The Advocate's Gateway

Identifying vulnerability in witnesses and parties and making adjustments

Toolkit 10

20 March 2017

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.

The Advocate's Gateway toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; toolkits are not legal advice and should not be construed as such. Toolkits represent our understanding of the law, procedure and research at the time of writing however readers should consult the most up to date law, procedure and research.

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Introduction

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

1. general principles and examples of adjustments for vulnerability;
2. early identification of vulnerability;
3. advocates' duties and responsibilities;
4. obtaining expert advice;
5. special measures, liaison and diversion and other examples of good practice in criminal cases.

The toolkit contains information about vulnerable witnesses and parties. It is primarily intended for use by lawyers, witness supporters, judges, magistrates and police.

This toolkit covers the following key points:

- There are many reasons why a witness or a party might be vulnerable in court.

- Vulnerability should be identified at the earliest possible stage and information-sharing is key to achieving this.
- Certain behaviour/characteristics/circumstances are 'risk factors' and these can indicate potential vulnerability.
- Once vulnerability is suspected, action should be taken to obtain expert advice as necessary. This can be from, for example, liaison and diversion services (where they exist) for suspects, an appropriate medical expert, or an intermediary.
- Research has shown that vulnerability is often missed or not properly acted upon.
- Advocates should not assume that vulnerability in a witness or party has always been identified before the matter comes to court.
- Advocates should ensure that the interests of their vulnerable clients are taken into account and their needs are met.
- 'Special measures' and other reasonable adjustments must be considered.

1. GENERAL PRINCIPLES AND EXAMPLES OF ADJUSTMENTS FOR VULNERABILITY

1.1 There is no universal definition of 'vulnerable' in the justice system. However, in the criminal justice system, section 16 Youth Justice and Criminal Evidence Act 1999 defines 'vulnerable' witnesses who are eligible for 'special measures' on the grounds of age or incapacity and section 17 Youth Justice and Criminal Evidence Act 1999 sets out witness eligibility for special measures on grounds of fear or distress about testifying. The extent of a person's vulnerability (in a general sense) in any given legal proceedings depends on a number of factors which may be age-related or due to a disability or a particular circumstance, such as being a victim of domestic abuse or hate crime. A person may be vulnerable in one context, such as the unfamiliar experience of appearing in court, but may not be vulnerable in a context with which they are familiar, such as at work or school. Individuals may have one or more vulnerabilities at any time. Vulnerability does not fit neatly into a single definition. While vulnerabilities for special measures (due to age, incapacity or fear or distress) are defined in statute, all vulnerabilities for both the witness and the defendant should be recognised, and suitable steps taken to ensure the person's needs are met.

According to Lord Reed, in *Osborn v Parole Board* [2013] UKSC 61: '[Justice] is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions.' (para 68) And fairness 'depends on the circumstances' and it is 'impossible to lay down rules of universal application' (para 80).

1.2 Vulnerability is not the same as unreliability. With the necessary support, most people including those who are deemed vulnerable, can give reliable evidence.

1.3 Advocates and judges should be proactive in identifying the need for an assessment of potential vulnerability and responding to it. Vulnerabilities in a witness or a defendant may be identified by a range of professionals and practitioners, including, for example, police officers, liaison and diversion services, instructing solicitors, court staff and victim support. It should not, however, be assumed that a person's vulnerability will have been

identified prior to their first appearance in court. Advocates should be alert to risk factors that may indicate that the witness or party is vulnerable and, if they are in any doubt, expert advice should be sought.

1.4 If a witness or defendant is vulnerable there should be a ground rules hearing, save in exceptional circumstances. See Toolkit 1- Ground rules hearings and the fair treatment of vulnerable people in court.

1.5 **Vulnerability is not the same as not being competent to give evidence.** Adjustments must be made to remove barriers to a person's effective participation in a hearing, including their ability to understand questions put to them and give answers that are understood. The question of competence is witness-specific. Adjustments that are made must not prejudice the parties and the trial must be fair.

