The Inns of Court College of Advocacy

The Council of the Inns of Court

ADVOCACY AND THE VULNERABLE

National Training Programme

Legal Research Paper

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Introduction

1. The Youth Justice and Criminal Evidence Act 1999 [YJCEA 1999] (as amended by the Coroners and Justice Act 2009) introduced a range of measures to facilitate vulnerable or intimidated witnesses giving their evidence.

2. The definition of vulnerable witnesses is contained within sections 16 and 17 of the YJCEA 1999: 'Vulnerable' includes those under 18 years of age and people with a mental disorder or learning disability (s.16 (2)(a)); a physical disorder or disability (s.16(2)(b)); or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case (s.16(1)).

Criminal Practice Direction and Rules

3. The legislation is now accompanied by the extensive *Criminal Practice Directions (2013) 1 WLR 3164 [CPD]* which came into effect from 7th October 2013 - see the summary here: http://www.justice.gov.uk/courts/procedure-

rules/criminal/docs/2012/criminal-practice-directions-2013-summary.pdf) and the 2015 *Criminal Procedure Rules* [CPR], which came into force on 5th October 2015.

- CPD 3D.2 However, many other people giving evidence in criminal cases, whether as a witness or defendant, may require assistance: **the court is required to take 'every reasonable step' to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant (Rule 3.8(4)(a) and (b))**. This includes enabling a witness or defendant to give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his or her defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends.

- 3D.3 Under Part 3 of the Rules, **the court must identify the needs of witnesses at an early stage (Rule 3.2(2)(b)) and may require the parties to identify arrangements to facilitate the giving of evidence and participation in the trial (Rule 3.10(c)(iv) and (v)).**

- 3E.4 **"The judiciary is responsible for controlling questioning. Over rigorous or repetitive cross-examination of a child or vulnerable witness should be stopped."**

4. Please see Part 3 of the CPR for the rules on case management and trial management https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-03.pdf

5. There are various statutory special measures that the court may utilise to assist a witness in giving evidence. Part 18 of the Rules gives the procedures to be followed http://www.legislation.gov.uk/uksi/2015/1490/pdfs/uksi_20151490_en.pdf

6. Courts should note the 'primary rule' which requires the court to give a direction for a special measure to assist a child witness or qualifying witness and that in such cases an application to the court is not required (rule 18.9).

Case Law Concerning Vulnerable Witnesses

R v Sandor Jonas [2015] EWCA Crim 562

7. In which it was said that:

   "Advocates must accept that the courts will no longer allow them the freedom to conduct their own cross-examination where it involves simply repeating what others have asked before or exploring precisely the same territory. For these purposes defence advocates will now be treated as a group and, if necessary, issues divided amongst them provided of course that there is no unfairness in so doing." [at para 34]

R v Pipe [2014] EWCA Crim 2570

8. This appeal was dismissed where the complainant, through emotional distress, became unfit to continue with her evidence and her cross-examination was stopped. The trial judge rightly found that it was more appropriate to reduce the evidence to admissions rather than persist with unnecessary cross-examination.

   "…the only element of the cross-examination that was cut short was an examination of the complainant with her own medical records. This would have related to potential inconsistencies between what she said at the time of the medical appointment. The judge ruled that there was no prejudice to the appellant because the records (and thus the inconsistencies) could be reduced to agreed facts and placed before the jury in writing. That is what happened. In our view, the Judge was right to reach that conclusion. In cases of this sort, it is often unnecessary and inappropriate for a complainant to be dragged through their own medical records in huge detail, particularly where any potential inconsistencies can be identified and be the subject of written admissions." [Coulson J at para 27]

R v Lubemba, R v JP [2014] EWCA Crim 2064

9. In this case the Court of Appeal gave guidance on the procedure to be followed by the judge when deciding whether the cross-examination of a vulnerable witness was appropriate.

10. The appellants appealed against their convictions for sexual offences against children. JP was convicted of sexually assaulting an eight-year-old child. The victim gave evidence by video interview which was played as evidence-in-chief at the trial. It was intended that defence counsel would be able to carry out cross-examination by live link. Both prosecuting and defence counsel met the complainant at the court when she arrived for cross-examination and it was noted that she was relaxed and content. The complainant was shown her video interview and confirmed that she was willing to be asked questions by counsel. The judge then visited the complainant without counsel. On his return to court, he announced without warning that the complainant was not able to participate in cross-examination. The video interview was played as the child's only evidence. At the summing-up, the judge directed the jury to make an appropriate allowance if they thought the defence case had been prejudiced by the lack of cross-examination. Mr. Lubemba was convicted by a majority of the rape of a 10-yearold child who gave evidence by video. Although cross-examination by defence counsel was permitted, it was limited to 45 minutes and the judge interrupted when he felt the questions were unclear or inappropriate. Afterwards, defence counsel expressed concern that she felt she had been unable to put her case to the complainant.

