

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



Implementing the *Speaking up for Justice* Report

- VOLUME 2:**
4. Witness Support and Preparation
 5. Witnesses at Court

	FOREWORD	ix
	ACKNOWLEDGEMENT	x
	MEMORANDUM PROJECT STEERING GROUP	xi
	INTRODUCTION	1
	1 The origins of the new Guidance	1
	Context	2
	Development of the new document	2
	2 The Scope of the Guidance	2
	Child Witnesses	2
	Vulnerable or Intimidated Adults	3
	Witness support	3
	Defence Witnesses	3
	3 The Guidance and Training	3
	4 The Content of the Guidance	4
1	GENERAL PRINCIPLES	5
	1.1 Categories of vulnerable witnesses	5
	1.5 Intimidated witnesses	6
	1.6 Special Measures	6
2	PLANNING AND CONDUCTING INTERVIEWS WITH CHILDREN	9
	Part A: Planning Interviews	9
	The context of the allegation: The intersection of the Child Protection and Criminal Justice Systems	9
	2.1 The different purposes of a video-recorded interview	9
	2.3 The criminal investigation	10
	2.10 Child protection enquiries	11
	2.16 Competence, compellability and availability for cross-examination: the legal position	12
	2.26 Criteria for video recording an interview	14
	2.32 Who should be involved in planning the interview?	16
	2.36 Interpreters and intermediaries	18
	2.42 Interview Supporters	19
	2.47 Factors to consider at the planning stage	20
	2.50 Assessment prior to the interview	21
	2.55 Time and place of the video recorded interview(s)	23
	2.58 Race, gender, cultural and ethnic background	23
	2.63 Other life experiences	25
	2.65 Preparing for the interview(s)	26
	2.68 Consent	27
	2.72 Who should lead the interview?	28
	2.77 Interpreters and intermediaries	29
	2.78 Technical and Organisational Oversight	29

2.81	Planning for immediately after the interview	30
2.83	Victim Personal Statements	30
2.90	Therapeutic help for the child	32
	Part B: Interviewing Child Witnesses	
2.92	General Principles	33
2.95	Preliminaries	34
2.97	Duration and pace of interviews	35
2.100	Phase One: Establishing Rapport	36
2.101	Ground rules	36
2.102	Truth and lies	37
2.103	Establishing the purpose of the interview	39
2.105	Learning more about the child	40
2.106	Phase Two: Free Narrative Account	41
	Phase Three: Questioning	42
2.112	Style of questions	42
2.114	The content of questions	43
2.118	Open-ended questions	44
2.121	Specific questions	44
2.126	Closed questions	46
2.127	Leading questions	46
2.131	Phase Four: Closure	47
2.136	Further Interviews	48
2.138	Misleading Statements	48
	Special Interviewing Techniques	49
2.140	Props	49
2.142	Other interviewing techniques	50
2.147	Interviewing Disabled Children	51
2.149	Interviewing Very Young Children	51
2.151	The Child who becomes a Suspect	52
3	PLANNING AND CONDUCTING INTERVIEWS WITH VULNERABLE AND INTIMIDATED WITNESSES	53
	PART A: PLANNING INTERVIEWS	53
3.1	Who are vulnerable witnesses?	53
	Information that might assist the investigating team in recognising vulnerable witnesses	53
3.2	Recognising vulnerable witnesses	53
3.4	Significant impairment of intelligence and social functioning (Learning disability)	54
3.10	Physical disability	55
3.12	Mental disorder/illness	55

