The Advocate's Gateway

Ground rules hearings and the fair treatment of vulnerable people in court

Toolkit 1

2 September 2019

The Advocate's Gateway toolkits aim to support the identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process.

> *'Advocates must adapt to the witness, not the other way round.'* Lady Justice Hallett in R v Lubemba; R v JP [2014] EWCA Crim 2064, para 45.

The handling and questioning of vulnerable witnesses and defendants is a specialist skill. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

> *'We confirm, if confirmation is needed, that the principles in Lubemba apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness. We also confirm the importance of training for the profession which was made clear at paragraph 80 of the judgment in R v Rashid (Yahya) (to which we have referred at paragraph 111 above). We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.'* Lord Thomas of Cwmgiedd, CJ in *R v Grant-Murray & Anor* [2017] EWCA Crim 1228, para 226.

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

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

Introduction

The toolkit contains information about ground rules hearings ('GRHs') in the criminal courts and is primarily intended for use by advocates as well as solicitors, police officers, social workers and judges. This toolkit is written with criminal proceedings in England and Wales in mind, however, the ground rules approach is also being applied in other parts of the justice system, for instance, the family courts, the employment tribunals and the Court of Protection. See, for example, *Re M (A Child)* [2015] EWFC 71, *J W Rackham v NHS Professionals Ltd* [2015] UKEAT 0110_15_1612 and *A County Council v AB and Others (Participation of P in Proceedings)* [2016] EWCOP 41. The approach has also spread beyond England and Wales to other jurisdictions, such as Northern Ireland (for example, see *Galo v Bombardier Aerospace UK* [2016] NICA 25) and New South Wales, Australia. However,

Scotland is the first jurisdiction to include ground rules hearings in primary legislation; see section 5(2) of *The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019* which amends *The Criminal Procedure (Scotland) Act 1995*

This toolkit is supplemented by The Advocate's Gateway ground rules hearing checklist (Cooper, 2015, 2016, 2019).

Key points include:

- GRHs are commonly used by judges to make directions for the fair treatment and effective participation of vulnerable defendants and vulnerable witnesses. Courts must take reasonable steps to ensure the effective participation of vulnerable defendants and witnesses.

  The most up to date versions of the Criminal Procedure Rules and Practice Directions, published by the Ministry of Justice and updated on a regular basis, can be found here.

- Where directions for the appropriate treatment and questioning are required, the court must set ground rules (Criminal Procedure Rules (CPR), 3.9(7)(b)).
- Courts have a safeguarding responsibility to children and vulnerable adults.
- When there is an intermediary they 'must' be invited to make representations (CPR 3.9(7)(a)); in other words they must be included in the discussion at the GRH.
- Advocates and judges should consider special measures and other reasonable adjustments throughout proceedings. Thus, it may be necessary to revisit the ground rules set at the start of the proceedings by way of a further GRH.
- Guidance for family courts, including on GRHs, is available in Toolkit 13 - Vulnerable witnesses and parties in the family courts.

1. GENERAL PRINCIPLES, DEFINITIONS AND CONTEXT

1.1 GRHs are commonly used by judges to make directions for the fair treatment and participation of vulnerable defendants and vulnerable witnesses.

'Ground rules hearings provide an opportunity to plan any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person.' (*Equal Treatment Bench Book 2018*, page 2-26 to 2-28)

Advocates should therefore be alert to risk factors which may indicate that a witness or party is vulnerable and that a GRH is required. General risk factors that suggest a witness is vulnerable are outlined in Toolkit 10 - Identifying vulnerability in witnesses and defendants. When necessary, expert advice (including an intermediary assessment) should be sought.

1.2 Courts must take every reasonable step to ensure the participation of vulnerable witnesses and defendants.

- The CPR state that 'the overriding objective' is that cases are 'dealt with justly' (CPR 1.1(1)). In addition:
- *'In order to prepare for the trial, the court must take every reasonable step—to encourage; and to facilitate the attendance of witnesses when they are needed; and to facilitate the participation of any person, including the defendant.'* (CPR 3.9(3)(a)–(b))
- *'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.'* (CPR 3.9(6))
- *'The judiciary is responsible for controlling questioning. Over-rigorous or repetitive cross-examination of a child or vulnerable witness should be stopped. Intervention by the judge, magistrates or intermediary (if any) is minimised if questioning, taking account of the individual's communication needs, is discussed in advance and ground rules are agreed and adhered to.'* CPD 3 E.1

1.3 Where directions for appropriate treatment and questioning are required, the court must invite representations by the parties and by any intermediary and must set ground rules.

