The Inns of Court College of Advocacy

# Advocacy & The Vulnerable (Family)

## The law relating to Vulnerable Witnesses in Family Proceedings

# Introduction

1. Speaking to the Wales Observatory on Children and Young People in 2015 Sir James Munby, then President of the Family Division considered the participation of children and vulnerable adults in the family justice system:

   *"Children, precisely because they are children, are vulnerable, but so are many of the adults who come before the family courts, whether as parties or witnesses. Vulnerability comes in many forms: physical, mental, and social to mention but three. Let me give some examples to illustrate the range of the issues which the family court deals with all the time. For many litigants in family cases, English is not their mother tongue. Some are illiterate. Some are deaf or blind or have other physical disabilities. Studies show, as experience suggests, that a significant number of parents involved in care proceedings have often significant learning disabilities. Another kind of vulnerability is exemplified by the victims of actual or anticipated domestic violence, forced marriage, female genital mutilation or even worse.*

   *Can we honestly assert that we are as alert as we should be to the problems and to the imperative need to ensure that the vulnerable who come before us, whether as parties or as witnesses, are enabled to participate, as they are entitled to, fairly and properly in the proceedings and not left in a position of disadvantage? Although I should like to think so, the truth is that much more, much, much more, needs to be done."*[1]

2. The need for reform of the way in which vulnerable people give evidence in family proceedings was pressed forcefully by Sir James Munby during his tenure as the President of the Family Division. As a result of his tireless work and that of others, important progress has been made, in particular the introduction of Family Procedure Rules Part 3A and the accompanying Practice Direction 3AA.

# Family Procedure Rules 2010

3. The general procedural rules in respect of evidence are contained in Part 22 of the Family Procedure Rules 2010. They provide that the court may control the evidence by giving directions, including as to the way in which the evidence is to be placed before the court (Rule 22.1(1)).

4. The general rule is that any fact which needs to be proved by the evidence of a witness at a final hearing, is to be proved by their oral evidence (Rule 22.2(1)(a)). The witness statement of a witness will stand as their evidence in chief (Rule 22.6(2)). The court may allow a witness to give evidence by a video link or by other means (Rule 22.3).

5. Part 22 must now be read with the procedural rules in relation to vulnerable parties and witnesses, contained in Part 3A and Practice Direction 3AA, which came into effect on 27 November 2017. These rules apply to all family proceedings.

[1] Sir James Munby, President of the Family Division. Annual lecture to the Wales Observatory on Children and Young People - Unheard Human Rights of voices: the involvement of children and vulnerable people in the family justice system – [2015] Fam Law 895.

## FPR Part 3A and Practice Direction 3AA

6. Part 3A and Practice Direction 3AA provide a specific procedural regime for proceedings involving vulnerable adult parties and witnesses, which came into effect on 27 November 2017.

7. Central to the regime are the following core duties of the court, parties and all representatives (PD 3AA):

*1.3 It is the duty of the court (under rules 1.1(2); 1.2 & 1.4 and Part 3A FPR) and of all parties to the proceedings (rule 1.3 FPR) to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings.*

*1.4 All parties and their representatives are required to work with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings.*

8. The court's duties under this part in respect of vulnerability of parties and witnesses apply as soon as possible after the start of the proceedings and continue until the resolution of the proceedings (FPR 3A.9(1)).

## Identifying Vulnerability

9. The term 'vulnerability' is not specifically defined by the Rules. When considering the vulnerability of a party or witness (who is not a protected party), Rule 3A.3(1) requires the court to have regard to the following matters set out in Rule 3A.7:

a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—

   i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or

   ii) any members of the family of the party or witness;

b) whether the party or witness—

   i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;

   ii) has a physical disability or suffers from a physical disorder; or

   iii) is undergoing medical treatment;

c) the nature and extent of the information before the court;

d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;

e) whether a matter is contentious;

f) the age, maturity and understanding of the party or witness;

g) the social and cultural background and ethnic origins of the party or witness;

h) the domestic circumstances and religious beliefs of the party or witness;

i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act;

j) any characteristic of the party or witness which is relevant to the participation direction which may be made;

...

m) any other matter set out in Practice Direction 3AA.

10. Paragraph 2.1 of the Practice Direction provides that, where Rule 3A.7(d) refers to questions of abuse, this includes any concerns relating to the following:

*a) domestic abuse, within the meaning given in Practice Direction 12J*

*b) sexual abuse*

*c) physical and emotional abuse*

*d) racial and/or cultural abuse or discrimination*

*e) forced marriage or so called "honour based violence"*

*f) female genital or other physical mutilation*

*g) abuse or discrimination based on gender or sexual orientation; and*

*h) human trafficking.*

11. Domestic abuse is given the following meaning:

*"domestic abuse" includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment.*

'Abandonment', 'coercive behaviour' and 'controlling behaviour' are further defined in PD 12J.

12. Paragraph 3.1 of Practice Direction 3AA also requires the court to consider the ability of the party or witness to:

*a) understand the proceedings, and their role in them, when in court;*

*b) put their views to the court;*

*c) instruct their representative/s before, during and after the hearing; and*

*d) attend the hearing without significant distress.*

13. The court should require the assistance of relevant parties in the case when considering whether these factors or any of them may mean that the participation of any party or witness in the case is likely to be diminished by reason of vulnerability (paragraph 3.1, PD 3AA).

14. Advocates should have regard to The Advocates' Gateway, Toolkit 10 – Identifying vulnerability in witnesses and defendants, and Toolkit 13 - Vulnerable witnesses and parties in the family courts, which provide guidance and good practice examples which may assist in identifying vulnerability.

## Vulnerable Parties

15. Rule 3A.4 places a duty on the court to consider how a party can participate in the proceedings:

*1) The court must consider* ***whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability*** *and, if so, whether it is necessary to make one or more participation directions.*

*2) Before making such participation directions, the court must consider any views expressed by the party about participating in the proceedings.*

16. This Rule does not apply to a party who is a child or to a protected party (FPR 3A.2).

17. This provision requires the court to consider making directions to enable a vulnerable party to fairly participate in the proceedings. This is distinct from the court's duty to consider impact of the party's vulnerability on their ability to give evidence, which is considered below.

