

Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children



Implementing the *Speaking up for Justice* Report

APPENDICES

APPENDICES

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A GLOSSARY OF TERMS

Admissible evidence – evidence which is relevant to a matter which the court is deciding, and which is not excluded by rules established by the courts and statute law. Under the Youth Justice and Criminal Evidence Act 1999 video recorded evidence may be admissible even though the normal rules of evidence require witnesses to attend and give their evidence at the time of the trial. (See also **inadmissible evidence**).

Burden of proof – In proceedings for a criminal offence the **defendant** is generally presumed to be innocent. This means that in order for the court to convict him, the prosecution must carry the burden of proving that the defendant committed the offence alleged, and must do so beyond reasonable doubt. In civil proceedings it is generally for the party bringing the proceedings to prove its case on the balance of probabilities.

Child witness – There are several definitions of “child” for legal purposes. For the purposes of the **special measures directions** which may be made under the Youth Justice and Criminal Evidence Act 1999 to assist **eligible** witnesses to give evidence, a child witness is a witness who is eligible because he or she is under 17 when the direction is made. Unless child witnesses are in need of **special protection**, there is a presumption that their evidence in chief will normally be received in the form of a **video recording**, with live link being used for **cross-examination** and any re-examination (as to which see **examination in chief**). A child witness is in need of special protection if the offence consists of one of a number of violent offences such as assault and kidnapping, or if it is sexual. In such cases there are further presumptions steering the court towards the use of video recorded evidence in chief and, in the case of sexual offences, pre-recorded cross-examination too.

Another relevant definition of “child” for the purposes of the Youth Justice and Criminal Evidence Act 1999 relates to the giving of unsworn evidence. A “child” under the age of 14 who is competent to give evidence does so without taking an oath or making an equivalent solemn affirmation, i.e. unsworn. (see also **competence**).

Civil proceedings – A case at civil law is normally one between private persons and/or private organisations. Typically it will be about defining the rights and relations between individuals (for example, matrimonial proceedings and disputes about where the child of separated parents should live).

Committal proceedings – Offences which are triable only on indictment are sent immediately for trial in the **Crown Court** after a preliminary hearing by magistrates at which the evidence is not considered. Where an offence may be tried either in the Crown Court or the **magistrates’ court** (an “either way” offence) the magistrates determine first whether the case is to be sent to the Crown Court for trial (“mode of trial” proceedings). If the case is to be tried in the Crown Court the magistrates also hold committal proceedings in order to give the defence an opportunity to argue that the evidence is insufficient to justify sending the case to trial. In practice this is rarely done and committal proceedings are often a formality. Witnesses are not called at committal proceedings.

Compellability (of witness) – The general rule is that if a witness is competent to give evidence they are also compellable. This means that the court can insist on them giving evidence.

Competence or competent (of witness) – In criminal proceedings a person who is not competent may not give evidence. Section 53 of the Youth Justice and Criminal Evidence Act 1999 provides that “all persons are (whatever their age) competent to give evidence”. An exception applies where a person is not able to understand questions put to him or her as a witness, and give answers which can be understood. If the question is raised it is for the trial judge (or in a magistrates’ court, the magistrates) to decide whether a particular witness falls within the exception, and the party who wishes to call the witness to give evidence must prove that he or she does not. A person over 14 who is competent but who does not appreciate the significance of an oath gives evidence unsworn, as do children under the age of 14.

A second kind of exception applies to a person who is on trial (the defendant). A defendant in a criminal trial is not permitted (and in that sense is not competent) to be called to give evidence for the prosecution. Provided that a defendant is not within the first exception, however, he or she may give evidence for the defence. Any evidence the defendant does give on his own behalf may count in favour of the prosecution if it is incriminating.

Complainant – according to section 63 of the Youth Justice and Criminal Evidence Act 1999, “complainant”, in relation to any offence or alleged offence, means a person against or in relation to whom the offence was (or is alleged to have been) committed. Thus a person may be a “complainant” even where he or she did not actually make the initial complaint. The 1999 Act makes special provision for complainants in sexual cases in relation to their status as **eligible witnesses**, and in relation to the prohibition on the accused from **cross-examination** in person.

Cross-examination – the procedure in the trial after **examination in chief** where the lawyer representing the side which did not call the witness seeks to establish its own case by questioning the other side’s witnesses. Among the **special measures** which the Youth Justice and Criminal Evidence Act 1999 allows for **eligible** witnesses is that they may be cross-examined by means of a **live-link**, or (where examination in chief is so conducted) by means of a **video recording**. The making of such a recording normally precludes any further cross-examination.

Sections 34 and 35 of the 1999 Act prevent the accused from cross-examining in person a witness who is the complainant in a sexual case, or a child witness where the offence is of a violent or sexual nature. Section 36 gives the court power to prevent the accused from cross-examining a witness in person in any other criminal case where to do so is justified in the circumstances of the case.

Crown Court – The criminal court that tries those charged with offences which are generally too serious for the magistrates’ court to deal with. This includes the most serious offences which are triable only on **indictment**, such as rape. Trial at the Crown Court is by judge and jury. The Crown Court also hears appeals against convictions or sentences imposed in the **magistrates’ courts**, and from findings of guilt and orders made upon such findings by **youth courts**.

Defendant – A person who is on trial in criminal proceedings. Under the Youth Justice and Criminal Evidence Act 1999 a defendant is not eligible for **special measures**, even though he would be so eligible if he gave evidence as a witness at the trial of another person.

Eligible (of a witness) – “eligible” is the term used in the Youth Justice and Criminal Evidence Act 1999 to describe a witness in respect of whom a **special measures** direction

may be made. A witness may be eligible (i) on the ground of age if under 17 when the direction is made; (ii) on the ground of incapacity if he or she has a physical or mental condition specified by section 16 (see Chapter 5, para.2.2) and the **quality** of the witness's evidence is likely to be diminished as a result, and (iii) on the ground that the **quality** of the witness's evidence is likely to be diminished by reason of fear or distress on his or her part in connection with testifying in the proceedings. The court in deciding eligibility must take account of the views expressed by any witness who is said to have an incapacity or to be likely to suffer fear or distress. A witness who is a complainant in relation to a sexual offence is automatically eligible unless they tell the court that they wish not to be. The accused is not an eligible witness.

Evidence in chief – The evidence which a witness gives in response to examination on behalf of the party who has brought the person forward as a witness (see **examination in chief**). Once evidence in chief has been completed, the witness is normally made available for **cross-examination** by the other party or parties to the proceedings. Under the Youth Justice and Criminal Evidence Act 1999 it is possible for a video recording to be used as a witness's evidence in chief even where he or she is not available for cross-examination, provided that the parties to the proceedings have agreed that cross-examination is not necessary or where a Special Measures direction provides for the witness's evidence on cross-examination to be given otherwise than by testimony in court.

Examination in chief – The procedure in the trial where, normally, the lawyer representing the side who has called the witness takes that person through his or her evidence (see evidence in chief). The Youth Justice and Criminal Evidence Act 1999 allows a **video recording** of an interview with an **eligible** witness to be played as the witness's evidence in chief. When such a recording is admitted, the witness is not normally examined in chief by the lawyer at the trial. Depending on the matters raised in **cross-examination**, the party who called the witness in the first place may choose to conduct a further examination in chief, or re-examination, as it is called. Thus, for example, where the prosecution calls a woman to give evidence that she has been raped by two men, she will give evidence in chief on behalf of the prosecution, and will be open to cross-examination on behalf of both defendants, with the prosecution having the option to re-examine. Where cross-examination is pre-recorded (see **cross-examination**) re-examination will take place at the same time.

Inadmissible evidence – Evidence which, though it may be logically relevant to some disputed matter, may not legally be used to prove or disprove it. In criminal cases, the main categories of inadmissible evidence are (i) the fact that the defendant has a criminal record or is otherwise of bad character and (ii) hearsay. Broadly speaking, 'hearsay' means any statement relating to the disputed facts which is put before the court other than by means of direct oral evidence from the mouth of the person who personally experienced them. Neither category of inadmissible evidence is absolute: there are a number of exceptions to both rules. In addition section 78 of the Police and Criminal Evidence Act 1984 gives a criminal court the power to exclude any item of normally admissible prosecution evidence where the court thinks that its use would make the trial unfair. Under this provision the courts sometimes exclude evidence that was illegally obtained. In civil proceedings, the rules of evidence are more relaxed, and matters are frequently admissible which would be inadmissible in a criminal case.

Indictment – An indictment is a formal document containing the charges against the accused. Trials on indictment take place in the Crown Court. The most serious offences are

triable on indictment only, while either way offences, as their name suggests, may be tried on indictment or summarily in the magistrates' court.

Intermediary – One of the special measures which the Youth Justice and Criminal Evidence Act 1999 allows for certain **eligible** witnesses is that they may give evidence (both **examination in chief** and **cross-examination**) through an intermediary. An intermediary must be approved by the court, and assists by communicating to the witness the questions which are put to him or her, and to anyone asking such questions, the answer given by the witness in reply to them. The intermediary may explain the questions or answers to the extent necessary to enable them to be understood. An intermediary may also be called upon to assist in the making of a video recording with a view to making it the witness's evidence in chief. In such a case the court will decide whether it was appropriate to use the intermediary when deciding whether to admit the recording in evidence. Only witnesses eligible on grounds of age or incapacity may receive the assistance of an intermediary under the Act, though the court also has inherent powers to call on an intermediary in other cases. The 1999 Act does not deal with the courts' powers to call on the assistance of signed or spoken language interpreters, but it recognises that all courts have such powers.

Interests of justice – Those interests which, according to section 27 of the Youth Justice and Criminal Evidence Act 1999 may preclude a court from making a **special measures direction** for a **video recording** to be admitted as a witness's **evidence in chief**. The 1999 Act does not define "interests of justice": it is for the court to determine in the light of all the circumstances. The court is unlikely to reject the recording on this ground unless it considers that to use it would be in some way unfairly prejudicial to the accused person (or, if there is more than one, to any accused). A case where it might not be in the interests of justice to admit a recording is one where the witness has subsequently retracted the statement, and it is known that she or he intends to give evidence that contradicts it.

