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# Foreword

The Government is committed to improving the protection for vulnerable and intimidated witnesses during the criminal justice process, especially children. As the Home Office document *Rebalancing the Criminal Justice System in Favour of the Law-abiding Majority* made clear, 'the needs of victims must continue to be at the heart of what the criminal justice system does. They must be treated properly throughout the system – with help, support, advice, and a chance for their voice to be heard.' Vulnerable and intimidated witnesses are in particular need of assistance to ensure that their voice is heard in court.

The first edition of this document was issued in January 2002 as part of Action for Justice, the implementation programme for the *Speaking Up for Justice* report. That report had led to the Special Measures in the Youth Justice and Criminal Evidence Act 1999, such as video-recorded interviews, which are aimed at ensuring that vulnerable and intimidated witnesses give their best-quality evidence to the court. The purpose of the guidance was to assist those conducting video-recorded interviews with such witnesses, as well as giving guidance to those tasked with preparing and supporting these witnesses during the criminal justice process.

A second edition has now become necessary in order to update the guidance as a result of developments of the past five years. These include reform of the law of evidence on bad character and hearsay in the Criminal Justice Act 2003; the Code of Practice for Victims of Crime, which came into force in April 2006 and places statutory obligations on criminal justice service providers; and the national roll-out by 2005 of the police/Crown Prosecution Service Witness Care Units, which aim to ensure that witnesses are better informed, better prepared and better supported throughout court proceedings. Additionally, the Intermediaries Special Measure has been the subject of a pilot in eight pathfinder areas. Finally, a new edition of this guidance allows the experiences of the many practitioners (without whom the best procedures would not succeed) to be taken into consideration, thus ensuring that our understanding – and the quality of this guidance – continues to improve.



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# Introduction

This guidance describes good practice in interviewing witnesses, including victims, in order to enable them to give their best evidence in criminal proceedings. It considers preparing and planning for interviews with witnesses, decisions about whether or not to conduct an interview, and decisions about whether the interview should be video-recorded or whether it would be more appropriate for a written statement to be taken following the interview. It covers the interviewing of witnesses both for the purposes of making a video-recorded statement and also for taking a written statement, their preparation for court and any subsequent court appearance. It applies to both prosecution and defence witnesses and is intended for all persons involved in relevant investigations, including the police, adults and children's social care workers, and members of the legal profession.

## 1. Status of the guidance

The first edition of this document (entitled *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses, Including Children* (Home Office, 2002)) replaced the *Memorandum of Good Practice on Video Recorded Interviews for Child Witnesses for Criminal Proceedings* (Home Office, 1992). This second edition builds on and extends the guidance set out in the first edition to include other groups of witnesses (see 'The scope of the guidance' below) and fresh government initiatives that will improve the quality of service provided by the criminal justice system to victims and witnesses (notably the No Witness No Justice programme). The guidance provided in this document is advisory and does not constitute a legally enforceable code of conduct. The guidance is also generic; it cannot ever cater for every possible set of circumstances that might arise. Each witness is unique and the manner in which they are interviewed and subsequently prepared for their court appearance must be tailored to their particular needs and circumstances. However, interviewers and other practitioners should bear in mind that significant departures from the guidance provided in this document may have to be justified in the courts.

This introduction provides information on:

- > the origins of the guidance;
- > the witnesses to whom this guidance applies;
- > its role in training; and
- > the structure of the document.

## 2. The origins of the guidance

The *Memorandum of Good Practice on Video Recorded Interviews for Child Witnesses for Criminal Proceedings* was published to support the implementation of provisions in the Criminal Justice Act 1991 which permitted certain child witnesses to give their evidence-in-chief in the form of a video-recorded statement. Since then, video-recorded interviews conducted according to the *Memorandum* have become the preferred method of hearing children's evidence in criminal proceedings, particularly in cases involving allegations of sexual abuse. Video-recorded interviews conducted according to *Memorandum* guidelines have also frequently been used as evidence in civil proceedings involving the care and custody of children.

In order to take forward the Government's commitment to improve protection for vulnerable or intimidated witnesses, the Home Office in 1998 published *Speaking Up for Justice*, the report of an interdepartmental working group on the treatment of vulnerable or intimidated witnesses (including children) in the criminal justice system. The report recommended extending the existing Special Measures introduced for child witnesses (live closed circuit television links (CCTV) and video-recorded evidence-in-chief) to vulnerable or intimidated adults, together with a range of other measures from the investigation stage, through to the trial and beyond. Provisions to implement those recommendations requiring legislation were included in Part II of the Youth Justice and Criminal Evidence Act 1999. These are subject to phased implementation and are not all available at the present time. An implementation table is attached to Ministry of Justice circular 25/06/07 *Complaints in sexual offence cases in the Crown Court: implementation of Section 27 of the Youth Justice and Criminal Evidence Act 1999* (for current availability please call 020 7035 8490).

A few months after the enactment of the Youth Justice and Criminal Evidence Act 1999, the Lord Chancellor, the Home Secretary and the Attorney General commissioned Sir Robin Auld to inquire into the practices, procedures and rules of evidence of the criminal courts in furtherance of the Government's overall aim of improving the criminal justice system. Sir Robin's report was the *Review of the Criminal Courts of England and Wales* (Lord Chancellor's Department, 2001). Recommendation 257 of the review suggested that consideration be given to extending the provision for video-recorded evidence to **critical** witnesses in cases of serious crime. This recommendation was subsequently reflected in the White Paper *Justice for All*

(Home Office, 2002). Provision was then made for direct witnesses to indictable or prescribed triable either-way offences to make use of video-recorded evidence-in-chief in Section 137 of the Criminal Justice Act (CJA) 2003. This legislation effectively extends the guidance published by the Association of Chief Police Officers (ACPO) in respect of video-recorded interviews with **significant** witnesses (most recent version published in November 2002).

The broader inter-agency recommendations made in *Justice for All* were subsequently reported on by an inter-agency working group in *No Witness No Justice* (Home Office, May 2003). Crucially, the working group recommended that the commitment in *Justice for All* to put victims and witnesses at the heart of the criminal justice system be taken forward as a specific programme of work. It is this commitment that forms the basis of the No Witness No Justice programme.

