

CASE MANAGEMENT IN YOUNG and OTHER VULNERABLE WITNESS CASES

Toolkit 1(a)

August 2014

This toolkit brings together policy and guidance relating to:

1. [Instructions, listing and other tasks](#)
2. [Witness needs, wishes and special measures](#)

The expression 'judge' here applies also to magistrates and district judges.

For a summary of this toolkit, omitting references and hyperlinks, see Toolkit 1(b). For case management issues relating to young defendants, see Toolkit 8, [Effective participation of young defendants](#).

See also Judicial College Appendix 2.3, [Adult Court Bench Book 2012](#)¹, [Youth Court Bench Book 2013](#), Part 5 Toolkit, Advocacy Training Council [Raising the Bar](#) 2011 and Family Justice Council [Guidelines in relation to children giving evidence in family proceedings](#) 2011.

1. INSTRUCTIONS, LISTING AND OTHER TASKS

1.1 **Address timetabling and other vulnerable witness issues at first appearance** in magistrates' court or preliminary hearing or PCMH in Crown Court (Judicial College [Bench Checklist Young Witness Cases](#) 2012). To help achieve certainty for the witness, complete the [PCMH questionnaire/ Magistrates' Court Preparation for effective trial form](#):

- based on consultation with witness and if appropriate, carer and supporter, with up-to-date witness information (sections 4.76, 5.1, 5.2, [Achieving Best Evidence](#) 2011);
- with availability and dates to avoid for the witness (eg exams or other important events); any [Registered Intermediary](#) assisting the witness at trial² (likely to have limited availability); and any named supporter in the live link room (Judicial College [Bench Checklist Young Witness Cases](#) 2012). The court must take every reasonable step to facilitate witness attendance (Rule 3.9(3)(a), [Criminal Procedure Rules 2014](#)).

1.2 **Priority listing** Delay adds disproportionately to the vulnerable person's stress:

- where the witness is under 18 or otherwise vulnerable (whether or not special measures have been ordered) the trial date should usually be fixed (para XIII F.3, [Criminal Practice Directions](#) 2014). The prosecution or defence will ask the court to give the trial date priority and fix it to a specific day (Standard 9, [Witness Charter](#) 2013);
- give priority to trials involving young defendants or vulnerable or young witnesses (para XIII A.3(ii), [Criminal Practice Directions](#) 2014). Delay in a case involving a child complainant should be kept 'to an irreducible minimum' (Lord Chief Justice in [R v B](#) [2010] EWCA Crim 4, para 50);
- if the live link is not available in all courtrooms, fix the courtroom when setting the trial date (Judicial College [Bench Checklist Young Witness Cases](#) 2012; Appendix 2.3, [Adult Court Bench Book 2012](#));

¹ Available to those with access to the [Judicial Intranet](#).

² May assist a vulnerable witness under section 29 [Youth Justice and Criminal Evidence Act 1999](#). For information about Registered Intermediaries for witnesses, contact the National Crime Agency at 0845 0005463, and by e-mail at soc@nca.pnn.police.uk (by pnn users) or soc@nca.x.gsi.gov.uk (by others). The judiciary may use its inherent jurisdiction to appoint non-registered intermediaries for vulnerable defendants. Section 104 [Coroners and Justice Act 2009](#) will (if implemented) allow appointment for certain vulnerable defendants for oral evidence at trial.

- if an early trial date is desirable/ defendant is young, a preliminary hearing should be listed about 14 days after sending the case to the Crown Court ([Preliminary hearing form](#): case progression).

1.3 **If the defence seeks an adjournment** the prosecutor should draw the court's attention to the adverse effect of delay on children and those with learning disabilities (section 5.18, [Achieving Best Evidence](#) 2011) or conditions such as autism spectrum disorder, mental health problems and specific learning difficulties.

1.4 **A court with plasma screens** will give a clear view of intermediary/witness interaction.

1.5 **Schedule and adhere to prompt start to witness evidence**

- agree a timed witness order in advance, ensuring opening/ preliminary points will be finished when witness evidence is due to start (section 18A, [PCMH questionnaire](#); Standard 13, [Witness Charter](#) 2013);
- schedule testimony to start early while the witness is fresh, taking account of concentration span, breaks, length of DVD, effect of any medication and whether there is more than one vulnerable witness. Schedule evidence-in-chief (DVD and additional questions) and cross-examination based on advocates' time estimates (Judicial College [Bench Checklist Young Witness Cases](#) 2012);
- short hearings in other matters should not be listed before the start or continuation of trial as they may cause delay (para XIII G.4, [Criminal Practice Directions](#) 2014);
- take account of witness wishes and judicial preferences about introductions. Prosecutors are expected to meet a witness and defence advocates may find it useful. It is up to the judge whether to meet a witness with the advocates (chapter 5, para 27e, [Equal Treatment Bench Book](#) 2013);
- duration should be developmentally appropriate and limits may be imposed (Rule 3.11(d), [Criminal Procedure Rules 2014](#); chapter 5, para 27c, [Equal Treatment Bench Book](#) 2013).

