Children and vulnerable adults

Key points

- Accommodating a vulnerable person's needs (as required by case law, the Equality Act 2010, the European Convention on Human Rights, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Persons with Disabilities and the European Directive establishing minimum standards on the rights, support and protection of victims of crime) requires the court or tribunal to adopt a more flexible approach.
- Courts have safeguarding responsibilities in respect of children and vulnerable adults. The exercise of judicial discretion often has a safeguarding dimension.
- The Inspectorates have highlighted local practices in respect of vulnerable witnesses which fail to comply with existing national, evidence-based policies.
- All witnesses, regardless of age, are presumed competent.
- Children and defendants have been shown to experience much higher levels of communication difficulty in the justice system than was previously recognised. This is also likely to be the case for vulnerable adult witnesses and the elderly.
- Children and vulnerable adults under stress can function at a lower level, making it harder for them to remember accurately and think clearly.
- The judiciary should be alert to vulnerability, even if not previously flagged up. Indicators may arise, for example, from someone's demeanour and language; age; the circumstances of the alleged offence; a child being 'looked after' by the local authority; or because a witness comes from a group with moral or religious proscriptions on speaking about sexual activities.
- Assessment by an intermediary should be considered if the person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority.
- Judges and magistrates should ask for relevant information, if not provided (in the case of vulnerable prosecution witnesses, by the police and Witness Care Units); information may also be provided by parents or guardians, social workers or other professional assessments.

1 Overarching principles

1. This chapter focuses primarily on ways to adapt criminal proceedings to accommodate children and other vulnerable witnesses and defendants, but much of it is also relevant to civil and family cases and tribunal hearings with a vulnerable witness, party or litigant in person. *Practice Direction 12A – Public Law Proceedings Guide to Case Management,* provides that the court will 'identify any special measures such as the need for access for the disabled or provision for vulnerable witnesses' (para 15.3(7) 2010). The Supreme Court has ruled that the family court may hear evidence from children in certain circumstances: 'There are things that the court can do [to facilitate the child's evidence] but they are not things that it is used to doing at present' (*Re W*

[2010] UKSC 12) and has considered adaptations to enable a vulnerable adult witness to give evidence (*In the matter of A (A Child)* [2012] UKSC 60).

A flexible approach to facilitate best evidence

2. Courts and tribunals are expected to adapt normal trial procedure to facilitate the effective participation of witnesses, defendants and litigants:

   a. giving effect to section 20 of the Equality Act 2010 by making reasonable adjustments to remove barriers for people with disabilities

   b. taking 'every reasonable step to facilitate the participation of any person, including the defendant' in preparation for trial (Rule 3.8(4)(b), Criminal Procedure (Amendment) Rules 2012).

3. In the 2013 Toulmin Lecture, the Lord Chief Justice said that:
   "Just because a change does not coincide with the way we have always done things does not mean that it should be rejected….Do proposed changes cause unfair prejudice to the defendant?: if so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective" (*Half a Century of Change: The Evidence of Child Victims*, King's College London).

4. These principles have also been reflected in criminal and family appellate decisions. For example:
   'When necessary, the processes have to be adapted to ensure that a particular individual [in this case, a defendant with complex needs] is not disadvantaged as a result of personal difficulties, whatever form they may take' (Lord Chief Justice, para 29, *R v Cox* [2012] EWCA Crim 549; see also *R v B* [2010] EWCA Crim 4).
   A judge's general duty to manage all cases to achieve targets 'cannot in any circumstance override the duty to ensure that any litigant… receives a fair trial and is guaranteed what support is necessary to compensate for disability' (Lord Justice Thorpe, para 21, *In the Matter of M (A Child)* [2012] EWCA Civ 1905). In this case, the Court of Appeal found a breach of Article 6 rights where, despite a report recommending special measures, a father of 'limited capacity' gave evidence in family proceedings with only 'unsatisfactory makeshift' arrangements.

5. Decisions about how procedures should be adapted should be made as early as possible.

<u>Examples of a more flexible approach</u>

- 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. There is no legal requirement to do so. Watching at a different time has the advantage that breaks can be taken as needed. It is the police's responsibility to arrange this, with the permission of the court. An intermediary may need to be present but should not be the person designated to record anything said at the viewing (section 4.51 '*Achieving Best Evidence in Criminal Proceedings*' March 2011, Ministry of Justice http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf). If it is appropriate to

swear the witness, do so just before cross-examination, asking if (s)he has watched the DVD and if its contents are 'true', in words tailored to the witness's understanding.

- Turning off or covering the 'picture in picture' on the witness's TV screen, where this may be a distraction to the witness.
- Using combined special measures. 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 (para 29A.2, Criminal Practice Directions 2013).
- Letting witnesses write and draw to clarify answers.
- 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.

6. Flexible arrangements in respect of children include:

    - moving the prosecution and defence advocates to the live link room for cross-examination of a five-year-old who struggled to communicate across the live link at a practice session. The Registered Intermediary recommended this solution and the judge ruled that the live link room was an extension of the courtroom
    - allowing children to briefly pause cross-examination to relieve their stress, without leaving the live link room, by going under a table, behind a curtain or under a blanket, and (in the case of a child with urinary urgency) being permitted to leave the room without prior permission to use the toilet
    - allowing a fearful eight-year-old to calm herself quickly by taking herself out of sight of the main live link camera (but still visible to the judge on the overview camera). The child and intermediary practised these 'in room' breaks beforehand, using a large 30-second egg timer. The judge requested everyone to wait, rather than adjourning the court. The child took around 15 brief breaks (two or three 'egg timer' intervals lasting around 60-90 seconds) across two hours of evidence. Only one complete break and adjournment was required
    - scheduling children with learning disabilities to give evidence for short periods, with breaks, in the morning over several days.