The guidance set out in this document is intended to support the Government's commitment to improve the quality of treatment for victims and witnesses in the criminal justice system so that they have an opportunity to provide their best evidence. It takes account of the *Code of Practice for Victims of Crime* (Office for Criminal Justice Reform, 2005), which was implemented in April 2006, and should be viewed in the context of other government policies in relation to improving the quality of service to victims and witnesses (see Appendix Q for a list of relevant publications).

### 3. The scope of the guidance

The guidance set out in this document covers:

- > vulnerable witnesses;
- > intimidated witnesses;
- > Section 137 CJA 2003 witnesses;
- > significant witnesses;
- > reluctant witnesses;
- > hostile witnesses; and
- > defence witnesses.

It is accepted that individual witnesses could fall into more than one of the vulnerable, intimidated and Section 137 CJA 2003 categories. In these circumstances, there is no need to be concerned about the eventual designation of the witness at the point of interview provided that the guidance in Chapters 2 to 4 of this document is followed, because each chapter is based on the same general principles. The eventual designation of the witness into a particular category for the purposes of making an application to the court can wait until the case has been considered by lawyers after all the necessary enquiries are complete.

### Vulnerable witnesses (Section 16, Youth Justice and Criminal Justice Act 1999)

'Vulnerable' witnesses are defined by Section 16 of the Youth Justice and Criminal Evidence Act 1999 as:

- > all child witnesses (under 17); and
- > any witness whose quality of evidence is likely to be diminished because they:
  - suffer from a mental disorder (as defined by the Mental Health Act 1983); or
  - have a significant impairment of intelligence and social functioning (e.g. a learning disability); or
  - have a physical disability or are suffering from a physical disorder.

References to 'very young children' in this document mean children of nursery school age (i.e. up to 5 years of age), the term 'young children' refers to children of primary school age (i.e. up to 11 years of age) and 'older children' denotes those of secondary school age (i.e. over 11 years of age). The unqualified terms 'child', 'children' or 'young witnesses' refer generally to children of all ages up to the upper age limit defined in the Youth Justice and Criminal Evidence Act 1999 (i.e. below 17 years of age). This guidance applies to the broad range of children in these age groups and as such will not necessarily apply to an individual child witness. Interviewers and court officials should always take account of the level of cognitive, social and emotional development of the individual child when applying this general guidance.

Not all people with disabilities will necessarily be vulnerable as witnesses and would not wish to be treated as such. It is, therefore, important that the views of individual witnesses who might fall into this category are taken into account.

Further guidance intended to aid the identification of vulnerable witnesses, including some potential physical, behavioural, and social indicators of vulnerability, can be found in *Vulnerable Witnesses: A Police Service Guide* (ACPO and Home Office, 2002).

### Intimidated witnesses (Section 17, Youth Justice and Criminal Justice Act 1999)

'Intimidated' witnesses are defined by Section 17 of the Youth Justice and Criminal Evidence Act 1999 as those whose quality of testimony is likely to be diminished by reason of fear or distress at the prospect of giving evidence.

In determining whether a witness falls into this category, the court should take account of:

- > the nature and alleged circumstances of the offence;
- > the age of the witness;
- > where relevant:
  - the social and cultural background and ethnic origins of the witness; and
  - the domestic and employment circumstances of the witness; and
  - any religious beliefs or political opinions of the witness; and
- > any behaviour towards the witness by:
  - the accused;
  - members of the accused person's family or associates; and
  - any other person who is likely to be either an accused person or a witness in the proceedings.

Complainants in cases of sexual assault are defined as falling into this category per se by Section 17(4) of the Act. *Vulnerable Witnesses: A Police Service Guide* (ACPO and Home Office, 2002) suggests that victims of domestic violence, racially motivated crime and repeat victimisation and witnesses who self-neglect/self-harm or who are elderly and frail also fall into this category.

A number of prompts intended to aid the identification of intimidated witnesses can be found in *Vulnerable Witnesses: A Police Service Guide* (ACPO and Home Office, 2002).

## Section 137 CJA 2003 witnesses

Section 137 CJA witnesses are those who have or claim to have witnessed, visually or otherwise, an indictable or prescribed triable either-way offence, part of such an offence, or events closely connected with it (including any incriminating comments made by the suspected perpetrator either before or after the offence). Video-recordings of interviews with these witnesses can be admitted as evidence-in-chief if the witness's recollection of the events is likely to be significantly better at the time of the interview than at the time of giving evidence. Courts will take account of the length of the interval between the alleged event and the interview when considering this question.

Indictable offences are offences that are so serious that they can only be tried in a Crown Court. They include offences like murder, manslaughter, grievous bodily harm with intent, rape, kidnap, and death by dangerous driving. Prescribed triable either-way offences are offences that can be tried either in a Crown or a magistrates' court that have been specifically designated by the Home Secretary as coming within the scope of Section 137 CJA (no such offences were designated at the time that this document was revised).

## Significant witnesses

Significant witnesses, sometimes referred to as 'key' witnesses, are those who:

- > have or claim to have witnessed, visually or otherwise, an indictable offence, part of such an offence or events closely connected with it (including any incriminating comments made by the suspected offender either before or after the offence) but who are unlikely to have video-recordings of their interviews admitted as evidence-in-chief under Section 137 CJA 2003 as a result of there having been a lengthy interval between the alleged event and the interview; or
- > stand in a particular relationship to the victim or have a central position in an investigation into an indictable offence.

In these circumstances, the purpose of the recording is primarily one of demonstrating the integrity of the interview process. **There is no statutory provision for video-recordings of interviews with significant witnesses to be played as evidence-in-chief.** The options for adducing the testimony on the recording as evidence are set out in paragraph 4.8 of this document.

Where significant witnesses are also vulnerable and/or intimidated, they should be treated as being vulnerable and/or intimidated rather than significant if their evidence is likely to be maximised by Special Measures.

