



# A National Protocol between the Police and Crown Prosecution Service in the Investigation and Prosecution of Offences in Relation to which the Cross-examination of a Witness will be Pre-Recorded

The National Police Chiefs' Council (NPCC) with the College of Policing has agreed to this protocol being circulated to, and adopted by, Home Office Police Forces in England and Wales.

It is Official under the Government Protective Marking Scheme and any referrals for advice and rationale in relation to Freedom of Information Act disclosure should be made to the NPCC Central Referral Unit at [npcc.foi.request@cru.pnn.police.uk](mailto:npcc.foi.request@cru.pnn.police.uk).

## Document information

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This protocol has been produced and approved by the NPCC lead for Victims and Witnesses in conjunction with the Crown Prosecution Service. Protocols produced by the NPCC should be used by chief officers to shape police responses to ensure that the general public experience consistent levels of service. The operational implementation of this document will require operational choices to be made at local level in order to achieve the appropriate police response and this document should be used in conjunction with Authorised Professional Practice (APP) produced by the College of Policing. It will be updated and re-published as necessary.

Any queries relating to this document should be directed to either the author detailed above or the NPCC Business Support Office on 020 3276 3800.

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## **1. PARTIES**

1.1. The Parties to this Protocol are the National Police Chiefs' Council ('the police') and the Crown Prosecution Service ('the CPS').

## **2. BACKGROUND**

2.1. Section 16 of the Youth Justice and Criminal Evidence Act 1999 ('the 1999 Act') states that a witness (other than the accused) is eligible for Special Measures to assist him or her in giving evidence in criminal proceedings, if he or she is aged under 18 years at the date of the hearing of the application for special measures (usually a Plea and Trial Preparation Hearing); or if the nature and quality of his or her evidence is likely to be diminished because he or she suffers from a mental disorder, a significant impairment of intelligence and social functioning or has a physical disability or disorder.

2.2. Section 28 of the 1999 Act provides for pre-recorded cross-examination to be shown as evidence at trial in cases involving vulnerable or intimidated witnesses. It is the last of the "special measures" in the 1999 Act to be implemented.

2.3. In line with the police and the CPS commitment to support witnesses throughout the criminal justice process, the objectives of introducing section 28 of the 1999 Act are:

- To facilitate improvement in the experience of witnesses by enabling them to give evidence at an earlier stage in proceedings, when their recollection of events is likely to be fresher; and
- To maximise the potential for earlier resolution of hearings as cross-examination might strengthen the prosecution case, thus encouraging the entering of a guilty plea, or it may result in the conclusion that there is no longer a realistic prospect of conviction.

2.4. The objective of this Protocol is to set out the working arrangements between the Police and the CPS with a view to ensuring that the benefits of section 28 are realised.

## **3. SCOPE**

3.1. This National Protocol currently only applies to cases which fit all of the following criteria:

- a) Where a witness who is required to give live evidence is under the age of 18 at the time of the hearing of the application for special measures, or, suffers from a mental disorder within the meaning of the Mental Health Act 1983, or has a significant impairment of intelligence and social functioning, or has a physical disability or a physical disorder, and the quality of their evidence is likely to be diminished as a consequence.
- b) Where the witness's account is contained in a visual recorded interview (VRI), in accordance with the principles of 'Achieving Best Evidence' with a view to it being used as the witness's evidence-in-chief, under section 27 of the 1999 Act.
- c) Cases which are heard in the Crown Court.

- 3.2. The provisions of this Protocol are to be read in conjunction with other guidelines issued to investigators and prosecutors which may pertain to the cases which fit the criteria referred to above. This guidance will include:

[Legal Guidance: Child sexual abuse](#)

[Legal Guidance: Rape and Sexual Offences](#)

[Mental Health and Learning Disabilities](#)

[ABE Guidance on Interviewing Victims and Witnesses and Using Special Measures](#)

[Advocates Gateway toolkit on intermediaries](#)

#### **4. COMMUNICATION**

- 4.1. Each CPS Area and each police force will appoint a section 28 Lead who will work together with Local Implementation Teams (“LITs”) to ensure that the investigation and prosecution of proceedings, where an application for pre-recorded cross-examination is to be made, is coordinated between the agencies, including the Witness Service.