7. Flexible arrangements in respect of vulnerable adult witnesses include:

    - allocating a female judge and counsel to a trial with a witness who refused to speak to a man about the alleged offence
    - allowing a Registered 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 in other cases to relay the 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

- seating the advocate at the end of the clerk's table, within a metre of a lip-reading witness who gave evidence behind a screen with the assistance of a Registered Intermediary, as even a skilled lip-reader may clearly understand less than half of what is said
- the judge's appointment of an advocate with relevant experience for a young woman who refused to testify in a sexual assault case, to advise her about the consequences of not giving evidence. The witness was persuaded to proceed and was allowed to pause her testimony to speak to the advocate, on condition that she did not discuss her evidence.

8. Flexible arrangements in respect of vulnerable defendants include:

- 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 (such defendants have particular difficulty following proceedings from the dock because advocates speak with their backs to them)
- permitting an intermediary to work alongside a defendant in the dock to help him to understand proceedings
- 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)
- agreeing that a defendant with mental health issues be given 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.

Safeguarding children and vulnerable adults

9. Safeguarding is defined as 'the action we take to promote the welfare of children and protect them from harm' and the key principles that should underpin them (*Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* HM Government 2013). Some aspects of safeguarding policy have been extended to protect vulnerable adults (e.g. requiring those supervising them to have an enhanced criminal record check: section 115(4), Police Act 1997). The safeguarding of a vulnerable adult as a witness in family proceedings is discussed in *A (A Child)* [2012] UKSC 60.

10. Individuals may have devastating experiences at court as a result of an accumulation of procedural failures and the way they are questioned. In safeguarding and other thematic reports on children, victims and vulnerable witnesses, the Inspectorates highlight the risk of secondary abuse from the criminal court process. For example, a 2012 report stressed that victims and witnesses, particularly those who are young and vulnerable:
'continue to be adversely affected by an absence of real focus on their needs… the

[CJS] system itself appears to be unable to maintain a consistent and acceptable level of care as cases pass through it' (HM CPS Inspectorate and HM Inspectorate of Constabulary, *Joint inspection report on the experience of young victims and witnesses in the CJS*).

11. The Inspectorates have recommended that courts' existing safeguarding policy and practice be brought together into 'overarching strategies'. A safeguarding policy for court staff (addressing, for example, listing strategy and the need for ushers working with vulnerable witnesses to have police checks) is in draft but has not yet been published.

The judiciary's role in safeguarding

12. Judges and magistrates have a role in safeguarding vulnerable people at court in ways which further the overriding objective and do not interfere with judicial independence.

13. The Government's safeguarding policy *Working together to safeguard children* (2013) emphasises that:

    a. safeguarding is everyone's responsibility, requiring 'each professional and organisation' to play their full part

    b. a child-centred approach is needed, based on a clear understanding of children's needs and views.

14. Ways in which to discharge this responsibility include:

    a. being alert to safeguarding concerns when dealing with a child (or vulnerable adult) and addressing them through effective planning and proactive enquiries

    b. ensuring that a named individual has responsibility for the vulnerable person's welfare at the hearing, with a line of communication to alert you to difficulties. 'Traditional hierarchies' tend to hinder communication in complex organised activities (Gawande, *The Checklist Manifesto* 2009)

    c. having contingency plans (e.g. regarding the timing of the vulnerable witness's evidence) if things go wrong in ways affecting the witness's welfare.

15. Safeguarding concerns should not be over-ridden because of pressures arising elsewhere in the justice system process. For example, despite clear policy to the contrary, some witnesses are still advised not to seek pre-trial therapy because of fears that it could jeopardise the prosecution. Reaffirm the correct position when the question arises: whether the witness should seek pre-trial therapy is not a decision for the police, prosecutor or court, and the best interests of the witness are the paramount consideration (*Provision of therapy for child witnesses prior to a criminal trial* and *Provision of therapy for vulnerable or intimidated adult witnesses prior to a criminal trial*, CPS, Department of Health and Home Office 2001).

16. Safeguarding is most at risk when responsibilities are unclear and there is a breakdown of communication. For example, when:

    a. two teenage witnesses, known to be confined to wheelchairs, spent all day at court without any hoist being provided to enable them to use a toilet

b. a judge was notified of the propensity for self-harming of a witness produced from custody but security personnel were unaware. The witness self-harmed during a break while in the cells and was unable to complete his evidence

c. a child was left alone in the live link room over the lunch period for 75 minutes, without food or support.

Competency

17. Competence is assumed if a witness of any age is capable of giving intelligible testimony (section 53, *Youth Justice and Criminal Evidence Act 1999*). This may require the assistance of an intermediary (see below). The test does not require the witness to understand every question or give a readily understood answer to every question; the test is not failed because the forensic techniques of the advocate or court processes have to be adapted to enable witnesses to give the best evidence of which they are capable (*R v B* [2010] EWCA Crim 4).

18. Even if competency is assumed, or ruled upon in favour of the witness by the judge, the judge is under a continuing duty to keep the matter under review and a party is not precluded from raising it during the course of the trial if justified. However, when there is material indicating that the witness satisfies the competency test (such as an ABE interview and an intermediary report):
'the court and the parties should carefully consider whether a competency hearing is, in fact, necessary at the initial stage of the case. In some circumstances such a hearing may serve to do no more than cause delay, increase expense and put unnecessary strain on the witness' (*R v F* [2013] EWCA Crim 424).

19. In that case, the problem of communicative competence was not that of the witness but of the questioners: the court found that 'the problem arose over an issue of ability to communicate with H in a non-leading way, rather than an issue of H's comprehension and thus her competence... what was intended to be a test of competency was seriously flawed'.