## Reluctant witnesses

Reluctant witnesses are individuals believed to have witnessed an offence, part of such an offence, or events closely connected with it who are reluctant to become involved in the investigative process. From time to time, investigators and others involved in the criminal justice system will encounter reluctant vulnerable, intimidated, Section 137 CJA, or significant witnesses. There could be a variety of reasons for this, including adverse perceptions of the police or criminal justice process based on experience or popular perception, fear of an alleged perpetrator, concern about the response of the community within which they live, worries about their identity being released or uncertainty about how they fit into the overall process. The initial actions taken in respect of such witnesses should, therefore, include trying to establish the source(s) of their reluctance, since it is only by doing this that an attempt to address the issue can be made.

## Hostile witnesses

Hostile witnesses are individuals believed to have witnessed an offence, part of such an offence, or events closely connected with it who are openly hostile about the prospect of getting involved in the investigative process. During some investigations, investigators will encounter hostile vulnerable, intimidated, Section 137 CJA, or significant witnesses. The reasons for such hostility might include their lifestyle or they might have a close relationship with the alleged perpetrator and

intend later to appear before the court as a defence witness. Some of these witnesses might simply refuse to co-operate, others might choose to provide false information intended to support the alleged perpetrator's account. Whatever the reason for the hostility and regardless of the extent of the co-operation, it is important that records are kept of all interactions with these witnesses. Where a hostile witness consents to an interview, it should be recorded in accordance with the guidance set out in this document: on video unless they object.

## Defence witnesses

This guidance applies to defence as well as prosecution witnesses and the provisions contained in Part II of the Youth Justice and Criminal Evidence Act 1999 and Section 137 CJA 2003 are available to both groups if the court is satisfied that the witness meets the criteria.

## 4. The guidance and training

As was the case with the 1992 *Memorandum*, it is recommended that this guidance be used, in conjunction with other relevant guidance, as a key resource in the training of police and adult and children's social care social workers involved in the investigative interviewing of witnesses. The National Assembly for Wales published training resource material on behalf of the Government in April 2004 to assist in such training. It should also be used as a resource by those concerned with providing pre-trial support and preparation and those involved in the trial process. Training should also take account of the curriculum that has been developed in support of ACPO's *Investigative Interviewing Strategy* (ACPO, 2004).

Specialist training should be developed to interview witnesses with particular needs. This should include interviewing young witnesses, traumatised witnesses and witnesses with a mental disorder, learning disability or physical disability impacting on communication. Such training should include working with intermediaries.

Specialist interview training should also be developed in respect of the use of the techniques in the cognitive interview (see paragraph 4.104).

It is important to note, however, that training alone is unlikely to deliver effective performance in the workplace. Training needs to be set in the context of a developmental assessment regime. Such a regime should deliver a means of quality assuring interviews, while developing, maintaining and enhancing the skills of interviewers. The regime should be supported by an agreed assessment protocol. In the case of police interviewers, such a protocol should take account of the National Occupational Standards for interviews with witnesses developed in *Skills for Justice*. Agencies regularly involved in conducting interviews with witnesses should have the necessary policies, procedures and management structures in place to quality assure interviews on an ongoing basis.

## 5. The content of the guidance

The guidance in this document is grouped into five major chapters:

**Chapter 1** provides a **general introduction** to the 1999 legislation as it relates to interviewing, safeguarding and supporting witnesses. Sufficient background material is provided to give a general orientation to all those who must be familiar with the intentions and provisions of Part II of the Youth Justice and Criminal Evidence Act 1999 and Section 137 CJA 2003 but are not necessarily concerned with their practical implementation.

**Chapter 2** gives advice and guidance on how to prepare for (Part A) and how to conduct (Part B) investigative interviews with **children**. It covers the legal knowledge necessary to carry out such interviews in a manner satisfactory to the courts, the requirements for the video-recording of such interviews, and advice on their conduct, including the style, variety and pace of questioning.

**Chapter 3** contains advice and guidance on how to prepare for (Part A) and how to conduct (Part B) investigative interviews with **vulnerable adult witnesses**. Again, the legal position as regard these witnesses is outlined and advice given on how witnesses may be most effectively interviewed to obtain best evidence. Specific guidance is provided on interviewing witnesses with sensory impairments, learning disabilities and mental ill health.

**Chapter 4** provides advice and guidance on how to prepare for (Part A) and how to conduct (Part B) investigative interviews with **adult intimidated, Section 137 CJA and significant witnesses** (including those who are reluctant or hostile). Specific guidance is provided on the use of the enhanced cognitive interview.

**Chapter 5** describes how **witnesses may be supported**, safeguarded and prepared in the interval between a statement being made and a case coming to trial. Topics covered include the nature and type of support that may be offered, access to therapy and the Witness Service, and appropriate procedures to be followed once the outcome of a case is known.

**Chapter 6** describes in detail the range of **Special Measures** available to vulnerable and/or intimidated witnesses, including children, at the discretion of the court. It also provides some guidance in respect of applications made under Section 137 CJA 2003. It describes good practice in the examination and cross-examination of witnesses, so as to enable them to give their best evidence.

# General principles

## Aims

By the end of this chapter, those involved with interviewing witnesses and preparing them for court should be able to understand:

- > the categories of vulnerable and intimidated witness covered by the Youth Justice and Criminal Evidence Act 1999 legislation (paragraphs 1.1 to 1.8);
- > the Special Measures and social support available to assist vulnerable and intimidated witnesses (paragraphs 1.9 to 1.19);
- > which witnesses might be eligible for video-recorded evidence-in-chief under Section 137 of the Criminal Justice Act (CJA) 2003 (paragraphs 1.20 to 1.23); and
- > which witnesses should have their interviews video-recorded by virtue of them being considered 'significant' (paragraphs 1.24 to 1.26).

## Vulnerable witnesses

**1.1** The principal areas that require attention if the needs of vulnerable witnesses, whether adults or children, are to be met are:

- > the recognition and subsequent reporting of crime;
- > the identification of vulnerabilities; and
- > putting effective measures to address these in place during investigation and pre-trial preparation, and during and after any criminal trial.