#### **5. IDENTIFICATION OF CASES**

- 5.1. The police will ensure that all officers and other relevant personnel are made aware of the availability of pre-recorded cross-examination and its scope, in order to ensure that witnesses who may benefit from this Special Measure are identified as early as possible in the investigation.
- 5.2. The police will provide more detailed guidance on the nature and scope of section 28 to those officers whose work is more likely to involve engagement with the categories of witnesses eligible for pre-recorded cross-examination. This will include (but is not limited to) those officers trained to undertake and monitor VRIs, as well as public protection officers and specialist rape and child abuse investigators.
- 5.3. Each police force should provide access to advice for officers about whether a witness might be eligible for pre-recorded cross-examination and the processes that should be followed.

#### **6. INVESTIGATION AND THE USE OF VISUALLY RECORDED INTERVIEWS**

- 6.1. The police will consider, from the point of first contact with a witness whether he or she should be interviewed by visual recording, in line with Achieving Best Evidence Guidance. Thereafter the police should consider whether or not the witness would be eligible for pre-recorded cross-examination and, where necessary, discuss that with the prosecutor from the CPS.

- 6.2. The police will be alert to any potential need for an intermediary and, where such a need is identified, ensure the engagement of a Registered Intermediary, via the Witness Intermediary Service (hosted by The National Crime Agency), as early as possible in the investigation and prior to the witness being interviewed. Alternatively, an unregistered intermediary may be engaged. An intermediary may also be engaged by the prosecutor later in the process, in order to improve the quality of the witness's evidence. All intermediaries are impartial and their duty is to the court.
- 6.3. Section 21 of the 1999 Act, as amended by section 101 of the Coroners and Justice Act 2009 ('the 2009 Act'), gives rise to a presumption that child witnesses will give their evidence in chief by recorded interview. Advocates will need to satisfy the court that the vulnerable adult suffers from a mental disorder, significant impairment of intelligence and social functioning or a physical disability or disorder that is likely to diminish the quality of their evidence and investigators need to consider at an early stage whether there is a need to seek evidence of such a condition to support a special measures application. Once established with medical evidence, the witness will be assessed by an intermediary to confirm the witness would benefit from having their evidence at police interview and/or at court being facilitated by an intermediary to assist with giving best evidence.
- 6.4. In the case of vulnerable adult witnesses in sexual offences, it should be noted that section 101 of ('the 2009 Act') inserted section 22A into the 1999 Act making special provision for adult complainants in sexual offence trials in the Crown Court. This section provides, on the application by a party to the proceedings, for the automatic admissibility of a VRI as evidence-in-chief under section 27 of the 1999 Act, subject to the court being satisfied that the special measure or combination of special measures is likely to maximise the quality of the witness's evidence.
- 6.5. It is vital that there is informed discussion between the police and the witness, or his or her parent or carer/supporter adult if he or she does not have the capacity to consent, as to what special measures are available.
- 6.6. Children may opt out of either or both recorded evidence in chief and evidence by live link in which case there is a presumption that they will give their evidence from behind a screen unless, subject to the agreement of the court, they opt out of use of the screen also. When deciding whether or not to agree to the child's wishes the court must be satisfied that the quality of his/her evidence will not be diminished.
- 6.7. All decisions regarding the visual recording of a witness's evidence will be taken on a case by case basis. The police will explain to witnesses and their supporters the available special measures and their advantages and disadvantages, including any potential impact on the proceedings. Police will also explain that section 28 may be used in conjunction with other special measures, will obtain the witnesses' informed views and pass them to the CPS to assist with any special measures application (the police should be sensitive to the fact that witnesses may have personal reasons for rejecting a visually recorded interview, for example where they were recorded by the perpetrator in the course of a sexual offence). However in these circumstances it must be explained to the witness, that an application for pre-recorded cross-examination can only be made where there is a VRI which can be used as evidence-in-chief at trial.
- 6.8. In advance of a final decision on whether or not an application for section 28 is made, the witness should be given the opportunity to receive support and to visit the court, so that

they may make an informed decision on their choice of special measure. For this the witness should be referred to the Witness Service, usually via the Witness Care Unit.