3.18	Witnesses suffering from fear or distress (intimated witnesses)	56
	Support for vulnerable witnesses at interview	56
3.19	Race and cultural facts	56
3.20	Witnesses with significant impairment of intelligence and social functioning (learning disability)	57
3.23	Witnesses with physical disabilities	57
3.28	Witnesses with mental disorder/illness	58
3.36	Witnesses suffering from fear or distress (intimidated witnesses)	59
	Planning the interview	59
3.41	The importance of planning	59
3.53	Interview duration	61
3.56	Social support at interview	62
3.57	Location of interview	62
3.58	The use of intermediaries	62
3.60	Consent and competence	62
	Information on planning interviews with different types of vulnerable witness	63
3.64	Witnesses with significant impairments of intelligence and social functioning (learning disability)	63
3.69	Witnesses with physical disabilities	64
3.70	Witnesses with mental disorder/illness	64
3.72	Witnesses suffering from fear or distress (intimidated witnesses)	65
	PART B: INTERVIEWING VULNERABLE WITNESSES	66
3.71	General Advice on Interviewing Vulnerable Witnesses	66
3.78	Interviewer Behaviour	67
	Pace and Duration of Interview	68
3.82	Pace	68
3.83	Breaks	68
3.81	Establishing Rapport	69
3.90	Oaths and the Importance of Telling the Truth	70
3.93	Free Narrative	71
3.102	Compliance	72
3.108	Acquiescence	73
	Styles of Questioning	74
3.112	General approach	74
3.114	Open-ended questions	74
3.122	Specific questions	75
3.125	Closed questions	76
3.128	Leading questions	76

3.142	Understanding What the Witness is trying to Convey	79
3.144	Special Interviewing Techniques	79
3.147	The cognitive interview	80
3.150	Other techniques	80
	Closing the Interview	81
3.153	Recapitulation	81
3.154	Closure	81
3.158	Further Interviews	81
3.160	Where there is a Video Record	82
3.161	Safeguarding the Intimidated	82
4	WITNESS SUPPORT AND PREPARATION	85
4.1	The Benefits of Preparation and Support	85
	Overview of Support and preparation work	86
4.7	Who is entitled to support and preparation?	86
4.9	What does support and preparation consist of?	87
4.12	Evidential boundaries	88
4.13	Who may provide it?	89
4.15	What skills are involved	89
4.16	Identifying and Responding to the Needs and Wishes of Witnesses	90
4.19	Preparation, Support and Liaison Throughout the Court Process	91
4.20	Support during the investigation	91
4.22	Special requirements	91
4.24	Pre-trial support, preparation and liaison	92
4.25	Communication between the police and the Crown Prosecution Service	93
4.28	Plea and Directions Hearing (PDH)	94
4.29	Preparation for going to court	94
4.31	A pre-trial visit to the court	94
4.33	Refreshing the memory of the witness	95
4.39	Communication with the witness	96
4.43	Provision of therapy prior to a criminal trial	97
4.45	Plans and communication concerning the trial	97
4.47	Role of the Witness Service	98
4.50	The role of the Crown Court liaison officer	98
4.51	Meeting the Legal Representative	99
4.52	Meeting the judge	99
5.53	Support at the hearing	99
4.54	Planning for breaks in testimony	99
4.55	Interpreters	100
4.56	Afterwards – dealing with the outcome	100

4.58	Special provisions for children	100
	Special provisions for adults	103
4.69	Vulnerable adults	103
4.74	Intimidated adults	105
5	WITNESSES AT COURT	106
5.1	Pre-trial Planning	106
5.7	Judicial responsibility for witnesses	107
5.12	The responsibility of legal representatives	109
5.18	Competence and capacity to be sworn	110
5.24	Special Measures Directions Under the Youth Justice & Criminal Evidence Act 1999	111
5.25	Witness eligibility (Sections 16 and 17)	112
5.33	Special provisions relating to young witnesses (Section 21)	113
5.37	Witnesses over 17 (Sections 21 and 22)	115
5.40	Special Measures directions (Sections 16-19)	115
5.43	Binding directions (Section 20)	117
	The Special Measures	117
5.45	Screening the witness from the accused	117
5.48	Evidence by live link	118
5.52	Choosing between live link and screens	119
5.55	Evidence given in private	119
5.58	Removal of wigs and gowns	120
5.59	Video recorded evidence in chief	120
5.70	Video recorded cross-examination or re-examination (Section 28) (when available)	122
5.75	Choosing between videotaped and live cross-examination	123
5.77	Use of intermediaries (when available)	124
5.84	Communication aids	124
5.85	The presence of a court witness supporter while the witness gives evidence	124
5.86	The address of the witness	125
5.87	The use of a sign language interpreter	125
5.89	Protection of Witnesses from Cross-Examination by the Accused in Person	125
5.90	Complainants in proceedings for sexual offences	125
5.91	Complainants and other witnesses who are children	126
5.92	Other cases	126
5.95	Restrictions on Evidence and Questions About Complainant's Sexual Behaviour	126