- *'The ground rules hearing should cover, amongst other matters, the general care of the witness, if, when and where the witness is to be shown their video interview, when, where and how the parties (and the judge if identified) intend to introduce themselves to the witness, the length of questioning and frequency of breaks and the nature of the questions to be asked.'* (*R v Lubemba; R v JP* [2014] EWCA Crim 2064, para 43)
- In addition, ground rules may include directions about relieving a party of putting their case, the manner of questioning, the duration of questioning, the topics that may or may not be covered, allocations of questions amongst co-defendants and the use of communications aids (in force from 6 April 2015):

(7) Where directions for appropriate treatment and questioning are required, the court must—

(a) invite representations by the parties and by any intermediary; and

(b) 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

(vi) directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer. (CPR 3.9(7))

1.4 A GRH is required in all intermediary trials and is good practice in any case where a witness or defendant has communication needs.

- *'Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge or magistrates, advocates and intermediary before the witness gives evidence.'* (CPD 3E.2)
- *'Discussion of ground rules is good practice, even if no intermediary is used, in all young witness cases and in other cases where a witness or defendant has communication needs.'* (CPD 3E.3)
- A GRH is expected in every case where there is a vulnerable witness, save in exceptional circumstances: *'judges are taught, in accordance with the Criminal Practice Directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert.'* (*R v Lubemba; R v JP* [2014] EWCA Crim 2064, para 42)
- For ground rules hearings and intermediaries for vulnerable defendants, see CPD (Amendment No 1) [2016] EWCA Crim 97, 3F in particular.

1.5 The GRH should take place about a week before the witness gives evidence (and at least the day before the trial) to enable advocates to prepare and, if necessary, to adjust their approach; the judge should state what the ground rules are and they should be recorded; advocates must abide by the ground rules.

- *'Discussion before the day of trial is preferable to give advocates time to adapt their questions to the witness's needs. It may be helpful for a trial practice note of boundaries to be created at the end of the discussion. The judge may use such a document in ensuring that the agreed ground rules are complied with.'* (CPD 3E.3)
- The advocate has a duty to abide by court rulings: *'In the forensic process the decision and judgment of this court bind the professions ... in the course of any trial, like everyone else, the advocate is ultimately bound to abide by the rulings of the court.'* (*R v Farooqi and Others* [2013] EWCA Crim 1649, para 109)

- Where necessary, advocates will need to address GRH and related issues in the appropriate case management forms.
- **In section 28 (pre-recorded cross-examination) cases**:

  Orders are likely to include: *'Fixing a date for a ground rules hearing, about one week prior to the recorded cross-examination and re-examination hearing, see CPD General matters 3E: Ground rules hearings to plan questioning of a vulnerable witness or defendant;'* CPD 18E.21 (vii)

  'The ground rules hearing will usually be soon after the deadline for service of the defence statement, the recorded cross-examination and re-examination hearing about one week later. However, there must be time afforded for any further disclosure of unused material following service of the defence statement and for determination of any application under s.8 of the CPIA 1996.' CPD 18E.22

  'It is imperative parties abide by orders made at the PTPH, including the completion and service of the Ground Rules Hearing Form by the defence advocate. Delays or failures must be reported to the judge as soon as they arise; this is the responsibility of each legal representative.' CPD 18E.27

  Advocates ensure they are familiar with CPD V Evidence 18E: USE OF S. 28 YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999; PRE-RECORDING OF CROSS-EXAMINATION AND RE-EXAMINATION FOR WITNESSES CAPTURED BY S.16 YJCEA 1999.

1.6 The GRH directions should be recorded in open court.

GRH like any hearing should normally take place in public, the court may adapt that in the circumstances, e. g., because of the witness or any issues being discussed, it can take place in private or through use of remote live link.

