The Advocate's Gateway

The Inns of Court College of Advocacy

Vulnerable witnesses and parties in the civil courts

Toolkit 17

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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 is a specialist skill (*Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court*, 2011). Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

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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This toolkit brings together policy, research and guidance relating to:

1. VULNERABLE WITNESSES AND PARTIES IN THE CIVIL COURTS

1.1 Civil litigation can cover a wide range of civil and commercial disputes, immigration, employment, housing, public law and so on. It may also be a useful guide for formal inquiries, such as the forthcoming Goddard Inquiry into institutional responses to child sexual abuse. This toolkit therefore provides only a general guide for many differing types of legal processes and is designed to focus attention on vulnerability at all stages of case preparation, including where a case is settled, as well as at court.

1.2 This document contains information about vulnerable witnesses in the civil courts and is primarily intended for use by representatives, advocates and judges. Where appropriate, it refers to existing legislation, rules and guidance already developed for criminal and family courts and to the existing toolkits. In recognition that many civil cases settle, this toolkit is designed to encompass a typical timeline from legal advice to hearing. Recognition of vulnerabilities at an early stage is vital to ensure that vulnerable witnesses are identified and enabled to effectively participate. Attention should be paid to the potential for triggers to vulnerability throughout proceedings (see Toolkit 18 - Working with traumatised witnesses, defendants and parties). The focus is on witnesses and parties being enabled to participate effectively in civil proceedings, thus ensuring access to justice and a fair hearing. This is achievable particularly through applying measures to ensure communication is facilitated and recognising what may trigger vulnerability.

1.3 Annex 1 (page 40) describes a typical timeline.

2. DATA

2.1 There is no data on the number of vulnerable people in civil litigation. There is some data on vulnerable court users but it is not complete. By way of examples, the following figures were obtained by the Association of Personal Injury Lawyers(APIL).

- Over the last five years to the end of 2014, 75,000 cases were heard by the Court of Protection.
- In the year to February 2015, 139,149 accounts were set up by the Court Funds Office for children who had received compensation. This does not include those cases where damages are accepted on behalf of a child without court approval by giving a parental indemnity. In addition 7,404 accounts were for Court of Protection awards for vulnerable adults and 1,139 were for protected beneficiaries.
- The court user survey of a small sample of court users in 2009–2010 has very low figures for adult court users who identify themselves as having a long-term illness, health problem or disability. This is not a useful guide because the sample was small (8,782 people) and because research tends to show that self-reporting is unreliable and the categories do not focus on vulnerability. Advocates should be aware, for example, of the content of the Radford Study into child abuse and neglect in the UK in order to understand that witnesses in any form of civil litigation may present as non-vulnerable but may have a significant background and history of vulnerability as a child.

3. OVERVIEW

3.1 The current Civil Procedure Rules (CPR) provide a wide but unfocussed discretion allowing for the use of technology and adapted court procedures but this is not covered in the directions questionnaire. While there are no formal procedures for settlement meetings there is still a need to consider the vulnerability of parties. This toolkit is therefore provided against a background where there is no focussed practice direction in civil proceedings on the issue of vulnerability, no accepted procedure for advocates, representatives or judges to identify vulnerable people in civil proceedings, no specific special measures and no requirements on judges to manage cases in relation to vulnerable witnesses or parties, including where the case involves litigants in person.

3.2 In this context, the following are imperative:

- As there is no definition of a 'vulnerable witness' or a 'vulnerable party' in the civil justice system where a significant proportion of parties and witnesses are likely to be vulnerable, it is vital for advocates, representatives and judges to seek to identify those who are vulnerable and the assistance they will need to give their best evidence. General risk factors which suggest a witness is vulnerable are outlined in Toolkit 10 - Identifying vulnerability in witnesses and defendants.
- Vulnerability should be identified at the earliest possible stage and information-sharing is key to achieving this. There is currently no bank of available intermediaries, independent sexual violence advisers (ISVAs) or technological facilities to assist in dealing with vulnerable clients or witnesses so the burden is on the advocates, representatives and judges up to the point of settlement or judgment to ensure that efforts are made at every stage to ensure the effective participation of vulnerable parties and witnesses. The need for a ground rules hearing (GRH) should be considered if a vulnerable witness or party is due to give evidence. Civil judges should consider 'additional measures' and other reasonable adjustments throughout proceedings. The current rules are passive in that they merely set out a wide discretion.
- Advocates, representatives and judges should be proactive in ensuring that suitable measures are available to enable parties or witnesses to give their best evidence during case preparation and to be able to effectively participate in

settlement procedures, at any hearing and, where appropriate, immediately after any hearing and/or settlement procedure.

- Special consideration should be given to managing and funding cases with interpreters, intermediaries or ISVAs. ISVAs are a small network of independent advisers. They have been established across England and Wales as part of a government initiative to provide targeted professional support to victims of serious sexual, violent crime (see the CPS's 'Violence against Women Guidance' page).

3.3 There is clearly a need for more informed support for vulnerable witnesses in the civil justice system, particularly adults who are at risk of being triggered to self-harm, attempt and/or commit suicide either before, during and/or after the legal process.

3.4 There is also a need for the provision of training for advocates, representatives and judges, particularly those who spend comparatively less time in contested hearings.

4. CURRENT RULES AND GUIDANCE

4.1 There are no CPR that deal expressly with vulnerable witnesses or parties. The rules (Part 21 CPR 1998) make specific provision only for children (under 18) and protected parties – those lacking the capacity to conduct litigation within the meaning of Mental Capacity Act 2005.

4.2 The CPR are clearly designed to have flexibility for the challenges created by the vulnerability of a party (falling short of protected party status) and witnesses. However, there are no specific provisions in this regard. The court is empowered generally under Part 1 and Part 3.1 CPR to manage cases in accordance with the overriding objective and this unfettered discretion allows the court to make such orders as it sees fit to further this objective.