- 6.9. VRIs should be taken in accordance with Achieving Best Evidence (ABE) in Criminal Proceedings: [Guidance on Interviewing Victims and Witnesses and Using Special Measures](#). The police will ensure that the sound and picture quality of the recording is fit for purpose.
- 6.10. Rapport building that lasts beyond the short exchange of pleasantries (for example in the case of young children or adults with learning disabilities) should be concluded during the planning phase when the witness is prepared for the interview, or be stored on a separate recording and not form part of the witness exhibit. Any separate recordings of this type must be supplied separately as unused material. The same applies to background or other information that is not part of the evidence on which the prosecution relies at court. The police will be responsible for editing the recording under the reviewing prosecutor's guidance.

## **7. EARLY CONSULTATION**

- 7.1. Early consultation between the police and the CPS is essential in rape cases and is a requirement of the Director's Guidance on Charging. However, early consultations are not restricted to rape cases, or to cases where there is an identifiable suspect or that pass the threshold test. They may take place in any case where the early involvement of an Area prosecutor would assist in the gathering of relevant evidence and any strategy for a likely prosecution. This will include a discussion around appropriate special measures such as pre-recorded cross-examination. A note of any advice given at this stage should be recorded by the Area Prosecutor.

## **8. CHARGING**

- 8.1. When submitting a case for a charging decision, the police will ensure that the file has been confirmed as having reached the required standard by a supervisor. The file should comply with the [Director's Guidance on Charging](#).
- 8.2. The investigating officer will make the VRI and Record of Visual Interview (ROVI) available to the prosecutor for the purposes of the charging decision. The prosecutor will watch the visually recorded interview prior to applying the Full Code Test, or consider the ROVI when applying the Threshold Test.
- 8.3. It is a requirement, in all cases where pre-recorded cross-examination is being considered, that the investigating officer prepares a full and detailed MG2 in order to ensure that any requirement for special measures receives early and informed consideration. The MG2, MG3/CMO2 and MG5 should all be marked as: Pre-recorded Cross-Examination Requested to ensure that this issue is addressed as early as possible.
- 8.4. Where an intermediary has been involved at the investigation stage of the case, the police will notify the intermediary of the date by when their court report will be required, having regard to the timescales set out in this Protocol. That notification and any response from the intermediary will be appended to the MG2.

8.5. The CPS will ensure that every MG3/CMO2 (charging advice) provided by a prosecutor, in accordance with this Protocol is provided within 28 days of receipt of the file and contains an Action Plan unless there is no additional or outstanding work required from the police. To ensure cases are managed efficiently, action dates will be agreed between CPS and the police and recorded on the Action Plan. Any Action Plan should include any material needed to support an application for Special Measures.

8.6. In all potential section 28 cases, where the police are not seeking a remand in custody, they will ensure that the gathering of relevant unused material takes place expeditiously, taking into account the witness age and / or vulnerability. The police will put in place supervisory processes to ensure that the investigation timescales do not drift.

8.7. Threshold charging decisions will be made in accordance with timescales under the Police and Criminal Evidence Act 1984 (PACE).

## 9. DISCLOSURE

9.1. The officer in the case or disclosure officer will handle unused material in accordance with the Criminal Procedure and Investigations Act 1996 (CPIA) as amended, the relevant Code of Practice, the [Attorney General's guidelines on disclosure](#) and the [Disclosure Manual](#).

9.2. The police will ensure that the officer in the case or disclosure officer is adequately trained on CPIA procedure.

9.3. In accordance with CPIA procedures the investigator or disclosure officer will identify and seek access to relevant third party material and relevant digital material held on devices and the internet, wherever possible at the pre-charge stage. The police may consult and seek Early Investigative Advice from prosecutors on reasonable lines of inquiry, in appropriate cases. They should certainly do so if there is uncertainty over what might amount to a reasonable line of inquiry in order to identify relevant material, so agreement can be reached between investigator and prosecutor. Access to third party material or digital material will be sought by the police prior to the decision to charge and, if the consent of the witness (or his or her parent or appropriate adult) is required, this consent will be sought in a sensitive manner, having regard to the nature of the material in question. Refer to:

- the [2013 Protocol and Good Practice Model on the handling of third party material in child sexual abuse cases](#);
- the [2018 Joint Protocol on dealing with third party material for adults](#); and
- [Disclosure – A guide to 'reasonable lines of enquiry' and communications evidence](#).