**1.2** Vulnerable witnesses are defined by Section 16 of the Youth Justice and Criminal Evidence Act 1999. Children are defined as vulnerable by reason of their age. The Act acknowledges that all children under 17 years of age, appearing as defence or prosecution witnesses in criminal proceedings, are eligible for Special Measures to assist them in providing their evidence and having their evidence heard at court. Since their introduction in the Criminal Justice Acts of 1988 and 1991, the video-recording of interviews as a substitute for the child's live evidence-in-chief at court and the use of the live link facility to enable the child to give evidence from outside the courtroom have been extensively and successfully employed to enable the court to hear best evidence.

**1.3** In addition to the witness who is under the age of 17 at the time of the hearing [Section 16(1)(a)(i)] (see Chapter 2), three other types of vulnerable witness

are identified in the Youth Justice and Criminal Evidence Act 1999. These are:

- > witnesses who have a mental disorder as detailed under the Mental Health Act 1983 [Section 16(2)(a)(i)] (mental disorder is defined in Section 1(2) of the Mental Health Act 1983);
- > witnesses significantly impaired in relation to intelligence and social functioning [Section 16(2)(a)(ii)] (learning disabled witnesses); and
- > physically disabled witnesses [Section 16(2)(b)].

**1.4** Early identification of the individual abilities as well as disabilities of each vulnerable adult is important in order to guide subsequent planning. An exclusive emphasis upon disability ignores the strengths and positive abilities that a vulnerable individual possesses. Vulnerable witnesses may have had social experiences that could have implications for the investigation and any subsequent court proceedings. For example, if the vulnerable adult has spent a long time in an institutional environment, they may have learned to be compliant or acquiescent. However, such characteristics are not universal and can be ameliorated through appropriate preparation and the use of Special Measures.

## Intimidated witnesses

**1.5** As with vulnerable witnesses, the principal areas that require attention to meet the needs of intimidated witnesses are:

- > the recognition and subsequent reporting of crime;
- > the identification of the basis of the intimidation; and
- > putting effective measures to address these in place during investigation and pre-trial preparation, and during and after any criminal trial.

**1.6** Intimidated witnesses are defined by the Youth Justice and Criminal Evidence Act 1999 as those suffering from fear or distress **in relation to testifying** in the case [Section 17(1)].

**1.7** Complainants in cases of sexual assault are defined as falling into this category by Section 17(4) of the Act. *Vulnerable Witnesses: A Police Service Guide* (ACPO and Home Office, 2002) suggests that victims of domestic violence, racially motivated crime and repeat victimisation and witnesses who self-neglect/self-harm or who are elderly and frail also fall into this category. The *Code of Practice for Victims of Crime*

(Office for Criminal Justice Reform, 2005) indicates that the families of homicide victims fall into this category.

**1.8** Research suggests that sexual offences and assaults and those offences where the victim knew the offender are particularly likely to lead to the intimidation of witnesses. It seems likely that crimes which involve repeated victimisation, such as stalking and racial harassment, are also particularly likely to lead to intimidation. In addition, some witnesses to other crimes may be suffering from fear and distress and may require safeguarding and support in order to give their best evidence. While the legislation distinguishes between vulnerable and intimidated witnesses, in respect of the criteria for their eligibility for Special Measures it is important to recognise that:

- > some witnesses may be vulnerable as well as intimidated (e.g. an elderly victim of vandalism who has dementia on an inner-city estate);
- > others may be vulnerable but not subject to intimidation (e.g. a child who witnesses a robbery in the street); and
- > others again may not be vulnerable but may be subject to possible intimidation (e.g. a young woman who fears violence from her current or former partner or someone who has been the subject of a racial attack).

While these examples provide illustrations of the application of the legislation, it is important not to attempt to categorise witnesses too rigidly.

## Special Measures

**1.9** It has long been recognised that many people who are the victims of or witnesses to crimes experience the ensuing process of investigation and justice as stressful and fear-inducing, to such an extent that the interests of justice in preventing and detecting crime and the needs of witnesses are not adequately met. Certain classes of witness have particular difficulties, either because of age or personal circumstances, or because of their fear of intimidation, or because of their particular needs.

**1.10** Stress affects the quantity and quality of communications with witnesses of all ages. The Youth Justice and Criminal Evidence Act 1999 introduced a range of measures that can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses. It extended the provisions for using video-recorded evidence-in-chief and the use of the live link facility to adult vulnerable or intimidated witnesses and introduced a range of new provisions to facilitate the giving of best evidence. Video-recorded evidence-in-chief, live link and the other provisions contained in the Youth Justice and Criminal Evidence Act 1999 are collectively referred to as 'Special Measures'. These are all subject to the discretion of the court, although different presumptions apply to different categories of witness.

### Box 1.1: Special Measures available to vulnerable and intimidated witnesses with the agreement of the court

- > Section 23: **Screens** may be made available to shield the witness from the defendant.
- > Section 24: The **live link** will enable the witness to give evidence during the trial from outside the court through a televised link to the courtroom. The witness may be accommodated either within the court building or in a suitable location outside the court.
- > Section 25: **Evidence given in private.** Exclusion from the court of members of the public and the press (except for one named person to represent the press) will be considered in cases involving sexual offences or intimidation.
- > Section 26: **Removal of wigs and gowns** by judges and barristers.
- > Section 27: A **video-recorded interview** with the vulnerable witness before the trial may be admitted by the court as the witness's evidence-in-chief. The court can, however, exclude a recording if there is insufficient information about where it was made, or if the recording contains serious violations of the rules of evidence.
- > Section 28: **Video-recorded cross-examination** is also to be considered admissible if the witness has already been permitted to give their evidence-in-chief on video prior to the court case. As with evidence-in-chief, the recording can be excluded if any rules have not been complied with.
- > Section 29: **Examination of the witness through an intermediary**, who may be appointed by the court to assist the witness to give their evidence at court. This measure is only available to vulnerable witnesses.
- > Section 30: **Aids to communication** will be permitted to enable the witness to give best evidence whether through a communicator or interpreter, or through a communication aid or technique, provided that the communication can be independently verified and understood by the court. Again, this measure is only available to vulnerable witnesses.

