

The Advocate's Gateway

**Case management in criminal cases
when a witness or a defendant is
vulnerable: essential questions on
Toolkit 1a**

10 April 2017

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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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Note: Unless otherwise indicated, the paragraph numbers referred to in this checklist are the paragraph numbers of the Toolkit 1a - Case Management in criminal cases when a witness or a defendant is vulnerable.

ESSENTIAL QUESTIONS

| Is the witness vulnerable? | | |
|-----------------------------------|--|-------|
| | Ask these questions ... | Notes |
| 1. | <p>Who are vulnerable witnesses?</p> <ul style="list-style-type: none"> • Section 16 Youth Justice and Criminal Evidence Act 1999 (YJCEA); • Criminal Practice Directions [2015] EWCA Crim 1567 (CPD), 3D.1 and 3D.2; • para 1.3. | |
| 2. | <p>What other toolkits deal with vulnerability?</p> <ul style="list-style-type: none"> • Toolkit 10 - Identifying vulnerability in witnesses and defendants; | |
| 3. | <p>What other toolkits apply when the defendant is under 18?</p> <ul style="list-style-type: none"> • Toolkit 8 - Effective participation of young defendants. | |
| When should disclosure be sought? | | |
| | Ask these questions ... | Notes |
| 4. | <p>When should applications for third-party disclosure be made?</p> <ul style="list-style-type: none"> • At the Plea and Trial Preparation Hearing (PTPH) in the Crown Court. | |
| 5. | <p>What if the witness is under 10?</p> <ul style="list-style-type: none"> • 2015 Protocol to Expedite Cases Involving Witnesses under 10 Years; • para 2.1. | |

| When should disclosure be sought? | | |
|---------------------------------------|---|-------|
| | Ask these questions ... | Notes |
| 6. | <p>What if there is an allegation of child abuse?</p> <ul style="list-style-type: none"> • 2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings; • para 2.1. | |
| 7. | <p>What if there is an allegation of child abuse and disclosure is required of education records for schools outside Local Authority control?</p> <ul style="list-style-type: none"> • Para 2.1 | |
| Intermediary assessment for witnesses | | |
| | Ask these questions ... | Notes |
| 8. | <p>When should an intermediary assessment be considered?</p> <ul style="list-style-type: none"> • As early as possible; • para 2.3. | |
| 9. | <p>For which witnesses should there be an intermediary assessment?</p> <ul style="list-style-type: none"> • CPD 3F.26; • para 2.2. | |
| 10. | <p>Should all witnesses under 11 have an intermediary assessment?</p> <p>No:</p> <ul style="list-style-type: none"> • para 2.2. | |
| 11. | <p>Can there be an intermediary at trial if there was no intermediary at the ABE interview?</p> <p>Yes:</p> <ul style="list-style-type: none"> • R v Boxer [2015] EWCA Crim 1684; • para 2.2. | |

| Intermediary assessment for witnesses | | |
|---------------------------------------|---|-------|
| | Ask these questions ... | Notes |
| 12. | <p>What other toolkit deals with intermediaries?</p> <ul style="list-style-type: none"> • Toolkit 16 - Intermediaries: step by step. | |
| Intermediaries for defendants | | |
| | Ask these questions ... | Notes |
| 13. | <p>Is there a statutory provision in force to allow a defendant to be assisted by an intermediary?</p> <p>No:</p> <ul style="list-style-type: none"> • CPD 3F.12; • R v Cox [2012] EWCA Crim 549; • para 2.4 | |
| 14. | <p>How likely is it that an intermediary will be appointed for an adult defendant?</p> <ul style="list-style-type: none"> • CPD 3F.13; • para 2.4. | |
| 15. | <p>If an intermediary is appointed for an adult defendant, will he or she be appointed for the whole trial?</p> <ul style="list-style-type: none"> • CPD 3F.13; • R v Rashid [2017] EWCA Crim 2; • para 2.4. | |
| 16. | <p>What factors will the court take into account when deciding whether to appoint an intermediary?</p> <ul style="list-style-type: none"> • R v Rashid [2017] EWCA Crim 2; • para 2.4. | |
| 17. | <p>What steps should the court take if there is no intermediary for a defendant?</p> <ul style="list-style-type: none"> • Para 2.5 | |