9.4. The investigator and disclosure officer must provide a report on third party and digital disclosure to prosecutors on an MG3/CMO2 insert or the MG6. This will be used by prosecutors to draft a Disclosure Management Document (DMD).

9.5. The prosecutor will make application to the court for a witness summons or for third party material to be withheld on the grounds of public interest immunity, where appropriate.

9.6. Wherever practicable to do so, the police will always seek to obtain third party material in a digital format.

## 10. CASE PREPARATION AND REVIEW

- 10.1. When a defendant is charged with an offence which is anticipated to be heard in the Crown Court, the officer in the case will (unless a remand in custody is being sought) request that the custody officer bail the defendant to appear at the Not Guilty Anticipated Plea (NGAP) hearing in the Magistrates' Court, within 28 days of the date of charge. It will therefore follow the timescales agreed under the Senior Presiding Judge's (SPJ) Better Case Management (BCM) initiative.
- 10.2. The CPS lawyer who authorises charge will request a full transcript of the VRI, at the point of making the charging decision, from the relevant contracted provider.
- 10.3. Thereafter, the officer in the case will ensure that a file which accords with [The National File Standard](#) is provided to the CPS 14 days in advance of the NGAP hearing. Access to the VRI will be provided to the Defence with the Initial Details of the Prosecution Case (IDPC), in advance of the NGAP hearing (where the defence solicitors are known or have made a request).
- 10.4. If an application for pre-recorded cross-examination is to be made in the case, the prosecutor will inform the Magistrates Court at the first hearing and the intention to apply will be recorded on the BCM Questionnaire. Where the defendant indicates a likely not guilty plea and the case is sent for trial at the Crown Court, it will be listed for a Plea and Trial Preparation Hearing (PTPH), 28 days after the sending (in accordance with the BCM timetable). Seven days prior to that hearing, the prosecutor will provide to the Court and Defence, uploaded to the Digital Case System (DCS):
  - a. Any Special Measures Application with any intermediary's court report unless an oral application is to be made to the court at PTPH (NB. the dates of availability to attend court of that intermediary will be required for the PTPH);
  - b. A transcript of the VRI(s);
  - c. Indictment;
  - d. PTPH form;
  - e. Disclosure Management Document; and
  - f. Any additional evidence.
- 10.5. Within five weeks of the initial hearing in the Magistrates Court, the police will provide the CPS with a bespoke file of evidence and MG6 disclosure documents in all cases that fall under this Protocol, irrespective of whether the Defendant is on bail or in custody. The CPS will serve its case within seven weeks of the sending hearing.
- 10.6. Sometimes a section 28 application will be indicated because the witness meets the criteria; however the police officer, intermediary or prosecutor may recommend other special measures to better meet the needs of the witness. In those circumstances, a familiarisation visit to the court should be requested for the witness, via referral to the

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Witness Service, ideally between the sending hearing and the PTPH. At the familiarisation visit, the witness should have all possible available special measures explained to them, so that they may make an informed choice. If it is not possible to arrange the visit prior to the PTPH, a final decision should only be made on applying for section 28, once the witness has made a final request to do so.

10.7. The outcome of these familiarisation visits should be brought to the CPS attention as soon as possible, so that the appropriate application is made to the court.

10.8. At all stages in the proceedings, the prosecutor will keep the case under continuing review and this will include a review of the case (in consultation with the officer in the case and the appointed advocate) after the pre-recorded cross-examination has occurred. The police will undertake any further enquiries arising from that or any other review.

10.9. At the PTPH hearing timetables should be sought for the following:

- Ground Rules Hearing;
- Agreed editing of the VRIs;
- Section 28 hearing / pre-recorded cross-examination; and
- Trial.