18. Advocates should have regard to the guidance in **Re C (A Child) [2014] EWCA Civ 128, and Re A (A Child) [2013] EWHC 3502 (Fam)**, in respect of the duty of those acting for a party with a hearing or learning disability to make the issue known to the court at the earliest opportunity, and regarding the role of expert evidence in such cases.

## Protected Parties

19. A protected party is a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct proceedings. Rules in relation to protected parties are set out at FPR Part 15, supplemented by Practice Directions 15A and 15B.

20. In the case of a protected party Rule 3A.6 provides that:

*1) The court must consider whether it is necessary to make one or more participation directions to assist–*

*a) the protected party participating in proceedings; or*

*b) the protected party giving evidence.*

*2) Before making such participation directions, the court must consider any views expressed by the protected party's litigation friend about the protected party's participation in the proceedings or that party giving evidence.*

21. There is no requirement for the court to consider <u>whether</u> their participation in the proceedings is likely to be diminished by reason of vulnerability, but in every case <u>must</u> consider whether to make any participation directions to assist that party.

22. Where an issue arises as to whether a protected party should give evidence, the court may have to make a separate determination. Practice Direction 15B provides:

*1.4 Where the court determines that a party does not have capacity to conduct the proceedings, the court may well also have to determine whether that party is able to give evidence and if so whether 'special measures' are required. Expert evidence is also likely to be necessary for the court to make such determinations. However, as in relation to the question of litigation capacity, the court may consider that evidence from a treating clinician who has a good understanding of the party's difficulties may be sufficient. If the treating clinician is provided with information about the legal framework, the clinician may be able to provide that evidence more readily and more quickly than an expert instructed to give an opinion as to the party's ability to give evidence.*

*1.5 Where the protected party is able to give evidence, the representative will wish to consider (and ask the expert to consider) the impact on that party of giving evidence. When making a determination as to whether that protected party should give evidence, the court may need to consider whether the impact of giving evidence would be so adverse to their condition that it would not be in that party's best interests to do so. The representative may put forward an argument on behalf of the protected party that the protected party should not give evidence.*

23. If a protected party is to give evidence, the court must hold a Ground Rules Hearing (see below).

## Vulnerable Witnesses

24. Rule 3A.5 places a duty on the court to consider how a party or witness can give evidence:

*1) The court must consider* ***whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability*** *and, if so, whether it is necessary to make one or more participation directions.*

*2) Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence.*

25. The 'quality of evidence' is a reference to its quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness' or a party's ability in giving evidence to give answers which address the questions put to the witness or the party and which can be understood both individually and collectively.

26. This duty does extend to children who are to be witnesses in the proceedings, but does not apply to protected parties (FPR 3A.2).

27. In deciding whether a child should give evidence the court must apply the relevant guidance from the caselaw and the guidance of the Family Justice Council in relation to children giving evidence in family proceedings (considered below) (PD 3AA, para. 5.1).

## Participation Directions

28. A participation direction is:

a) *a general case management direction made for the purpose of assisting a witness or party to give evidence or participate in proceedings; or*

b) *a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8*

29. Participation directions may be made at any hearing, on the application of a party or of the court's own initiative.

30. Where participation directions are being considered in respect of a vulnerable party or protected party's participation in the proceedings, it is clearly desirable that they are made at the earliest possible stage.

31. When considering whether to make one or more participation directions, for a vulnerable party or witness, Rule 3A.7 provides that the court must have regard, in particular, to the factors listed. These are the factors set out above at paragraph 9, to which the court is required to have regard when considering the vulnerability of a party, but with the addition of paragraphs (k) and (l):

*k) whether any measure is available to the court; and*

*l) the costs of any available measure.*

32. The measures referred to are set out at Rule 3A.8(1):

*a) prevent a party or witness from seeing another party or witness;*

*b) allow a party or witness to participate in hearings and give evidence by live link;*

*c) provide for a party or witness to use a device to help communicate;*

*d) provide for a party or witness to participate in proceedings with the assistance of an intermediary;*

*e) provide for a party or witness to be questioned in court with the assistance of an intermediary; or*

*f) do anything else which is set out in Practice Direction 3AA*.

33. The views of the party or witness should be sought in respect of the proposed directions (FPR 3A.4, 3A.5 and 3A.6).

34. It may be necessary for the court to direct an expert to report on the measures that will assist a witness or party to give evidence or to participate in proceedings.

35. There is no exhaustive list of the participation directions that can be made to facilitate a vulnerable party's participation in the proceedings. The practice direction specifically provides that the court may use its general case management powers to give appropriate directions to facilitate a party's participation in the proceedings.

36. Examples of such directions include; making directions as to the formality of language to be used in court and whether parties should be enabled to enter the court building through different routes or use different waiting areas (PD 3AA, para. 4.2). Also holding

hearings at a particular time of day, breaks, allowing a supporting person to come into court or permitting the party to witness to have a comforting object in court.

37. The Practice Direction does not make a similar specific provision for the use of the court's general case management powers in respect of vulnerable witnesses, nonetheless those powers are available to the court.

38. In respect of child witnesses, regard should be had to the guidance provided by the Family Justice Council (please see below for the evidence of children).

## Ground Rules Hearings

39. When the court has decided that a vulnerable party, vulnerable witness, or protected party should give evidence, the court must hold a Ground Rules Hearing ("GRH") (PD 3AA, para. 5.2). The GRH must be held prior to any hearing at which evidence is to be heard but need not be a separate hearing from any other hearing in the proceedings.

40. At the GRH, any necessary participation directions will be given as to the conduct of the advocates and the parties in respect of the evidence, and to put any necessary support in place. This will include consideration of those matters set out at paragraphs 28 to 38 above.