11. The Court of Appeal found that the court was required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. It was expected that a ground rules hearing would be held in every case involving a vulnerable witness, save in very exceptional circumstances. In the event of any doubts on how to proceed, guidance should be sought from an expert or from those who had responsibility for looking after the witness. It was reasonable that judges should introduce themselves to the witness in person before any questioning, preferably in the presence of the parties. It would also be reasonable for the judge to invite defence advocates to reduce their questions to writing in advance. The trial judge was responsible for controlling questioning and ensuring that vulnerable witnesses and defendants were able to give the best evidence they could. Therefore, the judge had a duty to intervene if an advocate's questioning was confusing or inappropriate. Advocates had to adapt to the witness and could not insist upon any supposed right to put their case. In JP's case, it was unclear why the judge had concluded that the child could not be cross-examined. If the judge had concluded on a sound basis that the witness could not be cross-examined, he should have revisited the provisions of the Youth Justice and Criminal Evidence Act 1999, section 27, and the decision to allow the video recording to be played. He should also have given far greater consideration to the impact upon the

fairness of the trial of prohibiting the defence from testing the evidence of the main prosecution witness.

Accordingly, JP's conviction was quashed and a retrial ordered. In Mr. Lubemba's case, however, the judge had not gone too far in trying to protect the vulnerable witness. Although defence counsel had done her best to cross-examine the child in short, non-confrontational questions, she had fallen into the trap of asking questions which were more suited to an adult witness than a child. The judge's interventions were justified, not excessive and did not prevent counsel from testing the evidence. Accordingly, the fairness of L's trial had not been undermined.

R v Thompson [2014] EWCA Crim 836

12. The appellant appealed against his conviction for sexual offences committed against two children. He had been convicted in 2007 of two counts of sexual assault against one child and one count of sexual assault against another. He had been acquitted of the remaining 10 counts which related to seven other child complainants.

13. In short, the jury in 2007 had not heard evidence of the appellant's Asperger's syndrome, which he was subsequently diagnosed with in relation to separate sexual allegations (where he was acquitted). As the facts of the 2007 offences could have been interpreted as not being sexually motivated by the jury (they may have been innocently connected to the appellant's condition vis-à-vis his meticulous hygiene regime and social awkwardness) the Court of Appeal quashed the verdicts.

R v IA & Others [2013] EWCA Crim 1308

14. This case involved the use of a registered intermediary for a complainant who was deaf. The court rejected challenges to the intermediary's involvement and criticised the length and style of cross-examination and re-emphasised the judgement of R v Barker, stating:

"…we will draw attention to paragraph 42 of R v Barker. There is a need, both for advocates' techniques and court processes to be adapted to enable the witness to give his or her best evidence. That will involve a degree of persistence and patience by all concerned. A witness found competent is entitled to have the best efforts made to

adduce his or her evidence before the court, notwithstanding the difficulties that may exist."

R v Wills [2011] EWCA Crim 1938

15. In dismissing the appeal, the Court of Appeal stated:

"We consider that in cases where it is necessary and appropriate to have limitations on the way in which an advocate conducts cross-examination, there is a duty on the judge to ensure that those limitations are complied with…

This case highlights that for vulnerable witnesses, the traditional style of cross-examination where comment is made on inconsistencies during cross-examination must be replaced by a system where those inconsistencies during cross-examination can be drawn to the jury at or about the time when the evidence is being given, and not, in long or complex cases, for that comment to have to await the closing speeches at the end of the trial. One solution would be for important inconsistencies to be pointed out, after the vulnerable witness has finished giving evidence, either by the advocate, or by the judge, after … necessary discussion with the advocates."

R v E [2011] EWCA Crim 3028

16. In which the court stated that:

"The real complaint here, in our view, is that the defence was deprived of the opportunity to confront C in what we might venture to call the traditional way". It is common, in the trial of an adult, to hear, once the nursery slopes of cross-examination have been skied, the assertion: "you were never punched, hit kicked, as you have suggested, were you?" It was precisely that the judge was anxious to avoid and, in our view, rightly. It would have risked confusion in the mind of the witness whose evidence was bound to take centre stage, and it is difficult to see how it could have been helpful".

R v Barker [2010] EWCA Crim 4

17. This is considered to be the landmark case on the approach to cross-examination of child witnesses. As per LCJ at paras 42 and 43:

    "...the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to a witness, and fully ventilate before the jury areas of evidence which bear on the child's credibility.

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

Toolkits

18. The Advocacy Training Council's (ATC) *'Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court'* (2011) recommends the use of 'toolkits' to assist advocates as they prepare to question vulnerable people at court.

    Further toolkits are available through the Advocate's Gateway website.

19. CPD 3D.7 These toolkits represent best practice. Advocates should consult and follow the relevant guidance whenever they prepare to question a young or otherwise vulnerable witness or defendant.

20. Judges have been encouraged to refer advocates to this material and to use the toolkits in case management.

Ground Rules Hearings

21. Criminal Practice Direction [Criminal Practice Direction (General matters) [2013] 1 W.L.R. 3164: Ground rules hearings to plan the questioning of a vulnerable witness or children.