4.3 In particular Part 34.8 permits the evidence of a witness to be taken by way of a deposition. Hitherto this has been used in proceedings with a foreign element or in cases concerning the terminal illness of a party or witness who may not still be alive (or be able) to give evidence at the time of trial (this is a common practice in terminally ill asbestos disease victims for example). The procedure is that the witness's evidence is taken at a time and a place agreed before an examiner of the court who represents the judge.

4.4 Unless otherwise directed, the examination of the witness must be conducted in the same way as if the witness were giving evidence at the trial (Part 34.9 CPR).

4.5 The taking of a deposition requires the deponent to be examined under oath before a judge or examiner of the court (or such other person as may be appointed). This can be a cumbersome procedure and, if being dealt with across jurisdictions, may mean that the guidance in this toolkit is not familiar to the examiner. As an alternative to obtaining a deposition, evidence by video link will generally be preferable in some cases and has the further advantage that the trial judge will hear the evidence first hand. The recorded evidence is then deployed at trial. For questioning by live link, see also Toolkit 9 - Planning to question someone using a remote link.

4.6 The CPR permit the giving of evidence by video link (Part 32.3) but this (and the use of evidence by way of deposition above) is at present against the general rule that factual evidence is to be proved by witnesses giving oral evidence at the trial (Part

32.2). Evidence given by way of video link has the advantage over evidence given by way of deposition in that the trial judge will be hearing and seeing the witness first hand and be able to ask questions him or herself. However, the extent to which the court will allow applications of this sort based on the vulnerability of the witness is not easy to predict and in the current climate the application would have to be supported by compelling evidence that the vulnerability is such that it is right to make such an order, certainly in cases concerning claims for damages arising out of historic sexual abuse.

4.7 There is precedent for the anonymisation of proceedings in relation to vulnerable witnesses and parties. Advocates, representatives and judges should be aware of *JXMX (by her mother and litigation friend AXMX) v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96 which considered CPR rule 39.2(4) which now provides that:

'The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.'

Case preparation

4.8 There are currently no rules for case preparation, meetings with experts or settlement meetings and the directions questionnaire does not proactively raise issues of vulnerability. It follows that there are substantial benefits of a revised approach to the collection and presentation of evidence from vulnerable parties and witnesses in the civil justice system. Improving the treatment of vulnerable people in the civil justice system brings a greater likelihood of a fair and just hearing and outcome for all the parties in each case. In particular, a revised approach will optimise conditions in which the best evidence can be given, as well as the more effective and efficient use of court time. The Law Society has published guidance for solicitors to help them meet the needs of vulnerable clients. This includes clients with a range of physical and mental health problems, including learning disabilities. There is also a helpful focus for practitioners on the best approach to take when working with clients who lack mental capacity. The guidance is supplemented by an Easy Read Guide for clients, supporting them to access solicitors more easily.

Crime/civil cross-over

4.9 It is also important to note that criminal and civil cases can overlap and by November 2015, EU member states will need to have demonstrated that they have modified their domestic laws to give effect to the Victim Directive 2012/29/EU which establishes minimum standards on the rights, support and protection of victims of crime by adopting various means, combining legislative, administrative and practical measures, and taking into account good practices in the field of assistance and protection for victims. To begin to understand how this might interest civil representatives and advocates, it is worth noting that, for the purpose of the directive, a victim is defined as follows:

- a natural person who has suffered harm (including physical, mental or emotional harm or economic loss) directly caused by a criminal offence — regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them (see Recital 19);
- family members of the deceased victim, who have suffered harm because of the person's death directly caused by a criminal offence (paragraph 1(a)(ii)). The criterion 'harm' should be interpreted in the context of the individual emotional relationship and/or direct material interdependence between the deceased victim and the relative(s) concerned.

4.10 It is also important to note that issues such as human trafficking and forced labour may arise in the civil context so advocates need to be aware of various relevant legalisation including, but not limited to, the Modern Slavery Act 2015 and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings. Other areas traditionally seen as 'criminal' are increasingly being considered by the civil courts, including forced labour, forced marriage and female genital mutilation. These are areas where advocates, representatives and judges should ensure they have specialist knowledge and training on vulnerability in justice systems to include cultural awareness and unconscious bias training.

5. OTHER JURISDICTIONS

5.1 Comparative guidance is available in both criminal and family proceedings. Advocates, representatives and judges should be familiar with the material openly available on The Advocate's Gateway website, particularly the good practice examples for facilitating communication and enabling vulnerable witnesses and parties to give their best evidence. As this document is an overview for use in many different types of civil proceedings, those good practice examples have not been repeated here.

5.2 The following definitions are of assistance:

5.3 **Vulnerable witnesses** are defined by section 16 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) as:

a. All child witnesses (under 18); and

b. Any witness whose quality of evidence is likely to be diminished because they:

   i. are suffering from a mental disorder (as defined by the Mental Health Act 1983);

   ii. have a significant impairment of intelligence and social functioning; or

   iii. have a physical disability or are suffering from a physical disorder.

5.4 **Intimidated witnesses** are defined by section 17 YJCEA as those suffering from fear or distress in relation to testifying in the case. Complainants in sexual offences are defined by section 17(4) as automatically falling into this category unless they wish to opt out.

6. CODES OF CONDUCT – REPRESENTATIVES

6.1 Mandatory principles underpinning the regulatory framework and which may impact on a solicitor's or other regulated representative's interaction with vulnerable people include:

- ensuring that the rule of law is upheld and that justice is properly administered;
- acting with integrity;
- acting in the best interests of each client;
- providing a proper standard of service to each client; and
- behaving in a way that maintains the trust that the public places in representatives.

6.2 The new SRA Handbook was published on 1 October 2017 (See also e.g. the Code of Conduct for members of the Chartered Institute of Legal Executives).

