TOOLKIT 1

GROUND RULES HEARINGS AND THE FAIR TREATMENT OF VULNERABLE PEOPLE IN COURT

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The Advocate's Gateway

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.

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1. INTRODUCTION

The toolkit contains information about ground rules hearings ('GRHs') in the criminal courts and is primarily intended for use by advocates as well as solicitors, police officers, social workers and judges. This toolkit is written with criminal proceedings in England and Wales in mind. However, the ground rules approach is also applied in other parts of the justice system, for instance, the family courts, the employment tribunals and the Court of Protection.

Family Procedure Rules, Part 3AA paragraph 5(2) mandates a ground rules hearing 'when the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence. The approach has also spread beyond England and Wales to other jurisdictions, such as Northern Ireland (for example, see ***Galo v Bombardier Aerospace UK*** [2016] NICA 25) and New South Wales, Australia.

However, Scotland is the first jurisdiction to include ground rules hearings in primary legislation; see section 5(2) of **The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019** which amends **Criminal Procedure (Scotland) Act 1995**

This toolkit is supplemented by **The Advocate's Gateway ground rules hearing checklist** (Cooper, 2015, 2016, 2019).

Key points include:

- GRHs are used by judges to make directions for the fair treatment and effective participation of vulnerable defendants and vulnerable witnesses. Courts must take reasonable steps to ensure the effective participation of vulnerable defendants and witnesses.
- Where directions for the appropriate treatment and questioning are required, the court must set ground rules (**Criminal Procedure Rules (CrimPR 2020)**, 3.8(7)(b)).

- When there is an intermediary they 'must' be invited to make representations (CrimPR 2020 3.8(7)(a)); in other words they must be included in the discussion at the GRH.
- The ground rules can be revisited during evidence in the light of questioning and any communication difficulties encountered by the witness.
- Guidance for family courts, including on GRHs, is available in Toolkit 13 - Vulnerable witnesses and parties in the family courts.

2. GENERAL PRINCIPLES, DEFINITIONS AND CONTEXT

GRHs are commonly used by judges to make directions for the fair treatment and participation of vulnerable defendants and vulnerable witnesses.

'A ground rules hearing is the opportunity for the trial judge and advocates to plan any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person' '

Equal Treatment Bench Book April 2023, page 76, para 139

Advocates should therefore be alert to risk factors which may indicate that a witness or party is vulnerable and there are issues regarding their communication skills which would affect the quality of their evidence, and that a GRH is therefore required. General risk factors that suggest a witness is vulnerable are outlined in Toolkit 10 - Identifying vulnerability in witnesses and defendants. When necessary, expert advice (including an intermediary assessment) should be sought.

Courts must take every reasonable step to ensure the participation of vulnerable witnesses and defendants.

The CrimPR state that 'the overriding objective' is that cases are 'dealt with justly' (CrimPR 2020, para 1.1(1)).

In addition:

- '*In order to prepare for the trial, the court must take every reasonable step—to encourage; and to facilitate the attendance of witnesses when they are needed; and to facilitate the participation of any person, including the* defendant.' (CrimPR 2020 para. 3.8(3)(a)–(b))
- '*Facilitating the participation of any person includes giving directions for someone to accompany a witness while the witness gives evidence, including directions about seating arrangements for that companion; and giving directions for the appropriate treatment and questioning of a witness or the defendant, especially where the court directs that such questioning is to be conducted through an intermediary.*' (CrimPR 2020 para. 3.8(6)(a)-(b))
- *'The judiciary is responsible for controlling questioning. Over-rigorous or repetitive cross-examination of a child or vulnerable witness should be stopped. Intervention by the judge, magistrates or intermediary (if any) is minimised if questioning, taking account of the individual's communication needs, is discussed in advance and ground rules are agreed and adhered to.'* Criminal Practice Direction (CrimPD) 3 E.1

Where directions for appropriate treatment and questioning are required, the court must invite representations by the parties and by any intermediary and must set ground rules.

'The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked.'

R v Lubemba; R v JP [2014] EWCA Crim 2064, at [43]

In addition, ground rules may include the following (CrimPR 2020 para 3.8(7)(a)-(b)

Where directions for appropriate treatment and questioning are required, the court must—

(a) invite representations by the parties and by any intermediary; and

(b) set ground rules for the conduct of the questioning, which rules may include—

- *i) a direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety,*
- *ii) directions about the manner of questioning,*
- *iii) directions about the duration of questioning,*
- *iv) if necessary, directions about the questions that may or may not be asked,*
- *v) directions about the means by which the intermediary may intervene in questioning if necessary*
- vi) *where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and*
- vii) *directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.*

A GRH is required in all intermediary trials and is good practice in any case where a witness or defendant has communication needs.