Research in 2016 (Cooper) with registered intermediaries in Northern Ireland suggests that one effective approach is to have ground discussions in chambers and then the judge makes the ground rules directions in open court.

The court should consider how technology might be used to allow the GRH participants to take part in the discussion from remote location(s).

2. GRHs INVOLVING AN INTERMEDIARY

2.1 The intermediary (if there is one) must be involved in the ground rules discussion (CPR 3.9 (7)).

- *'Ground rules for questioning must be discussed between the court, the advocates and the intermediary before the witness gives evidence, to establish (a) how questions should be put to help the witness understand them, and (b) how the proposed intermediary will alert the court if the witness has not understood, or needs a break.'* (Application for a Special Measures Direction, Part F)
- *'[Intermediaries] are used … to flag up potential difficulties in advance of the trial.'* (Judge, 2011)
- The judge may require the advocates to consult the intermediary regarding the wording of their questions. (See further Section 3 below.)
- In the event of disagreement about the proposed questions, the judge must decide what is appropriate: '*a trial judge is not only entitled, he is duty bound to control the questioning of a witness*' (*R v Lubemba; R v JP* [2014] EWCA Crim 2064 para 51)
- The trial judge has a duty to intervene if he or she thinks the questioning is inappropriate even if the intermediary does not: *'[T]he trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocate's questioning is confusing or inappropriate.'* (*R v Lubemba; R v JP* [2014] EWCA Crim 2064 para 44)

GOOD PRACTICE EXAMPLE

In what may be the first Court of Appeal hearing that required an intermediary to assist a witness, ground rules were set, prosecution and defence counsel 'worked as a team, the better to promote the interests of justice in the conduct of this case' and as directed by the ground rules, questions to be put to the vulnerable witness 'were reviewed by the registered intermediary, whose sensible expert suggestions were unhesitatingly adopted.' *Re FA* [2015] EWCA Crim 209

2.2 The trial judge and the advocates should agree the wording of the direction that will be given to the jury about the intermediary's role. Sample directions are included in the Crown Court Compendium (2018, section 3-7).

2.3 **Warning the jury about special measures for a witness:**

'Where on a trial on indictment evidence has been given in accordance with a special measures direction, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.' (Youth Justice and Criminal Evidence Act 1999 (YJCEA), section 32)

An appropriate direction should given 'before the evidence is presented and a short reminder of this should be given in the summing up'; in 'all special measures cases an explanation should be given about the purpose of presenting evidence with special measures'. (Crown Court Compendium, 2018, page 3-28, para 10 and 11 respectively). See further pages 3-28 to 3-35 of the Crown Court Compendium (2018) for examples of special measures directions.

3. GROUND RULES REQUIRING AN ADVOCATE TO REDUCE QUESTIONS TO WRITING

3.1 It is reasonable for judges to ask advocates to write out their proposed questions for the vulnerable witness and share them with the judge and the intermediary (where there is one):

'So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance.' (*R v Lubemba; R v JP* [2014] EWCA Crim 2064, para 42)

- The decision on the appropriateness of the proposed question is a decision for the judge, after consultation with the advocate who has prepared the questions and the intermediary (where there is one), without disclosure to the opposing advocate or the advocate for the co-defendant unless it relates to a question of admissibility of evidence.
- Disclosure of pre-prepared written questions may be agreed between the parties, but, if it is not, the judge will need to consider what is in the interests of justice.
- In YJCEA section 28 cases (pre-recorded cross-examination), advocates may be required to complete the section 28 Defence GRH Form from the HM Courts and Tribunal Service (HMCTS) which includes space at section 8 to set out for the judge *'all proposed questions which should be drafted taking into account the relevant Toolkit'*.
- *'In appropriate cases, where the witness is young or suffers from a mental disability or disorder, advocates may be required to prepare their cross examination for consideration by the court. This applies to all cases, not just those in the section 28 pilot scheme.' R v Dinc [2017] EWCA Crim 1206*
- Where witness cross-examination questions are disclosed in advance and/or discussed at the GRH, it is must be on the understanding that proposed cross-examination will not be 'telegraphed' in advance to the witness.