22. As per the CPR 13.(c)(iii) the Crown Court may conduct a pre-trial hearing when such a hearing is required to set ground rules for the conduct of the questioning of a witness or defendant.

    3E.4 ***All witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case.*** *For adult non vulnerable witnesses an advocate will usually put his case so that the witness will have the opportunity of commenting upon it and/or answering it.*

    When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions.

    Where limitations on questioning are necessary and appropriate, they must be clearly defined. *The judge has a duty to ensure that they are complied with and should explain them to the jury and the reasons for them. If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance.*

    Instead of commenting on inconsistencies during cross-examination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistencies after (instead of during) the witness's evidence. The judge should also remind the jury of these during summing up. The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial."

Criminal Procedure (Amendment) Rules 2015 No. 13 (L.1)

23. The latest amendment came into force on 6 April 2015 and has amended Rule 3.9 (Case preparation and progression) to provide for 'ground rules hearings'. The amended Rule now reads:

Case preparation and progression

3.9.— (1) At every hearing, if a case cannot be concluded there and then the court must give directions so that it can be concluded at the next hearing or as soon as possible after that.

…

[6] Facilitating the participation of any person includes giving directions for the appropriate treatment and questioning of a witness or the defendant, especially where the court directs that such questioning is to be conducted through an intermediary.

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

Invite representations by the parties and by any intermediary; and

Set ground rules for the conduct of the questioning, which rules may include—

(i) a direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety,

(ii) directions about the manner of questioning,

(iii) directions about the duration of questioning,

(iv) if necessary, directions about the questions that may or may not be asked, (v) where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and

(v) directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.

24. The importance of Grounds Rules Hearings should not be underestimated and the higher courts have been critical of failures to properly identify and deal with appropriate issues at Ground Rules Hearings. The desirability for Ground Rules Hearings was emphasised in *R v Lubemba* (see above).

25. In the recent child cruelty case of *R v RL [2015] EWCA Crim 1215* the defence for the mother of the children tried to appeal on the basis that the trial judge erred in his general restrictive approach at the ground rules hearings. Specifically, the argument was that 1) the trial judge unnecessarily curtailed the time for defence cross-examination and 2) the trial judge unfairly emasculated the defence advocate's cross-examination of the child witnesses to an unacceptable degree, evidenced by the fact the defendant was acquitted of assaulting the father of the children, who the defence were allowed robustly cross-examine. These arguments were rejected by the Court:

> *"Often the case that an ABE recorded interview will be substantially longer than the focused cross-examination of that witness. If there is thought to be any seeming disproportion such as might influence a jury, the counterbalance is provided by an appropriate judicial direction, of the kind which was admittedly given in this case. Secondly, the fact that the jury acquitted of the allegation in relation to the boys' father does not, in our view, provide any support for the argument that the applicant was unfairly handicapped by restrictions on the cross-examination of the children" [Para 18, Mr. Justice Holrodye].*

26. It is possible that the pre-agreed approach to cases where there are ground rules hearings may be rolled out in the future in other areas: 'In due course, consideration should be given to whether or not this [ground rules hearings] approach may sensibly be extended to other areas of cross-examination in which it may take place (for example, with expert witnesses).' Review of Efficiency in Criminal Proceedings by The Rt Hon Sir Brian Leveson, President of the Queen's Bench Division (https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings20151.pdf). The toolkit Ground Rules Checklist is contained at the end of this document.

Vulnerable Defendants

27. A substantial number of defendants suffer from disabilities including limited language ability, limited communication skills, mental illness, learning disabilities and suggestibility which makes it appropriate for assistance to be provided to them to enable them to give their best evidence. **Yet, whilst special measures legislation applies equally to prosecution and defence witnesses, apart from section 47 of the Police and Justice Act 2006 which enables defendants to give evidence through a live link in limited circumstances, there is still no legislation in force which permits the use of special measures for defendants.**

28. The relevant statutory provisions in the Coroners and Justice Act 2009 [s.104] to automatically provide an intermediary for a defendant with similar difficulties to other vulnerable and intimidated witnesses is not yet in force.

29. Despite the lack of statutory power there are routinely cases where intermediaries have been identified and used to facilitate effective participation of vulnerable child and adult defendants. **In *R v Walls [2011] EWCA Crim 443* the Court confirmed an inherent power to consider the use of intermediaries for defendants, in *R v Cox [2012] EWCA Crim 549* the Court of Appeal again reiterated that special measures for vulnerable defendants are at the discretion of the trial Judge and more recently in *R v Dixon [2013] EWCA Crim 465*, the Court of Appeal highlighted the responsibility on trial judges to "actively ensure the effective participation of vulnerable defendants".** *In R v SSJ and Cheltenham Magistrates' Court and CPS and Kids for Law International [2014] EWHC 1944 (Admin)*, the Divisional Court found that a defendant when giving evidence should be in the same position as a witness for the Crown being supported by a registered intermediary matched by the Witness Intermediary Scheme.