Chapter 1 of the SRA Handbook deals with client care. This chapter is about providing a proper standard of service which takes into account the individual needs and circumstances of each client. Outcomes centre around the need to treat clients fairly and to ensure that the service provided to clients is competent, delivered in a timely manner and takes account of the individual client's needs and circumstances.

Chapter 2 is about encouraging equality of opportunity, respect for diversity and preventing unlawful discrimination. The requirements apply in relation to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. There are also duties in relation to evidence and not taking unfair advantage. Overall, solicitors and other representatives must act in a manner which promotes the proper operation of the justice system. As set out above under case preparation, the Law Society has issued comprehensive guidance to help solicitors meet the needs of vulnerable clients. The guidance sets out good practice examples including how to:

- identify vulnerable clients;
- identify their needs at an early stage and respond appropriately;
- communicate with them more effectively;

- address issues they may have relating to mental capacity;
- work with third parties who can assist them and you to achieve the best possible legal outcomes.

7. CODES OF CONDUCT – ADVOCATES

7.1 Solicitor Advocates have a representative body called the SAHCA which states: 'Our uncompromising aim is to enable our members to attain the highest ethical and professional standards of advocacy, whilst promoting parity and equality of opportunity with the Bar.' It does not specify particular responsibilities towards the vulnerable and is not bound by the same criteria as the Bar. The Bar Standards Board Handbook 2014 provides the code of conduct for barristers who should ensure that the interests of vulnerable clients and their needs are taken into account (oC14) and should do what they reasonably can to ensure that the client understands the process and what to expect from it and from their barrister. It also states that barristers should also try to avoid any unnecessary distress to the client (gC41).

- However, the core duties, with which barristers are required to comply, include duties:
  - to observe your duty to the court in the administration of justice (CD1);
  - to act in the best interests of each client (CD2);
  - to act with honesty and integrity (CD3);
  - not to behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession (CD5);
  - not to discriminate unlawfully against any person (CD8).
- Representatives are subject to similar duties to uphold the rule of law and proper administration of justice and to provide a proper standard of service to clients including vulnerable clients (Principles 1 and 5, Representatives Regulation Authority Code of Conduct).

7.2 These duties mean that all advocates have some responsibility to assist the court in identifying and appropriately responding to the vulnerability of parties and other witnesses. In addition, it is suggested that advocates should, as part of their duty to assist the court in the administration of justice, assist the court as a public authority in its duty to act compatibly with the European Convention on Human Rights, especially Articles 6 and 8.

7.3 Representatives, advocates and judges should be aware that they too are potentially vulnerable to the adverse and unavoidable impact of secondary traumatic stress. They need to be alert to the symptoms and have steps in place enabling them to manage and metabolise any traumatic material to which they may be exposed during the legal process. Any reactivity could potentially re-traumatise vulnerable witnesses or parties, impeding their efficacy and communication in court.

(See 'Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients who are Victims of Domestic Violence and Abuse'; Andrew P Levin and Scott Greisberg (2003–2004) 'Vicarious Trauma in Attorneys' Pace Law Review 24:245; and 'Secondary Traumatic Stress in Attorneys and their Administrative Support Staff Working with Trauma-Exposed Clients'.)

8. IDENTIFYING VULNERABILITY OF PARTIES AND WITNESSES

8.1 Advocates should try to establish at the earliest possible stage whether a client could be considered 'vulnerable'. Ideally, this will be at the first meeting or conference with a client. Some types of vulnerability will be more obvious than others. The Advocate's Gateway Toolkit 10 - Identifying vulnerability in witnesses and defendants contains some good practice example questions to the client which may assist the advocate in ascertaining vulnerability and/or whether the person is taking medication. It is important to understand that self-reporting is not the only or even the most reliable way of ascertaining vulnerability.

8.2 It is important to remember that vulnerability may not be constant, consistent or continuous within an individual. Someone who would be regarded as vulnerable at the initial stages of a case may not be so at the final hearing and vice versa. Vulnerability may be transient or situational. Advocates, representatives and judges should therefore consider the issue of vulnerability at the time of the relevant meeting or hearing.

8.3 Similarly, the issue of vulnerability should be kept under review. Individual personal factors (for example, age, incapacity, impairment or medical condition), environmental factors, or a combination of the two, can give rise to vulnerability. For example, an environmental factor, such as being in the courtroom or seeing one of the parties might 'trigger' anxiety. It may also be necessary to obtain and share information with other professionals and organisations working with the client, such as the police, social workers, medical or mental health professionals or other support workers.

8.4 An expert may be necessary to help ascertain the level and extent of vulnerability, so consideration should be given at the earliest stage as to whether an application under Part 35 CPR should be made to the court. The type of expert required (if any) will depend heavily on the circumstances of the case. It should be remembered, however, that expert evidence is restricted to that which is reasonably required to resolve the proceedings: CPR rule 35.1. In addition, information may be helpful from doctors and professionals treating the individual.

8.5 Representatives, advocates and judges should bear in mind that vulnerability can be transient or fluctuating, and is not the same as capacity. The issue of vulnerability should therefore be regularly and proactively reviewed. Vulnerability may only become apparent or heightened in certain circumstances. For example, a client's vulnerability may not be apparent when in a meeting/conference, but may become apparent or heightened when at court, during evidence, or in meetings with professionals.

8.6 Representatives, advocates and judges should be familiar with *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (March 2011) (the ABE guidance). It relates solely to criminal proceedings but is a detailed analysis of good practice that has developed for the interviewing of children and vulnerable witnesses and the principles should be readily applicable to civil law cases. For those involved in cross-jurisdictional cases there is also Commonwealth guidance: see, in particular, the Bench Book for Children Giving Evidence in Australian Courts and the 'Interviewing children' section of the Australian Institute of Family Studies library.