In relation to adult witnesses who are **eligible** for **special measures**, the court has a wide discretion whether to make a **special measures direction** in favour of video recording, which is limited only in the circumstances stated above. Where a **child witness** is involved, including a **child witness in need of special protection**, the strong preference which the 1999 Act expresses for evidence in chief to be video recorded is still subject to the "interests of justice" test.

If only part of the recording is objected to, the 1999 Act expressly states that the court must weigh any prejudice to an accused which might result from showing that part of the recording against the desirability of showing the whole, or substantially the whole, of it.

Legal representative – In this Guidance the term legal representative is used both generally, to cover all legal advisers to any party to the proceedings, and more specifically to refer to advocates appearing in court on their behalf. A legal representative will normally be a qualified solicitor or barrister. In the Youth Justice and Criminal Evidence Act 1999 the term is used in a narrower sense to mean "any authorised advocate or authorised litigator" and is particularly concerned with the role of a representative in court.

Live links – One of the **special measures** which the Youth Justice and Criminal Evidence Act 1999 allows for **eligible witnesses** is that they may give evidence (both **examination in chief** and **cross-examination**) by means of a live link. According to section 24(8) of the Youth Justice and Criminal Evidence Act 1999 "live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place

where the proceedings are being held, is able to see and hear a person there, and to be seen and heard by the judge and/or magistrates; the jury (if there is one), legal representatives acting in the proceedings and any interpreter appointed to assist the witness. The link enables the witness to give evidence from another room, without appearing in open court in the presence of the accused, the jury and the public. The witness sits in front of a television monitor and can see the faces of those who put questions to him or her. The witness's demeanour can be observed in court, and all proper questions can be put, so that the use of the live link does not detract from the right to cross-examine. The judge or magistrates are also able to monitor the conduct of any other person who is in the room with the witness in the role of supporter. **Child witnesses** are normally cross-examined using live link, the main exception being where the case is sexual, when the cross-examination is normally pre-recorded.

Magistrates' court – The criminal court that tries most offences, specifically non-serious cases which are triable summarily only, and offences triable either on indictment or summarily (either way offences) which are judged to be suitable for summary trial. Most magistrates are lay people though a minority are legally qualified District Judges (Magistrates' Court). District Judges (Magistrates' Court) may try cases alone, while lay magistrates sit in groups of at least two, usually three, and are assisted on matters of law by the magistrates' clerk. Some cases, which are tried in the Crown Court, commence in the magistrates' courts with **committal proceedings**.

Newton Hearing – Where a defendant pleads guilty to a charge, it may still be necessary to hold a hearing to establish the facts which are relevant to sentencing, particularly where there is a conflict between the prosecution and the defence as to what actually occurred. The hearing at which evidence is called to establish a factual basis for sentencing is called a "Newton" hearing after the case in which the procedure was established.

Plea and Directions Hearing (PDH) – As a preliminary to a trial in the Crown Court, a PDH may be held. At the hearing, pleas are taken and, in contested cases, both the prosecution and the defence are expected to assist the judge in identifying the key issues and to provide any additional information required in connection with the case. The purpose of a PDH is to ensure that all necessary steps have been taken in preparation for trial, and to provide sufficient information for a trial date to be arranged. Because it is envisaged that **Special Measures Directions** will be made at the PDH stage wherever possible, the court will need to have full information on all matters which bear on the provision of special measures for witnesses appearing for the prosecution or the defence. The PDH will also seek to identify any points of law or issues as to the admissibility of evidence which may arise at the trial, and where possible to resolve them by making rulings in advance of the trial.

Primary rule – Under the Youth Justice and Criminal Evidence Act 1999 witnesses under the age of 17 at the time of the relevant hearing are subject to the primary rule when the court decided which of the **special measures** to assign. The primary rule states that the court must provide for any relevant video recording to be admitted as evidence in chief, and for any evidence given by the witness which is not given by video recording to be given by means of a live link. The limitations on the rule are first, that the measure in question must be available in the area, second that the video-recording must not be one which in the interests of justice falls to be excluded, and finally that the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality

of the child's evidence. The primary rule is modified in the case of child witnesses in need of **special protection** so as further to limit the options of the court. .

Quality (of an **eligible witness's** evidence) – According to section 16(5) of the Youth Justice and Criminal Evidence Act 1999, “quality” means quality in terms of completeness, coherence and accuracy, and “coherence” for this purpose refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

Special Measures – the measures specified in the Youth Justice and Criminal Evidence Act 1999 which may be ordered in respect of some or all categories of **eligible** witness by means of a **special measures direction**. The special measures are the use of screens; the giving of evidence by live link; the giving of evidence in private; the removal of wigs and gowns; the showing of video recorded evidence in chief, cross-examination and re-examination, and the use of intermediaries and aids to communication .

Special Measures Direction – the order by which the court states which, if any, of the measures specified in the Youth Justice and Criminal Evidence Act 1999 will be used to assist a particular **eligible** witness. Directions may be discharged or varied during the proceedings, but normally continue in effect until the proceedings are concluded, thus enabling the witness to know what assistance to expect. In deciding which measures to employ the court is aiming to maximise the quality of the witness's evidence so far as practicable, whilst still allowing the party challenging the evidence to test it effectively. The witness's own views are also considered. In the case of **child witnesses**, the court's powers of choice are more limited (see **child witnesses; primary rule; special protection**).

Special Protection – The Youth Justice and Criminal Evidence Act 1999 provides that a child witness is in need of special protection where the crime is a **sexual offence**, as defined by s35(3)(a) or an offence of assault or a related offence as defined by s.35(3)(b). In the former category are crimes of rape, indecent assault, unlawful sexual intercourse and all other sexual offences under the Sexual Offences Act 1956, together with buggery and a number of other statutory sexual offences likely to be directed against children. In the latter category are offences involving kidnapping, false imprisonment, child abduction, cruelty neglect and any offence involving injury or the threat of injury to any person. Where an offence of either sort is involved the “primary rule” is qualified to the extent that the court cannot elect to dis-apply the rule on the grounds that it believes that to apply it will not maximise the quality of the child's evidence. In addition, where the offence is sexual, the court must include in the Special Measures Direction a provision for video recorded cross-examination unless the child does not want that measure to apply.

Trial – Unless the defendant pleads “guilty” the prosecution must establish his guilt by calling evidence, the truth of which is then assessed (“tried”). In the Crown Court, the body that decides the disputed issue of guilt or innocence is the jury. In the magistrates' court it is the magistrates.

Video recording – according to section 63 of the Youth Justice and Criminal Evidence Act 1999, “video recording” means any recording, on any medium, from which a moving image may by any means be produced, and includes the accompanying sound-track.

Vulnerable (of a witness) – the Youth Justice and Criminal Evidence Act 1999 provides for the making of special measures directions to assist certain vulnerable witnesses in giving

evidence. Vulnerability may arise through youth, incapacity or circumstances. Witnesses who qualify for such assistance under the Act are termed **eligible** witnesses.

Witness – according to section 63 of the Youth Justice and Criminal Evidence Act 1999, “witness”, in relation to any criminal proceedings, means any person called, or to be called, to give evidence in the proceedings.

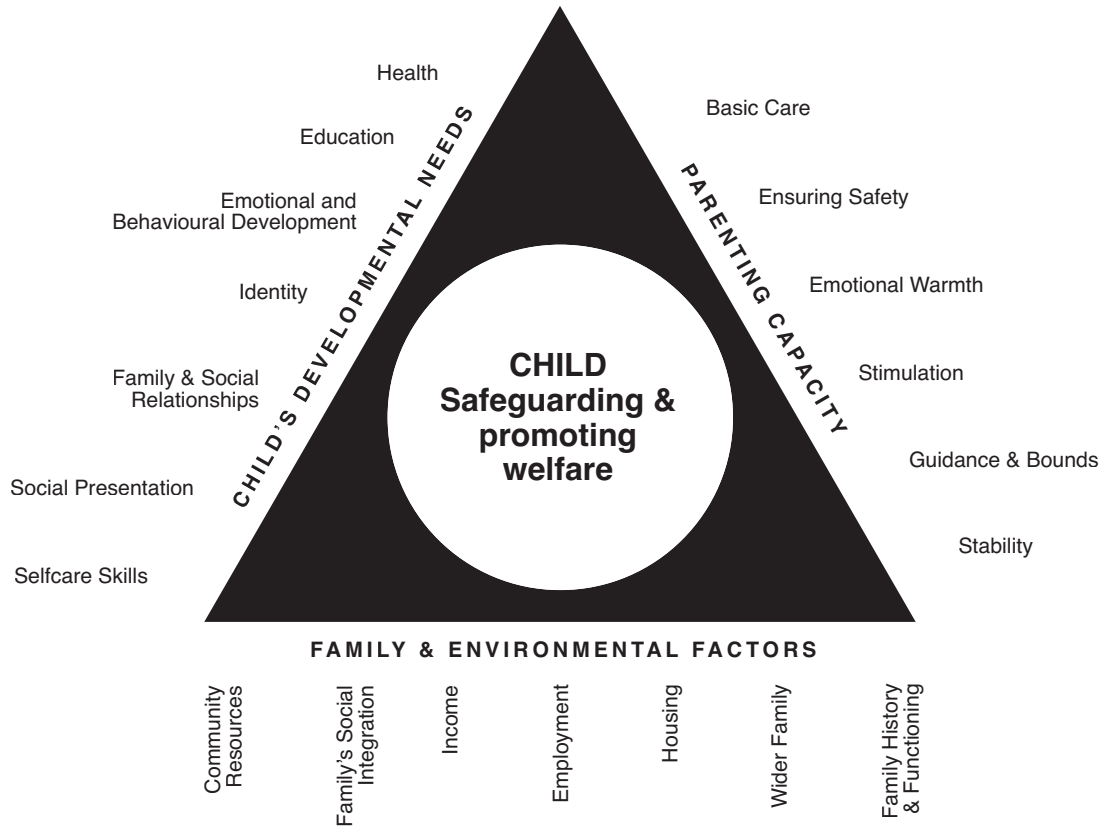
Youth court – The Youth Court deals with most young people aged between 10 and 17 who are prosecuted for criminal offences. However, young people who are accused of homicide and rape are heard in the Crown Court. The Youth Court can also send young people accused of very serious crimes, such as indecent assault and cases where an adult could be sent for prison for 14 years or more, to the Crown Court if it thinks its own powers are not enough. Magistrates who sit in the Youth Court receive specialised training.