- *'Where there is a vulnerable witness or accused, consideration must be given to holding a "ground rules hearing". The greater the level of vulnerability the more important it will be to hold such a hearing. A GRH is required in all trials involving an intermediary.'* (**CrimPD 2023** para 6.1.4)
- *'[Ground rule] hearings are good practice for all young witness cases and other cases with a vulnerable witness or vulnerable defendant with communication needs'* (**Equal Treatment Bench Book** p77 para 144)

For ground rules hearings and intermediaries for vulnerable defendants, see CrimPD 2023 para 6.4.

The GRH should take place as early as possible and, if at all possible, before the day of the hearing (Equal Treatment Bench Book p77 para 143). That enables advocates to prepare and, if necessary, to adjust their approach; the judge should state what the ground rules are and they should be recorded; advocates must abide by the ground rules.

'The arrangements for the trial must be discussed between the judge or magistrate(s), advocates and intermediary before the witness gives evidence . It is essential for a note of decisions reached in a GRH to be created. The judge must use this document to ensure that the agreed ground rules are complied with.' (**CrimPD 2023** paras 6.1.4-6.1.5)

The advocate has a duty to abide by court rulings: 'In the forensic process the decision and judgment of this court bind the professions ... in the course of any trial, like everyone else, the advocate is ultimately bound to abide by the rulings of the court.' (***R v Farooqi and Others*** [2013] EWCA Crim 1649, at [109])

In section 28 (pre-recorded cross-examination) cases

Orders are likely to include:

- *'the listing of a GRH (if the judge decides one is necessary). If one is to take place, depending on the circumstances of the case, this should be listed either at a convenient date prior to the recorded cross-examination and re-examination hearing, or it should take place immediately prior to the recording of the cross-examination and re-examination'* (CrimPD **2023** para 6.3.21g)
- *'The timetable should ensure the prosecution evidence and initial disclosure are served swiftly. The GRH, if one is ordered, will usually be soon after the deadline for service of the defence statement, with the recorded cross-examination and re-examination hearing about one week later. However, there must*

be time afforded for any further disclosure of unused material following service of the defence statement and for determination of any application under s8 CPIA 1996. Subject to judicial discretion applications for extensions of time for service of disclosure by either party should generally be refused.' (CrimPD 2023, para 6.3.22)

- *'It is imperative parties abide by orders made at the PTPH, including the completion and service of the Ground Rules Hearing Form by the defence advocate. Delays or failures must be reported to the judge as soon as they arise; this is the responsibility of each legal representative.'* CrimPD 2023, para 6.3.28

Advocates ensure they are familiar with CrimPD 2023 6.3 (Pre-recording of cross-examination and re-examination for witnesses (s.28 YJCEA 1999))

The GRH directions should be recorded in open court.

GRH like any hearing should normally take place in public, the court may adapt that in the circumstances, e. g., because of the witness or any issues being discussed, it can take place in private or through use of remote live link.

The court should consider how technology might be used to allow the GRH participants to take part in the discussion from remote location(s).

3. PRACTICAL ISSUES ARISING FROM THE USE OF A REMOTE

The intermediary (if there is one) must be involved in the ground rules discussion (CrimPR, para 3.8 7)).

- *'Ground rules for questioning must be discussed between the court, the advocates and the intermediary before the witness gives evidence, to establish (a) how questions should be put to help the witness understand them, and (b) how the proposed intermediary will alert the court if the witness has not understood, or needs a break.'* (Application for a Special Measures Direction, Part F)
- The judge may require the advocates to consult the intermediary regarding the wording of their questions. (See further below.)
- In the event of disagreement about the proposed questions, the judge must decide what is appropriate: '*a trial judge is not only entitled, he is duty bound to control the questioning of a witness'* (*R v Lubemba; R v JP* [2014] EWCA Crim 2064 at [51]). The judge has a duty to intervene even if the intermediary does not.