1.6 **DVD interview** Have both parties received the DVD?

- watch *before* PCMH to aid decisions on admissibility, editing and refreshing witness memory (section 5.3, [Achieving Best Evidence](#) 2011);
- is it playable and audible on court equipment? Check before day of trial;
- consider timetable for editing and whether a transcript is needed (Judicial College [Bench Checklist Young Witness Cases](#) 2012).

1.7 **Pre-trial familiarisation visit to the court** See section 2.8, below.

1.8 **Third party material or PII** Applications should be made at an early stage (sections 21, 31, [PCMH questionnaire](#); paras 44-49, [Judicial Protocol on the Disclosure of Unused Material in Criminal Cases](#) (2013); [Attorney General's Guidelines on Disclosure](#) (2013)). Disclosure of medical/ counselling records engage the witness's Article 8 right to privacy. Check that the police have obtained appropriate consent to gain access to the records. Witnesses must be informed about the purpose of the request. They are entitled to give qualified consent to disclosure (i.e. to the prosecution only, not the

defence) or to decline consent but must also be told about the possible consequences for the case outcome (chapter 15, [CPS Rape and Sexual Offences Legal Guidance](#)).

1.9 **Witness access to/ exit from building (not public entrance), standby arrangements and staggered arrival times** (section 18A, [PCMH questionnaire](#); Standard 14, [Witness Charter](#) 2013; Judicial College [Bench Checklist Young Witness Cases](#) 2012).

1.10 **Arrangements to refresh witness memory** should be addressed at the PCMH or case management hearing. The witness's first viewing of the DVD can be distressing or distracting. It should not be seen for the first time immediately before giving evidence. Assistance of the intermediary may be needed to establish how memory refreshing should be managed (para 29C.1, [Criminal Practice Directions](#) 2014). If the interview is ruled inadmissible, the court must decide what constitutes an acceptable alternative method of memory refreshing (para 29C.2). Decisions about how, when and where refreshing should take place should be court led in respect of each witness. General principles to be addressed include (para 29C.3):

- the venue for viewing. Refreshing at the same time as the court familiarisation visit may lead to 'information overload'. Refreshing need not take place at court but may be done, for example, at the police interview suite;
- requiring that any viewing is monitored, usually by the officer in the case, who will report to the court about anything said by the witness;
- whether it is necessary for the witness to see the DVD more than once for the purpose of refreshing (the court will ask the advice of the intermediary).

1.11 **There is no legal requirement that the witness should watch the DVD at the same time as the jury** Increasingly, this occurs at a different time, so that breaks can be taken without disrupting the trial and cross-examination starts while the witness is fresh (para 29C.4, [Criminal Practice Directions](#) 2014). If watched at a different time:

- an intermediary may be present but should not act as the independent person designated to take a note and report to the court if anything is said;
- the witness is sworn just before cross-examination and asked if (s)he has watched the DVD and if its contents are 'true' (in words tailored to witness understanding).

1.12 **Arrangements for memory refreshing are a police responsibility** (sections 4.48, 4.51, 4.52, [Achieving Best Evidence](#) 2011) and should be the subject of a clear local inter-agency agreement (HM CPS Inspectorate and HM Inspectorate of Constabulary, [Joint inspection report on the experience of young victims and witnesses in the CJS](#) 2012). In the case of a very young child it may be appropriate to record the viewing. Any supporter present for refreshing should generally not have been at the investigative interview, have supported the witness pre-trial or be expected to accompany the witness when giving evidence (section 4.19, [Achieving Best Evidence](#) 2011).

1.13 **Update witness and court post-PCMH** Informing witnesses of case progress is an obligation (overriding objective, Rule 1.1(2)(d), [Criminal Procedure Rules 2014](#)):

- ensure explanations are made in simple language with an opportunity for questions;

- new information may become available, witness preferences may change and ways to enable best evidence may have to be reassessed. Advocates must keep the court informed (section 5.4, [Achieving Best Evidence](#) 2011).

