informed of the fact of such disclosure. The details and the impact on the defence cross-examination should be not be discussed.
- Where leave has been given for a particular witness to be cross-examined about an aspect of their bad character under section **100 Criminal Justice Act 2003** or their sexual history under **section 41 YJCEA**, inform the witness that leave has been given.
- Inform the witness that the prosecutor can object to intrusive/irrelevant cross-examination and the judge will decide whether the questions need be answered. The witness should be advised that the judge's decision must be followed.

It is up to the judge whether to meet the child, but he or she will invariably do so if the child requests it.

The judge should not see the child without the advocates save in exceptional circumstances (for example, where advice is received that the child would find it too intimidating to meet the judge and advocates at the same time). In the rare situation where the judge does see the child without the advocates, he or she should discuss the position with the advocates in advance and a court official should be present.

Although the majority of witnesses are put at ease by these introductions, for some people they would be likely to increase their anxieties and therefore lessen their abilities in court. Judges and advocates should consider how they will dress (whether in robes or not) when they meet the child. Evidence should not be discussed with the witness.

Participation and adjustments

The judge should ascertain at the outset that any necessary adjustments have been made to enable the vulnerable person to effectively participate in the trial process. The judge should ensure that a vulnerable witness or defendant has sufficient breaks if they are unable to concentrate for the long periods that they might be in court. In the case of a vulnerable defendant, this may involve checking that the defendant is not in discomfort, if elderly or infirm, that the defendant can see and hear the judge and the advocates and that the defendant understands the procedure. Where the defendant is a young person or has communication difficulties, their understanding of any explanations given should be checked. The court has a continuing duty to ensure that the defendant understands what is happening (**CrimPD 3G.9**).

Before a witness is called to give evidence using live link, camera angles and the position of the witness should be checked to ensure the best picture of the witness is shown. Where there is an intermediary, both the witness and the intermediary should be visible on screen. The role of the intermediary should be explained to the jury.

Questioning the vulnerable person

Where limitations have been imposed on the length or scope of questioning at the GRH, these should have been set out in a trial practice note. All parties will be expected to comply with the directions given. The judge should explain to the jury what limitations have been imposed and why. If the advocate fails to comply with the limitations on cross-examination, the judge should intervene to prevent further questioning and explain the position to the jury (see ***R v Wills*** [2011] EWCA Crim 1938). A trial judge:

> *… is not only entitled, he is duty bound to control the questioning of a witness. He is not obliged to allow a defence advocate to put their case. He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate.*
>
> ***R v Lubemba*** [2014] EWCA Crim 2064

Whether limitations have been imposed or not, there is an expectation that advocates will adapt their questioning to enable the witness to give their best evidence (see ***R v IA*** [2013] EWCA Crim 1308; ***R v Lubemba*** [2014] EWCA Crim 2064). Adapting questioning may mean adapting style, the complexity of language used and the length of questioning in line with the needs of the vulnerable person.

When the defence relies on inconsistencies in statements made by a vulnerable witness, the judge may direct that a written schedule of inconsistencies should be provided. Instead of cross-examining the witness about those inconsistencies in cross-examination, following discussion between the judge and the advocates after receipt of the defence schedule, the advocate or judge may point out to the jury important inconsistencies after (instead of during) the witness's evidence. The judge should also remind the jury of these during the summing-up. The judge should be alert to alleged inconsistencies that are not, in fact, inconsistent, or which are trivial. (**CrimPD 3E.4**)

Separate toolkits provide guidance on the way to question a witness or defendant with specific vulnerabilities.

Unrepresented vulnerable defendants

If a vulnerable defendant chooses to represent him or herself, the court has no power to force legal representation on the defendant and no power to appoint a court advocate to assist the court: see ***R v Holloway*** [2016] EWCA Crim 2175.

7. ACKNOWLEDGEMENTS

The toolkit summarises key points from research and guidance including:

- Advocacy Training Council, Raising the Bar (ATC 2011)
- Crown Prosecution Service, Speaking to Witnesses at Court (CPS 2016)
- Crown Prosecution Service, Protocol to Expedite Cases Involving Witnesses under 10 Years (CPS 2015)
- Crown Prosecution Service, 'Provision of therapy for child witnesses prior to criminal trial'
- Crown Prosecution Service, 'Provision of therapy for vulnerable or intimidated adult witnesses prior to a criminal trial'
- Crown Prosecution Service, Special Measures: 'Intermediaries'
- Criminal Justice Joint Inspection, Joint Inspection Report on the Experience of Young Victims and Witnesses in the Criminal Justice Service (CJJI 2012)
- Criminal Practice Directions [2015] EWCA Crim 1567
- Criminal Procedure Rules 2020
- Family Justice Council, 'Guidelines in relation to children giving evidence in family proceedings' (Family Justice Council 2011)
- Judicial College, Bench Checklist 2012: 'Young witness cases'
- Judicial College, Equal Treatment Bench Book 2013, chapter 5, 'Children and vulnerable adults', and chapter 7, 'Mental disabilities, specific learning difficulties and mental capacity'
- Ministry of Justice, Achieving Best Evidence in Criminal Proceedings (Crown Copyright 2011)
- Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings (2013)

FURTHER WORK FROM THE ADVOCATE'S GATEWAY

Visit **https://www.theadvocatesgateway.org/** for further resources published and shared by The Advocate's Gateway, including our internationally recognised Toolkits, case law updates and guidance on intermediaries.

TOOLKIT 1: Ground Rules Hearings

TOOLKIT 1A: Case Management in Criminal Cases

TOOLKIT 2: General Principles from Research, Policy, and Guidance

TOOLKIT 3: Planning to Question Someone with Autism

TOOLKIT 4: Planning to Question Someone with a Learning Disability

TOOLKIT 5: Planning to Question Someone with 'Hidden Disabilities'

TOOLKIT 6: Planning to Question a Child or Young Person

TOOLKIT 7: Additional Factors Concerning Children under Seven

TOOLKIT 8: Effective Participation of Young Defendants

TOOLKIT 9: Planning to Question Someone using a Remote Link

TOOLKIT 10: Identifying Vulnerability in Witnesses

TOOLKIT 11: Planning to Question Someone who is Deaf

TOOLKIT 12: Planning to Question Someone with a Suspected (or Diagnosed) Mental health Disorder

TOOLKIT 13: Vulnerable Witnesses in the Family Courts

TOOLKIT 14: Using Communication Aids

TOOLKIT 15: Witnesses and defendants with autism

TOOLKIT 16: Intermediaries: Step by Step

TOOLKIT 17: Vulnerable Witnesses in the Civil Courts

TOOLKIT 18: Working with traumatised witnesses, defendants and parties

TOOLKIT 19: Supporting Participation in Courts and Tribunals

TOOLKIT 20: Court of Protection