2 Active case management from first appearance

20. See also:

- Criminal Practice Directions Section 3A, Case management (2013)
- The Advocate's Gateway (www.theadvocatesgateway.org) case management toolkit
- Judicial College *Bench Checklist: Young Witness Cases* (2012)
- Practice Direction 12A, *Public Law Proceedings Guide to Case Management*, incorporating the Public Law Outline (2010). This addresses parallel care and criminal proceedings (PD12A para 3.9). Disclosure of criminal material to family courts is addressed in CPS online policy.

Timetabling

21. Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved. For example, despite many policies to give young witness

cases priority, studies show that these cases usually take longer than the national average to reach trial. This may also apply to other cases involving vulnerable people, who are often more adversely affected by delay, both in terms of their recall and their emotional well-being. Timetabling is therefore an issue that impacts upon best evidence and safeguarding. Further, the Inspectorates warn that police and Witness Care Unit needs assessments are often inadequate, with a detrimental effect in criminal cases which progress to trial. Be alert to the possibility that needs have not been considered or identified and ask for information to be updated if necessary.

22. Schedule responses and make orders as necessary at the first appearance in magistrates' court or preliminary hearing or plea and case management hearing in the Crown Court:

Prioritise vulnerable witness cases (section 4.83, '*Achieving Best Evidence in Criminal Proceedings*' March 2011, Ministry of Justice). Delay in a case involving a child complainant should be kept to an 'irreducible minimum' (*R v B* [2010] EWCA Crim 4).

a. Obtain availability dates not just for witnesses but for any intermediary or named supporter, and dates to avoid for exams or other important events.

b. Fix young witness trials, not behind another trial or as a 'floater'. In exceptional circumstances, floating the trial may be appropriate: the Inspectorates describe as good practice offering a young witness an earlier floating date to try to ensure that her evidence was given before her school examinations started.

c. If necessary, fix the courtroom for a live link trial. In an intermediary case, plasma screens will give a better view of intermediary/ witness interaction.

d. Timetable any editing of the DVD interview, allowing time for the witness to see the edited version. Consider the need for a transcript. Where important non-verbal communication is omitted or key passages are marked 'inaudible' because the witness's speech is hard to hear or decipher, intermediaries have been asked to revise the transcript.

e. Ensure that applications for disclosure of third party material/ PII hearings are made and dealt with at an early stage.

f. Address special measures and any other necessary modifications to trial procedure to provide greater certainty to the witness. While special measures applications should be made within 28 days of entry of a not guilty plea in magistrates' court and 14 days in the Crown Court, a late application should not be rejected solely because it is made out of time.

Avoiding adjournments

23. A trial date involving a young or vulnerable adult witness should only be changed in exceptional circumstances. By exerting tight control at an early stage, it will be less likely that an adjournment will be necessary to safeguard the rights of the defendant. Research indicates that at least one-third of young witness trials are adjourned, many of them more than once. This can have a detrimental impact upon witness recall and emotional well-being as well as on the fairness of outcomes.

24. If an application for an adjournment is sought, consider the adverse effect of delay on the vulnerable person and consider whether:

    a. another judge can take the trial on the original date

    b. the trial can be heard elsewhere, taking account of witness/defendant views

    c. a trial with a lesser priority can be vacated instead.

25. If postponement is unavoidable, a trial involving a vulnerable witness should be re-listed in the shortest possible time.

Scheduling a 'clean start' to witness testimony

26. The capacity of a vulnerable witness to give evidence is likely to deteriorate if they are kept waiting. The Inspectorates express concern that many vulnerable witnesses experience lengthy delays, exceeding court waiting time targets, even when a 'clean start' is scheduled for their testimony. This can be devastating both for the witness and the quality of the testimony. Problems result from:

    a. the judge having to deal with other matters first. *The Consolidated Criminal Practice Direction* states firmly that 'on no account' should short hearings be listed that may delay the start or continuation of a trial (*Annex F, Listing*, section 5.4(f), 2010). Reasons for this policy, particularly in respect of vulnerable witnesses, should be brought to the attention of the Listing Officer

    b. witness waiting times artificially extended by advice to arrive at the hearing early, in order to avoid seeing or being seen by the defendant. Other ways to avoid confrontation should be ; e.g. a judge ordered the defendants to be seated in the dock for ten minutes at the start and end of each court day to ensure that young witnesses could enter and leave the building calmly

    c. discussions which do not, in the end, result in a guilty plea.

27. Last-minute legal discussions should not be allowed to have the knock-on effect of prejudicing the effectiveness of a vulnerable witness's evidence through tiredness and stress. It is good practice to schedule the start of a vulnerable witness trial in the afternoon (enabling the trial judge to deal with any outstanding issues), with the first vulnerable witness listed promptly at the start of the second day (with further directions for other vulnerable witnesses). Even if the court has to rise early, it is a small price to pay to maximise the quality of evidence of the vulnerable witness the next morning. If there is any risk that their evidence will not start on time, they should be advised to wait on standby. It is vital to:

    a. agree staggered witness start times, ensuring opening/preliminary points will be finished when the first witness's evidence is due to start

    b. schedule testimony to start while the witness is fresh (usually at the start of the day though for some vulnerable witnesses this may be different), taking account of concentration span and the effect of any medication

    c. schedule each stage of the witness's evidence, including breaks. Duration should be developmentally appropriate and limits may be imposed (Rule 3(10)(d),

Criminal Procedure Rules 2012). As a general rule, a young child will lose concentration after about 15 minutes, whether or not this becomes obvious

d. schedule a ground rules hearing. If deferred until the day of the witness's testimony, ensure that the hearing does not add to the witness's waiting time

e. allow time for introductions and take account of the witness's wishes. Prosecutors are expected to meet the witness and defence advocates may find it useful to do so. It is up to you whether to accompany the advocates but it can be a useful opportunity to 'tune in' to the witness's level of communication. Where justified by the circumstances, some trial judges have met the vulnerable witness with the advocates before the day of the witness's evidence.