30. In *R (On the Application of OP) v the Secretary for State for Justice [2014] EWHC 1944 (Admin)* after a judicial review the Divisional Court found that there was a risk of unfairness to the defence in not allowing a defendant, where necessary, access to a regulated and registered intermediary but allowing non-defendant witnesses access to one. The point at which a defendant entered a witness box was crucial and he should have the best opportunity to do himself justice. Accordingly, the secretary of state's decision refusing to provide a registered intermediary was set aside, with the Secretary of State to reconsider whether P should be provided with a registered intermediary for the purposes of giving evidence.

31. The duties of the Court in relation to vulnerable defendants are set out at Part 3G of the CPD:

3G.1 If a vulnerable defendant, especially one who is young, is to be tried jointly with one who is not, the court should consider at the plea and case management hearing, or at a case management hearing in a magistrates' court, whether the vulnerable defendant should be tried on his own, but should only so order if satisfied that a fair trial cannot be achieved by use of appropriate special measures or other support for the defendant. If a vulnerable defendant is tried jointly with one who is not, the court should consider whether any of the modifications set out in this direction should apply in the circumstances of the joint trial and, so far as practicable, make orders to give effect to any such modifications.

3G.2 It may be appropriate to arrange that a vulnerable defendant should visit, out of court hours and before the trial, sentencing or appeal hearing, the courtroom in which that hearing is to take place so that he or she can familiarize him or herself with it.

3G.3 Where an intermediary is being used to help the defendant to communicate at court, the intermediary should accompany the defendant on his or her pre-trial visit. The visit will enable the defendant to familiarise him or herself with the layout of the court, and may include matters such as: where the defendant will sit, either in the dock or otherwise; court officials (what their roles are and where they sit); who else might be in the court, for example those in the public gallery and press box; the location of the witness box; basic court procedure; and the facilities available in the court.

3G.4 If the defendant's use of the live link is being considered, he or she should have an opportunity to have a practice session.

3G.5 If any case against a vulnerable defendant has attracted or may attract widespread public or media interest, the assistance of the police should be enlisted to try and ensure that the defendant is not, when attending the court, exposed to intimidation, vilification or abuse. Section 41 of the Criminal Justice Act 1925 prohibits the taking of photographs of defendants and witnesses

(among others) in the court building or in its precincts, or when entering or leaving those precincts. A direction reminding media representatives of the prohibition may be appropriate. The court should also be ready at this stage, if it has not already done so, where relevant to make a reporting restriction under section 39 of the Children and Young Persons Act 1933 or, on an appeal to the Crown Court from a youth court, to remind media representatives of the application of section 49 of that Act.

3G.6 The provisions of the Practice Direction accompanying Part 16 should be followed.

3G.7 Subject to the need for appropriate security arrangements, the proceedings should, if practicable, be held in a courtroom in which all the participants are on the same or almost the same level.

3G.8 Subject again to the need for appropriate security arrangements, a vulnerable defendant, especially if he is young, should normally, if he wishes, be free to sit with members of his family or others in a like relationship, and with some other suitable supporting adult such as a social worker, and in a place which permits easy, informal communication with his legal representatives.

The court should ensure that a suitable supporting adult is available throughout the course of the proceedings.

3G.9 It is essential that at the beginning of the proceedings, the court should ensure that what is to take place has been explained to a vulnerable defendant in terms he or she can understand and, at trial in the Crown Court, it should ensure in particular that the role of the jury has been explained. It should remind those representing the vulnerable defendant and the supporting adult of their responsibility to explain each step as it takes place and, at trial, explain the possible consequences of a guilty verdict and credit for a guilty plea.

3G.10 A trial should be conducted according to a timetable which takes full account of a vulnerable defendant's ability to concentrate. Frequent and regular breaks will often be appropriate. The court should ensure, so far as practicable, that the whole trial is conducted in clear language that the defendant can understand and that evidence in chief and cross-examination

are conducted using questions that are short and clear. The conclusions of the 'ground rules' hearing should be followed, and advocates should use and follow the 'toolkits' as discussed above.

3G.11 A vulnerable defendant who wishes to give evidence by live link, in accordance with section 33A of the Youth Justice and Criminal Evidence Act 1999, may apply for a direction to that effect; the procedure in Section 4 of Part 29 of the Rules should be followed. Before making such a direction, the court must be satisfied that it is in the interests of justice to do so and that the use of a live link would enable the defendant to participate more effectively as a witness in the proceedings. The direction will need to deal with the practical arrangements to be made, including the identity of the person or persons who will accompany him or her.

3G.12 In the Crown Court, the judge should consider whether robes and wigs should be worn, and should take account of the wishes of both a vulnerable defendant and any vulnerable witness. It is generally desirable that those responsible for the security of a vulnerable defendant who is in custody, especially if he or she is young, should not be in uniform, and that there should be no recognizable police presence in the courtroom save for good reason.