4. GROUND RULES ABOUT SPECIAL MEASURES AND OTHER ADJUSTMENTS

4.1 A party applying for special measures should have done so in accordance with the rules (including time limits) set out in CPR 18**.**

Directions for appropriate treatment and questioning are not limited to special measures set out in the legislation. See Toolkit 10 - Identifying vulnerability in witnesses and defendants.

GOOD PRACTICE EXAMPLE

The defendant had a phobia about entering crowded rooms; the judge directed that the defendant should be the first to enter the courtroom at the start of the trial and after any break.

4.2 At the GRH the trial judge should consider how special measures/additional measures and other adjustments directed by the court will combine.

Section 19(2)(a) of the YJCEA refers to 'the special measures available in relation to the witness (or any combination of them)'.

For example, live link and a screen may be combined if the judge directs that the defendant is not going to be allowed to see the witness on the live link screen (CPD 18A.2). Complainants should not be given the impression that only one special measure can be used at a time (see research by Majeed-Ariss at al., 2019)

GOOD PRACTICE EXAMPLE

At the GRH the trial judge directed that the intermediary should work with interpreters to familiarise them with the deaf witness's idiosyncratic signs so that together they could convey the witness's answers to the court.

4.3 Even if no party has applied for special measures, the court may of its own motion raise the issue of whether such a direction should be given (YJCEA, section 19(1)(b)).

5. GROUND RULES RELIEVING A PARTY OF PUTTING THEIR CASE (CPR 3.9(7)(b)(i))

5.1 Defence advocates may be restricted from putting their client's case to the vulnerable witness - but generally the court expects them to be cross-examined in a modified form and with the benefit of the range of special measures.

- *'It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness (see for example paragraph 3E.4 of the Criminal Practice Directions).'* (*R v Lubemba; R v JP* [2014] EWCA Crim 2064, para 45)

- *'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 forego 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.'* (*R v B* [2010] EWCA Crim 4, para 42)

- In *R v RK* [2018] EWCA Crim 603, para 27, the Court of Appeal said:

  'We understand the concern to protect a child witness and the desire of a defence advocate to avoid any suggestion of confronting a child witness. However, if a child is assessed as competent and the judge agrees the child is competent, we would generally expect the child to be called and cross-examined, with the benefit of the range of special measures we now deploy. There is no reason to distress her or cause her any anxiety and therefore no reason to avoid putting the defence case by simple, short and direct questions. Although this court has in the past doubted the right to put every aspect of the defence case to a vulnerable witness, whatever the circumstances, it has not questioned the general duty to

ensure the defence case is put fully and fairly and witnesses challenged, where that is possible.'

- In section 28 YJCEA cases (pre-recorded cross-examination), advocates are required to complete the HMCTS's section 28 Defence GRH Form which includes space at sections 7 and 9 to request direction about putting the case to the vulnerable witness and to the jury.

5.2 Where such a restriction is imposed, it must be clearly defined and explained to the jury (*R v Wills* [2011] EWCA Crim 1938, paras 36 and 37, *R v E* [2011] EWCA Crim 3028) and more recently the Court of Appeal in *R v YGM* [2018] EWCA Crim 2458, para 21:

'We believe that the following is best practice in a case involving cross examination of a vulnerable witness. First, the identification of any limitations on cross examination should take place at an early stage. We assume that this will occur at the ground rules hearing where the judge will discuss with the advocates the nature and extent of the limitations imposed and whether they are simply as to style or also relate to content. Before the witness is cross examined, it is best practice, (as recommended by the Judicial College) that as well as giving the standard special measures direction, the trial judge also directs the jury in general terms that limitations have been placed on the defence advocate. If any specific issues of content have been identified that the cross examiner cannot explore, the judge may wish to direct the jury about them after the cross examination is completed. On any view, the judge should direct the jury about them in the summing-up. Finally, we should add that every advocate (and trial judge) is expected to ensure that they are up to date with current best practice in the treatment of vulnerable witnesses.'