These Special Measures are briefly outlined in Box 1.1 above and are described in detail in Chapter 6.

**1.11** It is important to note that the implementation of these Special Measures is a phased one. Some of these measures were still awaiting implementation at the time this edition of *Achieving Best Evidence* was written. The status of this **phased implementation**

at any given time can be established by checking the most current Home Office circular relating to this matter, at:

[www.knowledgenetwork.gov.uk/HO/circular.nsf/ViewTemplate%20For%20HOCircularsWeb?OpenForm](http://www.knowledgenetwork.gov.uk/HO/circular.nsf/ViewTemplate%20For%20HOCircularsWeb?OpenForm)

**1.12** In addition to Special Measures, the Youth Justice and Criminal Evidence Act 1999 also contains the following provisions intended to enable vulnerable or intimidated witnesses to give their best evidence:

- > Sections 34 and 35: **Mandatory protection of witness from cross-examination by the accused in person.** An exception has been created which prohibits the unrepresented defendant from cross-examining vulnerable child and adult victims in certain classes of cases involving sexual offences.
- > Section 36: **Discretionary protection of witness from cross-examination by the accused in person.** In other types of offence, the court has a discretion to prohibit an unrepresented defendant from cross-examining the victim in person.
- > Section 41: **Restrictions on evidence and questions about complainant's sexual behaviour.** The Act restricts the circumstances in which the defence can bring evidence about the sexual behaviour of a **complainant** in cases of rape and other sexual offences.
- > Sections 44 to 46: **Reporting restrictions.** The Act provides for restrictions on the reporting by the media of information likely to lead to the identification of children under 18 and certain adult witnesses in criminal proceedings.

**1.13** Vulnerable or intimidated witnesses can also receive social support at all stages of the investigation. Three distinct roles for witness support have been identified and it is unlikely to be appropriate for the same person to be involved in all three. They are:

- > interview support – provided by someone independent of the police, who is not a party to the case being investigated and who sits in on the original investigative interview; they may be a friend or relative, but not necessarily so;
- > pre-trial support – provided to the witness in the period between the interview and the start of any trial. Appendix F sets out National Standards for Young Witness Preparation; and
- > court witness support – a person who may be known to the witness, but who is not a party to the proceedings, has no detailed knowledge of the case and may have assisted in preparing the witness for their court appearance. Appendix G sets out National Standards for the Court Witness Supporter in the Live Link Room.

**1.14** Support measures are applicable to both defence and prosecution witnesses.

**1.15** In reaching a decision on whether the Special Measures should be ordered, the courts must take account of all of the circumstances of the case, including the wishes of the witness and whether or not the Special Measure in question is likely to inhibit the evidence being effectively tested by any party to the proceedings (Section 19(3), Youth Justice and Criminal Evidence Act 1999). It is, therefore, imperative that investigators establish at an early stage whether the witness is likely to qualify for a Special Measures direction and, if so, what particular measures, if any, will assist the witness to maximise the quality of their evidence. This will need to be discussed with the witness to ascertain their views. It is essential that the police, social care agencies, the prosecution and defence, and also court officials, take account of the individual circumstances of each witness, together with their expressed needs and wishes, in order to provide support sufficient to enable all witnesses to give their best evidence.

**1.16** While it is important to establish at an early stage whether the witness is likely to qualify for Special Measures, it should be noted that the need for such measures may change from the time of the investigation to the time of the trial. The effect of this is that witnesses might be eligible for more or less support as time goes on, depending on changes in their circumstances. For example, in some circumstances, effective witness preparation might reduce the witness's anxiety, thus reducing the need for some or all of the Special Measures previously thought necessary. In other circumstances, the witness's anxiety might increase as the time of the trial approaches, particularly where intimidation or harassment occurs or is anticipated, thus increasing the need for Special Measures. It is, therefore, important that all those involved in maintaining contact with the witness and preparing them to give evidence continue to liaise with the prosecution or the defence, as appropriate, to ensure that any changes of circumstance are carefully considered and taken into account as necessary.

**1.17** Special Measures are available to defence as well as prosecution witnesses, provided that the court is satisfied that the witness meets the qualifying criteria. While some of the notes and recommendations are drafted with the particular needs and concerns of the prosecution in mind, the guidelines in general apply to all those involved in investigating, interviewing, safeguarding and examining vulnerable and intimidated witnesses.

**1.18** The Special Measures for use at court are subject to application to the judge or magistrate by the prosecution or defence before the trial. Special Measures are not automatically available and are subject to the discretion of the court.

**1.19** The use of Special Measures in relation to child witnesses is described in Chapter 2, to vulnerable adult witnesses in Chapter 3, and to intimidated adult witnesses in Chapter 4. The role of witness

supporters is described in detail in the different phases of the investigation covered in Chapters 2 to 6. Advice on the legal rules and good practice concerning the use of Special Measures at trial are dealt with in detail in Chapters 5 and 6. This is followed by a glossary explaining specialist terms in Appendix A. Further appendices provide detailed guidance or information referred to in the chapters, together with a list of useful sources and further reading.

## Section 137 CJA 2003 witnesses

**1.20** Section 137 CJA 2003 provides for the admission of video-recorded interviews as evidence-in-chief in circumstances where:

- > the alleged offence is triable only on indictment or is a prescribed triable either-way offence;
- > the person interviewed on video claims to have witnessed (whether visually or in any other way):
  - events alleged by the prosecution to include conduct constituting the offence or part of the offence; or
  - events closely connected with such events;
- > the account given when the person was interviewed on video was given at a time when the alleged events were fresh in their memory; and
- > the court makes a direction that the recording or part of it should be admitted as the evidence-in-chief of the witness. The court can only make such a direction if:
  - the witness's recollection of the events in question is likely to have been significantly better when they gave the recorded account than it will be when they give oral evidence in the proceedings; and
  - it is in the interests of justice for the recording to be admitted, having regard in particular to:
    - the interval between the time of the events in question and the time when the recorded account was made;
    - any other factors that might affect the reliability of what the witness said in that account;
    - the quality of the recording; and
    - any views of the witness as to whether their evidence-in-chief should be given orally or by means of the recording.