B ADMISSIBILITY OF VIDEO RECORDING UNDER OTHER PROVISIONS OF THE CRIMINAL JUSTICE ACT 1988

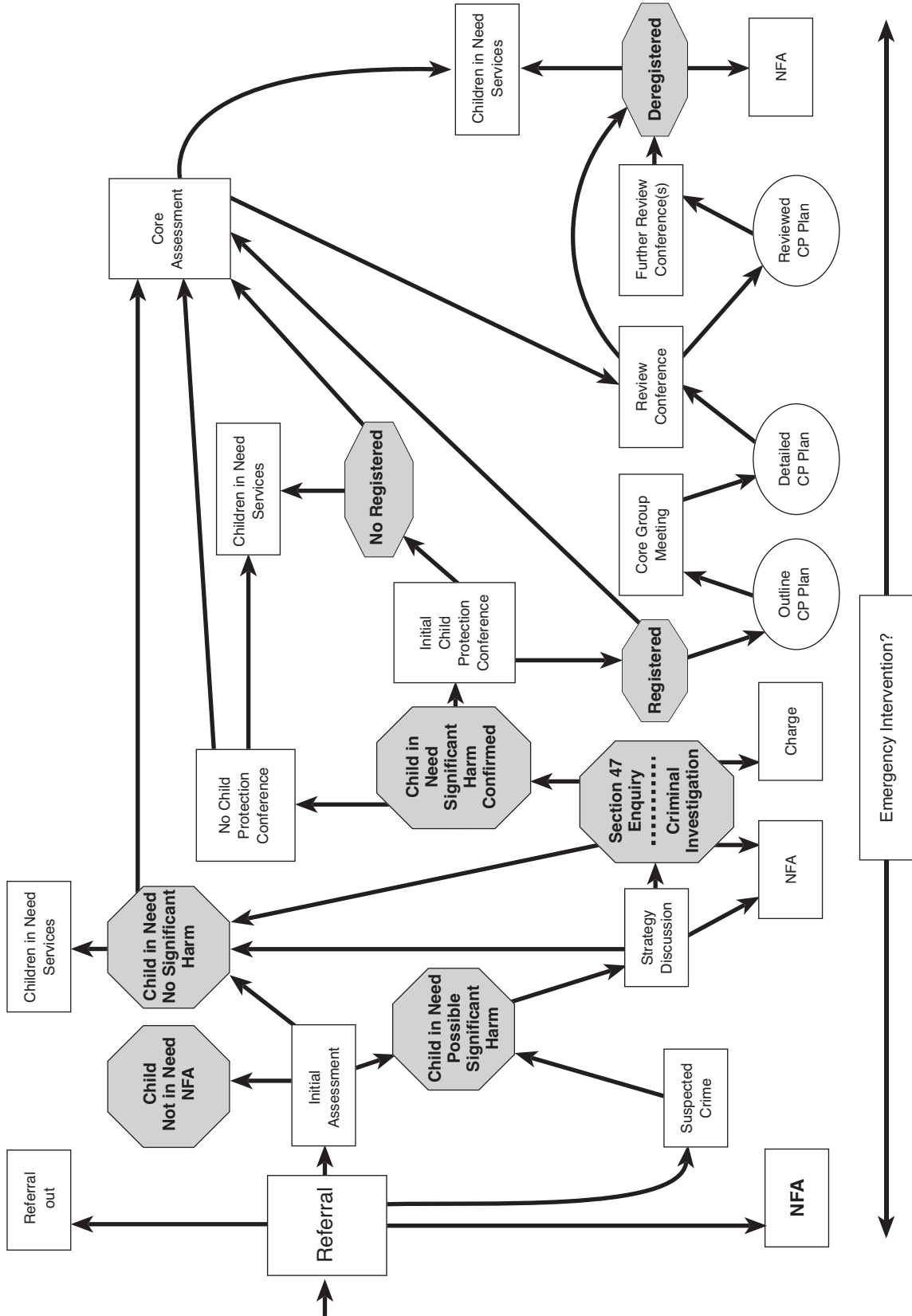
- B1** The situation may arise where it is thought unlikely that a vulnerable or intimidated witness will be available to be cross-examined. There may still be some point in interviewing the witness on video¹ as it may still be possible to use a video recording in evidence even where the witness does not go to court.
- B2** Under the Criminal Justice Act 1988 a statement in a document (which includes a video recording) may be put in evidence to prove any fact of which the maker of the statement could have given evidence in person. A statement made by any competent witness, including a vulnerable or intimidated witness could be put in evidence under this provision. The court would, however require to be satisfied of certain further conditions.
- B3** First, it is not enough that the witness does not want to give evidence. He or she would have to be unavailable at the time of the trial for one of the following reasons: *that he or she is dead; or mentally or physically unfit to give evidence; or outside the UK in circumstances where it is not reasonably practicable to call him or her, or that he or she is unable to be found even though reasonable steps have been taken to find him or her; or that the statement was made to a police officer or a person fulfilling a similar function and the child will not give evidence through fear or because he or she has been kept out of the way.*
- B4** Statements made by witnesses to police officers, social workers or others who receive them in the course of their profession or occupation may also be received on the ground that the witness cannot reasonably be expected to remember the facts to which the statement relates by the time of the trial.
- B5** The second condition applicable to all recordings put forward as evidence under the 1988 Act is strictly applied. It lays down that a statement which was prepared in the course of a criminal investigation, or with a view to being used in a criminal case, will only be received under the 1988 Act if the court can be persuaded by the party proposing the evidence that it would be in their interest of justice to do so. Most video recorded interviews will be required to satisfy this second, condition, which is very restrictively applied.

¹ Under sections 42 and 43 of the Children and Young Persons Act 1933 there is provision for written depositions from sick children to be admitted as evidence in criminal proceedings.

C THE ASSESSMENT FRAMEWORK



D CHILD PROTECTION FLOW CHART



E CONDUCTING A VIDEO RECORDED INTERVIEW – THE LEGAL CONSTRAINTS

E1 Introduction

E1.1 As explained in the Introduction to this Guidance, a video recorded interview may replace the first stage of a vulnerable or intimidated witness's evidence in court in a criminal case. The video recording will count as evidence of any fact stated by the witness of which he or she could have given evidence in court. This means that, in principle, the rules which govern procedure in court may be applied to the video recorded interview.

E1.1.2 There are rules which can render certain matters **inadmissible** irrespective of their truth, so that they cannot form part of the case. A criminal court has no power to depart from such rules. However there are also conventions of the court which the court may relax where the need arises. The most obvious example of such a convention is the avoidance of leading questions.

E1.1.3 The court will not expect video recorded interviews exactly to mimic examination of a witness by counsel in court. But rules of evidence have been created in order to ensure a fair trial for the **defendant**, and they cannot be ignored. Where the recording which is being made is likely to form part of the prosecution's case, early consultation with the Crown Prosecution Service should assist in identifying potential areas of difficulty. If the recording may be tendered in evidence for the defence, the defendant's legal representative should be consulted.

E1.1.4 It is therefore good practice to conduct an interview as far as possible in accordance with the rules which would apply in court. *Interviewers who ignore these rules are likely to produce video recordings which are unacceptable to a criminal court.* They will thus fail to spare the witness from having to give the first stage of his or her evidence in person. Because the provisions for video-recording cross-examination and re-examination under the 1999 Act will, (*when available*), apply only to cases in which a video-recording has been given in evidence as the witness's evidence in chief, the rejection by the court of a video recording as evidence in chief means that these further provisions will also be unavailable at trial.

E1.1.5 This Appendix explains the rationale behind those rules most likely to affect a video recorded interview – *leading questions, previous statements showing consistency or truth, statements about the bad character of the accused*. As with most rules there are circumstances in which they need not be applied. This is easier to determine when a child is being questioned in court and **the legal representatives** can agree at the time with the judge or magistrates what is acceptable. The interviewer has no such opportunity and should therefore err on the side of caution but, as this Appendix goes on to describe, there are circumstances when the rules can properly be disregarded.

E2 Leading questions

E2.1.1 It is not generally permissible to put leading questions to a witness. A leading question is one which either suggests the required answer, or which is based on an assumption of facts which have yet to be proved. Thus 'Daddy hurt you, didn't he?'

is an example of the first type of leading question, and ‘When did you first tell anyone about what Daddy did?’ put to a child who has not yet alleged that Daddy did anything, is an example of the second type.

E2.1.2 Where a leading question is improperly put to a witness in court, the answer is not inadmissible but may be accorded little or no weight because of the manner in which it was obtained. When witnesses testify live in court a leading question can be objected to before a witness replies. The party objecting to such a question in a video recorded interview has no such opportunity and so may ask for a part of the video recording to be edited out.

E2.1.3 However there are circumstances where leading questions are permissible:

(a) A witness is often led into his or her testimony by being asked to confirm his or her name and address, or some other introductory matter because these matters are unlikely to be in dispute. More central issues may also be the subject of leading questions if there is no dispute about them. For example, where it is common ground that a person, X, has been killed at a particular time, it is not ‘leading’ to ask a witness ‘What were you doing when X was killed?’ However, at the interview stage it may not be known what facts will be in dispute at the trial and so it will be safer to assume that most matters are still in dispute.