8.7 It may become apparent to the representative or advocate that an unrepresented party, or a witness who is not a party, may be vulnerable. Part of the advocate's duty is to raise this with the judge at the earliest stage, to consider whether to obtain expert evidence (and how to fund it if the vulnerable witness is not a party) and (in the case of a witness) to consider whether the court should be invited to join that person as an intervener or even a party. If the issue only arises at a late stage, for example, during that witness's or party's evidence, it is likely to be necessary to propose an adjournment to allow for assessment of the need for additional measures.

8.8 Once it is apparent that additional measures or adjustments are needed, particularly during contested hearings, there will almost certainly need to be a ground rules-type hearing (guidance about which is provided below).

8.9 Representatives, advocates and judges should be aware of the following studies so that, in the absence of training they can be properly prepared to facilitate the best evidence from vulnerable witnesses and parties.

- The 2013 MIND report *At Risk Yet Dismissed* focuses on the experiences of people with mental health problems in the criminal justice system. It reports that one in every four people in England and Wales is estimated to have a mental health

problem. Participants in the study had found the court process intimidating. Some dropped their cases, others were so severely affected that they went into crisis, self-harming and attempting suicide. Cross-examination by the defence was found to be very distressing, especially the experiences of being mocked and accused of lying. Good practice and enabling examples included pre-court visits, preparation and information, special measures and the judge intervening on behalf of the individual with mental health problems.

- The MIND report, *Achieving Justice for Victims and Witnesses with Mental Distress: A Mental Health Toolkit for Prosecutors and Advocates* gives excellent, good practice guidance on how to support people to give their best evidence.

- The Crown Prosecution Services (CPS) publication *Violence Against Women and Girls Crime Report 2012–2013* advises that the engagement of ISVAs is good practice in cases of sexual violence against women and girls who enter the criminal justice system.

- *Fair Access to Justice?*, the Prison Reform Trust report on access to justice, highlights the need for trained intermediaries to work with vulnerable defendants in the criminal justice system. The value of using intermediaries in the civil justice system is axiomatic.

- The *Report of the Vulnerable Witnesses and Children Working Group* (March 2015) set up by the President of the Family Division emphasises the need for the training of advocates and members of the judiciary and the need for the funding of intermediaries. It also gives guidance on good practice.

- Department of Health (2010–2011) *Valuing People Now: The delivery plan*.

9. CHILDREN AND YOUNG PEOPLE

9.1 Persons under the age of 18 should be automatically regarded as vulnerable. This accords with well-researched concepts reflected in international law.

9.2 A grant of party status to a child or young person leaves the court with a wide discretion to determine the extent of the role which he or she should play in the proceedings. In *Re LC (Children)* [2014] UKSC 1 Lady Hale, while noting an *'increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions'*, identified a number of possible options which could be used if necessary to limit the role of the child or young person as a party. For example:

- adduce a witness statement by the child or young person, or a report by the child or young person's guardian;
- permit cross-examination of the other parties on the child or young person's behalf;
- permit submissions to be made on the child or young person's behalf.

9.3 The extent to which the court should permit the child or young person who is a party to be present in court will be in the court's discretion and will very much depend on the child or young person's age, wishes and feelings, level of understanding, and the issues for determination before the court.

9.4 38 Some children may have vulnerabilities other than age. Regard should be had to some of the matters listed in relation to adults in Section 10 below.

10. ADULT WITNESSES AND PARTIES

10.1 There is currently no data available to indicate whether there has been a recent increase in the number of vulnerable adult witnesses in the civil justice system. There is, however, a rising tide of awareness that certain groups of adults are particularly vulnerable and are accessing the civil justice system both represented and unrepresented.

10.2 It is important to take into account the views of the individual witness or the party. Vulnerable people are not a homogeneous group and not everyone with a disability will automatically be vulnerable or would wish to be regarded as such. Equally, advocates, representatives and judges should note that parties or witnesses who appear to be robust or resistant to assistance may in fact be fearful about the impact of their vulnerabilities on the outcome of their case; for example, concern that disclosure of a mild learning disability or mental health history could negatively impact on the assessment of their claim. They may also be embarrassed or ashamed of their vulnerability and do all they can to hide or mask it.

10.3 There are many ways in which adults participating in civil proceedings may require assistance due to vulnerability, not only to assist them but also to ensure that proceedings can run as smoothly and efficiently as possible; the following list is not exhaustive but provides a guide to the most common examples that representatives and advocates may encounter in practice.

Violence, conflict survival, sexual abuse, stalking or harassment

a. Special consideration should be given to identifying cases where there is a risk of vulnerable witnesses and /or parties self-harming, attempting and/or committing suicide. People who have experienced sexual abuse in childhood are an at-risk group.

b. Representatives, advocates and judges should anticipate that legal proceedings may well be challenged or interrupted when a witness or party is 'triggered' into recalling a traumatic experience. The re-traumatised witness or party may cope in ways that are instinctive to them but confusing to other people. Witnesses or parties may dissociate, minimize, or try to control unrelated aspects of their environment. They may experience terror, uneasiness, flashbacks, body memories, freeze, go blank, become inarticulate and experience feelings they felt

at the time of initial trauma (see Toolkit 18 Working with traumatised witnesses, defendants and parties). For example, representatives and advocates should try to ensure that any hearings, settlement meetings and/or meetings with experts, do not coincide with the anniversary date of the abusive event.

c. Sensitive timing and pacing are required when questioning a vulnerable witness or party to ensure the witness does not become overwhelmed, potentially re-traumatised or unable to communicate. Representatives, advocates and judges need to be aware that sexual abuse, particularly involving a family member, is linked to a sense of stigma and painful shame which when triggered may result in the witness becoming re-traumatised.

d. Representatives, advocates and judges should be aware of traumatic events in the past history and the likely stress on adult victims of knowing or fearing that they may have to discuss those matters and/or encounter another party or witness in a settlement meeting or at court. This may result in them refusing to engage in proceedings or to comply with court directions about providing evidence. An adult victim's confidence and trust can disappear in an instant..

e. There is currently no decision preventing a litigant in person cross-examining a vulnerable witness or opposing party, despite the obvious effect on the giving of best evidence. Advocates should be aware of the European Convention arguments in Re C [2014] EWFC 44 in the Family Division and, given that by CPR rule 32.1(3) the court can limit cross-examination and rule 32.3 grants the court discretion to 'allow a witness to give evidence through a video link or by other means', reasonable adjustments can be made to avoid humiliation. In extreme cases, this ought to allow for the witness to answer written questions set out by the litigant in person in advance so that the judge and the opposing advocate can then also ensure that the questions are suitable.

f. Representatives and advocates should be aware of the possible detrimental impact on vulnerable adult survivors of sexual abuse of knowing that highly personal and sensitive information about their past histories could become 'common knowledge' in civil proceedings. In these situations representatives

and advocates should consider whether and, if so, how such information can be shared on a need-to-know-only basis.