1.6 **Examples of reasonable adjustments ordered by the judge include:**

- advocates moving to the live link room to conduct their questioning from there;
- allowing a witness or defendant to pause cross-examination by pointing to a 'pause' card on the table in the live link room and then the intermediary alerting the judge that a pause has been requested;
- use of an egg-timer in the live link room to time short three-minute breaks as required by the witness – the court remaining sitting during these breaks;
- allowing a witness to take a comfort toy into the live link room;
- allowing a defendant to have 'Blu-Tack'/a stress toy/a pen and paper in the dock to help maintain their concentration;
- allowing 'Post-it' notes in the dock to help a defendant who has difficulty understanding the order of events – these are stuck onto the glass screen and show the order of events during the trial and can be changed around and also removed once a particular event has happened;
- ensuring that the flat screen that is ordinarily visible to the defendant be turned off/covered so that the defendant can hear but not see the vulnerable witness giving evidence.

1.7 **Vulnerability may not be constant, consistent or continuous within an individual.** Someone who would be regarded as vulnerable at the investigation stage of a case might not be at the trial and vice versa. Vulnerability may be transient. Advocates and judges should consider the issue of vulnerability at the time of each hearing. For example, mental health conditions can fluctuate, making a person more or less vulnerable; and medication, fatigue or the ongoing stress of attending court can each adversely affect a vulnerable person's ability to participate in proceedings.

1.8 **The issue of vulnerability should be kept under review.** Individual personal factors (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 the defendant, might precipitate anxiety and fear which can bring a particular witness within the definition of 'vulnerable'.

GOOD PRACTICE EXAMPLE

The registered intermediary carried out an assessment of the witness's communication needs several months before the trial. The intermediary then attended the vulnerable witness's pre-trial court visit and identified additional steps that the court would need to take to facilitate the witness giving her best evidence. The intermediary wrote an addendum report for the court so that the additional recommendations could be addressed at a ground rules hearing.

Note: this good practice example could apply equally for a vulnerable defendant.

1.9 **Risk factors that indicate a person might be vulnerable in court include:**

- being a victim of domestic, racial, financial or sexual abuse;
- being a victim of trafficking, hate crime or discrimination;
- being a victim of exploitation;
- a lack of fluency in the English language;
- being unable to read or to write very well;

- having a disability, such as a learning disability, autism, or a hearing impairment;
- difficulty with communicating and/or understanding;
- having a mental health condition.

Note: all children (i.e. those under 18) are deemed vulnerable.

1.10 It is important to take into account the views of the witness or party who may be vulnerable. People who are vulnerable in court are not a homogeneous group and, for instance, not everyone with a disability is vulnerable or would wish to be regarded as such. Whether or not a person is vulnerable will depend on the nature of their disability or difficulty and/or their particular circumstance and the extent to which it affects their ability to perform the functions of a witness and/or to participate effectively in proceedings.

2. EARLY IDENTIFICATION OF VULNERABILITY

2.1 **Advocates should not assume that vulnerability has already been identified.** Risk factors may not be apparent and, even if they are, identification of vulnerability is poor. Even when identified, vulnerability is not always acted upon (Gudjonsson 2010; Young et al 2013).

2.2 **'Self-reporting', i.e. obtaining first-hand information from the witness or party or from a family member, can be a predictor of vulnerability due to disability/difficulty; however, it should be noted that 'self-report' is often unreliable as individuals may choose not to disclose for fear of discrimination, ridicule or a more punitive response.** An advocate who suspects a witness or defendant might be vulnerable should consider asking questions of that person, asking appropriate others to make enquiries and/or seek expert advice.

GOOD PRACTICE EXAMPLE

The following questions might help to identify if an individual is vulnerable.