See also *R v PMH* [2018] EWCA Crim 2452. For a demonstration of how this might occur, see the training film *A Question of Practice* (Criminal Bar Association 2013).

5.3 Not putting the opposing version to the witness potentially deprives the witness of the opportunity to have their evidence fairly tested.

Careful thought should be given to how questions might be reworded so that the witness's account can be fairly tested. If questions can be adapted so that the defence case can be put to the witness, then the questions should be put. If there is an intermediary for the witness/defendant, they should be consulted about how to word the questions.

5.4 The general principle, endorsed in *Director of Public Prosecutions v Nelson (Antigua and Barbuda)* [2015] UKPC 7, paras 23 and 24, is that:

> *'[I]f a party proposes to invite the jury to disbelieve the evidence of a witness on a particular point, that ought except in unusual circumstances to be made clear to the witness so that he has the opportunity to offer any explanation which he may have for what he says, and to show if he can that his evidence is reliable: see for example* Browne v Dunn *(1893) 6 R 67 and* R v Hart *(1932) 23 Cr App R 202 ... The gravamen of it is fairness.'*

5.5 A judge has no power to insist on defence cross-examination of the witness. The judge (or the prosecutor in re-examination) may ask a question to give the witness *'the chance to deal with the implication in the cross examination'* (*H v R* [2014] EWCA Crim 1555, para 63).

GOOD PRACTICE EXAMPLE

Defence counsel wanted to put to the witness the defendant's case that the incident had not happened at all. The intermediary advised on how this could be done in a way that the witness could deal with.

Questions defence counsel originally wanted to put:

Q: *D didn't put his willy in your mouth, did he?*

Q: *D didn't put his willy in your bottom, did he?*

On the advice of the intermediary, defence counsel's questions were reframed. The traditional statement-plus-tag form was avoided. Instead, two simple statements ('S') were followed by a simple question for each of the above, e.g:

S: *You said D put his willy in your mouth.*

S: *D says he didn't put his willy in your mouth.*

Q*: Did D really put his willy in your mouth?*

6. GROUND RULES ON THE MANNER OF QUESTIONING (CPR 3.9(7)(b)(ii))

6.1 Timetabling for the witness's evidence should be addressed at the GRH so as to schedule a 'clean start' to the witness's testimony.

'Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved…[and is] an issue that impacts upon best evidence and safeguarding.' (see *Equal Treatment Bench Book 2018*, 2-14).

GOOD PRACTICE EXAMPLE

The witness was taking a significant amount of medication to control psychiatric symptoms. Her ability to give evidence was much improved in the afternoon when her medication had the chance to start working and her mental state was most stable. The schedule was arranged so that she gave her testimony only in the afternoons.

6.2 If 'tag' questions are likely to be problematic for the vulnerable witness/defendant, the court should direct that they be avoided.

Tag questions are linguistically complex and powerfully suggestive. A tag question takes the form of a statement with a question added on at the end, for example, *'You don't like your stepdad, do you?'*, *'That's right, isn't it?'*; as opposed to more linguistically straightforward questions or requests, such as *'Do you like your stepdad?'* or *'Tell me about your stepdad.'*

6.3 Advocates should be reminded that cross-examination should consist of short, simple questions, not comment on the evidence.

'It is generally recognised that particularly with child witnesses short and untagged questions are best at eliciting the evidence.' (*R v W and M* [2010] EWCA Crim 1926 para 30).

'What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination.' (*R v Farooqi and Others* [2013] EWCA Crim 1649, para 113).

6.4 A succession of short questions, particularly if fast-paced, may sound fierce or intimidating to a vulnerable witness.

Use of signposting together with short questioning can put a vulnerable witness at ease and enable best evidence.

'… 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 the witness … it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. 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.' (*R v B* [2010] EWCA Crim 4, para 42)

6.5 Judges may give directions about cross-examination based on third-party disclosure.

A witness ought to know in advance if certain records have been disclosed to the other side and that they may be asked questions about them. A witness taken by surprise by questions may become distressed because, for example, they were unaware that their GP or social care records had been disclosed to the defence: *'… prosecutors [should] satisfy themselves that complainants have consented to their medical records and/or counselling notes being disclosed to the defence'* (Disclosure of Medical Records and Counselling Notes, HM Crown Prosecution Service Inspectorate July 2013) otherwise the witness should be informed if the judge ordered disclosure of such material to the defence in the absence of their consent. Note: Informing witnesses that they may be asked questions about certain records is not the same as witness coaching; witness coaching is prohibited (see *R v Momodou* [2005] EWCA Crim 177 and advocates' codes of conduct).

