

VULNERABLE DEFENDANTS

Identifying problems, finding solutions

Mary Cowe

What does vulnerability look like?



What does vulnerability look like?

CPD 3D.1

‘vulnerable’ includes those under 18 years of age and people with a mental disorder or learning disability; a physical disorder or disability; or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case.

What does vulnerability look like?

CPD 3D.2

However, many other people giving evidence in a criminal case, whether as a witness or defendant, may require assistance: the court is required to take 'every reasonable step' to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant (CrimPR 3.9(3)(a) and (b)). This includes enabling a witness or defendant to give their best evidence, and enabling a defendant to comprehend the proceedings and engage fully with his or her defence.

What does vulnerability look like?

The Unauthorised Version

A vulnerable defendant is a person who requires particular adaptations made to the Criminal Justice System to protect their Article 6 right to a fair trial.

These adaptations may be about enabling the defendant to understand the case against him, to give instructions to his team, to communicate with the Court/jury or to follow the evidence against him.

Article 6 ECHR

To be informed promptly in a language understandable to the suspect of the detail of 'the nature and cause of the accusation against them' (Article 6(3)(a))

To have adequate time and facilities to prepare a defence (Article 6(3)(b))

To have the free assistance of an interpreter if you cannot understand or speak the language used in court (Article 6(3)(e))

What does vulnerability look like?



Identifying Vulnerabilities

- Might be vulnerable in CJS but not apparently in rest of their life
- Learning disability
- Sensory impairment
- Autism
- Mental disorder
- Disorders of social function e.g. anxiety
- Previous trauma
- Youth or old age

Identifying Vulnerabilities

- Self-reporting may be unreliable
- Previous interactions with CJS may have been too minor or too serious for anyone to probe into mental health issues
- Lack of diagnosis could mean lack of self-care “falling through net”
- Anger/erratic behaviour may mask lack of understanding

Identifying Vulnerabilities

- Ask concrete questions

e.g. do you get help from disability living allowance/personal independent payments? Do you have anyone who helps you keep appointments (so we can meet up again)?

Are you on any medication (to stay strong during trial, make sure you look after self)?

Not nosiness, but purposive

Identifying Vulnerabilities

Look out for unusual behaviours

- Disordered thought or rapid speech
- Short attention span
- Inappropriate reactions
- Does not understand idioms
- Over-reliant on partner/friend in conference
- Eager to please

“Can I check I’ve explained that properly? You tell me what the prosecution need to prove”

Ask an Expert

Fitness to plead and stand trial

Effective participation in trial including understanding evidence, giving instructions, giving ongoing evidence

Sentence – therapeutic options in community or hospital, sentence length, dangerousness

Commission the Right Experts

- Psychologists (cognitive functioning: learning disability, PTSD, autism; sentence particularly in community; CAN help with fitness)
- Psychiatrists (mental disorder/fitness/treatment in hospital)
- Intermediaries/deaf advocate (participation in trial)

Ask the Right Questions

Provide an advice setting out why the expert has been instructed and the questions you want the expert to answer at that stage

You may not want to go near issues about possible community treatment for someone at a stage when you are assessing ability to participate

Your advice may end up in report!

Ask the Right Questions

Example learning disability:

Karen, 23, left home at 17 and moved in with her partner who is now 37. He comes to all conferences. Karen is epileptic. She went to mainstream school but her mother says the local authority wouldn't statement her because they didn't have the funding but she has "kept all the paperwork". Karen is charged with non-recent sexual offences. She was previously interviewed with other sexual offences that were NFA. Karen says she never saw the complainant that often. Karen nods a lot. The caution was explained to her 4 times before her solicitor was happy. You don't have the ABE yet, just notes.

Ask the Right Questions

- Level of functioning
- Name tasks D will be required to perform- ask, can she understand strength of evidence? Does she understand impact of decisions about giving evidence? Can she give comprehensible account/meaningfully be cross-examined?
- Opinion on fitness
- Age of complaints/ impact on memory
- Suggestibility
- Intermediary/special measures/other expert reports
- Significant impairment of intelligence/social function
- Physical/mental condition makes it undesirable D should give evidence: which factors should a tribunal called upon to make assessment be aware of in expert's opinion

Pritchard: Fit for purpose?

- Nolle Prosequi

AG grants indefinite adjournment not acquittal

- Abuse of Process

R (T.P.) v West London Youth Court [2006]

1 Cr App R 25

R v Cox (Practice Note) [2012] R Cr App R 6

DPP v P [2008] 1 WLR 1005

- Judicial Review?

Defence Intermediaries

- Inherent jurisdiction of Court
- See CPD 3F which contains summary of case law on exercise of this jurisdiction
- Defence must apply to Court for funding with CV of suitably qualified person (raise PTPH?)
- Intermediaries can be used in police station if can be sourced – solicitor should be present during assessment, not police

Other Special Measures CPD 3G

- can adaptations be made in a joint trial or is severance necessary?
- pre trial visits (with intermediary)/practice video link
- ground rules and toolkits should be followed
- reporting restrictions and powers under s41 of CJA 1925
- Court should be prepared to restrict numbers in Court
- uniforms/wigs
- normally sit with supporting adult

Credits/Further Reading

<http://www.theadvocatesgateway.org>

<http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015>

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417412/Reference_Guide.pdf

socwitnessint@nca.x.gsi.gov.uk (defence witness intermediary matching service)

The End