(b) The courts also accept that in cases other than the above it is *impractical to ban leading questions*. This may be because the subject matter of the question is such that it cannot be put to the witness without leading, as for example when the witness is to be asked to identify the person who hurt him or her. Or it may be because the witness does not understand what he or she is expected to tell the court without some prompting, as in the case of a very young child or a person with a learning difficulty.

E2.1.4 An interviewer who follows the provisions in the Guidance as to the conduct of an interview (see Chapter 2B) will avoid leading questions. As the courts become more aware of the difficulties of obtaining evidence in an interview with a vulnerable or intimidated witness, particularly from witnesses who are very young or who have a learning difficulty, and of counteracting the pressures on some witnesses to keep silent, a sympathetic attitude may develop towards necessary leading questions. A leading question which succeeds in prompting a witness into providing information spontaneously beyond that led by the question will normally be acceptable. However, *unless there is absolutely no alternative*, the interviewer should never be the first to suggest to a witness that a particular offence was committed, or that a particular person was responsible. Once this step has been taken it will be extremely difficult to counter the argument that the interviewer put the idea into a suggestible witness’s head and that the witness’s account is therefore false.

E2.1.5 If leading questions are judged by the court to have been improperly used during the interview it may well be decided not to show the whole or that part of the recording to the court, so that the witness’s answers will be lost. Alternatively the whole interview may be played, leaving the judge to comment to the jury, where appropriate, on the weight to be given to that part of the evidence which was led.

Neither outcome is desirable, and both can be avoided if interviewers keep off leading questions (see Chapter 2B)

E3 Previous statements

E3.1.1 A witness in court is likely to be prevented by the court from giving evidence of what he or she has previously said or what was said to him or her by another person. If allowed in evidence, previous statements might have two functions. First, in the case of the witness's own statement, the court might be asked to take account of the fact that the witness has consistently said the same thing in deciding whether he or she is to be trusted. Secondly, in the case both of the witness's own statements and of statements made to him or her by others, the court might be asked to take the further step of deciding that what was said out of court was true. In a criminal trial, both functions are frowned upon: the first because, in law, it says little for the reliability of a witness to show that he or she has been consistent, and the second because courts are reluctant to accept statements as true unless made in court and subject to the test of cross-examination.

E4 Previous statements showing consistency

E4.1.1 Although consistency adds little to the credibility of the witness, it will always be proper for the interviewer to ask the witness if he or she has told anyone about the alleged incident(s), who he or she told, when he or she told them, and why. But the interview must not ask the witness details of what was said except in certain circumstances. These circumstances are as follows:

(a) when a witness has *voluntarily given details of an alleged sexual offence soon after that offence took place*. A complaint of buggery made by a boy six months after the incident upon being forcefully questioned by his mother would not be admissible, but the details of a spontaneous allegation of buggery made by the boy on the day of the incident could be mentioned.

(b) *when a witness has previously made a positive identification of the accused*. Identification may be formal (in the course of an identification parade) or informal, for example where a child points out the defendant to a teacher and says 'This man tried to push me into his car.' Where such a prior identification has been made, it may be referred to in the video recorded interview.

E4.1.2 A case which may give rise to difficulty is where there is some doubt as to the fairness of admitting the identification. If, for example, a child tells her father that she has just been sexually assaulted by a man in a leather jacket, and the father apprehends the first leather-clad man that he sees and demands 'Is this him?', a court might be understandably reluctant to admit the child's positive answer as a positive identification and it should not therefore be mentioned in the video recorded interview. The interviewer must therefore be aware of the circumstances of any identification made by the child before the interview. (See Appendix H for further information and advice in conducting identification parades with vulnerable witnesses).

E5 Previous statements showing truth

E5.1.1 The technical name for an out-of-court statement which is used in court to prove that what was said is true is 'hearsay'. The general rule is that hearsay is inadmissible in a criminal trial. In one famous case, a little girl who was adjudged too young to give evidence told her mother that she had been indecently assaulted by a 'coloured boy'. A white man was charged but he could not call the mother to give evidence of what the child had said because the child's statement had been made out of court and was hearsay. The same result would have followed if the child had said that her attacker was white and the prosecution had wished to refer to her statement.

E5.1.2 Words (and conduct e.g. nodding in agreement) are only hearsay if used to prove their truth. There may be other reasons for proving that words were spoken in which case the hearsay rule is not broken. For example a witnesses' report of a child's statement 'Dad taught me to fuck' would be admissible to demonstrate a child's use of age-inappropriate language but inadmissible as evidence that the child's father had had intercourse with her.

E5.1.3 As with most other rules of evidence, the hearsay rule is not absolute. The use of a video recording of an interview with a witness as part of the witness's evidence is itself an example of a statutory exception to the rule. Without a detailed appreciation of the scope of the exceptions it will be difficult for an interviewer to gauge the chances of a hearsay statement being regarded as admissible in court and it is best to aim to avoid the inclusion of previous statements in the interview so far as possible. There are a couple of rules of thumb which should assist:

- (a) Any statements made by the witness about the alleged offence prior to the interview are likely to be hearsay. Therefore, subject to the advice in – paragraph 3.57 such statements should not be deliberately elicited from the witness during a video recorded interview. For example a witness should not be asked to relate any conversations he or she may have had concerning the offence.

If the witness spontaneously begins an account of what has been said to him or her the interviewer may decide that it is best not to interrupt. If so it should be remembered that this section of the tape is likely to be edited so it will be necessary to go over any relevant non-hearsay information gleaned at this point at a later stage of the interview.

- (b) The video recording should capture the witness's responses directly as the interviewer's description of the witness's response is itself hearsay. For example, if a child is asked where she was touched by an abuser and in response she points to her genitals, that action should be captured by the camera. It will not be enough for the interviewer to say 'She is pointing to her genitals' as this is a statement of the interviewer, not the child. Once this is understood it should be relatively easy to ensure that the relevant evidence comes from the witness.

E6 Character of the accused

E6.1.1 An important rule of evidence concerns the previous bad character of the accused. Under this rule it is not generally permissible for the prosecution to bring evidence of the accused's bad record or reputation, or of other misconduct in which he or she has been involved, in order simply to show the court that he or she is a bad person who is likely to do wrong. For example, a jury trying a man for sexual offences is likely to be kept in ignorance of his criminal record for such offences or of other charges of a similar nature which may have been made against him. The interviewer must be very careful to avoid mention of such matters and should try to steer the witness away from any mention of such discreditable facts

E6.1.2 The rule against admitting evidence showing the accused's bad character is, like the hearsay rule, subject to exception. Evidence of one offence may be admissible in the case of another offence by reason of the close connection or similarity between them. For example, where two or more women claim to have been indecently assaulted by the same person the evidence of one is sometimes used to support the allegations of the other. This is only permissible where the evidence goes beyond showing that the accused is a 'bad person likely to do wrong' and independently suggests that he is the person who committed the offence or offences in question. In other words, the probative value of the evidence must outweigh its prejudicial effect.

E6.1.3 In many cases the line between admissibility and inadmissibility is a difficult one to draw. Complex legal considerations are involved. All that can be done before the trial when making a video recording that may be put in evidence by the prosecution is to estimate the chances that the court will be prepared, say, to hear that a school-teacher has been accused of buggery by four of his pupils, or a father of incest by two daughters. This presents no difficulty for the interviewer if the evidence of one witness is quite separate from that of another. But it may be that the **complainant** of one offence claims to have witnessed the occurrence of another offence against a different complainant. In such cases it might be advisable, following consultation with the Crown Prosecution Service, to record separately the witness's account of (i) offences allegedly committed against him or her, and (ii) what he or she knows about offences involving other complainants.

E7 Court's discretion to exclude evidence

E7.1.1 A court trying a criminal case has a general power to exclude evidence tendered on behalf of the prosecution, even though the evidence complies with the strict rules of admissibility. Under section 78 of the Police and Criminal Evidence Act 1984, the court may exclude evidence on the grounds that, because of the way in which it was obtained or for any other reason, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. Courts may also exercise a common law power (that is, one supported by previous decisions of the courts) to exclude evidence the prejudicial effect of which outweighs its probative value. The definition of these powers is deliberately broad in order to preserve their flexibility.

E7.1.2 It is unlikely that the powers described above will be invoked with regard to video recorded evidence, as the court has, under section 27(2) of the 1999 Act, the duty to exclude a recording which in the **interests of justice** ought not to be admitted. This duty applies equally to video recordings tendered in evidence by the prosecution and those tendered by the defence. It also empowers a court to exclude part of a recording only. The court is likely to refer to section 27(2) first when ruling on whether a video recording should be received in evidence, and it is unlikely that a recording which the court decided to admit under section 27(2) would be found to be objectionable by applying either the common law power or the power in section 78 of the Police and Criminal Evidence Act 1984 described above. A court might, however, invoke its discretion under section 78 or the common law to exclude other evidence, for example the evidence of what occurred when a witness attended an identification parade that was adjudged to have been unfair.

F COURT WITNESS SUPPORTER IN CCTV LINK ROOM: NATIONAL STANDARDS

F1 Role of the supporter

The role of the court witness supporter is, by their presence, to provide emotional support to the witness and reduce their anxiety and stress when giving evidence, thereby ensuring the witness has the opportunity to give his/her best evidence.

The role of any accompanying member of the court staff would include ensuring that the equipment in the CCTV link room is working correctly.

F2 Identity of the Supporter

If the witness expresses a wish to be supported in the CCTV link room, there can be benefits, both in reducing the stress suffered by the child, and in the quality of the witness' evidence if this wish is granted. However, in each individual case, it is a matter for the judge to determine who should accompany a witness in a remote TV link room.

An application by the prosecution or defence for the witness to give evidence by means of live television link may be made in advance of the trial for determination at the Plea and Directions Hearing.