## **11. WITNESSES**

11.1. At the start of any investigation to which this Protocol applies, the police will ensure that witnesses are offered the assistance of local and/or national specialist support services, where appropriate.

11.2. The files of the police, CPS and Witness Care Unit (WCU) should be conspicuously marked so that it is clear to all parties who is responsible for communicating with the witness and keeping records of any actions.

11.3. The parties will ensure that once an order for pre-recorded cross-examination is made, all communications with the WCUs are marked accordingly (and any intermediary who is required is also warned). This is so that the dedicated Witness Care Officer is aware that he or she is required to warn the witness who will benefit from this special measure on the date when the pre-recorded cross-examination is to occur; as opposed to the trial date at which other witnesses will need to be warned to attend.

11.4. Once an order for pre-recorded cross-examination is made and the witness is warned, the WCU will ensure that the Witness Service (and any intermediary who is required) is notified of their anticipated attendance at court, if they have not otherwise been referred directly for advance support.

11.5. It is the responsibility of the WCU, in conjunction with the Witness Service, to arrange a court familiarisation visit for the witness (NB. see paragraph 11.1 and 11.2). Where the witness requires additional assistance such as an interpreter or help in gaining access to the premises due to disability, assistance will be provided.

11.6. Prior to the pre-recorded cross-examination, the officer in the case should arrange for the witness to be given the opportunity to familiarise him or herself with their evidence-in-

chief, by arranging for the witness to view the edited version of the visual interview that is to be used at trial. Where an agreement cannot be made on the edit then the case must be listed to agree one version. The familiarisation of evidence (memory refresh) should occur as close as possible in time to the date of the pre-recorded cross-examination and should ideally include the intermediary, if one has been appointed.

11.7. The Witness Service, CPS Paralegal Officers and Prosecuting Advocate should ensure that they comply with the CPS Guidance on [Speaking to Witnesses at Court](#), subject to any agreement that the guidance should be applied in a bespoke way (for instance, as a result of the age or vulnerability of the witness and the intention of the judge to oversee any meeting with the witness).

11.8. The police and CPS will comply with their responsibilities as set out in [The Victims' Code](#).

## **12. TRIAL**

12.1. The CPS will select an advocate with the necessary skills and expertise to prosecute every trial to which this Protocol applies, whether the advocate is an approved member of the CPS Advocate's Panel or a CPS Crown Advocate.

12.2. Wherever practicable, the trial advocate will attend the PTPH, the Ground Rules Hearing, the pre-recorded cross-examination and any Further Case Management Hearing, in a particular case. Other than in exceptional circumstances, the eventual trial advocate must conduct the section 28 cross-examination. Where it is not possible for this to happen, the reasons must be recorded clearly on the CPS file by the paralegal officer.

12.3. Trial advocates will introduce themselves to witnesses at court, prior to the start of the pre-recorded cross-examination, in accordance with the CPS Guidance [Speaking to Witnesses at Court](#). In the case of young children or highly vulnerable adults, the parties may agree that it is more appropriate for the judge and the advocates to meet the witness together. In such a case, it would not be appropriate for any other party to explain the trial process to the witness. This will ensure that the Speaking to Witnesses at Court guidance is applied in a bespoke way, to meet the individual needs of victims and witnesses.

12.4. The trial advocate will challenge offensive and seemingly irrelevant questioning, deal with inappropriate cross-examination of the witness and challenge any attempt by a Defence advocate to step outside of the parameters set by the judge at the Ground Rules Hearing.

## **13. IMPLEMENTATION**

13.1. This agreement will take effect in respect of existing police investigations where VRI has already been obtained from section 16 vulnerable witnesses.

13.2. The agreement will only apply to cases where the first Crown Court hearing is after the 1 July 2017, in accordance with Ministry of Justice Commencement Orders and subject to the staged timetable relevant for individual courts.

Signed:



Date:

7 May 2019

Max Hill QC  
Director of Public Prosecutions  
For and on behalf of  
The Crown Prosecution Service



25 April 2019

ACC Emma Barnett  
For and on behalf of  
The National Police Chiefs' Council