- Are you in receipt of Disability Living Allowance or Personal Independence Payments?
- Do you have a social worker, or is there anyone who helps you with daily living, such as helping to pay your bills?
- Do you use/have you used mental health services?
- Do you use/have you used learning disability services?
- Do you/did you get any extra help at school?
- Do you need any help with reading or writing?
- Do you need help managing money?
- Do you need help with getting about or going to appointments?
- Do you need help with reading?

- Do you need help to fill in forms?
- Can you tell the time using a clock? (**Note:** many people with a learning disability find it hard to read an analogue clock but can read the time using a digital clock.)
- Do you need help to stay calm?
- Are you taking any medication?

And, if the advocate knows the person is taking medication:

- Do you need any help taking your medicine?
- How does your medicine affect you?

2.3 The above questions are more likely to elicit useful and reliable information compared to questions such as: 'Do you have a learning disability?' or 'Are you disabled?' Advocates should bear in mind, however, that some witnesses and defendants may be reluctant to talk about any difficulties they have, especially with persons in authority and those they don't know. This might mean that their vulnerability is missed and their behaviour is misconstrued as being deliberately difficult or unhelpful. Some people may have undiagnosed conditions and, while they may be aware that they find some things hard to do, they may not be aware they have a disability or a particular condition.

2.4 **Certain behaviour may indicate vulnerability**. The following is adapted from Vulnerable and Intimidated Witnesses: A Police Service Guide 2011. The list is not exhaustive and applies to all witnesses and parties.

Behavioural characteristics that may warrant further consideration:

- has no speech or limited speech;
- is difficult to understand;
- finds it difficult to communicate without assistance/interpretation;
- uses signs and gestures to communicate;
- appears to have some difficulty in understanding questions;

- responds inappropriately or inconsistently to questions (research demonstrates that 60 per cent of young people who offend have speech, language and communication difficulties: Gregory and Bryan 2011);
- seems to focus on what could be deemed irrelevant small points rather than important issues;
- appears to have a short attention span;
- cannot read or write;
- has difficulty in telling the time;
- has difficulty in remembering their date of birth, age, address, telephone number;
- has difficulty knowing the day of the week, where they are and whom they are talking to;
- appears very eager to please;
- repeats what is said to them;
- appears over-excited/exuberant;
- appears uninterested/lethargic;
- appears confused by what is said or happening;
- is physically withdrawn;
- is violent;
- expresses strange ideas;
- does not understand common everyday expressions.

2.5 Information-sharing is key to identifying and safeguarding vulnerable witnesses and defendants. Advocates should check that solicitors and agencies (such as the police, Crown Prosecution Service, liaison and diversion services, Witness Care Unit, any treating physicians, expert witnesses, intermediaries and the Witness Service) have shared necessary information about the vulnerability of the witness or party.

Information should be shared appropriately and proportionately; local information-sharing protocols may be in place.

3. ADVOCATES' DUTIES AND RESPONSIBILITIES

3.1 **Advocates have a responsibility to assist the court to identify and appropriately respond to the vulnerability of witnesses and parties.** This is part of the barrister's core 'duty to the court in the administration of justice'. Barristers also have a responsibility to ensure that the interests of their vulnerable clients are taken into account and their needs are met. Barristers should do what they reasonably can to ensure their client understands the process and what to expect from it and from their barrister, and should try to avoid any unnecessary distress for their client (*Bar Standards Board Handbook*). Similarly, solicitors are obliged to 'uphold the rule of law and the proper administration of justice' and 'provide a proper standard of service to clients', including vulnerable clients (Solicitors Regulation Authority Code of Conduct). See also the Law Society practice note: 'Meeting the needs of vulnerable clients' (2015) and *R v Rashid* [2017] EWCA Crim 2:

'[An advocate's professional] competence includes the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using one ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer. These are all essential requirements for advocacy whether in examining or cross-examining witnesses or in taking instructions. An advocate would in this court's view be in serious dereliction of duty to the court, quite apart from a breach of professional duty, to continue with any case if the advocate could not properly carry out these basic tasks.' (para 80)

See also *R v Grant-Murray & Anor* [2017] EWCA Crim 1228, para 226.