3 Effective use of special measures

28. This section discusses ways to ensure that special measures and related directions achieve their objective of helping the witness to give evidence.

Avoiding confrontation

29. Standard 23, Witness Charter (2008) requires the court to have separate waiting areas and advises that vulnerable or intimidated witnesses may be allowed to wait on standby near the court. Nevertheless, standby arrangements are under-used and at many courts, it is quite common for prosecution witnesses to encounter defendants in or around the building. Enquire about the effectiveness of procedures to keep them separate at your court, including whether vulnerable witnesses are able to use an alternative entrance.

Remote live links

30. The Inspectorates recommend greater use of remote live links where there is a risk of confrontation (Ministry of Justice Live Links Protocol; section 4.6, 'Registered Intermediaries in Action' 2011; Parts C1, C2, Application for a Special Measures Direction). Many courts can now connect to other court buildings; some have routinely linked to a non-court facility (with good experiences reported by judges and witnesses) or have used mobile police equipment at schools and hospitals. Decide what evidence needs to be taken to the remote site.

Screens

31. Where the witness and defendant are screened from one another in court, if it is not feasible also to shield the witness from the dock and public gallery while entering court, (s)he should be behind the screen before the defendant and members of the public are seated and leave at a different time during adjournments.

Witness views about special measures

32. Emphasis is now given to the witness's viewpoint because witnesses are likely to give better evidence when they choose how it is given. Thus, witnesses eligible for special measures and not wishing to be seen by the defendant may prefer screens. A young witness (or one over 18 to whom sections 21 or 22 Youth Justice and Criminal Evidence Act 1999 apply) may wish to opt out of the primary rule (recorded evidence-

in-chief and live link) and secondary requirement (screens) (section 100 Coroners and Justice Act 2009).

Perceptions about the impact of technology on case outcomes

33. The Inspectorates have expressed concern that presumptions are being made about the best method for vulnerable witnesses to give evidence and that some feel pressured not to use the live link:

    a. Studies here and in other countries over a period of 20 years have found no significant difference in conviction rates when witnesses use live links (see overview, Hoyano and Keenan, 'Child Abuse: Law and Policy Across Boundaries' 2010).

    b. Ellison and Munro's study found that special measures had no consistent impact upon juror evaluation of the testimony of female adult rape complainants, juror perceptions of credibility or trial fairness ('Special measures in rape trials: Exploring the impact of screens, live links and video-recorded evidence on mock juror deliberation' 2012).

34. However, the size of jurors' TV screens may make a difference to outcomes. In an unpublished exercise, the (then) Resident Judge of Liverpool Crown Court monitored the outcomes of vulnerable witness trials: those in which large plasma screens were used had a higher rate of conviction than those where the jury watched outdated small TV screens. Ellison and Munro's study used a large, 50 inch plasma screen. They acknowledged that small screens in real courtrooms may 'adversely affect jurors' assessments' in ways not evidenced in their study.

Witness entitlement to practise on the live link

35. Witnesses are entitled to practise speaking and listening on the live link (Standard 17, Witness Charter 2008) and should be shown screens in place. However, not all witnesses are offered a familiarisation visit; some cannot attend because of restricted hours for court visits; and some courts do not allow witnesses to practise on the live link. Every court should facilitate such practice sessions. This is essential to help identify whether use of the live link interferes significantly with the quality of witness communication.

36. It is helpful (though not a replacement for a visit) if courts provide supporters and intermediaries with photos of live link rooms and screens, or allow them to take photos for the purpose of preparing the witness. The Resident Judge or senior magistrate should ensure there is a uniform policy at each court, and should tend to support the taking of photographs for this purpose (subject to whatever restrictions are considered appropriate, having regard to court security requirements).

Emotional support

37. Potential benefits to witness recall and stress reduction flow from the presence of a known and trusted supporter who can provide emotional support:

    a. courts may specify who accompanies a witness in the live link room and must take the witness's wishes into account (section 102, Coroners and Justice Act 2009,

amending section 24, Youth Justice and Criminal Evidence Act 1999; part C3, Application for a special measures direction)

b. this can be anyone who is not a party/ has no detailed knowledge of evidence; ideally, the person preparing the witness for court. Others may be appropriate.

38. However, some courts continue to prefer witnesses in the live link room to be accompanied only by the usher, rather than also by a named supporter. Ushers cannot offer emotional support to the witness and receive 'negligible' appropriate training (HM CPS Inspectorate and HM Inspectorate of Constabulary, 'Joint inspection report on the experience of young victims and witnesses in the criminal justice system' 2012).

Refreshing witness memory

39. Witnesses who give recorded evidence in chief are also entitled to refresh their memory before trial but many who make a DVD statement are not given the opportunity. The first viewing is often distressing or distracting and should be scheduled before the day of testimony (the witness need not watch the DVD at the same time as the jury – see page 2 above). Decisions about how, when and where refreshing should take place should be made on a case-by-case basis. There is a risk that a viewing combined with the court familiarisation visit will result in 'information overload'. For more detailed guidance, see section 29C, Criminal Practice Directions 2013). The Inspectorates recommend that memory refreshing be the subject of a clear local inter-agency agreement.

40. Arrangements should be judicially led. Someone (usually a police officer, not an intermediary) should be designated to take a note and report to the judge if anything is said. In the case of a very young child, it may be appropriate to record the viewing. If the DVD is ruled inadmissible, identify an alternative method of refreshing.