GOOD PRACTICE EXAMPLE

In what may be the first Court of Appeal hearing that required an intermediary to assist a witness, ground rules were set, prosecution and defence counsel '*worked as a team, the better to promote the interests of justice in the conduct of this case'* and as directed by the ground rules, questions to be put to the vulnerable witness '*were reviewed by the registered intermediary, whose sensible expert suggestions were unhesitatingly adopted.*'

***Re FA* [2015] EWCA Crim 209**

The trial judge must give a direction to the jury about the use of an intermediary either for a witness or for a defendant at the start of the trial. Sample directions are included in the Crown Court Compendium 2023, pages 3-37 to 3-38.

Directions to a jury about special measures for a witness:

- *'Where on a trial on indictment evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.'* (Youth Justice and Criminal Evidence Act 1999 (YJCEA), section 32)
- *'Any special measures, including the use of an intermediary, should be explained to the jury. Depending on the age of the child or the vulnerability of W, it may help the jury to explain how W's level of understanding, regardless of intelligence, may be limited. This may be done before W gives evidence. It may help the jury and be fair to all parties to explain to the jury, before such a witness is cross-examined,*

that the cross-examination will not be conducted in the same way as it would have been if the witness had been an adult/non-vulnerable adult' It should be 'addressed in a manner which is fair to both/all parties.' (**Crown Court Compendium 2023** (pages 10-28 10-30 which also gives examples of special measures directions).

4. GROUND RULES REQUIRING AN ADVOCATE TO REDUCE QUESTIONS TO WRITING

It is reasonable and common having regard to the vulnerability of the witness for judges to ask advocates to write out their proposed questions for the vulnerable witness and share them with the judge and the intermediary (where there is one)

'In appropriate cases, where the witness is young or suffers from a mental disability or disorder, advocates may be required to prepare their cross examination for consideration by the court. This applies to all cases, not just those in the section 28 pilot scheme.'

R v Dinc [2017] EWCA Crim 1206.

The judgment further states '*Far from prejudicing the defence, the practice ensures that defence advocates ask focused and often more effective questions of a vulnerable child witness. The advocate will know precisely what the witness is going to say in chief because they will have the benefit of the pre-recorded ABE interview and can prepare fully'*

'Where questions are to be committed to writing and subject to judicial editing, with or without input from an intermediary, then, as a general rule, the proposed questions must be shared with the other parties to the trial. This applies to both vulnerable witnesses and defendants, unless the judge directs otherwise.'

CrimPD 2023 para 6.1.5

The proposed questions should be set out in Section 28 Defence Ground Rules Hearing Form section 3.

'Judicial interventions in questioning can be minimized if the approach to questioning is discussed in advance at a ground rules hearing and adhered to by the advocates. It is now quite common (and expected) for advocates to be directed to disclose their proposed questions in writing to the judge in advance of the ground rules hearing. Those are then discussed at the ground rules hearing and approved or amended as appropriate. In order to control questioning, judges should construct developmentally appropriate questions if advocates fail to do so'

Equal Treatment Bench Book 2023 para 147

Where witness cross-examination questions are disclosed in advance and/or discussed at the GRH, it is must be on the understanding that proposed cross- examination will not be 'telegraphed' in advance to the witness.

5. GROUND RULES ABOUT SPECIAL MEASURES AND OTHER ADJUSTMENTS

A party applying for special measures should have done so in accordance with the rules (including time limits) set out in CrimPR 18.

Directions for appropriate treatment and questioning are not limited to special measures set out in the legislation. See **Toolkit 10** - Identifying vulnerability in witnesses and defendants.

GOOD PRACTICE EXAMPLE

The defendant had a phobia about entering crowded rooms; the judge directed that the defendant should be the first to enter the courtroom at the start of the trial and after any break.

At the GRH the trial judge should consider how special measures/additional measures and other adjustments directed by the court will combine.

Section 19(2)(a) of the **YJCEA** refers to 'the special measures available in relation to the witness (or any combination of them)'.

For example, live link and a screen may be combined if the judge directs that the defendant is not going to be allowed to see the witness on the live link screen (CrimPD 2023, para 6.3.8). Complainants should not be given the impression that only one special measure can be used at a time (see research by Majeed-Ariss at al., 2019)

GOOD PRACTICE EXAMPLE

At the GRH the trial judge directed that the intermediary should work with interpreters to familiarise them with the deaf witness's idiosyncratic signs so that together they could convey the witness's answers to the court.

Even if no party has applied for special measures, the court may of its own motion raise the issue of whether such a direction should be given (YJCEA, section 19(1)(b)).