TABLES AND BOXES

Chapter 1

- 1.1 Special Measures available to vulnerable and Intimidated witnesses 7

Chapter 2

- 2.1 How and when children talk about abuse 16
- 2.2 Checklist of factors to be considered at the planning stage 20
- 2.3 Additional factors to be addressed in cases where the child is known or suspected to have been previously abused 21
- 2.4 General factors to be explored via an assessment prior to interview 22
- 2.5 Some possible effects of child abuse and neglect 25
- 2.6 Some possible effects of racism 25
- 2.7 Some possible effects of discrimination based on impairment(s) 26
- 2.8 Some possible effects of domestic violence 26
- 2.9 Establishing the ground rules for the interview 37
- 2.10 Exploring the difference between truth and lies 38
- 2.11 Raising issues of concern 40

Chapter 4

- 4.1 Activities undertaken by pre-trial supporters and court witness supporters 87
- 4.2 Documenting support work 90
- 4.3 Components of pre-trial preparation 93
- 4.4 Measures to assist child witnesses at the hearing, prior to giving Evidence 102
- 4.5 Special arrangements for children at court 103
- 4.6 Issues of special importance for those planning support for vulnerable adult witnesses 105

Chapter 5

- Figure 5.1 Figure 1: Special Measures Directions [SMD] for Young Witnesses © Laura C.H. Hoyano 114
- Figure 5.2 Special Measures Directions [SMD] for Adult Witnesses © Laura C.H. Hoyano 116

APPENDICES

A	Glossary of Terms	129
B	Admissibility of Video-recordings Under the Criminal Justice Act 1988	136
C	The Assessment Framework	137
D	Child Protection Flow Chart	138
E	Conducting a Video Recorded Interview – the Legal Constraints	139
F	Court Witness Supporter in CCTV Link Room: National Standards	145
G	Guidance on Investigative Interviews with Disabled Children	148
H	Identification Parades Involving Vulnerable and/or Intimidated Witnesses	151
J	National Standards for Young Witness Preparation	152
K	Storage, Custody and Destruction of Video Recordings	154
L	Specimen Form of Receipt and Undertaking for Video Recorded Evidence	159
M	Specimen Index of Video Recorded Interview	160
N	Specimen Information Sheet: Video Recorded Interview	161
O	Technical Guidance	162
P	Warning Labels for Video Tapes	167
Q	Useful Sources	168

4 WITNESS SUPPORT AND PREPARATION

Aims

By the end of this chapter, those charged with preparing vulnerable and/or intimidated witnesses for court should be able to understand, for each individual case:

- The benefits of preparation and support of witnesses (4.1-4.6)
- Who should receive preparation, what form this preparation should take and who should provide it (4.7-4.10)
- The nature and type of support open to witnesses in the different phases of the investigation (4.11-4.15)
- Identify and respond to the needs and wishes of witnesses (4.16-4.55)
- Specific concerns and provisions for children giving evidence in court (4.58-4.68)
- Special provisions for vulnerable and intimidated adults (4.69-4.76)

THE BENEFITS OF PREPARATION AND SUPPORT

4.1 Support and preparation by providing information about the court process helps vulnerable and intimidated witnesses to produce better evidence, as well as reduce the trauma and distress from participating in the criminal justice process. Children, rape victims and witnesses with learning difficulties and mental disorder find the criminal justice process especially stressful, and on occasion, traumatic. High stress reduces the witnesses' ability to participate and respond to questioning, or effectively recall events in order to assist the fact-finding process of the criminal justice system. In addition, vulnerable and intimidated witnesses may also be coming to terms with severe personal difficulties and trauma. This process of healing and recovery can be delayed, or even set back by being involved in a court case.

4.2 Preparation and support, planned to fit the needs of individual witnesses can help to prevent and alleviate these problems. Certain groups of witnesses may be especially vulnerable. Examples include:

- learning disabled people,
- physically disabled witnesses,
- witnesses suffering from fear and distress (intimated witnesses),
- those victimised over extended periods of time,
- those with mental health problems, and
- children.