3G.13 The court should be prepared to restrict attendance by members of the public in the courtroom to a small number, perhaps limited to those with an immediate and direct interest in the outcome. The court should rule on any challenged claim to attend. However, facilities for reporting the proceedings (subject to any restrictions under section 39 or 49 of the Children and Young Persons Act 1933) must be provided. The court may restrict the number of reporters attending in the courtroom to such number as is judged practicable and desirable. In ruling on any challenged claim to attend in the courtroom for the purpose of reporting, the court should be mindful of the public's general right to be informed about the administration of justice.

3G.14 Where it has been decided to limit access to the courtroom, whether by reporters or generally, arrangements should be made for the proceedings to be relayed, audibly and if possible visually, to another room in the same court complex to which the media and the public have access if it appears that there

will be a need for such additional facilities. Those making use of such a facility should be reminded that it is to be treated as an extension of the courtroom and that they are required to conduct themselves accordingly.

Adaptable Approach

32. What is now expected from the Courts and from those who practise in them is a sensible and flexible approach to cases involving vulnerable witnesses. More recently, the courts under their wide-reaching case management powers and inherent duty to ensure a witness is able to give their best evidence, have increasingly adopted more inventive and flexible approaches to ensuring this is achieved.

33. Judges have accommodated the needs of witnesses and defendants by:

    - Helping vulnerable witnesses to begin cross-examination while they are fresh by not requiring them to watch their DVD interview at the same time as the jury (para 29C.4, CPD 2013)

    - Using combined special measures to shield the live link screen from the defendant and the public, as would occur if screens were being used for a witness giving evidence in the courtroom (para 29A.2 CPD 2013)

    - Turning off or covering the 'picture in picture' on the witness's TV screen, where this may distract the witness

    - Permitting witnesses unable to give evidence (e.g. because of distress due to a delayed start or as a result of inappropriate questioning) to come back the next day (if necessary, following a further ground rules discussion between the judge and advocates), rather than dismissing the case immediately.

34. Judicial decisions in respect of children have included:

    - Moving the prosecution and defence advocates into the live link room for cross-examination of young children

    - Allowing children to pause cross-examination briefly to relieve stress without leaving the live link room by going under a table, behind a curtain or under a blanket; letting children take 'in room' breaks using a large 30-second egg timer,

without releasing the jury; and letting a child with urinary urgency go to the toilet without seeking permission first

- Agreeing that a court usher would knit quietly during cross-examination because it was calming for the child, and meant the usher was not obviously observing; and agreeing to a young child's request that a male usher would cover his face with a cushion when the child had to say 'naughty' words

- Allowing children to reduce their arousal level and 'settle' with rhythmic physical activity during breaks in cross-examination. Agreed activities for four- and five-year olds have involved vacuuming, a tricycle, a mini trampoline and a small rocking chair

- Giving permission for a 15-year-old with psychological and communication problems to pull up her 'hoodie' (something she did when stressed or embarrassed to create a sense of safety) and to write down her answers if unable to speak. This reassurance, along with the presence of the supporter and intermediary, meant that she was able to give her evidence without covering her head.

35. Judicial decisions in respect of vulnerable adult witnesses have included:

- Arranging for introductions to the trial judge and advocates to take place at a pre-trial visit (coinciding with a pre-trial hearing), rather than at the trial

- Allowing the intermediary to relay the answers of a witness with autism spectrum disorder and behavioural problems who gave evidence with her back to the live link camera; and to relay replies of witnesses who would only whisper their answers

- Letting a man with autism spectrum disorder give evidence wearing a lion's tail, his 'comfort object' in daily life

- Agreeing use of a visual timeline to facilitate questioning about alleged offences over a period of time, e.g. a witness with a moderate learning disability described hotels where she had been assaulted. She identified hotel receipts as accurate, but mixed up locations and dates in interview. The intermediary helped the witness create a timeline marked with years and significant non-evidential events. The witness then added dates and locations from the hotel receipts. By referring to the timeline, she could provide correct information when questioned.

36. Judicial decisions in respect of vulnerable defendants have included:

    - Seating a defendant with impaired vision near the jury while they were empanelled, to enable him to object to jurors if necessary; and seating a defendant with a hearing problem in the body of the court
    - Allowing a defendant with mental health issues to take brief pauses during cross-examination to manage his emotional state and remain calm enough to respond to questions
    - Allowing a defendant with autism to have quiet, calming objects in the dock to help him to pay attention
    - Requesting that all witnesses be asked 'very simply phrased questions' and 'to express their answers in short sentences', to make it easier for a defendant (who had complex needs but no intermediary) to follow proceedings (R v Cox [2012] EWCA Crim 549).

Matters to Consider for Prosecution Advocates

37. The hearsay provisions are useful for prosecutors and provide opportunities to admit the otherwise inadmissible evidence of vulnerable witnesses. Hearsay in criminal proceedings is a statement not made in oral evidence in the proceedings that is evidence of any matter stated. [S.114 (1) CJA 2003]

38. The admissibility of hearsay evidence in criminal proceedings is set out in sections 114 – 136 Criminal Justice Act 2003 and applies to all criminal proceedings begun on or after 4 April 2005.