The key characteristics of anyone acting in this capacity are as follows:

- Someone **NOT** involved in the case, with no knowledge of the evidence, and who has not discussed the evidence with the witness;
- Someone who has received suitable training in their role and conduct (depending upon the supporter's identity, consideration needs to be given to their training)
- Someone with whom the witness has a relationship of trust

Ideally, this should be the person preparing the witness for court, but others may be appropriate.

Once the decision has been reached on the identity of the supporter in any particular case, the witness should be informed by either the officer in the case or the court witness supporter himself or herself. Additionally, the Witness Service (if they are not the preparer), CPS and police should also be informed.

The court witness supporter's conduct

The court witness supporter will need to act according to agreed standards of conduct, covering communication with the witness, both within and outside the TV link room, ensuring the witness' comfort, alerting the judge to any problem arising while the witness is giving evidence. The suggested behaviour to be observed in this role is as follows:

Before the witness gives evidence

- Accept and follow instructions of the judge with regard to witnesses and procedures to be observed
- Liaise with Witness Service (where the court witness supporter is not from the witness service)
- Ensure the room is ready for the witness*
- Escort the witness and carer to the waiting room*
- Remain with the witness at all times whilst in non public areas of the court building
- Settle into accommodation in waiting room
- Be present in court to take the oath as required by the judge
- Escort the witness to the remote video room

In the TV link room

- Sit the witness in the chair and fix microphone to their clothing*
- Place the warning notice in the corridor and close the door*
- Sit beside the witness and in view of the camera
- As directed by the judge, swear in the witness by enabling him or her to repeat the oath or promise, as appropriate
- Communicate relevant concerns (via the usher or agreed procedure) to the court
- Be present throughout the time the witness is in the room
- Ensure that the witness can clearly see and hear the transmission*
- Ensure that the witness can be clearly seen by the courtroom at all times*
- Remain visible to counsel and defendant during evidence*
- Hand any exhibits to the witness without comment*
- Remain with the witness in the event of failure of the equipment
- Prevent any unauthorised person entering the room
- Ensure there is no attempt to interrupt, intervene or intimidate the witness by any other person present in the TV link room

* Denotes tasks which could be carried out by the court witness supporter, but which would be more appropriate for the member of court staff, if one is present

Contact with the witness

- Do not speak to the witness about the case, or about his or her evidence, before or during the proceedings, or in any interruption to the proceedings
- Do not explain, interpret, guide or make comments about the evidence in the case
- Do not interrupt or intervene while court proceedings are taking place, unless it is to alert the judge to a problem
- Do not prompt or seek to influence the witness in any way
- Ensure any other person in the room observes these prohibitions
- Maintain a neutral but sympathetic manner, in order to provide comfort and reassurance and help him or her give their evidence clearly with a minimum of stress
- If the witness becomes distressed, and the proceedings are interrupted, the supporter may listen if the witness talks about the case, and make comforting gestures to ease the witness' distress
- When requested by the Judge, direct the attention of the witness to the questioner

In case of difficulties

- In the event of a problem, request the usher to contact the court by telephone
- If necessary, speak to the judge via the TV link (according to the procedure previously agreed with the court)

After the evidence has been given

- After completion of the evidence, return with the witness to a safe place

Skills required by the supporter for a child or vulnerable or intimidated adult witness

- Impartiality/lack of emotional involvement
- Communication skills (and with parents/carers, professionals and young people) particularly listening skills
- Awareness of the needs of abused children and adults, effects of crime and the effects of the court appearance on child witnesses and vulnerable adults
- Flexibility
- Knowledge of the Criminal Justice system
- Confidence of the police, CPS and the court
- Ability to liaise and work with other agencies
- Familiarity with basic rules of evidence and awareness of the danger of contaminating or discrediting the evidence of the witness.

G GUIDANCE ON INVESTIGATIVE INTERVIEWS WITH DISABLED CHILDREN

This Appendix sets out additional considerations for effective interviewing of disabled children whose impairments affect their communication with others. References are provided for further reading and resources. Disability can take many forms and specialist advice should routinely be sought in cases where communication impairments are likely to be an issue in the interview. It is important to note that knowledge is still growing in this area and for some children it is not yet possible to proscribe techniques for communicating about possible abusive experiences in ways which are reliable and evidentially safe.

G1 THE INTERVIEW

G2 Phase One – Rapport

It is important that adequate time is allowed for this phase. Establishing rapport between the interviewer and the child will in itself require more time and attention, especially if a third person is needed to assist communication. There are also additional functions of the rapport phase for disabled children:

- relax and inform the interviewer,
- educate the viewer of the video about the child and their impairments
- establish additional ground rules, for example clear expectations of any additional adult taking part in the interview.
- dispel common myths and prejudices (e.g. physical impairments inevitably affect a child's intelligence) and
- allow the child to demonstrate communication and understanding.

G3 It is important for the child to sense the importance of communicating clearly, and for the interviewer to develop as much skill as possible in talking with and understanding the child. Any difficulty that the interviewer or observer has in understanding the child's account at the time is likely to be magnified for any person subsequently viewing the video recording. The interviewer needs to be comfortable about referring to this and asking the child to repeat or rephrase or clarify as needed, and the supervisor needs to ensure that the recording can demonstrate the child's communication method.

G4 The child will need to be given an opportunity to explain their world, especially where this might be unusual and relevant for the interview (e.g. if the child stays away from their family, if there are different adults involved with their care at home or elsewhere, if the child needs intimate care or other 'unusual' help in day to day life etc.) It is important to establish the context at this stage to give meaning to what may follow as it is often harder to do so later. If, for example, a disabled child has a number of adults involved in their care, it will be important to demonstrate their ability to distinguish reliably between these different people. Alternatively, if a child needs very invasive care procedures (for example intermittent catheterisation) it will be helpful to establish the child's comprehension of this as a process before any discussion of possible sexual abuse ensues.

- G5** The experiences of disabled children may make them more compliant and eager to please or to see themselves as devalued. Some children with learning disabilities may have problems understanding the concept of truth, and interpreted communication may lead to additional confusions. Some children may need explicit permission to refute adult suggestions. Even with this permission, some children may find this impossible to do. It can help if everyone in the room makes a commitment to tell the truth (including the interviewer and any additional adults). It is important to convey that the interpreter as well as the child and the interviewer should say ‘I don’t know how to say that’ or ‘I don’t understand’ and not to guess if they are unsure.
- G6** Disabled children may need very explicit permission to request breaks, and a clear, simple sign, gesture or word with which to do so. Given the concentration required by all parties, it is important to establish that the adults can request breaks as well as the child.

Phase Two – Free Narrative Account

G7 Communication impairments do not necessarily prevent a child from giving a spontaneous account. Exceptions to this include when a child is:

- relying heavily on yes/no signalling
- using a communication board with a vocabulary that makes it difficult to discuss certain topics, or
- where a child has not reached the developmental stage of being able to tell a story.

Care should be taken to ensure that all responses are made by the child alone, without the intervention of a third party. Assisted communication (see Chapter 3, paragraph 3.26) is unlikely to be acceptable to the courts.

G8 A child with learning disabilities may often require a greater degree of facilitation before it is clear whether an offence has occurred and if so, what form it took. Open-ended prompts should be used as far as possible. Reflecting back to the child in an open, non-directive manner what she or he has told the interviewer helps to ensure accuracy as well as facilitating the production of further details.

Phase Three – Questioning

G9 A clear and informed plan for questioning is essential to ensure that a disabled child is not expected to respond to questions they cannot answer, or questions that are inherently confusing. This is important not just in terms of the child’s emotional welfare, but also in order to avoid undermining the child’s credibility. For example:

- Disabled children may be dependent on others for intimate care; interviewers will need to be able to distinguish between necessary caring or medical procedures and abusive or criminal actions.
- Children may be receiving orthopaedic treatment or using postural management equipment that might cause pain or discomfort but should never cause injury.
- A child’s condition may restrict the positions he or she can get into or be placed into and some positions may in themselves be dangerous.

- Certain physical or neurological conditions are likely to affect the sensations a child can feel.
- A child with a sensory impairment may be restricted in some of the information they can provide about the identity of the alleged suspect or details of the alleged offences.

G10 With some methods of communication, such as communication boards, questions can only be asked in a closed form which demands a yes or no response. Techniques, which can increase the evidential validity of closed questions, include:

- Avoiding a series of ‘yes’ responses by suggesting less likely alternatives first
- Completing any series of linked questions, rather than halting at the first ‘yes’, and
- Reverting to open questions wherever possible

When offering the child a range of alternatives, consistent wording is needed for each, particularly if the child has a learning disability or poor short-term memory.

Phase Four – Closing the Interview

G11 Given the relative lack of knowledge of investigative interviewing of disabled children, it would helpful for developing practice to obtain feedback from the child on their experience of the interview and perhaps also to acknowledge again the additional barriers to communication that discussion of sensitive issues such as abuse can provide. As long as there is no discussion of the evidence itself, such debriefing need not take place on camera, though a note should be kept of the points raised.

H IDENTIFICATION PARADES INVOLVING VULNERABLE AND/OR INTIMIDATED WITNESSES

- H1** The attendance of a vulnerable or intimidated witness at an identification parade or video identification (in which the witness sees a series of video clips of different people, including the suspect) requires advance planning and liaison between the officer responsible for the identification procedure and the officer with knowledge of the witness. A pre-trial support person who is not, or is not likely to be, a witness in the investigation should accompany the witness. Officers responsible for identification procedures should consider special measures to accommodate the needs of the witness but must take care to ensure that the procedure remains fair to the accused.
- H2** The assessment of the witness's ability (see Chapter 2, paragraphs 2.49-2.52 and Chapter 3, paragraphs 3.19-3.39) is relevant. Explanations to the witness about the purpose of the identification procedure and the wording of instructions during the procedure itself should be considered ahead of time and tailored to the witness's level of understanding.
- H3** If the witness has particular communication difficulties, or requires an interpreter, someone who can communicate with the witness must attend. If the witness does not recognise numbers, consideration should be given to the use of symbols to distinguish participants. The symbols must not have any special meaning for the witness. The best evidence is a verbal identification, but if witnesses are unable or likely to be unable to speak, they should be advised that it is acceptable to point. If the witness uses spectacles, contact lenses or a hearing aid, these must be used at the identification procedure.
- H4** At identification parades, a one-way screen should always be used and demonstrated to witnesses before the parade itself. They should be encouraged to say if they do not understand any part of the procedure. Arrangements should be made to escort vulnerable or intimidated witnesses to and from the location where the parade is held. They should be reassured that they will not encounter anyone who took part in the line-up on leaving the building.
- H5** Code D of the Police and Criminal Evidence Act (PACE) provides for the identification of persons by the police. Annex A of Code D sets out the procedures for identity parades and provides that either a colour photograph or a video film should be taken of the parade. Code D provides for other forms of identification procedure such as video identification, group identification and confrontation which may be video recorded. A witness giving video taped evidence or testifying over the TV link will be unable to point out the accused in court. In the absence of a requirement in the code to video record the procedure, it would be good practice to video any identification procedure where the witness subsequently may not be physically present in the courtroom.