Past medical history

10.4 Representatives and advocates should be aware of the potential embarrassment for vulnerable adult parties or witnesses of realising that aspects of their past medical histories may need to be disclosed within proceedings. In these situations, representatives and advocates should consider whether and, if so, how such information can be shared on a need-to-know-only basis.

Physical disability

10.5 Practitioners and courts should accommodate persons with physical disabilities by making the appropriate adjustments.

Hidden disability

10.6 In relation to hidden disabilities, such as specific language impairment, dyslexia, dyspraxia, dyscalculia and attention deficit disorder see Toolkit 5 - Planning to question someone with 'hidden' disabilities.

10.7 Stammering

10.8 45 Representatives and advocates need to exercise great patience with vulnerable witnesses or parties who stammer. Time must be given to allow them to communicate. Reasonable adjustments should be considered to enable communication by alternative

10.9 means, such as non-speaking methods. Further guidance is given in Toolkit 5 - Planning to question someone with 'hidden' disabilities and Appearing in Court from stammeringlaw.org.uk.

Learning disability

10.10 Representatives and advocates may need to request extra time when proposing the time estimate of a hearing in cases where an adult party or witness has learning difficulties, or they may need to make arrangements for an intermediary, an adult services social worker or an advocate to attend court with the adult to assist them in following and understanding proceedings.

Mental health

10.11 Representatives and advocates should be aware of the possible stressful effects of proceedings on adult parties or witnesses who are vulnerable due to mental health difficulties and should consider practical ways in which such stress can be reduced. Guidance is given in the MIND mental health toolkit

Deafness

10.12 In *Re C (A Child)* [2014] EWCA Civ 128, the Court of Appeal gave guidance about the correct approach to be applied in care proceedings involving profoundly deaf parents. The following points are of particular note.

- It is necessary for all agencies concerned to understand that communicating with a profoundly deaf person is not simply a matter of interpretation or translation. There will be a need for expert insight and support by a suitably qualified person at the earliest stage. It is the duty of those acting for the parents to identify the disabilities as a factor at the earliest stage.
- The parents and the local authority should make the court aware of the disabilities and the need for special measures as a matter of case management.
- An expert should be appointed so that the impact of the disability can be addressed at a case management hearing. In the case of a profoundly deaf person, consideration should be given to the use of an intermediary to communicate with the local authority and the court.
- The issue of funding by the Legal Aid Agency, the Courts Service and the local authority must be considered at, if not before, the case management hearing.

See Toolkit 11 - Planning to question someone who is deaf.

Sexuality and gender identity

10.13 Representatives and advocates should be aware of the possible stressful effects of participating in proceedings involving adults who are vulnerable due to the impact of issues relating to their sexuality or gender identity.

11. GROUND RULES HEARINGS

11.1 GRHs are a form of case management hearing in criminal cases. GRHs are required in cases in which an intermediary is appointed and are considered good practice when a witness or defendant has communication needs. GRHs are not yet regularly used in civil proceedings but it is good practice to have a GRH where a witness or party has communication needs or is vulnerable for some other reason and, arguably, where there is a litigant in person who is an alleged perpetrator cross-examining an alleged victim. The court and the parties should be particularly alive to the types of difficulties that could give rise to communication issues – mental disorder, learning disability and physical disability – and the variety of measures and approaches that will be necessary. For further guidance, see Toolkit 1 - Ground rules hearings and the fair treatment of vulnerable people in court.

12. ADDITIONAL MEASURES AND OTHER ADJUSTMENTS

12.1 In civil cases, regard should be had to the possibility of adopting where appropriate the special measures that are available in the criminal courts for vulnerable and intimidated witnesses. They are set out in sections 23–30 YJCEA 1999 and include:

- screening the witness from the accused;
- giving evidence by live link;
- giving evidence from a private location;
- removal of wigs and gowns by advocates and judges (rarely worn in civil proceedings);
- evidence being via pre-recorded video interview;
- giving evidence via an intermediary;
- giving evidence via an interpreter;
- using communication aids.

12.2 The Crown Prosecution Service (CPS) guidance also requires prosecutors to consider whether the witness would benefit from more informal arrangements, such as pre-trial visits and having regular breaks while giving their evidence.

12.3 In addition to special measures, the YJCEA also contains the following provisions intended to enable vulnerable or intimidated witnesses to give their best evidence:

- mandatory protection of the witness from cross-examination by the accused in person – a prohibition on an unrepresented defendant from cross-examining vulnerable child and adult victims in certain classes of case involving sexual offences;
- discretionary protection of the witness from cross-examination by the accused in person – in other types of offence, the court has discretion to prohibit an unrepresented defendant from cross-examining the victim in person;
- restrictions on evidence and questions about a complainant's sexual behaviour – the YJCEA restricts the circumstances in which the defence can bring evidence

about the sexual behaviour of a complainant in cases of rape and other sexual offences;

- reporting restrictions.

12.4 Although the discretion in the CPR is wide, it is suggested that the provisions of the YJCEA can form a useful guide, along with possible appropriate additional measures and other adjustments which may include any of the following.