3.2 Advocates should be proactive in asking for relevant information, for example, from the police officer in the case, liaison and diversion services (where they exist), the intermediary (if appointed), health care professional, or family member.

3.3 **The court 'must identify the needs of witnesses at an early stage' and adapt the pre-trial and trial process accordingly.**

- The sooner the disadvantage is identified, the easier it is to remedy it.

- The court should, where possible, ensure that information is obtained in advance of a hearing about any disability or medical or other circumstance affecting a person so that individual needs can be accommodated.
- For example, access to interpreters, signers, large print, audiotape, oath-taking in accordance with different belief systems (including non-religious ones), more frequent breaks and special measures for vulnerable witnesses can and should be considered (See *Equal Treatment Bench Book 2018*).

3.4 **All advocates should be alert to possible behavioural and psychological changes in the presentation of the witness or party at court.** For example, factors indicating vulnerability may only become apparent for the first time when the witness or defendant gives evidence. In these circumstances the advocate should inform the judge and seek an adjournment in order to establish what, if any, adjustments are necessary: '[Disability] places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.' (The Rt Hon Baroness Hale in *P v Cheshire West and Others* [2014] UKSC 19, para 45)

3.5 Contact should be maintained with the witness or party beyond their testimony and through to the judgment/verdict, helping the person to manage their understanding of the court's decision. Advocates should identify who will maintain contact: this could be, for example, the solicitor, police officer in charge of the case, the Crown Prosecution Service representative, or the advocate themself. If an advocate is concerned that the witness or party is at risk of harm, they should make a referral to the relevant child/adult-safeguarding service.

4. OBTAINING EXPERT ADVICE AND ADJUSTMENTS FOR VULNERABLE PEOPLE IN COURT

4.1 **Expert advice is necessary.** If there is uncertainty about the existence, type or impact of the person's vulnerability, expert advice should be taken. This might be from an expert witness, such as a psychologist or psychiatrist, for example. An intermediary is not an expert witness but can assist by carrying out an assessment of the communication needs and abilities of the witness or party. See Toolkit -16 Intermediaries: step by step.

GOOD PRACTICE EXAMPLE

A police officer interviewed a 40-year-old man who lived independently and had a full-time job. The police officer recognised possible vulnerability and requested an assessment by a registered intermediary; it transpired that the witness had significant undiagnosed special needs.

GOOD PRACTICE EXAMPLE

The CPS requested a registered intermediary assessment. The police officer, who had originally felt he could take a statement without support for the witness, watched the registered intermediary assessment being carried out and conceded he had underestimated the witness's comprehension difficulties and he had not appreciated how anxious the process was making the witness.

4.2 **Below are some examples of adjustments that have been considered by courts and tribunals for vulnerable witnesses and parties. Further examples can be found in the Equal Treatment Bench Book.** What is necessary and fair will depend on the circumstances of each case.

GOOD PRACTICE EXAMPLE

Where a defendant (or indeed a witness) may have difficulty in recalling all that they want to say to the jury because of their limitations, a very detailed defence statement could be read by the judge to the jury to enable jury members to hear the defendant's evidence in that way. Another possibility is to allow the witness (or a defendant) to refer to a document if it assists them to give their evidence properly (*R v SH* [2003] EWCA Crim 1208, paras 27–29 as cited in *Regina v. Camberwell Green Youth Court* [2005] UKHL 4, paras 58–59).

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 had the chance to start working and her mental state was most stable. The schedule was adjusted so that she gave her testimony only in the afternoons.

GOOD PRACTICE EXAMPLE

The defendant had a phobia of the police. The judge instructed the police officer to attend court in non-uniform.