J NATIONAL STANDARDS FOR YOUNG WITNESS PREPARATION

J1 Purpose of preparation

- to help the young witness feel more confident and better equipped to give evidence at court
- to help the young witness understand the legal process and their role within it
- to encourage the young witness to share their fears and apprehensions about the court process and thus assist the young person give their best evidence in court

It must **not** involve rehearsing the evidence or coaching the witness.

J2 Key characteristics of person undertaking witness preparation

- Ability to communicate with young children and young people in age appropriate language
- Ability to demonstrate a caring, mature and supporting attitude to both the young person and their parent or carer
- Ability to deal with difficult feelings and emotions
- Willingness and ability to offer continuity of support throughout the trial
- Willingness and ability to work within a framework of Equal Opportunities
- Willingness and ability to work within a framework of confidentiality

In addition to the above the person undertaking witness preparation must:

- be seen to be independent and focusing entirely on the young person's welfare in preparing for the experience of giving evidence
- not have been involved in the preparation of the case
- not discuss the details of the case or the evidence that the young person has given or is to give
- have received basic training from local agencies

J3 Key tasks

- obtaining information on which special measures have been ordered by the court at the PDH or pre-trial hearing to assist the young witness, including whether consideration has been given as to who accompanies the young witness while they give evidence
- liaising with police and CPS if there are any changes in circumstances which might require a variation in the court measures to be provided
- liaising with any other agencies that may be involved with the young witness and/or the family
- to undertake an assessment of the young person's needs in general, in relation to a court appearance, taking account of their developmental status

- to decide when the witness preparation should begin, bearing in mind the trial date and who the young person wishes to be present when this takes place
- ensure that the young person and parent or carer has the Young Witness Pack and, if appropriate, view the Young Witness video with the young witness and their parent or carer
- help the young witness to understand the court process and their role in it. This will include discussion of the roles of the participants in the case, the importance of telling the truth and the nature of cross-examination
- prepare the young person for any possible outcomes of the trial e.g. late change of plea, adjournments or acquittal
- liaise with the Witness Service to arrange a familiarisation visit to the court before the trial and ensure that the young witness and their parent or carer, if appropriate, are shown whatever special measures have been ordered by the court in their case
- provide the young person with stress reduction and anxiety management techniques
- involve the young person's parent or carer
- in conjunction with the Witness Service, communicate information (including the young person's wishes) to and from the police, CPS and courts, keeping the young person, parent or carer informed and ensure that practical arrangements are made for the young person
- co-ordinate arrangements with the Witness Service Co-ordinator or the Court Liaison Officer to ensure that the waiting time at the court is kept to a minimum
- de-brief the young witness and parent or carer and arrange for any follow-up support, including the need for specialist help
- ensure that the work with the young person is fully documented

K STORAGE, CUSTODY AND DESTRUCTION OF VIDEO RECORDINGS

A video recording made in accordance with this Memorandum can be a highly valuable piece of evidence in any investigation. It is also a record of intimate and highly personal information and images, which in the interest of the witness, should be held strictly in confidence and for its proper purpose. It is therefore essential that adequate arrangements are made to store the recording safely and securely and that access to it or to any official copies is restricted to those authorised to view the recording.

Ownership

- K1** The video recording will be treated as a document for the purposes of criminal proceedings and the statements in it will not belong to anybody except insofar as they are the property of the person who made them. However, the medium on which they are made is likely to be the property of the police or social services (as the case may be) and the fact of ownership of the videotape itself conveys certain rights and responsibilities which if properly exercised, will help to ensure that the recording is appropriately safeguarded.
- K2** It is essential that *all* videotapes, whether court exhibits or copies, containing interviews prepared under joint police/social services or NSPCC investigative arrangements and conducted under this Memorandum should be kept under optimal conditions. Decisions regarding access to any tape should be taken by the principal agency or agencies involved in their preparation. Once the case has passed to the Crown Prosecution Service, decisions as to disclosure of information will be made by them. In taking such decisions, all agencies should have regard to the provisions in Section 4 below and to Annex J of this Memorandum.

Tape registration, storage, management and disposal

- K3** It is essential that local guidelines are developed by the police in conjunction with other relevant agencies covering the registration, storage and management and disposal of video and audio material. Such guidelines should cover all of the issues reviewed in this Appendix. Wherever practicable, one named person, the tape librarian, should be responsible for supervision of these functions. The tape librarian should keep a logbook in which the details of all interviews are registered and the history and movements of the tape-recorded. The initial entry in the logbook should record the serial number of the recording, the names of the witness and the interviewer(s) and all others present, as well as the date and time of the interview. Any subsequent copying, transporting or editing of tapes would be recorded against the relevant entry in the tape logbook.

After the Interview

- K4** Once a recording is completed, the tape should be fully rewound and ejected from the recorder. The 'record protect' device fitted to cassettes should be activated to prevent the accidental erasure of the recording. The tape should be checked for the quality of the recording.

- K5** It is recommended that a brief index to the tape is prepared at this stage, in liaison with the interviewer so that the most relevant passages regarding the alleged offence can be readily located later. A specimen Index sheet is illustrated in Appendix M. The index is not a précis of the tape, but it should serve a similar purpose, enhanced by the video recording itself. The index should be carefully preserved and safeguarded along with other papers on the case. If a summary of the interview has also been prepared, a copy should be kept with the index. Paper documents should never be placed within the tape box itself because of potential damage to the tape.
- K6** The master tape of the video recording and all copies should be individually labelled and identified in the logbook, so that copies can be distinguished one from another and the master tape readily identified. The ownership of the tape should be treated in the same way as an exhibit for use in court and a signed exhibit label placed over the open side of the box. The seal should not be broken except in the presence of a representative of CPS and for the purposes of copying and access (see Section 2.3. below). The ownership of the master tape and any copies should be clearly indicated with a warning that none must be copied or shown to unauthorised persons. A recommended form of words for the label is shown in Appendix P.

Storage

- K7** Video recordings will inevitably suffer deterioration and loss over time; videotape should not be considered a permanent archiving medium. New technologies, such as digital recording, may solve some of these problems. In the meantime, however, rates of deterioration can be greatly reduced by proper storage arrangements and periodic inspection. Detailed guidance on the storage and management of tapes is set out in *Video recorded interviews with child witnesses published* by the Police Scientific Development Branch (Para's 6.7 to 6.7.3) from which the following guidelines are derived.
- K8** Tapes should be stored on edge, i.e. with the reels vertical, so that the tape is supported by the hub. They should be kept in rigid cases, which are clean and impervious to dust, but they should not be sealed in airtight containers, which may cause condensation damage. When taken out for viewing or copying, tapes should not be left in video recorders unnecessarily, particularly when switched off. Excessive use of the pause facility can damage or even rupture a tape. Tapes should never be left lying about where unauthorised persons can gain access to them.
- K9** Before long-term storage, tapes should be first wound and then rewound and checked for damage. Tapes should be kept in locked, secure containers. Videotapes should not be subjected to extremes of temperature or humidity and should be stored away from any devices which cause a strong electrical or magnetic field, such as electric motors or loudspeakers.

Copies and Access

- K10** Decisions about copying and access to video recordings prepared under this Memorandum should be taken individually and with careful regard to the following principles:
- Copying and access to the video or audio tape of an interview should be confined to the absolute minimum consistent with the interests of the child and justice
 - No one should have access to any tape unless they are able and willing to safeguard it to the standard set out in this Memorandum, and
 - No persons accused or implicated in the alleged offences should have custody or unsupervised access to any tapes made in connection with the investigation.
- K11** Production of copies should be minimised and carried out in secure manner in accordance with locally agreed procedures. Particular attention should be paid to the quality of the audio track on any copy. It is recommended that when making copies, the hi-fi track of the original recording be used as the sound source.
- K12** In most criminal cases, access to a recording will be needed by the joint investigating team, the Crown Prosecution Service and the court. A further copy will be required, for disclosure to the defendant's legal representative, either because it is part or all of the case against the accused, or because it is unused material which is disclosable under the Criminal Procedure and Investigations Act (1996). When the defendant is unrepresented, access should be under strict police supervision. Applications from other individuals or agencies to view or borrow a recording should be scrutinised carefully. Any access should be authorised only in respect of named individuals. If such individuals wish to borrow a tape, they must sign a written undertaking concerning protection and safeguarding of the tape and confirm that it will be returned to the police or local authority at the end of the proceedings. A form of undertaking, based on a model developed by the Law Society, is reproduced as Appendix L (this is not yet available from HO).
- K13** Applications to view or borrow a recording from other individuals or agencies should be scrutinised carefully. Claims to be acting in the interests of the child or justice should be validated and considered on their merits. Consideration should always be given to allowing supervised access in preference to lending a tape; and to a loan in preference to making a further copy.
- K14** Any persons borrowing tapes should have their attention drawn to:
- the precise ownership of the tapes
 - the likelihood that such recordings will form part of a criminal trial, and that
 - misuse or unauthorised retention of such tapes may constitute contempt of court or other criminal offence.
- K15** An entry should be made in the police logbook every time a tape is borrowed. The entry should include the name of the borrower and any other persons permitted to view the tape, together with details of the specific authority granted to them. Similar logbooks should also be maintained by any other body authorised to have

custody of copies of tapes and such logbooks should be available for periodic inspection by management.