Advocates should consider whether it is in fact necessary to go through this material in cross-examination simply to highlight the fact that there are inconsistencies which can be agreed and put before the jury. In *R v Pipe* [2014] EWCA Crim 2570, the Court of Appeal considered a case where a judge cut short cross-examination before the complainant could be asked about potential inconsistencies between what she had said during her evidence and what she had said at the time of her medical appointments, her medical records having been disclosed to the defence: *'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.'* (para 27)

7. GROUND RULES ON THE DURATION OF QUESTIONING (CPR 3.9(7)(B)(III))

7.1 A trial judge is entitled to set time limits on cross-examination.

A trial judge may be justified in imposing *'a time limit on the cross-examination of the complainant'* (*R v Butt* [2005] EWCA Crim 805) and *'is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate'* (*R v Lubemba; R v JP* [2014] EWCA Crim 2064 para 51). By way of example, in *Lubemba*, the cross-examination of a ten-year-old rape complainant was limited *'to 45 minutes and [the judge] interrupted when he felt her questions were unclear or inappropriate'* (*R v Lubemba; R v JP* [2014] EWCA Crim 2064 para 32).

GOOD PRACTICE EXAMPLE

The witness was allowed to have short 'time-out' breaks (usually of just 30 seconds) in a small tent in the live link room when her anxiety peaked, but was not at the point where she needed a full break from giving her evidence. While the witness took this short break, the live link was temporarily turned off and the court waited until she was ready to continue. (If the live link remains on, the judge should ensure that the microphones in the court are turned off so that the witness does not hear the conversations in the courtroom.)

8. GROUND RULES ABOUT QUESTIONS THAT MAY OR MAY NOT BE ASKED (CPR 3.9(7)(b)(iv))

8.1 Ground rules should prevent cross-examination based on discredited myths.

For example, in sexual assault cases judges are expected to prevent cross-examination based on:

'*… what modern research has proved to be myths … It is a myth that a man cannot be raped. It is a myth that rape involves a hooded stranger, or is limited to strangers. It is a myth that if there are no marks on the complainant, and no evidence of distress independently offered, that she cannot have been raped. It is a myth that unless the victim complains immediately she must have consented to sexual intercourse … It is a myth that if a woman has imbibed a great deal of alcohol with a man, she must have been willing to have sexual intercourse with him.'* (Judge 2011; see also the Crown Court Compendium (2018), section 20.

Sections 41–43 YJCEA restrict cross-examination on the complainant's sexual history without leave of the court. Applications for leave must be made in writing and within 28 days of disclosure (CPR 22).

8.2 Judges should make clear in advance where the boundaries of questioning lie.

'[T]here is a limit to the extent to which a Judge may properly intervene once questioning is underway without running the risk of seeming to descend into the arena and thereby potentially creating the perception of unfairness and – in extreme cases – imperilling any resulting conviction. Far better to have made clear from the start where the boundaries of questioning lie.' (Leveson 2015, 8.3.1, 'Ground rules approach', para 257)

9. GROUND RULES ALLOCATING TOPICS AMONG ADVOCATES FOR CO-DEFENDANTS (CPR 3.9(7)(b)(v))

9.1 Topics should be allocated to defence counsel to avoid repeat and/or unnecessarily prolonged cross-examination.

'In advance of the trial, the advocates should divide the topics between them, with the advocate for the first defendant leading the questioning, and the advocate(s) for the other defendant(s) asking only ancillary questions relevant to their client's case, without repeating the questioning that has already taken place on behalf of the other defendant(s).' (CPD 3E.5)

'As was explained [R v Lubemba; R v JP] [2014] EWCA Crim 2064, the judge has a duty to control questioning. Over-rigorous or repetitive cross-examination of a child or a vulnerable witness must be stopped. In a multi-handed trial the judge must ensure that the witness is treated fairly over all, and not asked questions on the same topics, to the same end, by each and every advocate. 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, there is no unfairness in so doing.' Lady Justice Hallett in *R v Jonas* [2015] EWCA Crim 562, para 31.