6. GROUND RULES RELIEVING A PARTY OF PUTTING THEIR CASE

Defence advocates may be restricted from putting their client's case to the vulnerable witness - but generally the court expects them to be cross-examined in a modified form and with the benefit of the range of special measures.

'It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness (see for example paragraph 3E.4 of the Criminal Practice Directions).'

R v Lubemba; R v JP [2014] EWCA Crim 2064, at [45]

'Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources.'

R v B [2010] EWCA Crim 4, at [42]

In ***R v RK*** [2018] EWCA Crim 603, at [27], the Court of Appeal said:

'We understand the concern to protect a child witness and the desire of a defence advocate to avoid any suggestion of confronting a child witness. However, if a child is assessed as competent and the judge agrees the child is competent, we would generally expect the child to be called and cross-examined, with the benefit of the range of special measures we now deploy. There is no reason to distress her or cause her any anxiety and therefore no reason to avoid putting the defence case by simple, short and direct questions. Although this court has in the past doubted the right to put every aspect of the defence case to a vulnerable witness, whatever the circumstances, it has not questioned the general duty to ensure the defence case is put fully and fairly and witnesses challenged, where that is possible.'

In section 28 **YJCEA** cases (pre-recorded cross-examination), advocates are required to complete the HMCTS's section 28 Defence GRH Form which includes space at sections 4 and 5 to request direction where certain issues could not be questioning about to the vulnerable witness .

Where such a restriction is imposed, it must be clearly defined and explained to the jury

This was clearly stated in ***R v Wills*** [2011] EWCA Crim 1938, at [36] and [37], and ***R v E*** [2011] EWCA Crim 3028).

In ***R v YGM*** [2018] EWCA Crim 2458, at [21] it was said:

'We believe that the following is best practice in a case involving cross examination of a vulnerable witness. First, 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. Before the witness is cross examined, it is best practice, (as recommended by the Judicial College) that as well as giving the standard special measures direction, the trial judge also directs the jury in general terms that limitations have been placed on the defence advocate. If any specific issues of content have been identified that the cross examiner cannot explore, the judge may wish to direct the jury about them after the cross examination is completed. On any view, the judge should direct the jury about them in the summing-up. Finally, we should add that every advocate (and trial judge) is expected to ensure that they are up to date with current best practice in the treatment of vulnerable witnesses.'

See also ***R v PMH*** [2018] EWCA Crim 2452. For a demonstration of how this might occur, see the training film ***A Question of Practice*** (Criminal Bar Association 2013).

Not putting the opposing version to the witness potentially deprives the witness of the opportunity to have their evidence fairly tested.

Careful thought should be given to how questions might be reworded so that the witness's account can be fairly tested. If questions can be adapted so that the defence case can be put to the witness, then the questions should be put. If there is an intermediary for the witness/defendant, they should be consulted about how to word the questions.

A judge has no power to insist on defence cross-examination of the witness. The judge (or the prosecutor in re-examination) may ask a question to give the witness 'the chance to deal with the implication in the cross examination' (***H v R*** [2014] EWCA Crim 1555, at [63]).

GOOD PRACTICE EXAMPLE

Defence counsel wanted to put to the witness the defendant's case that the incident had not happened at all. The intermediary advised on how this could be done in a way that the witness could deal with.

Questions defence counsel originally wanted to put:

Q: D didn't put his willy in your mouth, did he?

Q: D didn't put his willy in your bottom, did he?

On the advice of the intermediary, defence counsel's questions were reframed. The traditional statement-plus-tag form was avoided. Instead, two simple statements ('S') were followed by a simple question for each of the above, e.g:

S: You said D put his willy in your mouth.

S: D says he didn't put his willy in your mouth.

Q: Did D really put his willy in your mouth?

7. GROUND RULES RELIEVING A PARTY OF PUTTING THEIR CASE

Timetabling for the witness's evidence should be addressed at the GRH so as to schedule a 'clean start' to the witness's testimony.

Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved. A trial date involving a young or vulnerable adult witness should only be changed in exceptional circumstances. The capacity of a vulnerable witness is likely to deteriorate if there is delay.

It is important to schedule a 'clean start' to the evidence of vulnerable witnesses as their evidence is also likely to deteriorate if they are kept waiting. (**Equal Treatment Bench Book** 2023 p502)

GOOD PRACTICE EXAMPLE

The witness was taking a significant amount of medication to control psychiatric symptoms. Her ability to give evidence was much improved in the afternoon when her medication had the chance to start working and her mental state was most stable. The schedule was arranged so that she gave her testimony only in the afternoons.