- 1.14 **What exhibits may be needed in the live link room?** How will they be managed?
- 1.15 **Confirm timetable and ensure all relevant decisions have been made** Consider requesting a pre-trial review.
- 1.16 **If there are parallel care proceedings** refer to [CPS Protocol and Good Practice Model for disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings](#) (2013).
- 1.17 **There is a duty to inform the court at once if any order is not complied with** (overriding objective Rule 1.2(1)(c), [Criminal Procedure Rules 2014](#)).

2. WITNESS NEEDS, WISHES AND SPECIAL MEASURES

- 2.1 **Timely special measures applications** in magistrates' court within 28 days of entry of not guilty plea and in Crown Court within 14 days (Rule 29.3, [Criminal Procedure Rules 2014](#)). The court can vary time limits (Rule 29.5). Special measures information is needed to complete the [PCMH questionnaire](#).
- 2.2 **A judge's duty to manage all cases to achieve targets cannot override the duty to ensure that litigants receives a fair trial and are guaranteed the support necessary to compensate for disability** 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 ([In the Matter of M \(A Child\)](#) [2012] EWCA Civ 1905).
- 2.3 **Review witness information: request it if not provided** Gather information at the earliest stage (para 5.10, [Raising the Bar](#) 2011). Young witnesses are automatically eligible for special measures. Those over 18 who made a DVD statement when under 18 remain eligible (section 100 (8), [Coroners and Justice Act 2009](#)).
- 2.4 **Medical conditions** Consider any relevant precautionary arrangements, eg ensuring that someone trained in first aid is available in the court building for someone with epilepsy.
- 2.5 **Assessment of prosecution witness needs** should be recorded:
- by the police (Standard 4, [Witness Charter](#) 2013) and on police MG forms (section 4.40, [Achieving Best Evidence](#) 2011);
 - in a follow-up Witness Care Unit assessment (Standard 8, [Witness Charter](#) 2013; pages 9 and 32, [Code of Practice for Victims of Crime](#) 2013);
 - ask for information, if not provided, about concentration span (likely to be shorter at court), communication, development and health (section 4.76, [Achieving Best Evidence](#) 2011).

2.6 **Early identification of needs applies equally to defence witnesses and to vulnerable defendants** Consider whether a relevant expert should be instructed to consider what adaptations may be necessary.

2.7 **Competence is assumed if the witness is capable of giving intelligible testimony**
This may require use of an intermediary.

- [R v B](#) [2010] EWCA Crim 4 discussed section 53, [Youth Justice and Criminal Evidence Act 1999](#): 'These statutory provisions are not limited to the evidence of children. They apply to individuals of unsound mind. They apply to the infirm. The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question...The provisions of the statute are clear and unequivocal, and do not require re-interpretation' (para 38);
- the judge has a continuing duty to keep competency under review. If the witness seems to satisfy the test, eg based on the ABE interview and intermediary report, the court and parties should consider whether a competency hearing is necessary as it may 'cause delay, increase expense and put unnecessary strain on the witness' ([R v F](#) [2013] EWCA Crim 424, a case in which the competency test was 'seriously flawed').

2.8 **Is the witness being helped to express an informed opinion about special measures?** (parts B5 and 6, [Application for a special measures direction](#)):

- witnesses are likely to give better evidence when they choose how it is given. They need preparation and support to make an informed choice (section 4.84, [Achieving Best Evidence](#) 2011). This requires a pre-trial familiarisation visit³ to the court (section 18A, PCMH questionnaire) with a live link practice session; they should also see screens in place (Standard 11, [Witness Charter](#) 2013; page 19 [Code of Practice for Victims of Crime](#) 2013);
- the prosecution or defence will ask court staff to make provision for witness needs as a result of disability, medical condition or age. An accredited interpreter, Registered Intermediary, signer or other assistance will be provided in relation to language or communication needs (Standard 13, [Witness Charter](#) 2013; page 11, [Code of Practice for Victims of Crime](#) 2013);
- the police, Witness Care Unit or prosecutor or defence lawyer should explain available measures, and ask for witness views (Standards 4 and 8, [Witness Charter](#) 2013). CPS will take the victim's views into account (page 11, [Code of Practice for Victims of Crime](#) 2013). The witness may ask to meet the prosecutor to discuss special measures ([Prosecution Policy and Guidance: Witnesses and Best Evidence](#));

³ Courts should have a consistent policy on taking photographs (eg of the live link room) to support explanations, subject to appropriate restrictions, having regard to court security requirements: see chapter 5, para 36, [Equal Treatment Bench Book](#) 2013.