**1.21** In considering whether any part of a recording should not be admitted under Section 137 CJA 2003, the court must consider whether admitting that part would carry a risk of prejudice to the defendant and, if so, whether the interests of justice nevertheless require it to be admitted in view of the desirability of showing all or most of the interview (Section 138, CJA).

**1.22** Other than video-recorded interviews as their evidence-in-chief, witnesses who come within the scope of Section 137 CJA 2003 who are not also vulnerable or intimidated (as defined in this chapter) will not qualify for Special Measures under Part II of the Youth Justice and Criminal Evidence Act 1999 (screens, live link, etc.).

## **1.23 The provisions of Section 137 CJA 2003 were still awaiting implementation at the time this edition of *Achieving Best Evidence* was written.**

The status of the implementation of this Section at the time of reading can be established by checking Home Office circulars, at:

[www.knowledgenetwork.gov.uk/HO/circular.nsf/ViewTemplate%20For%20HOCircularsWeb?OpenForm](http://www.knowledgenetwork.gov.uk/HO/circular.nsf/ViewTemplate%20For%20HOCircularsWeb?OpenForm)

## Significant witnesses

**1.24** Significant witnesses, sometimes referred to as 'key' witnesses, are those who:

- > have or claim to have witnessed, visually or otherwise, an indictable offence, part of such an offence or events closely connected with it (including any incriminating comments made by the suspected offender either before or after the offence) but who are unlikely to have video-recordings of their interviews admitted as evidence-in-chief under Section 137 CJA 2003 as a result of there having been a lengthy interval between the alleged event and the interview; and/or
- > have a particular relationship to the victim or have a central position in an investigation into an indictable offence.

**1.25** Interviews with significant witnesses should usually be video-recorded because it is likely to:

- > increase the amount and quality of information gained from the witness;
- > increase the amount of information reported by the witness being recorded;
- > safeguard the integrity of the interviewer and the interview process; and
- > increase the opportunities for monitoring and for the development of interview skills.

## **1.26 There is no statutory provision for video-recordings of interviews with significant witnesses to be played as evidence-in-chief.**

The options for adducing the testimony on the recording as evidence are set out in paragraph 4.8 of this document.

# 2 Planning and conducting interviews with children

## Part 2A: Planning and preparing for interviews

### Aims

By the end of Part 2A, the interviewer should be able to consider, with respect to each case:

- > the context of the allegation, including competence and compellability (paragraphs 2.1 to 2.28);
- > initial action, including consent, medical examinations and assessment (paragraphs 2.29 to 2.36);
- > the information needed to plan an interview (paragraphs 2.37 to 2.65);
- > preparing children for an interview (paragraphs 2.66 to 2.73); and
- > making use of the information needed to plan an interview (paragraphs 2.74 to 2.122), including when to consider whether an assessment by an intermediary is appropriate (paragraphs 2.96 to 2.101).

What follows in this part is a recommended procedure for planning and preparing for interviews with child witnesses. Thorough planning is essential to a successful investigation and interview. Even if concerns about the child's safety necessitate an early interview, an appropriate planning session is required to identify key issues and objectives. Time spent anticipating and covering issues early in the criminal investigation will be rewarded with an improved interview later on. It is important that, as far as possible, the case is thoroughly reviewed before an interview is embarked upon to ensure that all issues are covered and key questions asked, since the opportunity to do this will in most cases be lost once the interview(s) have been concluded.

Part 2B covers the interview process itself. While what follows in this part and Part 2B should not be regarded as a checklist to be rigidly worked through, the sound legal framework that it provides should not be departed from by interviewers unless they have discussed and agreed the reasons for doing so with their senior manager or an interview adviser (tier 5 of the Association of Chief Police Officers' (ACPO's) *Investigative Interviewing Strategy* (ACPO, 2004)). Any such agreements and the rationale underpinning them should be recorded. It may subsequently be necessary to explain such departures at court.

### The context of the allegation: the intersection of the child protection and criminal justice systems

**2.1** Any video-recorded interview serves two primary purposes. These are:

- > evidence gathering for use in criminal proceedings; and
- > the evidence-in-chief of the child witness.

In addition, any relevant information gained during the interview can also be used to inform enquiries regarding significant harm under Section 47 of the Children Act 1989 and any subsequent actions to safeguard and promote the child's welfare, and in some cases, the welfare of other children.

**2.2** Some information may be common to both purposes, but there will be issues specific to each to be considered at the planning stage. The video interview may additionally serve a useful purpose in informing any subsequent civil childcare proceedings, or in disciplinary proceedings against adult carers (e.g. in residential institutions), and its potential value for these too should not be overlooked (see paragraphs 2.30 to 2.33 on associated issues of consent).

### The criminal investigation and the evidence-in-chief of child witnesses

**2.3** As an opportunity to gather evidence in a criminal investigation, interviewers should ensure that they are aware of the types of information necessary to prove any particular charge that may arise. Referral information may give clues to likely charges, but should not be used to drive the interview solely towards confirming earlier suspicions or allegations.

**The interviewer should keep an open mind as to what may or may not have happened to the child**, and should not seek only to elicit details that will prove a hypothesis about the child's experience(s) constructed on the basis of the initial information. In abuse investigations, the possibility of gathering additional evidence from a medical examination of the child or from the scene of the alleged abuse should also be considered.

**2.4** At this stage it will be helpful (if possible) to determine whether the child is believed to have been a victim of abuse or other crime, or instead a witness to a crime perpetrated upon someone else (this may not always be clear at the outset). The specific information, quality and degree of planning for the interview itself may differ depending on whether the child is a victim or a witness of a crime, or both. The subsequent support and therapeutic help offered to the child (and their family) may also be different depending on whether the child is a victim or witness or both. In addition, some children may need therapeutic help from the local children's services authority, health services or another agency to help them recover from the trauma associated with being a victim of a crime, even where there are no other concerns about their safety or welfare.