41. In addition, there are a number of specific considerations required by the Practice Direction:

> *5.3 If the court decides that a vulnerable party, vulnerable witness or protected party should give evidence to the court, consideration should be given to* ***the form of such evidence, for example whether it should be oral or other physical evidence, such as through sign language or another form of direct physical communication****.*
>
> *5.4The court must consider* ***the best way in which the person should give evidence, including considering whether the person's oral evidence should be given at a point before the hearing, recorded and, if the court so directs, transcribed, or given at the hearing with, if appropriate, participation directions being made****.*
>
> *5.5 In all cases in which it is proposed that a vulnerable party, vulnerable witness or protected party is to be cross-examined (whether before or during a hearing) the court must consider* ***whether to make participation directions, including prescribing the manner in which the person is to be cross-examined****. The court must consider whether to direct that-*
>
> *a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court;*
>
> *b) questions or topics to be put in cross-examination should be agreed prior to the hearing;*
>
> *c) questions to be put in cross-examination should be put by one legal representative or advocate alone, or, if appropriate, by the judge; and*
>
> *d) the taking of evidence should be managed in any other way.*

*5.6The court must also consider* ***whether a vulnerable party, vulnerable witness or protected party has previously-***

*a)* ***given evidence****, and been cross-examined, in criminal proceedings and whether that evidence and cross-examination has been pre-recorded (see sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999); or*

*b)* ***given an interview*** *which was recorded but not used in previous criminal or family proceedings.*

***If so, and if any such recordings are available, the court should consider their being used in the family proceedings.***

42. Any available expert evidence should be considered. Where an intermediary has been appointed it is good practice for them to attend the GRH to assist the court in identifying the appropriate directions (please see below in respect of intermediaries).

43. There can be no exhaustive list of the issues that may require consideration or the directions that may be given at a GRH. Each vulnerable witness will have their own individual needs. It is important not to overlook the importance of matters such as familiarisation visits, arrangements for memory refreshing, the availability of a live link or screens, how the witness will be addressed, the time of day that the witness will give evidence, time limits and breaks.

44. An Aide Memoire, setting out matters which may require consideration at a GRH is provided in the Annex to this paper.

## The Availability of Particular Measures

45. At present in the Family Court, the measures referred to in Rule 3A.8 are not available in every court. Where a direction is made for a measure that is not available where the court is sitting, the court may direct that the court sits at another location:

*2) If the family court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the family court sits and the measure is available*

*3) If the High Court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the High Court sits and the measure is available*

46. In some instances, necessary measures may not be available at all:

*4) Nothing in these rules gives the court power to direct that public funding must be available to provide a measure.*

*5) If a direction for a measure is considered by the court to be necessary but the measure is not available to the court, the court must set out in its order the reasons why the measure is not available.*

47. Please see below in respect of funding for intermediaries.

## Intermediaries

48. FPR Part 3A provides the following definition of an intermediary:

*"intermediary" means a person whose function is to—*

*a) communicate questions put to a witness or party;*

*b) communicate to any person asking such questions the answers given by the witness or party in reply to them; and*

*c) explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions;*

49. An intermediary can have a wider role than described in this definition. Intermediaries may be able to assist parties in understanding the court proceedings more generally, including at hearings other than those at which evidence is being given. The appointment of an intermediary to provide wider assistance to a party is not however excluded by this definition and the provisions of Part 3A which refer to it - Rule 3A.8(1)(d) makes specific and separate provision for a party or witness to participate in proceedings with the assistance of an intermediary (as well as to be questioned with the assistance of an intermediary). In addition, as discussed above, the court retains its general case management powers.

50. The need for an intermediary may be indicated by expert evidence, but such evidence is not required before the court may find that the appointment of an intermediary is necessary.

51. An intermediary will be able to make recommendations to the court as to the measures and directions which will assist a vulnerable witness in giving their best evidence (including a recommendation as to whether the assistance of an intermediary is required). In order to make recommendations, the intermediary will need first to assess the party or witness and provide a report.

52. Whilst there is no statutory basis for the funding of intermediaries in family proceedings, the Ministry of Justice has published internal HMCTS guidance on the issue which provides:

*"Whilst there is no statutory requirement for HMCTS to fund an intermediary or intermediary assessment, in family proceedings where it appears to the court that this is the only way a party or witness can properly participate in proceedings, or be questioned in court, the judge may order that there should be (i) an assessment to determine the nature of support that should be provided through an intermediary in the courtroom, and (ii) funding for that intermediary. HMCTS may then provide the funding if there is no other available source of funding.*

*Intermediaries are usually appointed to support vulnerable witnesses or parties to participate in or understand proceedings inside the courtroom. HMCTS can also if necessary fund the cost of an intermediary to assist with preparation work outside the court but only if this is directly relevant to matters to be dealt with in the court room and there is a judicial order to this effect. HMCTS is not able to fund the general provision of intermediaries outside the court room."*

53. If an intermediary is to be instructed, this should take place prior to the GRH so that he/she can attend that hearing and the court can consider the recommendations made.

54. Intermediaries are impartial and their role is to assist the court. When assisting a witness this may include reviewing and advising on written questions as well as identifying any breakdown in communication or other factors impinging on the witness' ability to give his or her best evidence.

## ABE Interviews and Pre-Recorded Cross-Examination

55. PD 3AA requires the court, at a GRH, to give specific consideration as to whether a witness has *'given evidence, and been cross-examined, in criminal proceedings and whether that evidence and cross-examination has been pre-recorded (see sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999)'* or *'given an interview which was recorded...'*

56. A witness interview, conducted in accordance with Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures, March 2011, an 'ABE interview' is admissible in family proceedings (Children (Admissibility of Hearsay Evidence) Order 1993, SI 1993/621) and may be directed to stand as the witness' evidence in chief, if they are to give oral evidence.

57. Section 28 of the YJCEA 1999 allows the admission, in criminal proceedings, of pre-recorded cross-examination and re-examination of a child, vulnerable or intimidated witness.

58. A pilot scheme commenced in 2014 for child witnesses and the national roll-out is currently awaited.

59. Information sharing will be essential to making use of these provisions for vulnerable witnesses. Where there are concurrent or linked criminal proceedings there should be close liaison between the respective parties and the allocated Judges and ideally linked directions hearings (see FJC Guidelines and 2013 Protocol and Good Practice Model Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings).