- has the young person received the relevant [Young Witness Pack](#) booklets (Standard 11, [Witness Charter](#) 2013; page 61, [Code of Practice for Victims of Crime](#) 2013)? These explain special measure options (page 4, [Witness Charter](#) 2013; sections 1.23, 4.11, Box 4.3, Appendix K.3, [Achieving Best Evidence](#) 2011).

2.9 **Witness opt out** Those 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 also wish to opt out of (recorded evidence-in-chief and live link) and secondary requirement (screens) (section 100, [Coroners and Justice Act 2009](#)).

2.10 **Remote live link (away from trial court) from another court, non-court facility or using mobile police equipment** (Toolkit 9; part C2 [Application for a special measures direction](#)). Consider this where the witness is anxious about seeing the defendant/supporters; facilities make it difficult to keep the witness separate; or where there is concern about intimidation/ fear of the court environment. What evidence needs to be taken to the remote site? (Judicial College [Bench Checklist Young Witness Cases](#) 2012).

2.11 **A neutral supporter (trusted by the witness) in the live link room** may be specified by the court which *must* take witness wishes into account (part C3, [Application for a special measures direction](#); section 102, [Coroners and Justice Act 2009](#)). This can be anyone who is trusted by the witness and who is not a party/ has no detailed knowledge of evidence; ideally, the person preparing the witness for court. Others may be appropriate (section 5.34, Appendix L.2.1, [Achieving Best Evidence](#) 2011) and need not be an usher⁴ or court official (para 29B.2, [Criminal Practice Directions](#) 2014).

2.12 **Consider evidence in private** (part D [Application for a special measures direction](#)) in sex offence cases, or if there is a reasonable belief that someone is seeking to intimidate a witness (section 25, [Youth Justice and Criminal Evidence Act 1999](#)).

2.13 **Where a witness fears being seen by the defendant, or for another specific reason**, the defendant's monitor may be screened/ covered/ turned off (para 29A.2, [Criminal Practice Directions](#) 2014; Judicial College [Bench Checklist Young Witness Cases](#) 2012).

2.14 **Intermediary special measure to help maximise quality of evidence** A [Registered Intermediary](#)'s assessment report advises how best to question the witness:

- can the witness recognise a problematic question/ tell the questioner that (s)he has not understood? If not, consider intermediary assessment (chapter 5, para 46, [Equal Treatment Bench Book](#) 2013; CPS [Special Measures: Intermediaries](#) 2012; Box 2.1, [Achieving Best Evidence](#) 2011);
- if opposing the application, raise properly arguable grounds. Do not take it upon yourself to decide the communication needs of potentially vulnerable witnesses, in

⁴ 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).

particular, children. If no intermediary was used in interview this is not evidence that one is not needed at trial (para 1.28, [RI Procedural Guidance Manual](#) 2012). If an intermediary apparently took no active part at the police interview, this is usually because (s)he provided advice to the interviewer beforehand;

- part F.1, [Application for a special measures direction](#) and para 5.2, [Magistrates' Court Preparation for effective trial](#) require discussion of ground rules with the intermediary, judge/ magistrates and advocates (see Toolkit 1(c) Ground Rules). Advocates may request intermediary advice about adapting specific questions.

2.15 **Communication aids can help improve the quality of evidence** Intermediaries will, with the permission of the court, advise on the selection of appropriate aids e.g. a visual time line for a witness being asked to give evidence about different events over time/ in different locations; or a body map for a witness asked to clarify intimate touching (eg a gender-neutral child body outline at lexiconlimited.co.uk/body-outline). 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.

2.16 **Whether the witness seeks pre-trial therapy** is not a decision for the police or prosecutor. The best interests of the witness are the paramount consideration. Careful recording of therapy is essential (sections 4.58-59, [Achieving Best Evidence](#) 2011; sections 4.3-4, 5.4, CPS, Department of Health, Home Office [Provision of therapy for child witnesses prior to a criminal trial](#) 2001; sections 4.3, 4.4, 6.5, [Provision of therapy for vulnerable or intimidated adult witnesses prior to a criminal trial](#) 2001; pages 33 and 60, [Code of Practice for Victims of Crime](#) 2013).

2.17 **Even when assured about reporting restrictions, children and vulnerable adult witnesses remain concerned that enough detail will be published to make them identifiable** Key guidance includes:

- [Reporting Restrictions in the Criminal Courts](#) (Judicial College 2014);
- [Reporting restrictions: children and young people as victims, witnesses and defendants](#) (CPS online policy);
- [The Family Courts: Media Access & Reporting](#) (President of the Family Division, Judicial College and Society of Editors 2011);
- [The views of children and young people regarding media access to the family courts](#) (Children's Commissioner for England 2010).

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