Tape Disposal

- K16** The Code of Practice made under the Criminal Procedure and Investigations Act (1996) lays down that the minimum period for the retention of interview records should be six months from the date of any conviction or after a convicted person has been released from custody, whichever is the longer. Material must also be retained for the full duration of any appeal. This ruling applies both to the master copy and to any edited version of the tape approved by the court for use in the trial.
- K17** However, for video or audio taped interviews with witnesses, there are good reasons for extending the retention period well beyond the minimum laid down by the Code. In addition to their use in criminal investigations and applications to the Criminal Cases Review Commission, recordings of interviews with witnesses may be used in civil proceedings and for criminal injury compensation claims, where a considerable delay can ensue between the original investigation and any proceedings. In cases of alleged sexual or physical abuse, new allegations against an accused can emerge many years after the original investigation. It will be vital to both prosecution and defence to have access to as complete a record of the original interview(s) as possible. The need for the preservation of such material needs to be weighed against the understandable concern of many witnesses to close a particular chapter in their lives and to know that all recordings dealing with their allegations have been destroyed.
- K18** Duplicate material may be destroyed early. Once any proceedings are completed or after five years have elapsed since the interview took place, working copies of interviews can be disposed of. However, for the reasons outlined above, it is recommended that the master copy of any video or audio recording should be retained for a period of 20 years. A witness who was a juvenile at the time of the interview may request the destruction of a tape prior to this date, when he or she reaches the age of 18 years.
- K19** Where tapes need to be disposed of, this is best done by crushing or by burning. Strict controls must be in place to ensure that all tapes are destroyed and a certificate supplied to this effect by the organisation responsible. Tapes should never be reused: there is a risk of incomplete erasure of the original recording and deterioration in tape quality and reliability.

Tapes at legal proceedings

Tapes and transcripts

- K20** Tape-recorded interviews are the primary medium by which vulnerable witnesses will give their evidence at court. However, it can assist the court to have a written transcription of what the witness has said in their interview. The timing of a request for a typewritten transcript is important. Too early a request may result in production of a transcript which is not then required. Too late a request may provide insufficient time for production and the checking of the transcript against the video record. Such checking forms an essential step in the production of the evidence and is best conducted by the person who conducted the interview.

Collection and delivery

- K21** Care should be taken in the packaging, delivery and collection of tapes by court officials and legal representatives to ensure that the security of the tape is safeguarded at all times. Tapes should be sent in tamper-proof packaging, and should be signed for when collected and received to ensure an audit trail while in transit. Acceptable methods for delivery of tapes can include personal delivery over short distances, recognised security couriers or Royal Mail Special Delivery.

Tapes at court

- K22** Detailed procedures for the management of tape-recorded evidence at court are provided in a memorandum circulated to all crown courts in 1993 by the Lord Chancellor's Department. When a tape is delivered to court, a note should be made on the court file and the tape checked to ensure it is adequately labelled. Tapes should be kept in a secure locked cupboard. A logbook should be kept with any tapes in which the movements of the tape can be recorded. The Child Liaison Officer or another nominated officer is responsible for ensuring that tapes are returned to the lockable cupboard during adjournments and overnight. After the trial, the tape should be returned in its box to the representative of the CPS who will sign alongside the appropriate entry in the logbook.

Use of tapes for training and other purposes

- K23** Video recorded interviews may be used for training or for other official purposes such as audit or research, provided that specific and informed consent has been secured, preferably from the witness him or herself. Alternatively, if the witness is not in a position to provide informed consent, then the adult who discharges the principle duty of care for the witness should be consulted. The witness should be reassured that granting consent does not mean that anyone who wishes to see the video will be able to do so. Consent should not be sought before the interview, nor will it always be right to do so immediately afterward. If consent is granted, this should be recorded in a logbook or by completing a form designated for this purpose.

(use of tapes in sex offender treatment programmes to be explored further)

L SPECIMEN FORM OF RECEIPT OF UNDERTAKING FOR VIDEO RECORDED EVIDENCE

Form of undertaking recommended when receiving recorded evidence of child witnesses prepare to be admitted in evidence at criminal trials in accordance with Section 54 of the Criminal Justice Act 1991.

Name of person(s) who it is proposed should have access to recording

.....

Position in organisation

Organisation

Address.....

.....

.....

Telephoneemail:

I/We acknowledge receipt of the recording marked "evidence of

....."

I/We undertake that whilst the recording is in my/our possession I/we shall:

- (a) not make or permit any other person to make a copy of the recording;
- (b) not release the recording to [name of the accused];
- (c) not make or permit any disclosure of the recording or its contents to any person except when in my/our opinion it is strictly necessary in the interests of the child and/or the interests of justice'
- (d) ensure that the recording is always kept in a locked, secure container and not left unattended in vehicles or otherwise unprotected
- (e) return the recording to you when I am/we are no longer professionally involved in the matter; and
- (f) will record details of the name of any person allowed access to a recording together with details of the source of the authorisation granted to him or her.

Signed.....

For and on behalf of

Date

M SPECIMEN INDEX OF VIDEO RECORDED INTERVIEW

Part I: Information about the interview

NAME OF CHILD

DATE OF BIRTH

NAME OF INTERVIEWER.....

POSITION.....

LOCATION OF INTERVIEW(S).....

Date of interviewsNo Tapes.....Total.....Duration.....(mins)

OTHER PERSONS PRESENT

POSITION.....

Part II: Information on the tape

INDEX NOS

DESCRIPTION

Start of the interview

Introductions

Explanation of the purpose of the interview

Close of interview

DETAIL OF THE OFFENCE(S)

(Give child's own words where practicable and use continuation sheets where necessary)

Child's description of the offence(s)

Child's description of the offender(s)

N SPECIMEN INFORMATION SHEET: VIDEO RECORDED INTERVIEW

Name of child.....

Expected time, date and place of interview(s).....

.....
.....

I am making a video recording of my interview with.....

because I think it will spare him/her from having to go over the same ground with my colleagues. If there are any legal proceedings, it could be played in court to spare him/her some of the ordeal of criminal proceedings.

If there is any information about you think we should know to make the interview as comfortable as possible for him/her, please let me know. I would be particularly interested to hear about any special medical or dietary problems.

The video recording will be kept under lock and key and access will be very strictly controlled, in line with the Home Office guidelines. It will not be given to the accused although he/she will be entitled to supervised access for legal purposes only. We will make sure we ask permission first if it is wanted for training or any other professional purpose.

Name of interviewer

Contact telephone number

O TECHNICAL GUIDANCE

Preliminaries

- O1** The following guidance sets out the basic recommendations about the equipment that should be used to achieve a standard of recording that is adequate for use in court and likely to meet the requirements of the court rules. *Basic hand-held equipment is less likely to reach the required standard and should only be used in exceptional circumstances*, for example when the witness has limited mobility and is in hospital or residential care. Guidance for when hand-held equipment has to be used can be found in paragraphs O15-O18. below.
- O2** Whatever equipment is chosen, this should be within the competency of the operator, properly maintained, and regularly tested before each interview. Such testing should involve making a short recording using sound and vision and replaying the recording on another machine to confirm that the quality is adequate. Testing should be the responsibility of a local technician or other suitably trained person.
- O3** Interviews should not normally be conducted in an operational police station, but in a specifically equipped interview room. The room should be selected to ensure a reasonably quiet location away from traffic or other sources of noise such as offices, toilets, and banging doors. It should have a carpeted floor and curtains on the windows. Ideally, the room should be rectangular (not square) and no larger than necessary (less than 5m by 4m). When furnishing the room for the interview, consideration should be given to simplicity in order to avoid a cluttered image on the screen. The furniture should be set out in advance in relation to camera angles and light source (see paragraph 2.1.6 below) and, once a suitable arrangement has been established, it can be helpful to mark the position of the furniture on the floor for future reference.
- O4** *It is very important that the furniture, cushions and in the case of children, any toys or 'props' do not provide a source of noise.* Furniture filled with polystyrene chips should not be used and care should be taken to avoid intrusive noise from other sources, such as rustling papers.

Vision

- O5** For the purposes of this guidance, video-recorded interviews may be carried out using one or two cameras. However, whilst the use of a single fixed camera need not produce a recording of inferior quality, it will provide less assurance to the courts as to who was present in the room throughout the interview. This requirement can most easily be satisfied by the use of two cameras: one focussed on the witness and the other giving a general view of the room. If only one camera is to be used the requirement of the rules may need to be satisfied by evidence from those who were present at the interview. A single camera system is unlikely to be suitable for very young witnesses who are more likely to move around the room. (See O8 below).