Intermediaries: facilitating complete, coherent and accurate communication

41. See also:

a. The Advocate's Gateway (www.theadvocatesgateway.org) 'Intermediaries' section (Registered Intermediaries for prosecution and defence witnesses, and non-registered intermediaries for defendants).

b. The toolkit 'Effective participation of young defendants' on the same website, which describes the appointment process for non-registered intermediaries; Annex A lists ways in which these have been used in the pre-trial period and at trial.

The function

42. Intermediaries are one of the statutory special measures for prosecution and defence witnesses (section 29, Youth Justice and Criminal Evidence Act 1999). They are communication specialists whose primary responsibility is to enable complete, coherent and accurate communication (section 16). They are expected to prevent miscommunication from arising and 'actively to intervene when miscommunication may or is likely to have occurred or to be occurring' (*R v Cox* [2012] EWCA Crim 549).

43. Intermediaries can assist the judiciary to monitor the questioning of vulnerable witnesses and defendants but responsibility to control questioning remains with the judge or magistrates. Intermediaries are impartial, neutral officers of the court. They are not expert witnesses. Their assessment reports are valued as a guide to how questioning can best be adapted to the individual's needs. In addition, advocates may request intermediary advice ahead of trial about adapting their questions. Where the assessment indicates that some restrictions on cross-examination may be necessary, some judges review specific questions in advance with the intermediary.

44. Registered Intermediaries for prosecution and defence witnesses are appointed through the Ministry of Justice Witness Intermediary Scheme involving regulation, police checks, accreditation training, support and standards for matching skills to witness needs (see 'Registered Intermediary Procedural Guidance Manual' Ministry of Justice, 2012) For the use of intermediaries for defendants, see below.

When appointment should be considered

45. The Inspectorates highlight poor levels of awareness about the benefits of intermediary use. For example, intermediaries appointed post-interview often find that a written statement has been taken from witnesses who do not understand them and cannot read them. Sometimes this has necessitated taking another statement. Even where no application for a Registered Intermediary has been made, you may always request assessment of a vulnerable prosecution or defence witness whose communication needs may have been overlooked (section 19(1)(b), Youth Justice and Criminal Evidence Act 1999).

46. Assessment by an intermediary should be considered if the person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority. Studies suggest that the majority of young witnesses, across all ages, fall into one or other or both categories. A deaf person should always be assessed by an expert in deafness and/or a suitably qualified and experienced intermediary.

If the application is contested

47. The intermediary should always attend the hearing to explain their recommendations and in what way their presence will facilitate 'complete, coherent and accurate' communication. It may be suggested that the intermediary is not needed at trial because:

    a. *the interview was conducted without the need for an intermediary.* Communication during the trial process is more challenging than the investigative interview, leading to greater stress and potentially more opportunities for miscommunication

    b. *an intermediary was present at the interview but apparently took no active part.* This is often because the intermediary had already provided advice to the interviewer about how to adapt his or her questions and therefore did not need to intervene

    c. *the advocates will comply with guidance in the intermediary's report.* In practice, many advocates find it more difficult to adapt key questions than they anticipate.

It can also be difficult to keep in mind all aspects of questioning that may be problematic for the individual witness. An intermediary who has already assessed the witness's communication is able to alert the court to any problems or loss of concentration.

Intermediaries in family cases

48. Intermediaries have occasionally been appointed by family courts and their use is discussed in Family Justice Council 'Guidelines in relation to children giving evidence in family proceedings' (2011). The Ministry of Justice will provide a Registered Intermediary only where there is a direct link to a criminal case in which the witness is involved and where one has already been provided through the Witness Intermediary Scheme. This is justified on the basis of continuity of care for the witness who already has rapport with the intermediary. Even in these circumstances, assistance will only be provided where the intermediary used in the criminal case is available and where there is no impact on availability of intermediaries for witnesses covered by section 29.

Non-registered intermediaries for vulnerable defendants

49. Section 104, Coroners and Justice Act 2009 creates a new section 33BA, Youth Justice and Criminal Evidence Act 1999, providing an intermediary to an eligible defendant while giving evidence. This has not been implemented. However, courts have exercised their inherent discretion to appoint intermediaries for a vulnerable defendant's testimony, or for the whole trial (*R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin)). In a trial which lasted 12 weeks, the judge appointed two non-registered intermediaries who took turns to attend.

50. Any intermediary appointed to assist a defendant is considered to be 'non-registered' even though the individual carrying out this role may be a Registered Intermediary in respect of witnesses.

51. Non-registered intermediary appointments are not routine:

    a. Adapting the trial process may be sufficient where the trial judge conducts proceedings 'with appropriate and necessary caution' (*R v Cox* [2012] EWCA Crim 549).

    b. However, appointments should be considered in 'obvious cases [such as] those in which the defendant was a young child or a person with complex problems of the sort that defendants in the reported cases have suffered from' (Recorder of Leeds, *R v GP and 4 Others* (2012) T20120409, 'Guidance for future applications'). Appointment of an intermediary by itself may not be a sufficient adjustment: in *R v Jordan Dixon* [2013] EWCA 465) an intermediary was appointed to assist a vulnerable defendant during the trial, but failures to hold a ground rules hearing and to modify the language used during the proceedings were described as 'regrettable' by the Court of Appeal.

    c. Even where a judge concludes that he has a common law power to direct the appointment of an intermediary, the direction will be ineffective if no intermediary can be identified for whom funding would be available (*R v Cox* [2012] EWCA Crim 549).

52. The Legal Services Commission pays for a non-registered intermediary's assessment and pre-trial involvement, subject to prior authority; his or her attendance at trial is paid for by HM Courts and Tribunals Service (agreement between the Legal Services Commission, Ministry of Justice and HM Courts and Tribunals Service). The matching service for Registered Intermediaries run by the Ministry of Justice and National Crime Agency cannot assist in obtaining a non-registered intermediary.