If 'tag' questions are likely to be problematic for the vulnerable witness/defendant, the court should direct that they be avoided.

Tag questions are linguistically complex and powerfully suggestive. A tag question takes the form of a statement with a question added on at the end, for example, 'You don't like your stepdad, do you?', 'That's right, isn't it?'; as opposed to more linguistically straightforward questions or requests, such as 'Do you like your stepdad?' or 'Tell me about your stepdad.'

Advocates should be reminded that cross-examination should consist of short, simple questions, not comment on the evidence.

"… it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness … it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.'

R v B [2010] EWCA Crim 4, at [42]

"What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination."

R v Farooqi [2013] EWCA Crim 1649, at [113]

Judges may give directions about cross-examination based on third-party disclosure.

A witness ought to know in advance if certain records have been disclosed to the other side and that they may be asked questions about them. A witness taken by surprise by questions may become distressed because, for example, they were unaware that their GP or social care records had been disclosed to the defence: '*… prosecutors [should] satisfy themselves that complainants have consented to their medical records and/or counselling notes being disclosed to the defence*' (**Disclosure of Medical Records and Counselling Notes**, HM Crown Prosecution Service Inspectorate July 2013) otherwise the witness should be informed if the judge ordered disclosure of such material to the defence in the absence of their consent. Telling the witness this is not tantamount to coaching.

Advocates should consider whether it is in fact necessary to go through this material in cross-examination simply to highlight the fact that there are inconsistencies which can be agreed and put before the jury.

"Instead of exploring apparent inconsistencies in cross-examination it may, subject to discussion between the judge and the advocate(s), be appropriate for these to be identified to the jury after the witness's evidence. Where appropriate the judge should point out important inconsistencies after (instead of during) the witness's evidence"

CrimPD 2023 para 6.1.9

8. GROUND RULES ON THE DURATION OF QUESTIONING

A trial judge is entitled to set time limits on cross-examination.

A trial judge may be justified in imposing 'a time limit on the cross-examination of the complainant' (***R v Butt*** [2005] EWCA Crim 805) and '*is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate*' (***R v Lubemba; R v JP*** [2014] EWCA Crim 2064 at [51]).

By way of example, in ***Lubemba***, the cross-examination of a ten-year-old rape complainant was limited '*to 45 minutes and [the judge] interrupted when he felt her questions were unclear or inappropriate*' (***R v Lubemba; R v JP*** [2014] EWCA Crim 2064 at [32]). See also ***R v Lally*** [2021] EWCA 1372.

GOOD PRACTICE EXAMPLE

The witness was allowed to have short 'time-out' breaks (usually of just 30 seconds) in a small tent in the live link room when her anxiety peaked, but was not at the point where she needed a full break from giving her evidence. While the witness took this short break, the live link was temporarily turned off and the court waited until she was ready to continue. (If the live link remains on, the judge should ensure that the microphones in the court are turned off so that the witness does not hear the conversations in the courtroom.)

9. GROUND RULES ABOUT QUESTIONS THAT MAY OR MAY NOT BE ASKED

Ground rules should prevent cross-examination based on discredited myths.

For example, in sexual assault cases judges are expected to prevent cross-examination based on:

'… what modern research has proved to be myths … It is a myth that a man cannot be raped. It is a myth that rape involves a hooded stranger, or is limited to strangers. It is a myth that if there are no marks on the complainant, and no evidence of distress independently offered, that she cannot have been raped. It is a myth that unless the victim complains immediately she must have consented to sexual intercourse … It is a myth that if a woman has imbibed a great deal of alcohol with a man, she must have been willing to have sexual intercourse with him.'

Judge 2011;

see also the Crown Court Compendium (2023), section 20.

Sections 41–43 YJCEA restrict cross-examination on the complainant's sexual history without leave of the court. Applications for leave must be made in writing and within 28 days of disclosure (CrimPR 22).

Judges should make clear in advance where the boundaries of questioning lie.

'[T]here is a limit to the extent to which a Judge may properly intervene once questioning is underway without running the risk of seeming to descend into the arena and thereby potentially creating the perception of unfairness and – in extreme cases – imperilling any resulting conviction. Far better to have made clear from the start where the boundaries of questioning lie.'