**2.5** Children in appropriate cases who have witnessed an event and are not alleged victims should also be interviewed in the style advocated by this guidance, and by trained interviewers. This may be particularly important to remember at weekends or other times when normal interviewing personnel or facilities are less available.

**2.6** The Special Measures introduced in the Youth Justice and Criminal Evidence Act 1999, together with the rephrasing of the competency requirement contained in the Act (see paragraphs 2.19 to 2.26), emphasise that no child should be precluded from an interview at an initial stage. Consideration of child witnesses should proceed on a case-by-case basis and there should be no automatic exclusion by reason of age or disability.

**2.7** The Special Measures, including video-recorded evidence-in-chief, that child witnesses might be given access to at the trial should be outlined and the views of the child and of their carers (unless inappropriate) ascertained in respect of them. When obtaining the views of the child and their carer, it should be explained how the evidence-in-chief will be used and to whom it will be made available, and how the live TV link at court can be seen by the defendant and the public gallery in the courtroom. Their views about the possibility of having a supporter present while they are being interviewed and/or giving evidence should also be solicited (see paragraphs 2.102 to 2.105). While soliciting these views it is essential that the witness/carers understands that while their views will be listened to, **access to Special Measures and/or a supporter during the trial is very much a decision for the court based on an application by the prosecution, and as such should not be taken for granted.** Further details of Special Measures are set out in Chapter 6.

**2.8** Although the Crown Prosecution Service (CPS) is not part of the investigating team, and does not direct the investigation, an early meeting between the police and the CPS to discuss Special Measures may be appropriate (separate guidance on CPS–police liaison can be found in *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* (CPS, ACPO and the Home Office, 2001)). The police may also seek advice from the CPS at an early stage about any other evidential issues that may affect the way in which the investigation is conducted. In some exceptional cases the CPS may select suitably qualified counsel for advice at a very early stage.

**2.9** The investigating team should consider whether the criminal investigation, and needs of the child, might be better served by obtaining a written statement rather than a video-recorded interview. This may be relevant if the child is older, or there is the possibility that the alleged abuse involved the use of video-recording (e.g. for the production of pornography). Research has shown that giving children the choice of whether or not to avail themselves of technological innovations in giving evidence can be as important as the technology itself. Even if the interview is video-recorded, some children may find it helpful to be able to write things down at certain points in the interview, e.g. if they are too embarrassed to speak about particular details. What is written down can then be read out by the interviewer or exhibited and shown to the jury in any subsequent trial.

## Section 47 enquiries

**2.10** At a minimum, such as instances in which the child has experienced no previous contact with the public services, the investigating team in child protection cases should include representatives from both the police and the local children's services authority. It may also be important to involve primary health care or educational professionals who know the child. For children who have had past or current involvement with that local children's services authority, useful information may already have been provided from different professionals or may be obtained from other adults who know the child (e.g. parents, carers, teachers, educational psychologists, youth workers, occupational therapists), and it may be that other individuals are offered a more active role in the planning process for the investigation (e.g. facial composite operators where the suspect is not known to the child).

**2.11** Whenever suspicion has arisen that a child has suffered, or is likely to suffer, significant harm, there will be a strategy discussion or meeting involving the local children's services authority, the police and other professionals as appropriate, e.g. paediatrician, child and adolescent mental health services (*Working Together to Safeguard Children* (The Stationery Office, 2006), paragraphs 5.54 to 5.59 and *Safeguarding Children: Working Together for Positive Outcomes* (National Assembly for Wales, 2004), paragraphs 5.29 to 5.39). If enquiries under Section 47 of the Children Act 1989 are pursued following the strategy discussion/meeting, then the core assessment undertaken using the *Framework for the Assessment of Children in Need and their Families* (The Stationery

Office, 2000) will provide considerable information about the child and their carer(s). (The assessment framework is summarised in Appendix C.) The investigative interview and criminal investigation will run alongside such Section 47 enquiries and the interviewer(s) might, therefore, have access to detailed information about the child that can be drawn upon when planning and conducting the investigative interview, depending upon the exact timing of the interview in relation to the Section 47 enquiries.

**2.12** Where it has been agreed by the police and children's social care, in a strategy discussion/meeting, that it is in the best interests of the child that a full criminal investigation be carried out, the police are responsible for that investigation, including any investigative interview (video-recorded or otherwise) with the victim (recommendation 99 of the Victoria Climbié Inquiry Report). Having responsibility for the criminal investigation does not mean that the police should always take the lead in the investigative interview. Provided both the police officer and social worker have been adequately trained to interview child witnesses in accordance with the guidance set out in this document, there is no reason why either should not lead the interview. The decision as to who leads the interview should depend on who is able to establish the best rapport with the child. In circumstances where a social worker leads the interview, the police should retain their responsibility for the criminal investigation by ensuring that the interview is properly planned and that the police officer has an effective role in monitoring the interview (see paragraphs 2.87 and 2.88). Similarly, where a police officer leads the interview, the local authority should retain their duty to make enquiries under Section 47 of the Children Act 1989 by ensuring that the interview is properly planned and that the social worker has an effective role in monitoring the interview.

**2.13** Enquiries should be carried out in such a way as to minimise distress to the child and to ensure that families are treated sympathetically and with respect. The decision as to whether to conduct a joint investigative interview or joint visits should be determined by what is in the best interests of the child, for example by limiting the number of occasions that the child has to relate an account of what has happened to them or reducing the frequency of agency visits to the child's home. Investigators should consult Local Safeguarding Children Board safeguarding children procedures about how enquiries relating to children suffering or likely to suffer significant harm (under Section 47 of the Children Act 1989) and associated criminal investigations should be conducted and the circumstances in which joint enquiries are necessary and/or appropriate.