4.3 Learning disabled children and adults may have problems with memory, vocabulary, level of understanding and suggestibility to leading questions. Some

learning disabled people are acquiescent, or compliant to the demands of those in positions of power or authority. In addition to these difficulties, such witnesses often lack knowledge or understanding of the criminal justice system (see Chapter 2, paragraphs 2.13-2.14 and Chapter 3, paragraphs 3.140-3.141). Such difficulties can be helped by provision of appropriate information and support. National Guidelines have been prepared for those involved in Young Witness Preparation and these are reproduced as Appendix J.

- 4.4 Adults or children who have been victimised may have special difficulties as witnesses in criminal proceedings. They may need help to overcome the feeling that it is they, rather than the accused, who is on trial. The context and process of the trial itself may also bring back old memories and patterns of reaction and response for vulnerable witness. They may be especially sensitive to imputations of their own guilt or responsibility for the alleged actions of the accused.
- 4.5 Those persons with mental health problems can also find the criminal justice system especially stressful. Those with post-traumatic anxiety disorders can have special problems prior to and during the trial, particularly if their problem is related to the alleged offence.
- 4.6 Preparation and support are thus necessary to enable the witnesses to give their best evidence as well as to safeguard their welfare while so doing. This chapter provides guidance to those supporting all vulnerable, intimidated and/or young witnesses and preparing them to give evidence and to those planning and coordinating the attendance of such witnesses at court. Paragraphs 4.47-4.57 refer to all vulnerable witnesses, whether adult or child, while particular issues relevant to vulnerable children and adults are noted in paragraphs 4.58-4.68 and 4.69-4.75 respectively.

OVERVIEW OF SUPPORT AND PREPARATION WORK

Who is entitled to support and preparation?

- 4.7 All witnesses, including those who may be vulnerable or intimidated, require support before the trial. Witnesses, whether giving evidence for the prosecution or defence, are entitled to an explanation of their role at court and assistance to ensure that they are enabled to give their best evidence. Support is appropriate at all stages of the case. This will *not* involve discussing or rehearsing the witness' evidence or otherwise coaching them before the trial.
- 4.8 Vulnerable or intimidated witnesses are particularly in need of support and preparation. The **Special Measures** available are described in detail in Chapter 5. The Youth Justice and Criminal Evidence Act 1999 enables many such witnesses to seek access to Special Measures to help them give evidence in the best way, and with the minimum of attendant stress and trauma (see Chapter 5, paragraph 5.24). Children, for instance, may have a video-recorded interview admitted as their evidence in chief and be cross-examined via a live TV link. (see Chapter 5, paragraphs 5.48-5.51). Vulnerable adult witnesses, too, may take advantage of a range of Special Measures, at the discretion of the court, on individual application by defence or prosecution (see Chapter 5 paragraphs 5.40-5.42).

What does support and preparation consist of?

4.9 The first task is the identification of children and those vulnerable adults who therefore need special consideration during their involvement with the criminal justice process. It is usually the police who first identify witnesses' vulnerability, though this can be highlighted by anyone with knowledge of the witness. Once a witness has been identified as either intimidated or vulnerable, there is potentially a long time period before the court hearing takes place. During this time, preparation and support needs to focus on arrangements surrounding any interviews with the witness, pre-trial arrangements, and preparation for any court hearing (*SUFJ 6.1*). If the case goes ahead, support will also be required during the court hearing and in the immediate aftermath. In the typical criminal case, these activities will probably occur over many months.

4.10 Box 4.1 illustrates some of the range of possible activities which can be undertaken with vulnerable witnesses by pre-trial and court witness supporters. The key tasks for Young Witness Preparation are described in the National Standards for Young Witness Preparation (see Appendix J) and the *Young Witness Pack*.

Box 4.1. Activities undertaken by pre-trial supporters and court witness supporters

Supporters can:

- provide emotional support,
- give information and education,
- understand the witnesses' views, wishes, concerns, and any particular vulnerabilities which might affect them during the criminal process,
- familiarise the witness with the court and its procedures,
- support the witness through interviews and court hearings,
- undertake court preparation and pass on information about the forthcoming trial,
- accompany the witness on a pre-trial visit to court,
- accompany the witness when memory is refreshed (this should not be undertaken by a supporter who will accompany the witness while giving evidence),
- liaise with family members and friends of the witness,
- liaise with legal, health, educational, social worker and other professionals,
- liaise with those offering therapy and counselling prior to a criminal trial,
- arrange links with other professionals with special expertise in any specific vulnerabilities or difficulties which the witness has, e.g. language communication problems, learning disabilities, specific cultural or minority ethnic group concerns, or religious priorities.