Witnesses in Fear – S.116

39. Section 116(2)(e) is the most relevant to cases involving vulnerable witnesses who are unavailable on account of fear is section, for example in sex cases trafficked women, victims of violence and domestic sexual abuse:

    116 (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—

(a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,

(b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and

(c) any of the five conditions mentioned in subsection (2) is satisfied.

(2)The conditions are—

…

(e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

(3) For the purposes of subsection (2)(e) "fear" is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

(4) Leave may be given under subsection (2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard—

(a) to the statement's contents,

(b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence),

(c) in appropriate cases, to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c. 23) (special measures for the giving of evidence by fearful witnesses etc) could be made in relation to the relevant person, and

(d) to any other relevant circumstances.

(5) A condition set out in any paragraph of subsection (2) which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described in that paragraph are caused—

(a) by the person in support of whose case it is sought to give the statement in evidence, or

(b) by a person acting on his behalf, in order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement).

40. Admission under this section is commonly utilised in domestic violence cases but has equal applicability to all cases and, provided it complies with the provisions, can be used even if it represents the sole or decisive evidence in the case.

    Examples would include:

    - An account captured on a police officer's body worn camera;
    - First account recorded in a pocket notebook;
    - Account in a 999 call [may also be covered by res gestae];
    - Account to a neighbour, friend or family member and recorded in a statement from that person.

41. The Court will consider carefully the statutory framework and the reliability of the evidence. There must be a legitimate justification for the absence of the witness AND it must be possible to make an assessment as to the reliability of the hearsay evidence.

"The interests of Justice" – Section 114

42. In appropriate cases consideration could be given to an application under 114(1) (d):

114 (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—

…

(d) the court is satisfied that it is in the interests of justice for it to be admissible.

(2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—

(a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;

(b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);

(c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;

(d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it.

(3) Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

43. However, the interests of justice section should not be used to get around the other gateways, for example where the witness is reluctant and not truly in fear [*R v*

Freeman [2010] EWCA Crim 1997.] However, see *Barnaby v DPP [2015] EWHC 232 (Admin)* where the transcripts of emergency 999 calls made by a victim of domestic violence and the conversations she had with police officers at the scene were admissible as hearsay evidence under the res gestae principle. When considering the admissibility of hearsay evidence under the res gestae principle, the primary question was whether the possibility of concoction or distortion could be disregarded. The victim's state of agitation and strangulation marks entitled the court to disregard that possibility - her remarks would have been instinctive and spontaneous.

Child Witnesses

44. **S.114 (1) (d) has been successfully used to admit previous accounts of witnesses too young to give an account or who have given significant statements to police officers.** In *R v SJ [2009] EWCA Crim 1869* a hearsay account in the mother's statement of what her 30 month old had told her about a sexual assault was admitted. In that case the account was corroborated by medical evidence.

Section 41 Youth Justice Criminal Evidence Act 1999

45. Section 41 of the Youth Justice and Criminal Evidence Act 1999 [YJCEA 1999] was implemented to protect complainants in proceedings involving sexual offences by restricting evidence or questions about their previous sexual history, subject to exceptions.

46. Section 41 provides a structured approach to the application of judicial discretion and sets out when evidence of previous sexual history can be admitted in rape cases. **In essence courts may only give leave if:**

    - **The evidence or questions rebut evidence led by the prosecution or**
    - **The evidence or questions relate to a relevant issue at trial and that issue is not one of consent.**

47. There is a difference of course between what is fair for the prosecution and fair to the defence. In *R v Soroya [2006] EWCA Crim* 1884 the Court of Appeal said that balance could be achieved by use of section 78 PACE by the trial judge. If the issue is one of consent, the behaviour to which they relate is either alleged to have taken place at or

about the same time as the alleged offence or is so similar to the complainant's behaviour at that time that it cannot reasonably be explained as coincidence.

48. **The court must also be satisfied that to refuse leave would result in the jury or the court reaching an unsafe conclusion on a relevant issue of trial.** The court will also refuse permission if it considers that the main aim of evidence claimed to relate to a relevant issue is simply to undermine the complainant's reliability.

49. **The defence must apply for permission to question on sexual behaviour in writing and not more than 28 days after the prosecutor** has complied or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996(a).

R v A (No. 2) [2002] 1 AC 45

50. This was an appeal in a rape case in the Court of Appeal, where a certified question was subsequently sent to the House of Lords concerning the use of section 41. It was argued in the lower Court that evidence of the complainant's recent sexual history with the accused should have been admitted to enable cross-examination. The lower Court found it admissible to show he had held a genuine belief that the victim had consented, it was legitimate for the defendant to adduce evidence concerning recent consensual sexual activity between the parties in order to establish his belief (s 41(3)(a)). Such evidence was, however, inadmissible for the purpose of determining consent on the part of the complainant (s 41(3)(b)).