## Duties on Advocates

60. In addition to the advocates' core duties as set out above, advocates are expected to be familiar with and to use the techniques employed by the toolkits and the approach of the Advocacy Training Council (PD 3AA, para. 5.7). The toolkits are available at www.theadvocatesgateway.org.

## Application Procedure

61. An application may be made by a party for directions, either on the application form initiating the proceedings or during the proceedings. The application procedure in Part 18 applies and the application must contain the following information specified in Practice Direction 3AA (FPR 3A.10):

*a) why the party or witness would benefit from assistance;*

b) *the measure or measures that would be likely to maximise as far as practicable the quality of that evidence;*

c) *why the measure or measures sought would be likely to improve the person's ability to participate in the proceedings; and*

d) *why the measure or measures sought would be likely to improve the quality of the person's evidence.*

62. The court may make directions of its own initiative pursuant to the procedure set out in Rule 4.3(2) to (6) (notice requirements and right to apply to set aside).

63. The court is required to set out its reasons on the court order for (1) making, varying or revoking directions made under this Part, and (2) deciding not to make, vary or revoke directions in proceedings that involve a vulnerable person or a protected party (FPR 3A.9(2)).

## Evidence of Children

64. In every case in which a child may be required to give evidence, particular considerations apply and the court will determine whether a child should give evidence, and if so how that evidence should be given.

65. In **Re W (Children) [2010] UKSC 12** the Supreme Court considered the principles which should guide the exercise of the court's discretion in determining whether to direct that a child should give evidence in family proceedings.

66. The Supreme Court held that the then existing law, which had erected a presumption against a child giving evidence, could not be *'reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing Convention Rights. Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even in criminal proceedings account must be taken of the article 8 rights of the perceived victim: see SN v Sweden, App no 34209/96, 2 July 2002. Striking that balance in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point.'* (per Baroness Hale at para. 22).

67. Baroness Hale went on to explain:

'23. The object of the proceedings is to achieve a fair trial in the determination of the rights of all the people involved. Children are harmed if they are taken away from their families for no good reason. Children are harmed if they are left in abusive families. This means that the court must admit all the evidence which bears upon the relevant questions: whether the threshold criteria justifying state intervention have been proved; if they have, what action if any will be in the best interests of the child? The court cannot ignore relevant evidence just because other evidence might have been better. It will have to do the best it can on what it has.'

68. In considering whether a child should be called as a witness, the court is required to weigh two primary considerations:

a) The advantages that calling the child will bring to the determination of the truth; and

b) The damage it may do to the welfare of this or any child.

69. The welfare of the child is a relevant but not paramount consideration. A number of factors to which the court should have regard when balancing the primary considerations are identified:

*"26. The age and maturity of the child, along with the length of time since the events in question, will also be relevant to the second part of the inquiry, which is the risk of harm to the child. Further specific factors may be the support which the child has from family or other sources, or the lack of it, the child's own wishes and feelings about giving evidence, and the views of the child's guardian and, where appropriate, those with parental responsibility. We endorse the view that an unwilling child should rarely, if ever, be obliged to give evidence. The risk of further delay to the proceedings is also a factor: there is a general principle that delay in determining any question about a child's upbringing is likely to prejudice his welfare: see Children Act 1989, s 1(2). There may also be specific risks of harm to this particular child. Where there are parallel criminal proceedings, the likelihood of the child having to give evidence twice may increase the risk of harm. The parent may be seeking to put his child through this ordeal in order to strengthen his hand in the criminal proceedings rather than to enable the family court to get at the truth. On the other hand, as the family court has to give less weight to the evidence of a child because she has not been called, then that may be damaging too. However, the court is entitled to have regard to the general evidence of the harm which giving evidence may do to children, as well as to any features which are particular to this child and this case."* (per Baroness Hale).

70. The Supreme Court emphasised that the risk of harm is a consistent feature, and whilst this may vary from case to case, it must always be taken into account. The court does not necessarily require expert evidence in order to assess and weigh the risk.

71. When undertaking the balancing exercise the court must take into account the measures that can be taken to improve the quality of the child's evidence and to reduce the risk.

72. Following the Supreme Court decision in Re W the Family Justice Council published its **Guidelines in relation to children giving evidence in family proceedings** (June 2011). The aim of the Guidelines is to provide those involved with family proceedings with advice as to what matters should be taken into account where the question of a child giving evidence arises.

73. The Guidelines were endorsed by the Court of Appeal **Re E (A Child) [2016] EWCA Civ 473**. Lord Justice MacFarlane noted that the Court had been told that, despite the six years since the decision in **Re W**, the prevailing culture in the family court was reportedly unchanged, a state of affairs that was plainly contrary to the binding Supreme Court decision and Article 6 of the European Convention on Human Rights.

74. The judgment provides the following guidance:

57. *In any case where the issue of children giving oral evidence is raised it is necessary for the court to engage with the factors identified by Baroness Hale in Re W, together with any other factors that are relevant to the particular child or the individual case, before coming to a reasoned and considered conclusion on the issue.*

58. *It is crucial that any issue as to a child giving evidence is raised and determined at the earliest stage, and in any event well before the planned trial date. The court will not, however, be in a position to come to a conclusion on that issue unless it has undertaken an evaluation of the evidence which is otherwise available. Where there has been an ABE interview, and the quality and/or content of that interview are to be challenged, it is likely that the judge will have to view the DVD before being in a position to decide the Re W issue.*

59. *The court should also have regard to the Working Party of the Family Justice Council Guidelines on the issue of Children Giving Evidence in Family Proceedings issued in December 2011 [2012] Fam Law 79. The Guidelines, which were specifically developed to assist courts following the decision in Re W, contain a list of no less than 21 factors to which the court should have regard when determining whether a child should give oral evidence in the context of the principal objective of achieving a fair trial [paragraph 9(a) to (v)]. The Guidelines require the court to carry out a balancing exercise 'between the following primary considerations:*

    *i) the possible advantages that the child being called will bring to the determination of truth balanced against;*

    *ii) the possible damage to the child's welfare from giving evidence i.e. the risk of harm to the child from giving evidence.'*