Communication aids

53. Intermediaries can also assist in recommending appropriate communication aids. Courts have permitted a wide range (e.g. pen and paper, models, picture cards, signal boards, visual timetables, human figure drawings and technology) to augment or replace oral testimony. Aids have helped improve the quality of evidence and given access to justice to some witnesses previously excluded. Intermediaries will, with the approval of the court:

    a. advise on the selection of appropriate aids e.g. a body map for a witness asked to clarify intimate touching (for an example of a gender neutral child body outline, see http://lexiconlimited.co.uk/body-outline). The failure to ask a non-verbal witness to identify body parts by reference to pictures was criticised in *R v F* [2013] EWCA Crim 424

    b. develop aids specifically tailored to the needs of the witness and the advocate's questions (e.g. development of a visual timeline to support questions about several incidents over time).

4 Ground rules hearings: planning to question someone with communication needs

54. See also:

    a. Criminal Practice Directions Section 3E, Ground rules hearings to plan the questioning of a vulnerable witness or defendant (2013)

    b. The Advocate's Gateway toolkit on 'Ground rules hearings' and others addressing a range of communication issues (www.theadvocatesgateway.org)

    c. Family Justice Council 'Guidelines in relation to children giving evidence in family proceedings' (2011).

A key ingredient of trial management

55. Judicial interventions in questioning can be minimised if the approach to questioning is discussed at a ground rules hearing before the witness's testimony and ground rules are agreed and adhered to. Discussions have been held in court, in chambers and over a remote live link when the intermediary is at a different location with the witness. The ground rules hearing is the opportunity for the trial judge and advocates to plan any adaptations to questioning that may be necessary to facilitate the evidence of a vulnerable person. Where an intermediary is appointed, the purpose of the hearing is 'to establish how questions should be put to help the witness understand them and how the intermediary will alert the court if the witness has not understood or needs a break' (part F.1, Application for a special measures direction).

56. Judges and magistrates have a paramount duty to control questioning, as required by the overriding objective. Witness testimony must be adduced as effectively and fairly as possible. You are encouraged to intervene if needed, even if an intermediary – if any – does not:

    a. Witnesses must be able to understand the questions and enabled to give answers they believe to be correct. If the witness does not understand the question, the answer will not further the overriding objective.

    b. The manner, tenor, tone, language and duration of questioning should be appropriate to the witness's developmental age and communication abilities.

When to hold a ground rules hearing

57. Ground rules hearings should take place in the presence of the trial judge or magistrates, advocates and intermediary, if any. The hearings are:

    a. *mandatory* in all intermediary trials, and they remain vital even where participants have previously worked with an intermediary, as arrangements need to be agreed that are specific to the individual before the court. The intermediary must be present but need not take the oath

    b. *good practice* in all young witness cases and other cases with a vulnerable witness or vulnerable defendant with communication needs

    c. *desirable* before the day of the witness's testimony, where possible, giving advocates more time to adapt their questions and ensuring the witness can be prepared on the basis of agreed special measures

    d. *also appropriate* where the defendant is unrepresented. Sections 34 to 40, Youth Justice and Criminal Evidence Act 1999 prohibit unrepresented defendants from cross-examining young witnesses for certain offences and give a wider discretion to judges to prohibit cross-examination of witnesses by unrepresented defendants in other circumstances. Section 105, Coroners and Justice Act 2009 extends section 35, preventing cross-examination by an accused in person of a 'protected witness' i.e. under the age of 18.

Topics for discussion

<u>Third party material</u>

58. It is within the judge's powers to require the advocate to explain to the jury the nature of the defence and to justify why questions arising from third party material are being asked, before such questions are asked.

59. A witness who does not anticipate being asked questions arising from third party disclosure may become very distressed. Where such questions were asked at the start of cross-examination, in some instances the witness was unable to go on to answer questions relating to the current alleged offence. Consideration should be given to the place in cross-examination when questions about third party material should be put to the witness.

Limits on cross-examination

60. The ground rules hearing should consider whether a departure may be necessary from normal cross-examination practice in which leading questions are asked, 'putting the case' to the witness. The Court of Appeal has observed that 'some of the most effective cross-examination is conducted without long and complicated questions being posed in a leading or "tagged" manner' (*R v Wills* [2011] EWCA Crim 1938). It has endorsed limitation of cross-examination in certain circumstances, including requiring advocates to:

    a. ask direct, not leading, questions (*R v Edwards* [2011] EWCA Crim 3028)

    b. not put the defendant's case directly to the witness, but to tell the jury of challenges to the witness's evidence, in a form and at a time agreed with the judge and the party calling the witness (*Wills*, above). In this way, failure to cross-examine in such circumstances is not taken as tacit acceptance of the witness's evidence.

Limits on cross-examination

61. The ground rules hearing should consider whether a departure may be necessary from normal cross-examination relevant to their client's case, without repeating the questioning that has already taken place on behalf of the other defendant(s).

62. Where limitations on questioning are 'necessary and appropriate' *Wills* stated that:

    a. the limits must be clearly defined

    b. the judge should explain them to the jury and the reasons for them

    c. the judge or advocate may point out important inconsistencies after – instead of during – the witness's evidence, following discussion with the advocates. (Be alert to alleged inconsistencies that are not, in fact, inconsistent or are trivial. Remind the jury of important inconsistencies during summing up)

    d. the judge has a duty to ensure that limitations are complied with. If the advocate fails to comply, 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.