| Special measures | | |
|------------------|---|-------|
| | Ask these questions ... | Notes |
| 18. | <p>Who is eligible for special measures?</p> <ul style="list-style-type: none"> • Section 16 and section 17 YJCEA; • para 2.8. | |
| 19. | <p>What special measures are available?</p> <ul style="list-style-type: none"> • Para 2.9 | |
| 20. | <p>Can a defendant give evidence by live link?</p> <p>Yes:</p> <ul style="list-style-type: none"> • section 33A YJCEA; • para 2.10 | |
| 21. | <p>What steps should be taken if a witness or defendant gives evidence by live link?</p> <ul style="list-style-type: none"> • Appendix 1 of Amendment No 3 to the Criminal Practice Directions 2015; • CPR 18.10 and CPR 18.15; • para 2.11. | |
| 22. | <p>Can defence witnesses give evidence by live link?</p> <p>Yes:</p> <ul style="list-style-type: none"> • CPD 3N.11; • para 2.12. | |
| 23. | <p>What special measures apply for children or those under 18 when the Achieving Best Evidence (ABE) interview was recorded?</p> <ul style="list-style-type: none"> • Section 21 YJCEA; • para 2.13. | |
| 24. | <p>When is it appropriate for a witness to give evidence by remote link?</p> <ul style="list-style-type: none"> • See Toolkit 9 - Planning to question someone using a remote link. | |

| Special measures | | |
|--|--|-------|
| | Ask these questions ... | Notes |
| 25. | <p>When should an application for special measures be made?</p> <ul style="list-style-type: none"> • CPR 18.3; • para 2.14. | |
| Pre-trial familiarisation visit to court | | |
| | Ask these questions ... | Notes |
| 26. | <p>What is the purpose of pre-trial familiarisation visit?</p> <ul style="list-style-type: none"> • Para 3.1 | |
| 27. | <p>Who should attend the pre-trial familiarisation visit?</p> <ul style="list-style-type: none"> • CPS Guidance, Speaking to Witnesses at Court 2018, para 2.2; • para 3.1 | |
| 28. | <p>Who should supervise the pre-trial familiarisation visit?</p> <ul style="list-style-type: none"> • Witness Charter 2013, standard 11; • para 3.2. | |
| 29. | <p>What should happen at the pre-trial familiarisation visit?</p> <ul style="list-style-type: none"> • Witness Charter 2013, standard 17; • para 3.3. | |
| Counselling/therapy | | |
| | Ask these questions ... | Notes |
| 30. | <p>Is it for the police or prosecution to decide if a witness should seek pre-trial counselling or therapy?</p> <p>No:</p> <ul style="list-style-type: none"> • para 3.4. | |

| Counselling/therapy | | |
|--|--|-------|
| | Ask these questions ... | Notes |
| 31. | <p>If counselling/therapy takes place, are records of it disclosable?</p> <p>They may be:</p> <ul style="list-style-type: none"> • 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 2018, chapter 2, ‘Children, Young People and vulnerable adults’; • para 3.4. | |
| Ongoing assessment and review | | |
| | Ask this question ... | Notes |
| 32. | <p>Should there be an ongoing assessment and review of the witness’s needs?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 3.5. | |
| Keeping the prosecution witness informed | | |
| | Ask this question ... | Notes |
| 33. | <p>Should prosecution witnesses be kept informed of the progress of the case?</p> <p>Yes:</p> <ul style="list-style-type: none"> • CPS Guidance, Speaking to Witnesses at Court 2018; • para 3.7. | |

| Plea and trial preparation hearings | | |
|-------------------------------------|---|-------|
| | Ask these questions ... | Notes |
| 34. | <p>What steps should be taken by the PTPH?</p> <ul style="list-style-type: none"> • Paras 4.1–4.3. | |
| 35. | <p>Should there be priority listing for trials of vulnerable witnesses?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 4.4. | |
| 36. | <p>What applications should be made?</p> <ul style="list-style-type: none"> • Para 4.7 | |
| 37. | <p>Should there be provision for further pre-trial hearings?</p> <ul style="list-style-type: none"> • Para 4.9 | |
| Ground rules hearings | | |
| | Ask these questions ... | Notes |
| 38. | <p>When must a ground rules hearing (GRH) be held?</p> <ul style="list-style-type: none"> • Section 28 YJCEA; • para 5.1 | |
| 39. | <p>When may a GRH be held?</p> <ul style="list-style-type: none"> • CPD 3E; • R v Lubemba [2014] EWCA Crim 2064, para 42; • paras 5.1 and 5.2. | |
| 40. | <p>What steps should advocates take to prepare for a GRH?</p> <ul style="list-style-type: none"> • Para 5.3 | |