60. *Whilst not all of the elements described by Baroness Hale in Re W or in paragraph 9 of the Guidelines will be relevant in every case, it is plain that the court undertaking a Re W determination will need to engage in a relatively full and sophisticated evaluation of the relevant factors; simply paying lip-service to Re W is not acceptable. By 'full' I do not wish to suggest that a lengthy judgment is required, but simply that the judge must consider each of the relevant points with that process recorded in short-form in a judgment. Such a detailed process is in my view justified given the importance of the decision for the welfare of the child and for the fairness of hearing.*

75. The factors identified in the Guidelines are:

a) The child's wishes and feelings; in particular their willingness to give evidence; as an unwilling child should rarely if ever be obliged to give evidence

b) The child's particular needs and abilities

c) The issues that need to be determined

d) The nature and gravity of the allegations

e) The source of the allegations

f) Whether the case depends on the child's allegations alone

g) Corroborative evidence

h) The quality and reliability of the existing evidence

i) The quality and reliability of any ABE interview

j) Whether the child has retracted allegations

k) The nature of any challenge a party wishes to make

l) The age of the child; generally the older the child the better

m) The maturity, vulnerability and understanding, capacity and competence of the child; this may be apparent from the ABE or from professionals discussions with the child

n) The length of time since the events in question

o) The support or lack of support the child has

p) The quality and importance of the child's evidence

q) The right to challenge evidence

r) Whether justice can be done without further questioning

s) The risk of further delay

t) The views of the guardian who is expected to have discussed the issue with the child concerned if appropriate and those with parental responsibility

u) Specific risks arising from the possibility of the child giving evidence twice in criminal or other and family proceedings taking into account that normally the family proceedings will be heard before the criminal; and

v) The serious consequences of the allegations i.e. whether the findings impact upon care and contact decisions

76. In giving his judgment in **Re E**, Lord Justice MacFarlane further emphasised the importance of weighing in the balance the possible advantages that a child's evidence may bring the proceedings, as well as the potential harm to the child:

*61. It is plainly good practice for the court to be furnished with a written report from the children's guardian and submissions on behalf of the child before deciding whether that child should be called as a witness. This court understands that it is, however, common-place for guardians to advise that the child should not be called to give evidence on the basis that they will or may suffer emotional harm as a result of doing so. Where such advice is based upon the consideration of harm alone, it is unlikely to be of great assistance to the court which is required to consider not only 'harm' but also the other side of the balance described in the Guidelines, namely the possible advantages that the child's testimony will bring to the determination of truth.*

*62. Part of any consideration of the overall welfare of a child must be that decisions as to his or her future, or the future of other children, are based, so far as is possible, upon a true understanding of important past events. Whilst the process of giving*

*oral evidence in relation to allegations of past harmful experiences will almost always be an unwelcome one for any child, and for some that process itself may be positively harmful, those negative factors, to which full and proper weight should be given, are but one half of the balancing equation. In some cases, despite the negative factors, it may nevertheless be in accordance with the wider welfare interests of the child for him or her to be called to give evidence. Each case will be different, but even where the child may suffer some emotional harm from the process, if such harm is likely to be temporary and where the quality and potential reliability of the other evidence in the case is weak, it may (in addition to any fair trial issues) nevertheless be in the child's best interests to give oral evidence. If the ABE interview process is poor, and there is little or no other evidence, then it may be that no findings of fact in accordance with allegations made by a child can properly be made unless the child is called to give evidence. The Re W exercise must plainly take account of such a situation.*

77. The wishes and feelings of the child, in particular their willingness to give evidence is the first of the relevant factors set out in the Guidelines which go on to state that 'an unwilling child should rarely if ever be obliged to give evidence'. In Re S (Care Proceedings: Case Management) [2016] EWCA Civ 83 the Court of Appeal identified that the issue as to whether the court can or should use its powers to issue a witness summons to compel a reluctant child to give evidence, had not been considered by the Court of Appeal or the Supreme Court since the decision in Re W. The Court did not express a view on the matter but noted that the agreed position of counsel was that:

*"... a competent child is a compellable witness in civil proceedings and that a witness summons could have been issued under s 31G of the Matrimonial and Family Proceedings Act 1984 if appropriate. Theoretically, the penalties for failing to attend in answer to a witness summons are committal to custody and/or a fine. However, there can be no detention for contempt of a person under the age of 18, see ss 89 and 108 of the Powers of Criminal Courts (Sentencing) Act 2000."*

## Case Management

78. The case law makes clear that in every case in which the question of a child giving evidence arises, the court should identify this as an issue at the earliest opportunity.

79. In each case the court should hold a 'Re W hearing' to determine whether the child should give evidence. At that hearing the court should have watched the child's ABE interview if there is one and should have available a written report from the Guardian. In some, but not all, cases it may be necessary for there to be expert evidence.

80. At that hearing the court will consider the relevant factors in the context of the principle objective of achieving a fair trial and balancing the identified primary considerations. In doing so the court must take account of the directions and measures that may be utilised to reduce the risk of harm to the child and improve the quality of their evidence.

81. If it is determined that a child should give evidence, the court must list a Ground Rules Hearing (PD 3AA, para. 5.2).

## Ground Rules Hearings

82. The court should have regard to the specific considerations identified in PD 3AA which include consideration as to whether the child should give evidence at a point before the hearing.

83. The **Guidelines** urge serious and early consideration of the possibility of a child giving evidence on an occasion distinct from the substantive hearing so as to avoid oral examination. It is advised that the further questioning should be carried out as soon as possible after the incident in question and would have significant advantages to the child.

84. Advocates should refer to the detailed guidance on the directions and measures that the court should consider in respect of the evidence of children, including whether their evidence can be given otherwise than at a hearing, practical measures including the use of an intermediary, the use of live links or screens, breaks, limiting questioning, memory refreshing, support and familiarisation visits.

85. The **Guidelines** provide that the court and the parties should take into account the Good Practice Guidance in managing young witness cases and questioning children (part of the NSPCC/Nuffield Foundation research 'Measuring Up' July 2009 by Joyce Plotnikoff and Richard Woolfson; and the subsequent Progress Report[2]. This can be found at https://www.nspcc.org.uk/globalassets/documents/research-reports/measuring-up-good-practice-guidance.pdf.