The interests of the witness and of consistent information giving will be best served if the same supporter is involved throughout. However, in some cases, it will be necessary to involve more than one person in providing the assistance the witness requires.

4.11 Different support functions may be provided at different stages:

- **At the investigative interview.** Accompanying and supporting children and vulnerable witnesses can be helpful during investigative interviews. This may be a friend or relative provided they are not party to the proceedings.
- **Pre-trial.** Support from a trained person with knowledge of the court process can assist the witness through information provision and preparation for giving evidence. A supporter may be present when the witness views his or her videotaped statement for the purpose of memory refreshment before the trial. However, careful consideration must be given as to who this supporter should be in order to guard against future allegations of coaching the witness. Generally, any supporter present during the witnesses' memory refreshment would not be the same person who is expected to accompany the witness when giving evidence. This issue should be raised at the Plea and Directions Hearing (see below).
- **While giving evidence.** Providing support during the Court process itself and in the CCTV link room where necessary. There are evidential constraints which apply to the person providing support (see summary below and Appendix F, *Court Witness Supporters in the CCTV Link Room: National Standards*). The identity of a supporter in the CCTV link room must be the subject of an application to the court (see paragraph 4.27 below).

Evidential boundaries

4.12 The supporter must not be a witness in the case and must not be given details of the case or the evidence of the witness. However, the supporter needs to know:

- the charges against the **defendant**
- the relationship between the defendant and the witness or whether the charges
- involve an abuse of trust
- the defendant's custody status and any change in this during the pre-trial period
- matters which may affect how preparation is conducted or how the witness gives evidence.

Supporters must not discuss with the witness the details of the case or the evidence the witness is to give or has given. In their initial contact with witnesses, supporters must explain that they are independent of both the prosecution and the defence and that there will be no discussion of the evidence, to avoid allegations that the supporter has told the witness what to say. Supporters need to distinguish between providing practical emotional help and support to the witness generally which is a key part of their role, and on the other hand expressing their own views and beliefs concerning the evidence of the witness which is not permitted.

Supporters must also explain that preparation work cannot be guaranteed to be confidential. Thus, for example, If the witness begins to talk about the evidence, the supporter must make a note in the witness's words of what was said, notify the police and ask the witness to speak to the person who conducted the investigative interview. Such a written record is discloseable. Further guidance on intermediaries and court witness supporters has been developed and is described in Appendix F.

Who may provide it?

4.13 Who undertakes the range of support functions will depend upon the needs of the individual witness and the availability of resources and the court's directions. In addition to general considerations, including the views of the witness, it may be appropriate to secure the assistance of a supporter who has a particular understanding of the needs of the witness, for example from the point of view of ethnic or cultural background or disability awareness. However, it is important to distinguish the coordination role from the role of provider of the relevant services.

4.14 Assistance and support is available from Victim Support and the Witness Service (see paragraph 4.45) as well as a range of other organisations. In the case of child witnesses various local arrangements exist which may involve organisations such as the NSPCC and Barnardos. Agreement should be reached on a local basis on who is responsible for pre-trial preparation and also for ensuring that the necessary preparation has been or is being undertaken. Plans for a referral system for young witnesses are in the process of being developed. *Regardless of which profession is identified as best placed to co-ordinate pre-trial preparation and support it is vitally important that it begins as soon as the witness' vulnerability is identified and the police and/or the CPS become aware that he or she may need to attend court.* In individual cases, no support and preparation work with a prosecution witness should be undertaken without the prior authority of the police officer in charge of the case. Different individuals carry out **child witness** preparation and support across the country. Regardless of professional background, the work should be carried out by someone who is independent and focuses purely on preparing the witness for a difficult experience. They must also not have been involved in the detailed preparation of the case, nor must they discuss details of the prosecution case or the evidence of the witness. It is recognised that support personnel could be police officers or other professionals, or volunteers. However, all must have received basic training, which may include guidance from the Crown Prosecution Service. The social worker or police officer who conducted the investigative interview are excluded from the role of supporter (see *Government Policy on the Child Witness Supporter, in Preparing Young Witnesses for Court, NSPCC, 1998*).

What skills are involved?