- Provision of separate waiting areas or reserved, secure conference rooms if the witness/party feels intimidated by others involved in the case.
- Making arrangements for the vulnerable witness to arrive at court or leave the court by a different entrance to avoid meeting others in the case.
- Requesting that cases involving vulnerable witnesses or parties are given priority in the list so the witness/party does not suffer unnecessary anxiety or stress due to long waiting times.
- Allowing a representative of an advocacy service (for example, provided by Mencap, POhWER or the Elfrida Society) to be present during meetings, conferences and in court with the party/witness.
- Allowing longer periods for a witness/party to file and serve evidence.
- Judges allowing adequate time after handing down judgment for parties to go though it with their advocates.
- Provision of sign language interpreters and possibly a deaf relay interpreter or Registered Intermediary (RI) in cases where the party or witness has a hearing disability. RIs who are themselves deaf can communicate with deaf witnesses in their first language and adapt communication as appropriate. This is preferable to using a deaf relay interpreter whose role is only to translate language. RIs have a wider role in that they can monitor communication, alert the court to any difficulties that arise and adapt communication further to ensure that the deaf witness understands and is understood. While the role of a deaf RI may encompass some delay, interpreting the remit is broader and can offer a more comprehensive solution. RIs will also advise the court in relation to suitable sign language interpreters that meet the deaf person's communication needs and monitor the interpreting process to ensure understanding.

- Advocates being required to adjust their style (e.g. fewer leading questions, no 'tagged' questions) or language of questioning (e.g. simple and straightforward language, short sentences).
- Providing the witness/party with a simple way to communicate the need for an extra break (either directly to the court or through an intermediary), for example, a 'pause' card on the table.
- Providing the witness/party with a way of alleviating stress and maintaining concentration while giving evidence (e.g. a stress toy).
- Where the witness is giving evidence by live video link but may become distressed by one or more parties seeing their face, positioning or covering the screen so their face cannot be seen but they can be heard.

12.5 Vulnerable witnesses and parties should be consulted about the proposed additional measures. However, representatives, advocates and the court should be alert to the fact that it is not uncommon for witnesses to change their mind about additional measures. There should therefore be some flexibility in arrangements.

12.6 A careful balance must be reached, however, to ensure that additional measures or other adjustments to ensure the party/witness can give their 'best evidence' do not diminish the value of that evidence or the weight which can be placed on it. Similarly, where the witness/party's evidence forms the basis of allegations made against another party, care must be taken that that party's Article 6 rights are not breached.

13. ASSISTANCE TO VULNERABLE PARTIES AND WITNESSES

13.1 Although there is no special or additional measures regime in the civil courts in England and Wales, there are sources of expertise and guidance as well as several recent reviews and reports making recommendations about what should happen. Practice is, however, erratic.

13.2 Interpreters

- There is Ministry of Justices Guidance on interpreters within civil proceedings in England which sets out the court's responsibility to fund interpreters for deaf and hearing-impaired litigants (presumably including witnesses) and for foreign language speakers.
- Sign language interpreters (SLIs)/British Sign Language (BSL) interpreters are qualified professionals who are skilled in the interpretation of English into BSL and vice versa and are accountable to their registration body, the National Registers of Communication Professionals. All SLIs working in legal settings must be qualified and registered (RSLI) and should also have experience and/or specific training in working in legal settings. It is important that the deaf person in court understands the interpreters provided; difficulties can arise with interpreters from different areas of the country, in working with deaf children or young people, if the deaf person has idiosyncratic signs, or if the interpreter is just not well matched to the deaf person. A deaf RI, the court interpreter or an independent expert RSLI will advise if this is the case and may recommend a change of interpreter(s) or the use of a different interpreter(s) with particular skills, or the recruitment of a deaf interpreter to the interpreting team.
- It is worth noting that there are free tools available on the internet that provide instant translations, free of charge, in most languages – see, for example, www.google.com/language_tools, although these will not adequately take the place of an interpreter/intermediary where one is needed.

13.3 Key points when using interpreters

- Use registered, qualified interpreters with legal training and experience. It is not appropriate to use civil members or friends as interpreters because there would be

no way of monitoring the accuracy of the interpretation and because they are not qualified.

- The role of the interpreter is to translate from one language to another. It is not appropriate to ask their opinion or advice.
- Remember to take account of the fact that there will be a time lag while the interpretation process takes place.
- Remember that interpreters are obliged to interpret everything that is spoken or signed.
- Remember that English is a second language for those who communicate in another language (including sign language). Do not expect the person to be able to read written documents without assistance. Written documents will also need to be translated.
- Interpreters need to be supplied with documentation to provide them with some background information and contextual understanding so that they can translate accurately in the court.
- Consideration should be given to the importance of written translation rather than oral interpretation. Valuable information is available in the criminal context in Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

13.4 Intermediaries

- Intermediaries provide skilled support to enable communication with vulnerable witnesses within the criminal justice system, and there are precedents for intermediaries to work with vulnerable witnesses and other parties in the civil courts. The role of an intermediary is to improve access for vulnerable people. This can include vulnerable parents who are required to give evidence in civil proceedings. They can assist by providing practical information about the needs of the parents or of the child to the court and can also assist the witness in giving evidence by supporting their communication. This may include helping them to prepare to give evidence and to understand court documents and court processes.
- Intermediaries can assist by:
    - carrying out an initial assessment of the person's communication needs;

- providing advice to professionals on how a vulnerable person communicates, their level of understanding and how it would be best to question them while they are giving evidence;
- directly assisting in the communication process by helping the vulnerable person to understand questions and helping them to communicate their responses to questions;
- writing a report about the person's specific communication needs;
- assisting with court familiarisation.