86. Further, that the examination of the child should take into account the guidance given by the Court of Appeal in the case of **R v Barker [2010] EWCA Crim 4** para 42 which identified that the techniques of advocates must be adapted to enable a child to '*give the best evidence of which he or she is capable.*' Detailed guidance in respect of the approach to questioning is set out in the Guidelines at paragraph 20 which should be read with the toolkits of The Advocates' Gateway.

87. Section 96 of the Children Act 1989 provides that a child who does not understand the nature of an oath may nonetheless give evidence, provided that he/she understands that it is his duty to tell the truth and has sufficient understanding to justify his/her evidence being heard.

## Vulnerable Adult Witnesses

88. The court is less often called upon to determine whether a compellable but vulnerable adult witness, who is not a protected party, should be called to give evidence, as opposed to how that they give their evidence.

89. In **Re A (A Child) (Vulnerable Witness) [2013] EWHC 1694** the court was required to determine just such an issue. This very long running and difficult set of proceedings was the subject of a prior judgment in the Supreme Court on the issue of the disclosure of the witness' identity (**Re A (A Child) (Family Proceedings: Disclosure of Information)[2012] UKSC 60**). Giving the judgment of the Supreme Court, upholding the direction for disclosure, Baroness Hale emphasised that there '*are many ways in*

[2] The NSPCC has recently published 'Falling Short? A snapshot of young witness policy and practice, revisiting Measuring Up?, by Joyce Plotnikoff and Richard Woolfson, February 2019.

*which her evidence could be received without recourse to the normal method of courtroom confrontation.'* (at para. 36).

90. Following the disclosure of her identity, the matter came before Pauffley J to determine whether X, a vulnerable adult witness, aged 21, should give evidence in private law proceedings, in respect of allegations of sexual abuse made by her in respect of the father. She did not wish to give evidence and there was expert psychiatric evidence that to do so posed a severe risk to her health and consequentially to her social wellbeing and her academic progress.

91. In light of X's youth and particular frailties, Pauffley J considered it appropriate to consider the overarching question posed by Baronness Hale in Re W, by weighing the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of the witness. She further had regard to the relevant factors identified in the Supreme Court judgment as well as the steps that might be employed to improve the quality of the evidence and reduce the risk posed to X. Having given careful and detailed consideration to the various factors, she concluded the balance came down decisively in favour of striving to identify a set of circumstances in which could be assisted to make a personal contribution to the proceedings, with the assistance of an intermediary.

92. The judgment in the fact finding hearing **Re A (a child) [2013] EWHC 2124 (Fam)**, provides a detailed description of the measures used at the finding of fact hearing and the difficulties encountered during X's evidence (paragraphs 23 to 39).

93. In the subsequent appeal **Re J (Vulnerable Witness: Sexual Abuse: Fact Finding) [2014] EWCA Civ 875**, the findings of sexual abuse made at first instance were set aside. In so doing, the Court of Appeal considered the approach of the court to X's evidence and the measures put in place for her, as a vulnerable witness. Lord Justice MacFarlane said:

*'[91] Despite the very valuable support given to X by NM, a registered intermediary, who was described by Pauffley J as extremely impressive, it is clear that X found the process of discussing these matters to be highly distressing. As I have explained, her evidence was halting, truncated by the need for breaks and, in the end, concluded in the early stages of questioning on behalf of F.*

*[92] Within this appeal, no criticism has been made of the sequence of decisions which led to the choice of these particular arrangements, as opposed to other less direct methods, for the court to receive evidence from X. As Baroness Hale of Richmond explains, in any case there will be a scale of options, running from no fresh input from the witness into the proceedings, through written answers, video-recorded questioning by trained professionals or live questioning over a video-link, to full involvement via oral evidence given in the normal forensic setting. The aim, again as Baroness Hale says, is to enable witnesses to give their evidence in the way which best enables the court to assess its reliability. It must be a given that the best way to assess reliability, if the witness can tolerate the process, is by exposure to the full forensic process in which oral testimony is tested through examination in chief and cross-examination. Just as the sliding scale of practical arrangements rises from 'no fresh involvement' to 'the full forensic process', there will be a corresponding scale in which*

*the degree to which a court may be able to rely upon the resulting evidence will increase the nearer the process comes to normality. In each case, where a vulnerable witness requires protection from the effects of the full process, it will be necessary for the court to determine where on the scale the bespoke arrangements for that witness should sit with a view to maximising the potential reliability of the resulting evidence, but at the same time providing adequate protection for the particular vulnerabilities of that witness.*

***[93] Where special measures have been deployed it is, however, necessary for the judge who is evaluating the resulting evidence to assess the degree, if any, to which the process may have affected the ability of the court to rely upon the witness' evidence. Where, for example, the witness has simply been unable to play any active part, the court will be required to fall back upon hearsay records of what has been said outside the court context on earlier occasions and without any challenge through questioning.'***

94. The picture was a complex one and there were a number of factors which led the Court of Appeal to conclude that the findings made must be set aside. Of particular relevance in the context of this paper is the conclusion that 'the judicial analysis should have included assessment of the impact of the, necessarily, limited forensic process around X's oral evidence.' (per MacFarlane LJ at para. 99). A re-trial was not ordered:

*'[102] It seems highly unlikely that X will be able to engage to a greater extent in the forensic process than she did before Pauffley J; indeed powerful submissions were made by Miss Morgan and by M to the effect that it would be abusive and/or untenable to expect X to take part in a further hearing.'*

95. The reported judgments in this lengthy and complex set of proceedings are valuable reading and emphasise the overarching requirements of fairness in cases involving vulnerable witnesses:

*'It was obviously important in trials with vulnerable witnesses that the trial process should be carefully and considerately managed in such a way as to enable their evidence to be given in the best way possible and without their being subjected to unnecessary distress. But that should not come at the price of depriving defendants and others, who claimed that they had been falsely accused of criminal conduct, of their right to a fair trial in which they participated and a proper opportunity to present their case in accordance with natural justice and Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.' (per Gloster LJ at para. 109)*

96. In **Carmarthenshire CC v Y and Others [2017] EWFC 36** a vulnerable adult witness was unable to give evidence, there being expert evidence that it would be very harmful for her to do so. The court determined the matters in issue on the other available evidence.