Leveson 2015, 8.3.1, 'Ground rules approach', para 257

10. GROUND RULES ALLOCATING TOPICS AMONG ADVOCATES FOR CO-DEFENDANTS

Topics should be allocated to defence counsel to avoid repeat and/or unnecessarily prolonged cross-examination.

'If there is more than one accused, the judge should not permit each advocate to repeat the questioning of a vulnerable witness. In advance of the trial, the advocates should divide the topics between them, with the advocate for one accused leading the questioning, and the advocate(s) for the other accused asking only ancillary questions relevant to their client's case without repeating the questioning that has already taken place.'

CrimPD 2023, para 6.1.10

'In a multi-handed trial the judge must ensure that the witness is treated fairly over all, and not asked questions on the same topics, to the same end, by each and every advocate. Advocates must accept that the courts will no longer allow them the freedom to conduct their own cross-examination where it involves simply repeating what others have asked before, or exploring precisely the same territory. For these purposes defence advocates will now be treated as a group and, if necessary, issues divided amongst them, provided, of course, there is no unfairness in so doing.'

R v Jonas [2015] EWCA Crim 562, at [31] (Hallett LJ).

11. GROUND RULES ABOUT COMMUNICATION AIDS

Communication aids (YJCEA, section 30) may be ordered for eligible vulnerable witnesses.

GOOD PRACTICE EXAMPLE

The judge directed that a witness could pause cross-examination by pointing to a 'pause' card on the table in the live link room and the intermediary could then alert the judge that a pause had been requested.

GOOD PRACTICE EXAMPLE

'In particular in a trial of a sexual offence, "body maps" should be provided for the witness' use. If the witness needs to indicate a part of the body, the advocate should ask the witness to point to the relevant part on the body map. In sex cases, judges should not permit advocates to ask the witness to point to a part of the witness' own body. Similarly, photographs of the witness' body should not be shown around the court while the witness is giving evidence.'

CrimPD 3E.6

Communications aids for vulnerable defendants have also been ordered by judges using their inherent jurisdiction.

GOOD PRACTICE EXAMPLE

'Post-it' notes may be stuck on to the glass screen in the dock showing the order of events during the trial. These can be changed around and also removed, once a particular event has happened, to help a defendant who has difficulty understanding the order of events.

GOOD PRACTICE EXAMPLE

The defendant who struggled with concepts of time was allowed a timeline to assist cross- examination. The advocates had a duplicate copy and indicated certain points on the timeline when putting questions to the witness.

Ground rules should consider how the witness's supporter or intermediary will assist with communication aids.

'In a trial of a sexual offence there is an obvious need for sensitivity in the nature of and way questions are asked of a complainant and/or accused. Judges should not permit advocates to ask the witness to point to a part of the witness's own body. Similarly photographs of the witness's body should not be shown while the witness is giving evidence. If there is a need for a witness to identify a part of the body then the use of body maps will be appropriate'.

CrimPD 2023 para 6.1.11

GOOD PRACTICE EXAMPLE

It was directed that the intermediary would hold up to the live link camera the answers written by the partially mute witness and she would also number the pages used by the witness to communicate his answers in writing.

12. EXTENDING THE USE OF GRHs

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

Leveson 2015, 8.3.1, 'Ground rules approach', para 267

13. ACKNOWLEDGEMENTS

The toolkit summarises key points from research and guidance including:

- Cooper, P, Highs and Lows: The 4th Intermediary Survey (Kingston University 2014)
- Cooper, P and Allely, C, 'The curious incident of the man in the bank: procedural fairness and a defendant with Asperger's syndrome' 180 (35) Criminal Law and Justice Weekly (2016)
- Cooper, P, Backen, P and Marchant, R, 'Getting to grips with ground rules hearings: a checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court' 6 Criminal Law Review 417–432 (2015)
- Cooper, P and Norton, H (eds), Vulnerable People and the Criminal Justice System: A Guide to Law and Practice (Oxford University Press, 2017)
- Criminal Procedures Rules and Practice Directions (England and Wales)
- Judge, The Rt Hon The Lord, Lord Chief Justice of England and Wales, 'Vulnerable witnesses in the administration of criminal justice' (17th Australian Institute of Judicial Administration Oration in Judicial Administration, Sydney 2011)
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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

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TOOLKIT 19: Supporting Participation in Courts and Tribunals

TOOLKIT 20: Court of Protection