- Sometimes the same witness is involved in both criminal and civil proceedings. In these circumstances, the best practice would be for the same intermediary to provide communication support in both settings, to ensure continuity for the witness and also to avoid unnecessary cost through duplication of assessment and rapport building. This has happened, but is rare.
- Although the Ministry of Justice operates a scheme of RIs, it is not currently available for civil court witnesses. For more information, contact the Witness Intermediary Scheme (WIS) operated by the National Crime Agency socwitnessint@nca.x.gsi.gov.uk.
- In civil cases most intermediaries will be operating outside the WIS and in these circumstances they will be non-registered intermediaries.
- There are organisations offering intermediary services for civil cases, subject to funding. The intermediary should be matched according to their communication specialism, their availability and, if possible, their geographic location. Funding must be agreed on a case by case basis as there is no standard procedure in civil courts.
- Intermediaries are not expert witnesses; they are 'a person who facilitates two way communication between the vulnerable witness and the other participants in the legal process, to ensure that their communication is as complete, accurate and coherent as possible': *R v Secretary of State for Justice and Cheltenham Magistrates' Court and CPS and Just for Kids Law (intervener)* [2014] EWHC 1944 (Admin) at para 3.
- RIs funded by the Ministry of Justice and ISVAs funded by the Home Office are only available to support vulnerable witnesses in the criminal justice system. No similar facility exists or is currently planned to support vulnerable witnesses in civil

proceedings but there are independent organisations who may be approached for funded assistance. See Toolkit 16 - Intermediaries step by step.

13.5 Interviewers

- When the evidence of a vulnerable witness is required for civil proceedings, there are different ways that best evidence can be achieved. Some witnesses have a police interview or joint interview conducted within ABE guidance and therefore available on DVD. Whether or not this interview is used within criminal proceedings, it can be used as evidence in civil proceedings subject to the rules of disclosure (See Disclosure of Information in Cases of Alleged Child Abuse and Linked Criminal and Care Directions Hearings, October 2013).

- Sometimes an existing police interview is not of sufficient quality, or does not cover some essential issues, in which case an additional filmed interview may be required for civil proceedings.

- Sometimes witnesses have not been interviewed within ABE guidance (perhaps because of their young age, or because their communication needs have been seen as too complex).

- In both of the above situations, alternative interview arrangements may be needed. Forensic interviewing of children is a skilled task, and where the child's needs are particularly complex, better evidence may be obtained through specialist interviewers. Triangle provides specialist interviewers for children and young people up to the age of 25 (see the intermediaries page on the Triangle website).

14. OBTAINING EVIDENCE AND SHARING EVIDENCE

14.1 It is essential to think widely and carefully about any professionals or services who may have information about a vulnerable person in order that the court has all relevant information before it. There are many sources of evidence that might be available in a civil case to provide information about the level and nature of vulnerability in a party or a witness and how to put in place the necessary measures to assist the vulnerable witness. It is therefore important for advocates to understand the most effective ways of obtaining that evidence.

14.2 Information being sought for this purpose is likely to be very sensitive and of a personal and private nature. Issues of confidentiality of information are likely to arise when obtaining the information and when considering to whom it should be disclosed. These issues will need to be considered at every stage in a civil case. The Article 6 and Article 8 rights, both of the witness and of those parties involved in the case, are likely to be engaged.

14.3 Much will depend on whether or not the witness is in agreement with the information being sought; on whether the witness is an adult or a child; and on whether or not the witness is a party to the civil court proceedings.

Particular sources of information

14.4 If a witness or party has already been identified as vulnerable in criminal proceedings, then the first task for the civil court will be to establish if that witness is a potential witness in the civil proceedings. If so, then the civil court will need to establish the following.

- What information is already available about the witness and any potential vulnerability? What reports/assessments have already been obtained? What arrangements are being put in place to support that witness?
- What is the timing of the criminal case? Will it be before any civil court hearing involving the same issues? Should the civil case wait for the criminal case? The impact of giving evidence twice needs to be carefully considered.
- If the criminal case has already taken place, or is going to take place before the civil case, consideration should be given to obtaining the transcripts of any evidence given by the relevant witness in the criminal case. If the criminal case is

yet to take place, consideration should be given to whether any of the advocates or professionals from the civil proceedings will attend the criminal proceedings. Obtaining the transcripts may avoid, or shorten, the evidence required in a civil case which will be particularly relevant when managing the needs and requirements relating to vulnerable witnesses.

- It is likely that a vulnerable party or witness (adult or child) will have had contact with the medical services and may also be a patient with the Community Mental Health Team, Child and Adolescent Mental Health Service and/or the Community Drug and Alcohol Service. Any information from such professionals is likely to be essential to determine the issues of vulnerability in the civil court.

15. USE OF EXPERTS

15.1 It is important to note that all necessary measures should be taken when a vulnerable party is being assessed by an expert to ensure that the expert evidence is produced on a sound evidential basis.

15.2 On the point of whether a witness or party is vulnerable or not, permission to instruct an expert or an assessor must be sought from the court at the earliest opportunity and no later than the case management hearing. If there is uncertainty about the existence, type or impact of a person's vulnerability, expert advice should be sought. If there is a social worker involved who has sufficient expertise he or she may be able to provide this. Alternatively, it may be necessary to obtain an opinion from an expert witness, such as a psychologist or psychiatrist, or from an intermediary. An intermediary is not an expert witness but can assist by carrying out an assessment of the communication needs and abilities of the witness specifically in relation to communication within legal proceedings and facilitating communication. Parties and the court must be clear about who is to be instructed to report and the purpose of their report.

16. LITIGANTS IN PERSON (SELF-REPRESENTED LITIGANTS)

16.1 Figures for litigants in person are not collated in the civil courts. The Master of the Rolls, Lord Dyson, told a Commons Select Committee in 2011 that the civil courts had experienced a significant impact from a rise in litigants in person (see the *Parliamentary report on Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*).

16.2 The term 'litigant in person' is the sole term used to describe individuals who exercise their right to conduct legal proceedings on their own behalf. This applies to proceedings in all courts – family, criminal and civil. The term encompasses those preparing a case for trial or hearing, those conducting their own case at a trial or hearing, and those wishing to enforce a judgment or to appeal. There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer in civil cases.