## Specific Considerations in Private Law Children Cases Involving Allegations of Abuse

97. In private law cases specific difficulties arise where the court is determining disputed allegations of abuse and the alleged perpetrator of that abuse is a litigant in person.

98. The relevant procedure is found in the revised Practice Direction 12J which requires the court to determine, as soon as possible, whether it is necessary to conduct a fact finding hearing in respect of any allegation of abuse, and to ensure that the proceedings are conducted '*so that matters in issue are determined as soon as possible, fairly and proportionately, and within the capabilities of the parties*'.

99. There is no jurisdiction for the court to direct that HMCTS, or any other agency, provide funding for legal representation for the purpose of challenging the alleged victim's account in cross-examination (**Re K and H (Children) [2015] EWCA Civ 543**).

100. In Re A (A Minor: Fact-finding: Unrepresented Party) [2017] EWHC 1195 (Fam), Hayden J summarised the issue:

*"61. The iniquity of the situation was first highlighted 11 years ago by Roderic Wood J in H v L & R [2006] EWHC 3099 (Fam), [2007] 2 FLR 162. It was reiterated in Re B (a child) (private law fact-finding-unrepresented father), D v K[2014] EWHC (Fam). Cross examination by a perpetrator is prohibited by statute in the Crown Court, in recognition of its impact on victims and in order to facilitate fairness to both prosecution and defence. In Wood J's case he called for 'urgent attention' to be given to the issue. This call was volubly repeated by Sir James Munby, President of the Family Division in Q v Q; Re B (a child); Re C (a child) [2014] EWFC 31 and again in his 'View from the President's Chambers (2016): Children and Vulnerable Witnesses: where are we?'*

*62 In that document the President highlighted the Women's Aid Publication: Nineteen Child Homicides. I too would wish to emphasise it:*

*"Allowing a perpetrator of domestic abuse who is controlling, bullying and intimidating to question their victim when in the family court regarding child arrangement orders is a clear disregard for the impact of domestic abuse, and offers perpetrators of abuse another opportunity to wield power and control."*

*Commenting on this, the President asked 'who could possibly disagree?' The proposition, in my view, is redundant of any coherent contrary argument"*

101. Insofar as it relates to the conduct of cross-examination, PD 12J provides that the court must consider

*'what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence' (paragraph 19(j))*

*'what support the alleged perpetrator may need in order to have a reasonable opportunity to challenge the evidence' (paragraph 19(l))*

*'While ensuring that the allegations are properly put and responded to, the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process,*

*which at all times must protect the interests of all involved. At the fact-finding hearing or other hearing:*

*- each party can be asked to identify what questions they wish to ask of the other party, and to set out or confirm in sworn evidence their version of the disputed key facts; and*

*- the judge should be prepared where necessary and appropriate to conduct the questioning of the witnesses on behalf of the parties, focussing on the key issues in the case.' (paragraph 28)*

102. The provisions of Part 3A and PD 3AA apply, requiring the court to consider *whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions* (FPR 3A.5). A GRH is required if the alleged victim is considered to be a vulnerable party/witness.

103. These provisions were considered by the Court of Appeal in **Re J (Children) [2018] EWCA Civ 115**. Lord Justice MacFarlane identified three options available to the court: cross-examination by the alleged perpetrator, granting rights of audience to a McKenzie Friend for the purposes of cross-examination, and the questioning being conducted by the Judge. He concluded:

*'74. It follows from this brief review that, where an alleged perpetrator is unrepresented, the court has a very limited range of options available in order to meet the twin, but often conflicting, needs of supporting the witness to enable her evidence to be heard and, at the same time, affording the alleged perpetrator a sufficient opportunity to have his case fairly put to her. Of the options currently available, the least worst is likely to be that of the judge assuming the role of questioner.'*

104. The matter has most recently been considered by Hayden J in the case of **PS v BP [2018] EWHC 1987 (Fam)** in which he reviewed the existing case law, in particular the observations of the Master of the Rolls in **Re K and H (Children) [2015] EWCA Civ 543**, and the procedural requirements of Part 3A, PD 3AA and PD 12J, as well as noting the provisions contained in section 31G(6) of the Matrimonial and Family Proceedings Act 1984:

*'(6) Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to –*

*a) ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and*

*b) put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper.*

105. Hayden J then went on to extrapolate some general principles from which assistance can be derived:

*34. I propose to make a few observations intending to assist Judges and the profession where this kind of situation arises in future. I emphasise I do not intend what I say below to be elevated to the status of guidance. There can be no guidance*

*where the situation is, as here, untenable. Until Parliament addresses these circumstances the best I can offer is a forensic life belt until a rescue craft arrives:*

*(i) Once it becomes clear to the court that it is required to hear a case "put" to a key factual witness where the allegations are serious and intimate and where the witnesses are themselves the accused and accuser, a "Ground Rules Hearing" (GRH) will always be necessary;*

*(ii) The GRH should, in most cases, be conducted prior to the hearing of the factual dispute;*

*(iii) Judicial continuity between the GRH and the substantive hearing is to be regarded as essential;*

*(iv) It must be borne in mind throughout that the accuser bears the burden of establishing the truth of the allegations. The investigative process in the court room, however painful, must ensure fairness to both sides. The Judge must remind himself, at all stages, that this obligation may not be compromised in response to a witnesses' distress;*

*(v) There is no presumption that the individual facing the accusations will automatically be barred from cross examining the accuser in every case. The Judge must consider whether the evidence would be likely to be diminished if conducted by the accused and would likely to be improved if a prohibition on direct cross-examination was directed. In the context of a fact-finding hearing in the Family Court, where the ethos of the court is investigative, I consider these two factors may be divisible;*

*(vi) When the court forms the view, from the available evidence, that cross-examination of the alleged victim itself runs the real risk of being abusive, (if the allegations are established) it should bear in mind that the impact of the court process is likely to resonate adversely on the welfare of the subject children. It is axiomatic that acute distress to a carer will have an impact on the children's general well-being. This is an additional factor to those generally in contemplation during a criminal trial;*