4.15 Witness support requires training. The skills involved in pre-trial preparation and support include the following:

- knowledge about, and aptitude for, working with vulnerable individuals an ability to prepare witnesses to go to court without discussing their evidence or coaching them in any way
- knowledge and understanding of court procedures, relevant legislation and policy
- an ability to liase with other professionals and family members.

Working with young witnesses requires additional qualities and skills and these are described in the *National Standards for Young Witness Preparation* (see Appendix J) and in *'Preparing Young Witnesses for Court – a handbook for child witness supporters'*, (NSPCC, 1998). There must be proper documentation of any support work (Box 4.2).

Box 4.2 Documenting support work

Supporters should:

- make concise and factual records summarising all activities undertaken with witnesses, including a record of all phone contacts
- make the records as soon as possible after the event
- make a record of all liaison contacts with other professionals
- distinguish fact from opinion, when it is necessary to record opinion
- note any reference by the witness to the evidence in the witness's own words, and notify the police accordingly
- keep records securely in a locked room or filing cabinet

IDENTIFYING AND RESPONDING TO THE NEEDS AND WISHES OF WITNESSES

- 4.16** The police are often the first to identify the needs and wishes of the witness. They activate the system for witness support in their area. That service is then coordinated and delivered on a local basis. As the police investigation becomes completed, support personnel then take on the role of further identifying needs and wishes of witnesses. Part of their role then becomes effective communication with the police, the CPS and **legal representatives** as required.
- 4.17** The police and the prosecutor and/or defence legal representatives require information about both the needs and the wishes of the witness for the purpose of, pre-trial preparation, planning how the witness should give evidence and in making related applications to the court. The police should ask witnesses for details of any difficulties they might have in giving evidence, and explain how the Special Measures might assist them, though young witnesses will be automatically **eligible** for consideration for Special Measures. Witnesses can then express an informed view on their preference for particular measures which will be included in any application. Research concerning young witnesses suggests that giving them the choice as to whether or not to give evidence via CCTV link has a beneficial effect on their emotional state, their experience of court and performance as a witness.
- 4.18** The police may also seek indirect information about the needs of the witness from his or her court witness supporter, relatives, friends or carers (provided that they are not party to the crime under investigation) or other agencies. The CPS or legal representative should seek such information if it is not provided, as this will be necessary for pre-trial planning and decision-making at the plea and directions hearing. In the case of defence witnesses, it is the responsibility of the defence lawyer to enquire about the witness's needs.

PREPARATION, SUPPORT AND LIAISON THROUGHOUT THE COURT PROCESS

4.19 Pre-trial support and preparation can begin as soon as the witness has been identified as vulnerable or liable to intimidation. These issues will normally have been highlighted before the first investigative interview. In the case of video recorded interviews a pre-interview planning meeting should be scheduled, at which any special difficulties are identified and plans made for relevant Special Measures to be taken at the interview. After the interview the next stage involves support, further assessment of need, and liaison with others. As pre-trial hearings and the trial hearing come closer, specific preparatory work for these will be necessary. In some cases, separate pre-trial therapy or counselling work will be necessary to meet the needs of the witness (see paragraph 4.40). A variety of support tasks are needed at the hearing itself. The period after the hearing is an important one for ensuring continuing support or treatment, through debriefing and arranging for further work with the vulnerable witness to be carried out by other professionals. Hence, opportunities for support occur throughout the witnesses' involvement with the legal process. These activities can easily be summarised under four categories:

- Support during the investigation.
- Pre-trial support, preparation and liaison.
- Support at the hearing.
- Support after the hearing.

Support during the investigation

4.20 Information collected during the planning phase prior to a video recorded investigative interview, and that emerging during the interview itself is highly relevant to later decisions concerning how witnesses may give their best evidence. During the investigation information about the witness will have been gathered from contact with the witness directly, as well as those providing care, education, or special services.

4.21 During the course of the investigation, for example in an interview, further information may emerge which may be relevant to decisions about how the witness might give their best evidence (see Chapter 3, paragraphs 3.44-3.48). It may become clear that further expert advice is needed in order to determine the best method of communicating with the witness, any special support or assistance which might be required and in what form the vulnerable witnesses' evidence might best be taken.