GOOD PRACTICE EXAMPLE

The judge allowed a young witness to take a very small tent into the live link room which was not visible on the TV link screen in the courtroom. The witness was allowed to have short 'time-out' breaks (usually of just 30 seconds) in the tent 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.)

GOOD PRACTICE EXAMPLE

The vulnerable defendant, who struggled with concepts of time and gave evidence from the live link room, was allowed to take a timeline into the live link room to assist cross-examination. The advocates had a duplicate of the timeline and indicated certain points on the timeline when putting questions to the defendant.

GOOD PRACTICE EXAMPLE

The judge allowed the defendant to sit next to his support worker, which helped to keep him calm during proceedings.

4.3 Advocates should ensure that there is consistency between the adjustments made in the hearing and those made at other times. For example, a vulnerable witness might need the intermediary to be present for witness familiarisation to be effective. For defendants, advocates should also seek to ensure consistency between 'upstairs' (in court) and 'downstairs' (in the cells); the judge might approve certain measures in the court itself and the advocate should establish whether reasonable accommodation is also being made in the holding cells.

POOR PRACTICE EXAMPLE

In one case the vulnerable defendant missed lunch as he wasn't able to make himself understood when the custody officers asked him if he wanted any.

GOOD PRACTICE EXAMPLE

The vulnerable defendant was brought to court at the usual time but on this particular day of the trial the case was listed as 'not before 12'. The defendant's legal team made sure that custody officers and the defendant in the cells knew what was happening in order to avoid the defendant becoming anxious about the delay.

4.4 If it appears that the adjustments or special measures are necessary to safeguard the witness or defendant or to ensure they give their best evidence and participate effectively, the advocate should consider inviting the judge to impose these, even if the witness or defendant says that they do not wish to have them.

5. WITNESS CARE

5.1 For witnesses (including victims), the advocate should check that the Witness Care Unit has offered, where appropriate:

- to inform the witness. if they need to give evidence in court, what to expect and to discuss what help and support they might need;
- to arrange a court familiarisation visit, to enter the court through a different entrance from the accused and to sit in a separate waiting area where possible;
- a needs assessment to help work out what support the witness needs;
- information on what to expect from the criminal justice system; and
- a referral to organisations supporting victims of crime.

See further the Ministry of Justice *Code of Practice for Victims of Crime 2015*.

6. VULNERABLE DEFENDANTS IN CRIMINAL PROCEEDINGS

6.1 Liaison and diversion for vulnerable suspects

Liaison and diversion is a process whereby people of all ages with mental health or substance misuse problems, learning disabilities, autism and other needs are identified and assessed by healthcare staff as early as possible when they enter the criminal justice system. Liaison and diversion services work with suspects, defendants and offenders.

6.2 Services operate in police custody suites and the criminal courts and were recommended by Lord Bradley in his review into people with mental health problems or learning disabilities in the criminal justice system, *The Bradley Report*, for the Department of Health in 2009.

6.3 Liaison and diversion services seek to improve health outcomes and reduce re-offending by providing early intervention for vulnerable people as they first come to the attention of the criminal justice system. Information from liaison and diversion assessments is shared appropriately and proportionately with criminal justice agencies to help inform criminal justice decision-making and enable reasonable adjustments to police and court proceedings where necessary.

6.4 Development and rollout of liaison and diversion services is incremental. During 2016/17 population coverage of services across England was more than 50 per cent and funding is in place to achieve 75 per cent population coverage by 2018. Subject to a full business case, 100 per cent population coverage should be realised by 2020.

6.5 Further information about liaison and diversion services can be found on the NHS England website and in the findings of an independent Evaluation of Offender Liaison and Diversion Trial Schemes. Similar services exist in Wales and are known as Criminal Justice Liaison Services.

ACKNOWLEDGEMENTS AND REFERENCES

The development of this toolkit was funded by a grant from the Legal Education Foundation.

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Note: This toolkit was updated in March 2017 by Professor Penny Cooper, Jenny Talbot OBE and DCI Jim Foley.

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