Limiting the length of cross-examination

63. Judges are fully entitled to impose reasonable time limits on cross-examination (Rule 3(10)d, Criminal Procedure Rules 2013). They are expected to challenge unrealistic estimates in the plea and case management hearing questionnaire and to keep duration under review at trial. The judge may direct that some matters be dealt with briefly in just a few questions. Duration of cross-examination must not exceed what the vulnerable witness can reasonably cope with, taking account of his or her age/ intellectual development, with a total of two hours as the norm and half a court day at the outside. The witness's needs may require questioning to take place over more than one day.

Questions likely to produce unreliable answers

64. The ground rules hearing must discuss questions likely to cause difficulty for the individual witness. Cross-examination techniques such as complex vocabulary and syntax and leading, multi-part questions have been demonstrated to mislead and confuse ordinary adult witnesses, undermining the accuracy and completeness of their evidence (*Exploring the influence of courtroom questioning and pre-trial preparation on adult witness accuracy* Ellison and Wheatcroft, 2010). Questions proving particularly problematic for children and adult witnesses with communication needs include the following:

    a. *'Tag' questions* (e.g. 'Jim didn't touch you with his willy, did he?'). These are powerfully suggestive and complex: to respond accurately, the witness has to be able to judge whether the statement part of the question is true; understand that the tag expresses the advocate's point of view, and is not necessarily true; be able to counter that point of view; and (if the question combines both a positive and a negative) understand that a positive statement takes a negative tag and vice versa. Lord Judge, when Lord Chief Justice, described tag questions as unacceptable for children and indicates the need for 'full judicial insistence that questions of a young witness should be open ended' (*Half a Century of Change: The Evidence of Child Victims*, 2013 Toulmin Lecture, King's College London). By analogy, tag questions should also be avoided with adults whose intellectual development equates to that of a child or young person. More direct questions should be put: e.g. 'Did Jim touch you?' (answer) followed by 'How did Jim touch you?'. The name of the alleged perpetrator should be used, as the witness may not always immediately connect 'he' with this person.

    b. *Other assertions* such as 'Isn't it a fact that…'. 'Is that right?', give undue emphasis to the suggestion. Alternatives include: 'Are you sure?'; or 'Is it true Jim hit you?'. Questions in the form of statements e.g. 'You went to his house that night' may not be understood as requiring a response. Lord Judge (see above) criticised the technique, 'particularly damaging' in young witness cases, of asking a 'long assertion, followed by "did he?" or "did you?" or sometimes not even a question, but raising the voice in an inflexive questioning tone'.

    c. *'Do you remember…?' questions.* These are complex, particularly where the witness is asked, not about an event, but about what (s)he told someone else.

    d. *Questions containing negatives,* which are harder to uncode. Judges are usually alert to double negatives but difficulties can arise from single negatives, negative forms (e.g. '*in*correct', '*un*happy') and concealed negatives (eg *'un*less').

    e. *'Forced choice' questions.* These may omit the correct answer so it is preferable to offer an open-ended option as well.

    f. *Questions using figures of speech* (e.g. *'I'm going to jog your memory'*) *and the present tense* (e.g. *'Are you at school?'*) which may be interpreted literally.

    g. *Questions repeated by an authority figure, such as an advocate, as these* may cause the witness to conclude that the first answer was wrong (even if correct) and to change it. If a question must be repeated because an answer was unclear, this should be explained to the witness.

h. *Series of leading questions inviting repetition of either 'Yes' or 'No' answers.* An acquiescent witness may adopt a pattern of replies 'cued' by the questioner and cease to respond to individual questions.

i. *A challenge that the witness is lying or confused.* If this is developmentally appropriate for the witness it should be addressed separately, in simple language, at the end of cross-examination. Repeated assertions to a young or vulnerable witness that (s)he is lying are likely to cause the witness serious distress. They do not serve any proper evidential purpose and should not be permitted.

Information for the jury

65. The ground rules hearing should discuss what information should be given to the jury in respect of any restrictions on questioning and the role of the intermediary. In *R v Edwards* [2011] EWCA Crim 3028, the judge ruled at the ground rules hearing that defence counsel should not put leading questions to a six-year-old witness. He therefore advised the jury as follows (and reminded them before the child gave evidence):
"The directions that I have given to Mr X in this case are that he can and should ask any question to which he actually wants answers, but he should not involve himself in any cross-examination of [the witness] by challenging her in a difficult way. In this case the defendant has already set out in some detail what his defence is. It is not a question of putting it to a witness and challenging her about it, so you won't hear the traditional form of cross-examination. I thought you ought to know that from the outset.'

66. When intermediaries are appointed to facilitate communication of witnesses or defendants at Crown Court, it is customary for the judge to explain their presence to the jury. The intermediary may also be asked to explain to the jury his or her role and qualifications and the purpose of any communication aids. An example of a judicial direction to the jury is as follows:
"Members of the jury, you will see two people [in the live link room/dock]. One is the witness [or defendant]. The other, Mrs. X, is there to assist the court; the technical term for her position is an "intermediary". The witness suffers from learning difficulties. Because of this I have ruled, following representations from both the prosecution and the defence, that there should be an intermediary to assist communication. An intermediary is not an expert and does not give evidence. She is an independent person, a communication specialist here to assist with two-way communication in court. She will only intervene if a communication issue is identified. Questions will be short, simple and straightforward and it is likely we will take breaks. I must stress that giving evidence with an intermediary to assist communication is perfectly normal in a case such as this. It must not in any way be considered by you as prejudicial to the accused". [Additionally, in the case of an intermediary appointed to assist a defendant throughout the trial: "All this is in order to enable the defendant to understand fully the evidence in this case and the proceedings".]

Trial practice note of boundaries

67. The Advocacy Training Council recommends that advocates create a trial practice note of boundaries, with an indication that all parties expect the judge to ensure agreed

ground rules are complied with ('Raising the Bar' 2011, an approach endorsed in *R v Wills* [2011] EWCA Crim 1938).