- Many do not qualify for public funding, either financially or because of the nature of their case. One of the consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is that public funding in many civil cases (particularly in private law) is rarely available.
- Some cannot afford a solicitor or may distrust lawyers.
- Others believe that they will be better at putting their own case across to the court.

16.3 It is important to remember that most litigants in person are stressed and worried, operating in an alien environment in what for them is a foreign language. They are trying to grasp concepts of law and procedure about which they may be totally ignorant. They may well be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party. The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation. While many of these circumstances apply generally to litigants in person, they are likely to be particularly relevant in civil proceedings where the issues are usually highly emotive and where the stakes are often extremely high.

16.4 It is important for advocates to maintain patience and an even-handed approach in cases involving litigants in person, particularly where the litigant in person is being oppressive or aggressive towards another party or their representative or towards the court or tribunal. In particular, it is important to try and remain understanding, so far as possible, as to what might lie behind their behaviour. Maintaining a balance between assisting and understanding what the litigant in person requires, while protecting their represented opponent against the problems that can be caused by the litigant in person's lack of legal and procedural knowledge, is the key issue for the court – and for advocates – in these situations.

16.5 The disadvantages faced by litigants in person stem from their lack of knowledge of the law and court or tribunal procedure. For many, their perception of the court or tribunal environment will be based on what they have seen on the television and in films. They tend to:

- be unfamiliar with the language and specialist vocabulary of legal proceedings;
- have little knowledge of the procedures involved and find it difficult to apply the rules even if they do read them;
- lack objectivity and emotional distance from their case;
- be unskilled in advocacy and unable to undertake cross-examination or test the evidence of an opponent;
- be ill informed about the presentation of evidence;
- be unable to understand the relevance of law and regulations to their own problem, or to know how to challenge a decision that they believe is wrong.

16.6 All these factors are likely to have an adverse effect on the preparation and presentation of a litigant in person's case. Litigants in person may also face a daunting range of problems of both knowledge and understanding arising from the following issues:

- English or Welsh may not be the first language of the litigant in person and they may have particular difficulties with written English or Welsh. Any papers received from the court or from other parties may therefore need to be translated. A mutually acceptable interpreter may be required to attend the proceedings to explain to the litigant in person in their own language what is taking place and to

assist in the translation of evidence and submissions. This issue would need to be dealt with in advance at the case management conference.

- Litigants in person come from a variety of social and educational backgrounds. Some may have difficulty with reading, writing and spelling. Advocates should therefore be sensitive to literacy problems and be prepared where possible to agree short adjournments to allow a litigant more time to read or to ask anyone accompanying the litigant to help them to read and understand documents.

16.7 70 Litigants in person need to be informed at an early stage that they must prove what they say by witness evidence so they may need to approach witnesses in advance and ask them to come to court. They should also be informed that no party can call an expert witness unless permission has been given by the court in advance.

16.8 Litigants in person may phrase questions wrongly and some find it hard not to make a statement when they should be cross-examining. In these circumstances, the judge may need to explain the difference between evidence and submissions and help them put across a point in question form. Litigants in person may also have difficulty in understanding that, just because there is a different version of events to their own, this does not necessarily mean that the other side is lying. Similarly, they may construe any suggestion from the other side that their own version is not true as an accusation of lying.

16.9 Some useful material for litigants in person and those professionals required to interact with them is available as follows:

- guidance for litigants in person released in June 2015 by the Bar Council, CILEx and the Law Society*: Litigants in Person: New Guidelines for Lawyers*;
- the *Handbook for Litigants in Person*;
- Civil Justice Council report on *Access to Justice for Litigants in Person*;
- Litigants in Person: A Literature Review of published research on litigants in person in civil and family courts;
- Judicial College, Equal Treatment Bench Book, 'Litigants in Person' (November 2013);

- the Personal Support Unit: part-funded by the Ministry of Justice, the Personal Support Unit provides free, independent, practical and emotional support for litigants in person facing civil court proceedings;
- Lawworks is a pro bono representatives group currently working in partnership with the Personal Support Unit to set up new clinics under a Secondary Specialisation Scheme, which is part funded by the Ministry of Justice. Law firms, with specialist training, will take on case handling on a pro bono basis for litigants in person.

17. INCAPACITY

This toolkit does not deal with the issue of capacity in detail. However, representatives, advocates and judges must ensure that identification and assessment of capacity is undertaken with consideration of what measures may enable effective participation so that vulnerable people are not incorrectly excluded from conducting their own proceedings.

ANNEX 1: TYPICAL TIMELINE

WITNESSES AND PARTIES IN THE CIVIL COURTS

TYPICAL TIMELINE IN A CIVIL CLAIM

Initial client contact Obtaining instructions Obtaining/collation of evidence	Months one to three
Sending letter before claim Response to letter before claim Obtaining expert evidence	Months three to seven
Issuing civil claim Preparation of pleadings Service of particulars of claim/defence	Months eight to twelve
Filing of directions questionnaires and cost budgets Costs and case management conference	Months twelve to fourteen
Disclosure and exchange of documents Exchange of witness statements Exchange of expert evidence Exchange of schedules of loss	Months fourteen to twenty
Filing of listing questionnaire Pre-trial review Trial	Months twenty to twenty-four

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The toolkit summarises key points from law, policy, research and guidance including:

- *Radford, Lorraine et al, Child Abuse and Neglect in the UK Today (the Radford Study) (2011)*

  NSPPC Study

- *Greisberg, Scott 'Vicarious trauma in attorneys' (2003–2004)*

  24 Pace Law Review 245

- *Levin Andrew, P, 'Secondary trauma and burnout in attorneys: effects of work with clients who are victims of domestic violence and abuse' (2008)*

  9 Commission on Domestic Violence eNewsletter

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