*(vii) Where the factual conclusions are likely to have an impact on the arrangements for and welfare of a child or children, the court should consider joining the child as a party and securing representation. Where that is achieved, the child's advocate may be best placed to undertake the cross-examination. (see M and F & Ors. [2018] EWHC 1720 Fam; Re: S (wardship) (Guidance in cases of stranded spouses) [2011] 1 FLR 319);*

*(viii) If the court has decided that cross-examination will not be permitted by the accused and there is no other available advocate to undertake it, it should require questions to be reduced to writing. It will assist the process, in most cases, if 'Grounds of Cross-Examination' are identified under specific headings;*

*(ix) A Judge should never feel constrained to put every question the lay party seeks to ask. In this exercise the Judge will simply have to evaluate relevance and proportionality;*

*(x) Cross-examination is inherently dynamic. For it to have forensic rigour the Judge will inevitably have to craft and hone questions that respond to the answers given. The process can never become formulaic;*

*(xi) It must always be borne in mind that in the overarching framework of Children Act proceedings, the central philosophy is investigative. Even though fact finding hearings, of the nature contemplated here, have a highly adversarial complexion to them the same principle applies. Thus, it may be perfectly possible, without compromising fairness to either side, for the Judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate.*

106. Advocates should ensure they are familiar with this 'forensic life belt' in all cases in which this difficult issue arises.

## Conclusions

107. The provisions of FPR 3A and Practice Direction 3AA, when combined with the court's general case management powers provide a structured regime, which enables an effective and flexible approach to meeting the needs of vulnerable adult parties and vulnerable witnesses.

108. Advocates should ensure that they are familiar, not just with the provisions of the FPR, and the case law but with the toolkits of The Advocates Gateway which provide an essential source of practical, evidence based guidance in respect of vulnerable witnesses.

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May 2019

# Appendix 1

**Ground Rules Hearings: Aide Memoire**

The following matters may require consideration at a Ground Rules Hearing or other hearing at which Participation Directions are being considered in respect of a vulnerable party or witness. In each case the specific directions will depend upon the needs of the particular individual.

**Vulnerable Parties**

- How the party will communicate and whether any aids are required:
  - Language interpreter
  - BSL or Deaf relay interpreter
  - Lip reader
  - In writing and/or by drawing
  - Hearing loop
  - Other form of direct physical communication
- Whether an intermediary is required, if so
  - Arrangements for the assessment
  - Whether the intermediary will be required throughout each hearing, for a specific hearing or part of a hearing only
  - How the intermediary will assist the party during hearings
  - The intermediary's recommendations
  - Funding
- The type of language to be used during hearings.
- Provision for scheduled breaks:
  - Whether these are required at regular intervals
  - Duration of breaks
  - Whether these are for a break or will be used in whole or part to provide explanations of the course of the hearing to the party
  - Any specific breaks required for medication or other matters
- Procedure for unscheduled breaks i.e. how the party will communicate that they need a break, whether the court will rise or remain sitting.
- Provision for additional time to receive advice and explanations of the evidence or submissions and to give instructions.
- Whether the witness requires a separate entrance to the court building or waiting area.
- Whether hearings should take place at a certain time of day.
- The use of a screen or live link during hearings.

- Any object that the party may have with them in court.
- Whether the party will be supported by any other person.
- Any other matter which will promote the parties' fair participation in the proceedings.

## Vulnerable Witnesses

- How the witness will communicate and whether any aids are required:
  - Language interpreter
  - BSL or Deaf relay interpreter
  - Lip reader
  - In writing and/or by drawing
  - Hearing loop
  - A device to assist communication
  - Other form of direct physical communication.
- Whether an intermediary is required, and if so:
  - Whether the intermediary will review the advocates' proposed questions.
  - What visual aids the intermediary will use.
  - How the intermediary will alert the Judge to a communication issue or the need for a break.
  - The intermediary's recommendation in respect of the witness.
  - Funding.
- Whether the witness' evidence should be given other than at a hearing. If so,
  - The practical arrangements
  - How the evidence will be recorded
  - How will the questions be asked of the witness
- If the witness has previously given evidence or ABE interview, whether the recordings should be used.
- Arrangements for a familiarisation visit, including the opportunity to answer neutral questions over the live link or from the witness box.
- Arrangements for the witness to refresh their memory from their statement or ABE interview.
- Whether the witness will meet the Judge and the advocates prior to giving evidence and if so the arrangements.
- Whether the witness requires a separate entrance to the court building or waiting area.
- Where the witness will sit or stand during evidence.

- Will anyone accompany the witness when he/she gives evidence.
- Whether other parties and advocates will sit or stand during evidence.
- The time of day that the witness will give evidence.
- How the witness will be addressed.
- How the advocates and other parties will be referred to during questioning.
- The length of time that the witness will give evidence for, including any limits on the length of cross-examination.
- Scheduled breaks – frequency and duration.
- Procedure for unscheduled breaks i.e. how the witness will communicate that they need a break, whether the court will rise or remain sitting.
- The identification of relevant issues for cross-examination and exclusion of matters on which the witness will not be cross examined.
- The identification of the advocate/s who will put questions to the witness and whether one advocate will do so on behalf of more than one party.
- Whether questioning should be undertaken by the Judge.
- Directions in respect of questioning may include:
  - Agreement of written questions in advance
  - Agreement of topics in advance
  - Specific directions as to the type of language
  - Specific directions as to the type of questions
  - The use of signposts
  - The use of a chronology/timeline
  - The use of body maps
  - The use of photographs
  - The need for drawing materials
  - The use of models or figures
  - A direction that questions should not be repeated by different advocates
- Any object that the witness may take into the witness box.
- Use of a Live link, if so
  - Who will be present in the live link room
  - Practical arrangements to ensure all necessary documents and other aids are available in the link room
- Use of screens, if so:
  - Practical arrangements for the entering of the court room
  - Identification as to who will and will not be screened

- Any other matter which will promote the witness' ability to give their best evidence.

*In every case the Ground Rules and Directions should be recorded in writing and attached to the Case Management Order for the hearing.*