5 Reporting restrictions

68. Even when assured about reporting restrictions, children and vulnerable adult witnesses remain concerned that enough detail will be published to make them identifiable, especially in small communities. Key guidance includes:

    a. *'Reporting restrictions: children and young people as victims, witnesses and defendants'.* These are set out in CPS online policy. Section 39, Children and Young Persons Act 1933 and enable courts to restrict reporting the identity of victims, witnesses and defendants under 18 in magistrates' courts and the Crown Court. Section 44 requires all courts to have regard to the welfare of such children. The child's welfare is likely to favour a restriction on publication.

    b. *Press Association, R (on the application of) v Cambridge Crown Court* [2012] EWCA Crim 2434. The Court of Appeal allowed an appeal against a trial judge's imposition of an indefinite prohibition on the publication of "anything relating to the name of the defendant which could lead to the identification of the complainant [an adult rape victim] which could have serious consequences for the course of justice". The Lord Chief Justice said that it was for the press to decide how appropriately to report the case so as to ensure the anonymity of the complainant. However: "the judge is entitled to express concerns as to the possible consequences of publication, and indeed to engage in a discussion with representatives of the press present in court about these issues, whether on his own initiative, or in a response to a request from them. The judge is in charge of the court, and if he thinks it appropriate to offer comment, we anticipate that a responsible editor would carefully consider it before deciding what should be published. The essential point is that whatever discussions may take place, the judicial observations cannot constitute an order binding on the editor or the reporter".

    c. *Reporting on Court Cases involving Sexual Offence'* (Press Complaints Commission 2011). This warns editors to take account of information about the case that is already in the public domain in order to avoid 'jigsaw identification' of the victim. The guidance includes examples of where publication of such information led to a complaint being made and upheld.

    d. *The Family Courts: Media Access & Reporting* (President of the Family Division, Judicial College and Society of Editors 2011). This summarises the current position.

    e. *The views of children and young people regarding media access to the family courts* (Children's Commissioner for England 2010). This found that 96 per cent of children who had been involved in family proceedings would have been unwilling to talk to a clinician if advised that a reporter might be in court. The report expressed concern that family courts may be faced with making difficult decisions with incomplete evidence from children and limited or no information from clinicians about children's wishes and feelings.

6 At trial

Before the vulnerable person gives evidence

69. Take account of the person's actual arrival time at court and ask to be updated about the time they have waited and the impact of any delay on him or her.

70. Confirm the timetable and that the following checks have already been made:

    a. All directions are in place and the person's needs are catered for.

    b. The equipment is working and if a DVD is to be used, that it is compatible with equipment in the courtroom where the trial is listed.

    c. In the case of a vulnerable witness, that the defendant cannot be seen over live link (checked before the witness enters the live link room).

71. Early signs of the person's loss of concentration may not be apparent to the court, especially over the live link. Ask the intermediary or supporter accompanying the witness or defendant to alert you.

Simplified instructions

72. Efforts to simplify language should not be confined to cross-examination. Any instructions should avoid court jargon and figures of speech. Use simple language with which the person is familiar. This includes advice to a witness about to give evidence, which should be tailored to their needs and understanding, for example:

    a. Tell the truth. Don't guess. Tell everything you remember.

    b. Say if you don't know the answer.

    c. Say if you don't understand (but do not rely on witnesses to do so. They often try to answer anyway. Be alert to non-verbal clues to miscommunication, e.g. puzzled looks, knitted eyebrows, downcast eyes and long pauses).

    d. You should say if someone says something wrong. (Research shows that telling even 'ordinary' adult witnesses that they do not have to agree with questioners if what they say is not correct helps them give more accurate responses).

    e. "We will take a rest in about X minutes. If you need a rest before then, tell me" (but witnesses may not ask for a break even if needed, to get things over with).

    f. "Tell me if you have a problem. I can always see you over the live link even when you can't see me." (Some witnesses fail to tell the judge about a problem because they cannot see the judge and believe the judge cannot see them. Giving the witness a coloured 'signal' card in the live link room may help them to indicate a problem or the need for a break).

While the vulnerable person is giving evidence

73. Ensure that someone using the live link can always see the questioner's face.

74. Do not allow the witness to give his or her address aloud without good reason.

75. Ensure duration of questioning is appropriate to the witness's needs and attention span. Do not exceed the estimated time without good reason. Monitor the time approaching

planned breaks, as otherwise the agreed time is often exceeded. Be alert to the need for unscheduled breaks (the need may be urgent). Giving the witness a brief rest is sometimes sufficient, without sending out the jury. Questioning may be curbed if the witness becomes seriously distressed or ill.

76. Be alert for possible miscommunication and ask the advocate to rephrase. Do not ask *'Do you understand?'* as many vulnerable people do not recognise when difficulties occur or would be embarrassed to admit this. If appropriate, check directly on understanding by asking the person to explain the question.

77. Prevent questioning that lacks relevance or is repetitive, oppressive or intimidating.

78. Where ground rules on cross-examination are necessary, you have a duty 'to ensure that limitations are complied with'. Give relevant directions to the jury at the time when the failure to comply occurs (*R v Wills* [2011] EWCA Crim 1938).

79. If the advocate is unable or unwilling to adapt his or her questions appropriately despite repeated interventions, some judges exercise their duty to ensure directions are complied with by taking over and asking the advocate's questions in a simplified way.

80. Be prepared to address the jury about an advocate's persistent failure to comply with directions when that occurs and to prevent further questioning that does not comply with the ground rules set in advance.

7 The importance of routine feedback

81. Judges and magistrates should request regular feedback from those responsible for the welfare of vulnerable witnesses and defendants about what local arrangements work well and what could be improved, and encourage the use of local surveys for this purpose.