51. The House of Lords was asked to consider whether refusing to admit such evidence would contravene a defendant's right to a fair trial under the Human Rights Act 1998 Sch.1 Part I Art.6. The House found that evidence of a complainant's previous sexual history was admissible where that evidence, and questioning concerning it, was so relevant to the issue of consent that by not including it the fairness of the trial would be brought into question. The relevance of the previous sexual experience was a matter for the trial judge to determine. On the basis of this approach it was unnecessary for the House to answer the certified question.

R v TH, R v MH [2001] EWCA Crim 1877

52. This is a case concerning what is, in fact, caught by section 41 and the definition of previous sexual behaviour. RT and MH, who had both been charged with sexual

offences against children, appealed against a ruling that the questions which they wished to put to their respective complainants were prohibited by reason of s 41. RT wished to cross-examine the complainant about why she had not raised allegations against him on an earlier occasion when she had been asked about her sexual history by the police in connection with alleged episodes of abuse by other males. MH wanted to ask questions designed to identify a pattern of lying on the part of the complainant in respect of both sexual and non-sexual matters. Each appellant submitted that such lines of questioning were not about "sexual behaviour" within the meaning of s 41 but rather they were about the complainants' previous responses (and the truth in them) to certain relevant questions and were therefore not caught by the provisions in s 41.

53. The Court of Appeal allowed the appeals. It was clear that both issues raised by the defence were highly material in the context of their respective cases and it was important for the Court to draw the distinction between questions "about" any sexual behaviour and those which, although referring to previous statements about sexual experience, did not require verification into the truth of them. The Trial Judge would have to make rulings and monitor closely cases in which it was argued the line of questioning, although concerning evidence of sexual activity, were not about "sexual behaviour".

54. Guidance was given in R v AM [2009] EWCA Crim 618. Advocates must have a proper evidential foundation before they are entitled to make an allegation that the complainant had made a false complaint of a sexual offence on another occasion.

Ground Rules Checklist

55. Please ensure you have the relevant forms.

    - S.28 Ground Rules Hearing Form, and
    - S.28 Crown Court Preliminary Hearing form

Section A: Facilitating the Role of the Intermediary

56. If there is an intermediary they must be included in the Ground Rules Hearing ('GRH') discussion and in particular their report(s) considered and discussed, especially if a report recommendation is disputed. The intermediary is not a witness and is not

required to be in the witness box for the GRH. The hearing is a discussion and the hearing is not for cross-examination of the intermediary. The intermediary is not required to take the intermediary oath at this stage (Section 29(5) Youth Justice and Criminal Evidence Act 1999 requires the intermediary to make the declaration as specified)

57. At the GRH discuss:

    a. Whether advocates have shown the intermediary the wording of their proposed questions and taken advice on the suitability of the wording and communication style.

    b. Where the intermediary will stand/sit during the trial (for the defendant) or testimony (if for a witness), so that she is able to observe and intervene to assist with communication whilst all the time being visible to the judge, advocates and jury.

    c. If for a defendant, where the intermediary will sit in relation to other defendants (if any) and officers in the dock.

    d. Where and when the intermediary will take the intermediary oath.

    e. If the intermediary and witness will be in a remote location, practical issues such as who will administer the oath and how exhibits would be made available to the witness. See also Toolkit 9 Planning to question someone using a remote link.

    f. How the intermediary will be addressed in court in front of the vulnerable person – for example, it might be by her first name if that is how the witness knows her.

    g. How the intermediary will intervene/get the judge's attention if there is a communication issue or the intermediary needs to discuss a communication issue with judge and counsel in the absence of the jury.

    h. How the role of the intermediary will be explained to the jury in a way that makes clear they are not a witness but that their role is to assist everyone in achieving complete, accurate and coherent communication with the vulnerable person.

    i. If communication aids are to be used, how the intermediary will assist with these.

    j. Any other recommendations in the intermediary's report.

58. It is important to remember that in the absence of an intermediary for the defendant, trials should not be stayed where an asserted unfairness can be met by the trial judge adapting the trial process with appropriate and necessary caution

(*R v Cox [2012] EWCA Crim 549, [2012]* 2 Cr. App. R. 6).' (CPD 3F.6)

Section B: Participation of the Vulnerable Defendant

59. If the defendant is vulnerable and, in so far as this has not been covered above, discuss (including with the intermediary if there is one):

    a. Whether an interpreter is required for the trial.

    b. Where the defendant will sit during the trial, for example, in the dock or next to the defence lawyers/if anyone will accompany the defendant in the dock – if they need the support of a nurse, for example.

    c. Whether the vulnerable defendant will need assistance in the dock to access/follow written evidence and, if so, how this will be achieved.

    d. Start and end times of the trial days.

    e. Scheduled breaks during the trial day, including, for example, time to take medication, extra time to go through papers with a defendant who cannot read and extra time to allow counsel to take instructions.

    f. How a request for an unscheduled break will be notified, if required.

    g. Ground rules for all witness testimony to help the defendant follow proceedings; for example, directing that all witness evidence be adduced by simple questions.' (CPD 2014, 3F.6)

    h. How and when the defendant will be familiarised with the courtroom. (CPD 2014, 3G.2)

    i. Use of communication aids, for example, iPad/tablet, hearing loop, stress/concentration aids, break cards, visual timetable and writing/drawing materials.

    j. Whether the jury will be assisted by an explanation about the defendant's condition and its effect on his or her behaviour so as to avoid that behaviour

being misinterpreted (for example, see *R v Thompson [2014] EWCA Crim 836* and the defendant with Asperger's syndrome).