**2.14** Different circumstances experienced by the child prior to the interview will have implications both for the amount of knowledge that may already be available about the child to be shared between agencies, and

subsequently for the manner in which any investigative interview is planned and proceeds:

- > Some children will hitherto have been unknown to the local children's services authority, but known to their GP, health visitor or school.
- > Some children may not be known to the local children's services authority, but may be known, for example, to child and adolescent mental health services or education professionals because of emotional or behavioural problems, or special educational needs.
- > Some children will be known to the local children's services authority as open cases or as previously open cases, as well as to health and education services.

**2.15** Whatever the child's circumstances, the police officer, the children's social care worker and any other members of the investigating team should give a proper explanation of their roles to the child and their carer. The child's knowledge and understanding should be monitored throughout the investigation.

**2.16** Children who have previously been unknown to the local children's services authority and the police are likely to have least understanding of the interviewing process, and of the nature of professional interventions. The way in which the purpose of the interview and the roles of the investigating team are explained to the child and their carer(s) will need to take account of the fact that they have had no previous contact with public services regarding child protection concerns about a child's safety or welfare.

**2.17** Children who have previous experience of public services may be more knowledgeable about the roles of different personnel, though their experiences will have varied depending on their individual circumstances. However, no assumptions should be made about a particular child's level of knowledge of public service personnel, especially children's social care workers, who may have been involved with the family for a number of possible reasons (e.g. children in need services, services for disabled adults, or adults with mental health problems). If there have been concerns about a child's safety and/or welfare or current concerns have resulted in the consideration of an investigative interview, an initial assessment of the child's needs and their family members will have already been undertaken by the local children's services authority.

**2.18** Consideration should be given to holding a discussion between the investigating officer and the CPS where necessary to discuss what Special Measures might be needed to assist the witness before and during the trial (see *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* (CPS, ACPO and the Home Office, 2001)).

## Competence, compellability and availability for cross-examination: the legal position

**2.19** Since the video-recorded interview might serve as the child's evidence-in-chief at court, the investigating team must also consider the child's competence, compellability, and availability for cross-examination.

**2.20** Section 53 of the Youth Justice and Criminal Evidence Act 1999 provides that in principle 'all persons are (whatever their age) competent to give evidence'. The Section qualifies this principle by saying that persons are incompetent as witnesses where the court finds that they are unable to understand questions put to them, or unable to give answers to them which can be understood; but Section 54(3) makes it clear that in considering this question a court must bear in mind the various Special Measures that are available under Sections 23 to 30 of the Act (for example 'communications aids', available under Section 30, see paragraph 6.25).

**2.21** Thus, where children are to give evidence, it is no longer necessary, as it was at one time, to persuade the court that he or she 'is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth'.

**2.22** Where a video-recorded interview is to be played in court as evidence-in-chief, there is no need for the witness to be sworn. Section 31(2) and (3) of the Youth Justice and Criminal Evidence Act 1999 expressly provides that such a video-recorded statement, if admitted by the court as the evidence of the witness, shall have the same legal status as that witness's direct oral testimony in court – even where, if giving direct oral testimony in court, the witness would have been required to take an oath.

**2.23** However, just because the witness who was interviewed on video was competent it does not necessarily follow that the court will admit the recording in evidence. By Section 27(2) of the Youth Justice and Criminal Evidence Act 1999 the court may refuse to admit such a statement if, in all the circumstances, it believes it would not be 'in the interests of justice' to do so; and under Section 78 of the Police and Criminal Evidence Act 1984 the court has a more general discretion to exclude any piece of evidence that the prosecution wish to call, where it believes the use of such evidence would make the trial 'unfair'. One circumstance in which a court might decide to exclude such evidence is where the statement is clearly prejudicial to the defendant, but the court feels that it is of very little weight.

**2.24** In the light of this, it will usually be wise to explore with a witness who is very young, or who has a learning difficulty, what their understanding is of the difference between truth and lies (see paragraph 2.143). Where, as normal, the recording is admitted in

evidence, this would often be of help to the court in assessing the weight to put on the evidence. In exceptional cases where an attempt is made to persuade the court to exclude the evidence, it might help to rebut the argument that the court ought to exclude the evidence because it is seriously unreliable.

**2.25** A witness is usually not only competent to give evidence, but also **compellable**. This means that they can be legally required to attend trial (or, where a 'Special Measures direction' has been given to this effect, to be available for a video-recorded pre-trial cross-examination). In general, however, the fact that a witness is compellable does not mean that they can be legally required to give any kind of preliminary statement to the police – even the sort of statement that is made under this guidance.

**2.26** It does not necessarily follow that because a witness is competent and compellable, the CPS will insist on making them attend court to give evidence if unwilling to do so. The prosecution is not legally required to call every piece of evidence available, and in some cases may proceed without a particular witness's evidence if they believe they can secure a conviction without it. In cases where they believe the evidence of a particular witness is essential, the Code for Crown Prosecutors leaves it open to the CPS to drop the case if they think that it would be particularly damaging to the witness to proceed (in such cases the child witness and their carer must be informed of the implications of this decision). In deciding whether to include a particular witness's evidence, and whether to proceed with the case at all, the CPS will always take account of the wishes of the witness (although they will not necessarily defer to them). Reports to the CPS should always include clear information about the wishes of the witness, and their parents or carers, about going to court. The CPS may in any event need to seek further information from the investigating team, and should always be kept up to date throughout the case to ensure a continuous review.

**2.27** A video-recorded interview is usually only admissible as evidence-in-chief at trial where the person who made it is 'available for cross-examination'. By Section 27(4) of the Youth Justice and Criminal Evidence Act 1999, however, 'available for cross-examination' includes being available for a cross-examination held in private and in advance of trial, subject to the discretion of the court (when implemented, Section 28 of the Youth Justice and Criminal Evidence Act 1999 will make this facility available for all eligible witnesses where an application is granted by the court), while Section 21 makes it the normal procedure for witnesses under 17 years of age when the offence is a sexual one. In this connection, it should also be remembered that where the defendant is unrepresented, Sections 34 to 40 of the Youth Justice and Criminal Evidence Act 1999 now impose serious restrictions on the defendant to cross-examine in person (see Chapter 6 for further information on Special Measures).



















































































































































































































































































