| Ground rules hearings | | |
|-----------------------|---|-------|
| | Ask these questions ... | Notes |
| 41. | <p>What are the restrictions on an advocate cross-examining a vulnerable witness or defendant?</p> <ul style="list-style-type: none"> • R v Lubemba [2014] EWCA Crim 2064; • R v Sandor Jonas [2015] EWCA Crim 562; • CPR 3.9(7) and 3.11(d); • Equal Treatment Bench Book 2018, chapter 2, 'Children, Young People and Vulnerable Adults'. | |
| 42. | <p>What other matters should be dealt with at the GRH?</p> <ul style="list-style-type: none"> • Para 5.5; • para 5.6. | |
| 43. | <p>Should there be a note of what was ordered at the GRH?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 5.7. | |
| 44. | <p>What other toolkits should be considered?</p> <ul style="list-style-type: none"> • Toolkit 1 - Ground rules hearings and the fair treatment of vulnerable people in court | |
| Section 28 YJCEA | | |
| | Ask these questions ... | Notes |
| 45. | <p>When will there be a hearing under section 28?</p> <ul style="list-style-type: none"> • Para 5.9 | |
| 46. | <p>Must there be a GRH for a section 28 hearing?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 5.11. | |
| 47. | <p>Should the intermediary attend the section 28 hearing?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 5.11. | |

| Section 28 YJCEA | | |
|------------------|---|-------|
| | Ask these questions ... | Notes |
| 48. | <p>Can the cross-examination at a section 28 hearing be edited?</p> <p>Yes, with the judge's permission:</p> <ul style="list-style-type: none"> • para 5.13. | |
| Pre-trial review | | |
| | Ask these questions ... | Notes |
| 49. | <p>When and why should a pre-trial review (PTR) take place?</p> <ul style="list-style-type: none"> • Para 5.14. | |
| 50. | <p>What steps should have been taken by the PTR?</p> <ul style="list-style-type: none"> • Paras 5.15 and 5.16. | |
| 51. | <p>What particular problems should be resolved at the PTR for vulnerable witnesses?</p> <ul style="list-style-type: none"> • Para 5.18; • para 5.17. | |
| 52. | <p>Should timetabling of a vulnerable witness's evidence be dealt with at the PTR?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 5.18. | |
| 53. | <p>Should consideration be given at the PTR to arrangements for the access and exit of the vulnerable witness when at court?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 5.19. | |

| Pre-trial review | | |
|----------------------------|---|-------|
| | Ask these questions ... | Notes |
| 54. | <p>Should consideration be given at the PTR as to who will attend the live link?</p> <p>Yes:</p> <ul style="list-style-type: none"> • appendix 1 of Amendment No 3 to the Criminal Practice Directions 2015; • CPR 18.10 and 18.15; • para 5.20. | |
| Trial | | |
| | Ask these questions ... | Notes |
| Practical issues | | |
| 55. | <p>What steps should be taken at trial to ensure compliance with previous directions?</p> <ul style="list-style-type: none"> • Paras 6.1 to 6.5 | |
| Meeting the witness | | |
| 56. | <p>What should prosecuting counsel say to a prosecution witness before the witness gives evidence?</p> <ul style="list-style-type: none"> • Speaking to Witnesses at Court 2018, paras 2.1 and 3.4; • paras 6.6 and 6.7. | |
| 57. | <p>Should the judge speak to a vulnerable witness before the witness gives evidence?</p> <ul style="list-style-type: none"> • Para 6.8. | |
| 58. | <p>If the judge speaks to a vulnerable witness before the witness gives evidence, should the advocates be present?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 6.8. | |

| Trial | | |
|---|---|-------|
| | Ask these questions ... | Notes |
| Participation and adjustments | | |
| 59. | <p>What steps should the judge take to ensure the full and effective participation of a vulnerable witness in the trial?</p> <ul style="list-style-type: none"> • Paras 6.10 and 6.11. | |
| Questioning the vulnerable witness | | |
| 60. | <p>Will the judge stop cross-examination of a vulnerable witness if it fails to comply with judicial directions?</p> <p>Yes:</p> <ul style="list-style-type: none"> • <i>R v Lubemba</i> [2014] EWCA Crim 2064; • para 6.12. | |
| 61. | <p>Will the jury be told about any restrictions in cross-examining a vulnerable witness?</p> <p>Yes:</p> <ul style="list-style-type: none"> • para 6.12. | |
| 62. | <p>Can the jury be told what questions the advocate would have asked and of any alleged inconsistencies if there had been no restrictions on cross-examining the vulnerable witness?</p> <p>Yes:</p> <ul style="list-style-type: none"> • <i>R v Wills</i> [2011] EWCA Crim 1938, • para 6.14. | |
| Vulnerable defendant representing him or herself | | |
| 63. | <p>If a vulnerable defendant represents him or herself, can the court order that he or she has legal representation or appoint a court advocate to assist the court?</p> <p>Not if the defendant objects:</p> <ul style="list-style-type: none"> • <i>R v Holloway</i> [2016] EWCA Crim 2175; • para 6.16 | |

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