60. Ground rules may need to be revisited if during the trial the defendant's effective participation is still not being achieved. Then, if the defendant later elects to give evidence there would normally be a further GRH specifically to discuss how questioning should be conducted (see next section).

Section C: Fair Questioning of a Vulnerable Person (Witness or Defendant)

61. Discuss (including with the intermediary if there is one):

    a. Whether an interpreter is required for the person's testimony.

    b. Whether it is necessary to appoint a lawyer for an unrepresented defendant to conduct any cross-examination on behalf of the defendant (Sections 34–40 YJCEA 1999).

    c. Whether the person will give evidence on oath or not and any assistance they might need to take the oath.

    d. Whether the person will give evidence in court or over a live link (Section 33A YJCEA 1999 for an eligible defendant and section 24 YJCEA 1999 for an eligible witness).

    e. How other special measures, which may have previously been ordered, will be implemented – for example, a screen, evidence given in private, evidence pre-recorded, wigs and gowns removed by judge and advocates, a witness supporter, use of communications aids,9 such as models of maps, timelines, charts, pictures etc. Use of communication aids, such as body maps, for trial of a sexual offence10 should also be considered.

    f. How special measures and other adjustments may be combined: a combination of special measures may be appropriate. For example, if a witness who is to give evidence by live link wishes, screens can be used to shield the live link screen from the defendant and the public, as would occur if screens were being used for a witness giving evidence in the court room (CPD 29A.2).

g. Where the advocates will be when they conduct their questioning, for example, in court over live link or in the live link room.

h. How long cross-examination is likely to take and how long it will be permitted to last, taking into account relevant matters such as the witness's concentration abilities, effects of prescribed medication etc.

i. When there will be scheduled breaks during the trial day, including duration and nature of breaks.

j. How a request for an unscheduled break will be notified, for example, arising from an urgent medical need.

k. Whether all breaks should involve adjourning the court or whether brief breaks may speed proceedings for all. Many courts have agreed breaks of up to three minutes for young children; during a short, non-adjourned break (the court stays sitting) and the microphones and cameras to the live link room are temporarily made visible only to the judge, enabling the witness to take a few minutes in the live link room to re-orientate or calm themselves. This avoids the need for the jury to be sent out and brought back which would be unnecessarily time-consuming.

l. Whether the judge has seen the advocates' proposed questions and determined if they are appropriate (if there is an intermediary they should also have been reduced to writing and shown to the intermediary).

m. How repetitious questioning will be avoided when there are separately represented defendants.

n. If limitations are going to be placed on cross-examination, how these will be explained to the jury.

o. How and when the person will be familiarised with the witness box/live link room/remote live link site, if this has not happened already.

p. How and where and when the person will have their memory refreshed by watching the DVD recording of their achieving best evidence (ABE) interview, if any. Note that there is no requirement for the witness to watch their ABE at the same time as the jury.

q. Whether and how the judge and advocates (preferably together) will meet the vulnerable person beforehand. Discussion may include matters such as whether the judge/advocates will be robed. 'In general, experts recommend that the trial

judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties. This seems to us to be an entirely reasonable step to take to put the witness at their ease where possible.' (See *R v Lubemba [2014] EWCA Crim 2064*.)

r. The best time of day for the person's testimony to start.

s. Whether the person will need assistance during testimony, for example, referring to/accessing written material, maps, photos, diagrams, transcripts etc.

t. How the court will be enabled to access the person's nonverbal communication, for example, indicating, pointing, drawing and writing.

62. The Court of Appeal endorsed *R v Lubemba in R v L [2015] EWCA Crim 1215*. In that case the restrictions imposed by the trial judge at a ground rules hearing were valid despite the limited amount of time made available for the defence's cross-examination of the defendant's children who were complainants in a child cruelty case. In addition, the fact that the defence could not point to a single question that was inappropriately excluded confirmed the Court's view that the defence were able to put their case and challenge the truthfulness of the child witnesses' evidence.

"It is, we think, significant that in his general challenge to the effect of the judge's rulings, Mr Dunning has not sought to identify a specific example of a question which he says he should have been permitted to ask but was not allowed to do. Nor, in our view, is it entirely fair for Mr Dunning to complain that he was effectively bound by the answers given by the young witnesses. He was able to put his case, he was able to challenge the veracity of the witnesses, and he was of course able, when addressing the jury, to make his forensic points in terms other than those appropriate to the cross-examination of young children" [Mr Justice Holroyde, para 17].