- O6** If a two camera system is adopted, a vision mixing unit will also be needed to allow the image from the camera recording the whole room to be inset within a corner of the screen relaying the image from the camera focused on the witness. Mounting the cameras close together may avoid a disorientating effect when images are displayed on the screen. The exact placement of the cameras can best be determined by factors such as the location of doors and windows.
- O7** As far as it is technically feasible, the *first camera* should aim to clearly show the witness's head and face. If this camera is fixed, care should be taken that it is not set too high or so low that the view of the witness may be obstructed. A good clear picture of the witness's face may help the court determine what is being said and to assess the emotional state of the witness. Every reasonable effort should be made to ensure the definition and quality of the image of the witness' face throughout the interview. The *second camera* should provide as full a picture as possible of the whole room. The court may need to be reassured that any part of the interview room which was not recorded by this camera was unoccupied: the placing of fixed furniture in any 'blind spot' could provide that reassurance and should prevent the witness from straying into the 'blind area'.
- O8** Some younger child witnesses may want to wander around the room. By careful placement of the furniture in a small room it may be found that the child can be encouraged to settle in one spot and not move far from it during the interview. However, for some children it may be more difficult to remain in the one place. This problem might be overcome by the first camera having zoom and pan/tilt facilities but using these features requires considerable skill. *The operator has no editorial function with regard to what the witness is saying or doing and care should be taken to ensure for instance that particular parts of the witness's statement are not highlighted by the use of close up. Close ups using the first camera, however, can be useful, if the child is drawing a plan or picture or demonstrating with dolls or other props (in accordance with the guidance in Chap. 2 paragraphs 2.139-2.140) where the information being conveyed would otherwise be obscured. The second camera should maintain the overall view of the room.*
- O9** A different two-camera system to that described above has been found useful in clinical applications dealing with young and disturbed children. This system comprises of two colour cameras mounted on the wall diagonally opposite to each other, at eye level. The effective use of such a system is likely to require specialised, skilled resources and, for criminal proceedings, particular care will be needed to ensure that any decisions about the editing or selection of the camera images are fully consistent with evidential objectives and do not distort or detract from the testimony in any way.
- O10** Modern video equipment does not normally require special additional lighting. Natural daylight may be perfectly adequate particularly if enhanced by pale coloured walls and a white ceiling. However, shafts of light, or sudden changes in natural light, can present problems for the automatic iris of the camera and should be avoided if possible. If natural daylight proves insufficient or unsuitable, normal fluorescent light can be used effectively. Ideally, the main sources of light should be either side of the camera. A mixture of natural light, tungsten and fluorescent light should be avoided. This can cause unnatural effects if colour equipment is used.

Acoustics

- O11** *The evidential value of the video recorded interview will depend very much on the court being able to discern clearly what was said, both by the interviewer and the witness. Provided that a room of the dimensions and furnishings recommended above (see Preliminaries) has been selected, acoustics should not present a problem. However, the selection and placing of microphones will require very careful attention if a satisfactory recording is to be made.*
- O12** The video recorder should preferably be capable of two track sound recording and ideally there should be manual recording level controls for each sound channel so that these can be set at an appropriate level for the facilities and a sound level meter.
- O13** A microphone of the type normally used for recording interviews with suspects, i.e. a boundary layer microphone, will also be suitable for the purpose of this guidance provided that the system is correctly installed. Preferably, two microphones should be used with the aim of locating one close to and within two meters of the conversation to provide the main sound recording. A small pre-amplifier should be used with each microphone to bring the signals up to normal audio line input levels.
- O14** Care is also needed in the placing of remote microphones if they are not to obtrude, distract or otherwise impede the witness' communication. Witnesses may find them inhibiting while some children may be drawn to them as playthings. A further problem is that some witnesses, for example children, may move around the room and far away from the intended location for which the equipment has been optimistically installed. A recommended solution is to mount the second microphone unobtrusively on the wall to provide a second recording. This can be used to back up the main recording where the sound has been made less clear due to the child moving from the intended location. The use of two microphones will also ensure some sound is recorded if one microphone should fail.

Portable equipment

- O15** In the event that exceptional circumstances dictate that the recording is made with a portable (camcorder type) system, a good quality recording may still be possible if sufficient care is taken. VHS portables with hi-fi sound are available and 8mm recorders have digital sound recording allowing high quality sound reproduction.
- O16** Most camcorders have built-in microphones and normally these will have to be used, although separate microphones should be used if they are available. Because the built-in microphone will probably need to be located near the witness to get a clear sound recording, the composition of the image that can be obtained may be less than ideal. In these circumstances, some compromise on picture content may be necessary to meet the paramount aim of obtaining a clear recording of the witness' speech.

- O17** As with all interviews, before they begin, a short test recording should be made and replayed to ensure that there are no technical difficulties. Where the recording is made in locations other than the interview room, there may be particular problems with poor lighting or extraneous sounds which should be resolved, if possible. The camera should ideally be mounted on a tripod as close to the witness as possible, and the picture composed to include the witness and the interviewer. Movement or adjustment of the camera should be avoided if at all possible, to prevent extra noises being added to the sound track. The use of an external microphone may be beneficial, but great care will be needed in its placement to avoid noise pick-up from contact with the microphone or its support.
- O18** Portable equipment may be less reliable than fixed systems due to damage in transit, careless handling or storage in poor conditions (e.g. exposure to heat and humidity). Where the equipment is brought in from the cold into a warm environment, condensation will form. The equipment and tape should therefore be allowed time to warm up before the tape is loaded. Another cause of difficulty can be lack of familiarity with the controls. Batteries should not be relied on and care must be taken with trailing cables to ensure that they do not present a hazard.

Recorders and tapes

- O19** The format of the equipment should be such as to produce recordings of suitable quality that can be reproduced in court. The video play back equipment being installed in Crown Courts as part of the Speaking Up for Justice implementation programme is VHS hi-fi format, with standard and long play and freeze frame facility. The specification also requires the equipment to have the facility for either of the hi-fi audio tracks of the video recording to be selected and must have sufficient quality sound for videos recorded on single channel and two sound channel recording.
- O20** Use of a generator to insert time and date into the picture should avoid the need to demonstrate to the court for each video recording, both when the recording was made and the continuity of the interview. Such devices are therefore strongly recommended. Nevertheless, oral statements of the date and time should be made at the beginning and at the close of the interview to confirm that the device is accurate.
- O21** The equipment should ideally be capable of making two simultaneous recordings during the interview: the master copy that should be sealed after the interview and the working copy. (See Appendix K, paragraph 2.1.4. Storage, Custody and Destruction of Video Recordings). The master copy should be played only once to check its quality before its submission for criminal proceedings. If two recordings are not made during the interview, all copies required must be made in a secure and verifiable way with a statement of where and by whom the copy was made, and confirming that no further copies were made (again see Appendix K, paragraph K10-K15).
- O22** Where two recorders are used, the video and audio should not be looped through one recorder to the other in case of failure of one of the recorders.

O23 Only good quality videotapes from a reputable manufacturer should be used. No more than one interview should be recorded on a new, unused, sealed tape. Ideally the working copy should also be recorded on an unused blank tape. If previously used tapes are to be employed, any earlier recording should be erased so that the tape on which the working copy is to be made is genuinely 'blank'. The recommended maximum number of times that a tape can be erased and then recorded upon is ten. It will therefore be necessary to have a method of noting the number of times each tape is used to make a recording.

P WARNING LABEL FOR VIDEO TAPES

This videotape is the property of
[PRINT NAME AND ADDRESS OF CONSTABULARY]

It has been prepared pursuant to the
Youth Justice and Criminal Evidence Act 1999 and
Must **NOT** be copied or shown to unauthorised persons.

**UNAUTHORISED USE OR RENTION MAY LEAD TO A FINE,
OR A PERIOD OF IMPRISONMENT OR BOTH**

Q USEFUL SOURCES

Information for interviews and court professionals

Aldridge, M. and Wood, J. (1998). *Interviewing Children: A Guide for Child Care and Forensic Practitioners*. Chichester, Wiley.

Ann Craft Trust (2000). *Working with Witnesses and Offenders who have Learning Disabilities: Detailed Series of Training Programmes on the Treatment of Vulnerable Witnesses and Offenders*. Nottingham, Ann Craft Trust.

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Information for witnesses and their carers:

The NSPCC (1998) Young Witness Pack series includes:

For young witnesses:

Let's Get Ready for Court: an activity booklet for child witnesses aged 5-9

Tell Me More about Court: a book for young witnesses aged 10-15

Inside a Courtroom: a card model of a courtroom with slot-in characters, for use with younger witnesses

Going to Court: Information and advice for Crown Court Witnesses aged 13-17

Young Witnesses at the Magistrates' Court and the Youth Court: for 9-17 year olds

Screens in Court: An information sheet for 9-17 year olds

NSPCC (2000). *Giving Evidence, What's It Like? – A video addition to the Young Witness Pack (1998)*. NSPCC.

For parents and carers:

Your Child is a Witness

For child witness supporters:

NSPCC Preparing Young Witnesses for Court

Barnardos video *So You're Going to Be a Witness*. [For younger witnesses].

NSPCC video *Giving Evidence – What It's Really Like* [for 11-15 year olds].

For witnesses with learning difficulties:

[Picture books without words published by St George's Mental Health Library in association with VOICE UK, available from the Royal College of Psychiatrists Publication Department]

Going to Court

I Can Get Through It

General information for witnesses:

Home Office (1999). Victims of Crime. This leaflet explains what will happen now you have reported a crime to the police. London: Home Office Communication Directorate. (Available in Braille, audiotape, large print format and also in a wide range of languages).

Home Office (1997) Witness in Court. This leaflet tells you what to expect. London: Home Office Communication Directorate. (Available in a wide range of languages).

Additional material aimed at vulnerable or intimidated witnesses is in preparation.

Relevant Government Publications:

Crown Prosecution Service and Association of Chief Police Officers, with the Home Office (2001). *Early Special Measures Meetings between the Police and the Crown Prosecution Service and meetings between the Crown Prosecution Service and Vulnerable or Intimidated Witnesses: Practice Guidance*. London: Home Office

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Lord Chancellor's Department (1999). *Making Decisions: The Government's Proposals for Making Decisions on Behalf of Mentally Incapacitated Adults*. London: The Stationery Office (Cm 4465, October 1999).

National Assembly for Wales (2000). *In Safe Hands: Guidance on the Protection of Vulnerable Adults in Wales*.

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The Stationery Office (1999). *Youth Justice & Criminal Evidence Act 1999*

The Stationery Office (1999). *Explanatory Notes – Youth Justice & Criminal Evidence Act 1999*

Useful websites

www.homeoffice.gov.uk/index.htm

www.homeoffice.gov.uk/domesticviolence/index.htm

www.jsboard.co.uk

www.lcd.gov.uk

www.nspcc.org.uk/

www.victimsupport.com/witness.htm

www.doh.gov.uk