'It will never be in the interests of justice that witnesses should be subjected to bullying and intimidatory tactics by counsel or to deliberately and unnecessarily prolonged cross-examination.' (Leveson 2015, 8.3.1, 'Ground rules approach', para 264)

10. GROUND RULES ABOUT COMMUNICATIONS AIDS (CPR 3.9(7)(b)(vi))

10.1 Communication aids (YJCEA, section 30) may be ordered for eligible vulnerable witnesses.

GOOD PRACTICE EXAMPLE

The judge directed that a witness could pause cross-examination by pointing to a 'pause' card on the table in the live link room and the intermediary could then alert the judge that a pause had been requested.

GOOD PRACTICE AND BODY MAPS

'In particular in a trial of a sexual offence, "body maps" should be provided for the witness' use. If the witness needs to indicate a part of the body, the advocate should ask the witness to point to the relevant part on the body map. In sex cases, judges should not permit advocates to ask the witness to point to a part of the witness' own body. Similarly, photographs of the witness' body should not be shown around the court while the witness is giving evidence.' (CPD 3E.6)

10.2 Communications aids for vulnerable defendants have also been ordered by judges using their inherent jurisdiction.

GOOD PRACTICE EXAMPLE

'Post-it' notes may be stuck on to the glass screen in the dock showing the order of events during the trial. These can be changed around and also removed, once a particular event has happened, to help a defendant who has difficulty understanding the order of events.

GOOD PRACTICE EXAMPLE

The defendant who struggled with concepts of time was allowed a timeline to assist cross-examination. The advocates had a duplicate copy and indicated certain points on the timeline when putting questions to the witness.

10.3 Ground rules should consider how the witness's supporter or intermediary will assist with communication aids.

GOOD PRACTICE EXAMPLE

It was directed that the intermediary would hold up to the live link camera the answers written by the partially mute witness and she would also number the pages used by the witness to communicate his answers in writing.

11. EXTENDING THE USE OF GRHs

'In due course, consideration should be given to whether or not this [GRHs] approach may sensibly be extended to other areas of cross-examination in which it may take place (for example, with expert witnesses).' (Leveson 2015, 8.3.1, 'Ground rules approach', para 267)

ACKNOWLEDGEMENTS AND READING LIST

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- Paula Backen
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- Felicity Gerry QC
- HHJ Michael Hopmeier
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Note: This toolkit was updated in October 2016 and July 2019 by Professor Penny Cooper.

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

- **Cooper, P, *Highs and Lows: The 4th Intermediary Survey***

  (Kingston University 2014)
- **Cooper, P and Allely, C, '*The curious incident of the man in the bank: procedural fairness and a defendant with Asperger's syndrome*'**

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- **Cooper, P, Backen, P and Marchant, R, 'Getting to grips with ground rules hearings: a checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court'**

  6 Criminal Law Review *417–432 (2015)*
- **Cooper, P and Norton, H (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice***

  (Oxford University Press, 2017)

- ***Criminal Procedures Rules and Practice Directions (England and Wales)***
- **Judge, The Rt Hon The Lord, Lord Chief Justice of England and Wales, *'Vulnerable witnesses in the administration of criminal justice' (17th Australian Institute of Judicial Administration Oration in Judicial Administration, Sydney 2011)***
- **Judicial College (2018) *Crown Court Compendium***
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- **Leveson, The Rt Hon Sir Brian, President of the Queen's Bench Division, *Review of Efficiency in Criminal Proceedings***

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- **Majeed-Ariss, R, Brockway, A, Cooke, K and White, K, *'"Could do better": Report on the use of special measures in sexual offences cases'*** Criminology and Criminal Justice, 1-18, 2019 https://orcid.org/0000-0003-0892-4710
- **Wurtzel, D, 'Time to change the rules?'**

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