Special requirements

4.22 For witnesses whose specific needs include culture and language, consultation should take place with appropriate advisors and interpreters. During the course of a pre-interview planning meeting, for a video-recorded interview, or immediately after the interview, the police may have discovered special needs of the witness with respect to culture or language. Some of these issues will have been identified in Form MG6, a standard form used by the police to transmit confidential information to the CPS (see paragraph 4.25 below). Members of the witness's

family or friends or carer will often be a good source of knowledge about these needs or requirements. They include communication difficulties, but also differences connected with cultural and minority ethnic values and sometimes religious practices which are likely to have an influence on the investigative and pre-trial support and preparation phases. The police should consult with the witness and those who know the witness best in order to seek their advice on these matters, provided that they are not a party to the crime under investigation. One example is those witnesses whose first language is not English, but who at first meeting appear to communicate relatively easily using English (see Chapter 2, paragraph 2.58). Appropriate advice and interpretation may be needed during the interview, when providing information about the court process and when giving evidence at trial in order to prevent the witness becoming confused, and to enable them to give their best evidence. National guidelines covering the arrangements for the attendance of interpreters in investigations and proceedings within the criminal Justice system (April, 1998) and on engagement of interpreters (July, 1999) have been issued by the Trials Issues Group (TIG) Interpreters Working Group. These are available on www.criminal-justice-system.gov.uk/codes.htm. These guidelines should be adhered to.

- 4.23** As the hearing approaches, witness support work will become more specifically focused upon preparing the witness for giving evidence at court. In some cases, therapy prior to trial will be organised too. These different tasks are now described in more detail.

Pre-trial support, preparation and liaison

- 4.24** The interval between the investigative interview and the final trial hearing can often be long. Over the months the tasks range from initially assessing need, either by direct enquiry or observation by the police, through gathering information from others, to providing continuing support. The witness's needs may well change during that period, requiring continuing re-assessment by the supporter. Once a pre-trial support person has been identified for vulnerable or intimidated witnesses, their role is to:

- seek the witness's views about giving their evidence and being at court
- provide information about the criminal process and their role within it
- support and general assistance to the witness to enable them to give their best evidence
- liaise with others, as appropriate.

Box 4.3. Components of pre-trial preparation

Assessing the needs of the witness

- Directly
- Obtaining information from others

Support

- General emotional support for the witness
- Management of anxiety connected with Court process
- Therapy and Counselling

Liaison and communication

- With the witness
- With other professionals in the legal case
- With the witness' family and friends
- With the witness' circle of professionals
- With those providing therapy and counselling to the witness

Preparing for the trial

- Information concerning courts
- Options for giving evidence
- The victim's wishes
- Pre-trial visits
- Refreshing memory
- Meeting the legal representative

Communication between the police and the Crown Prosecution Service

- 4.25** The case file information form, MG6, is a confidential document which is completed in all cases to inform the prosecutor of relevant background information so that there can be an effective case review. It is a confidential document and is there to assist the prosecutor when considering the evidential and public interest criteria of cases. Although the form is designed for any type of case, there are a number of specific questions which relate to children and other vulnerable adult witnesses. The standard form covers issues such as; whether a special measures meeting is required, whether key support workers are desirable, whether an application is required for video link evidence, information about strengths and weaknesses of the evidence and the witness, the views of the witness, and other information designed to assist rapid communication.
- 4.26** An early Special Measures meeting between the investigating officer and the Crown Prosecution Service may be of benefit in determining what measures may

be of assistance to the witness before and during the trial, taking into account the witness's own views and preferences.

- 4.27** In addition, both prosecution and defence have a responsibility to communicate any special needs of the witness to the court, including the presence of a court witness support person while giving evidence, either at the time the case file is reviewed or at a pre-trial hearing. The court should be made aware of what means would be needed at court to enable the witness to give their best evidence. It may also be appropriate for the legal representatives and/or the judge to meet the witness before the trial (see also paragraphs 4.19 and Chapter 5, paragraphs 5.7-5.11).

Plea and Directions Hearing (PDH)

- 4.28** In Crown Court cases, the **PDH** provides the opportunity for pre-trial planning and initial decisions to be taken about Special Measures available to the vulnerable witness under the 1999 Youth Justice and Criminal Evidence Act. At those PDHs which involve young witnesses, the judge completes the supplementary checklist, informed by the legal representatives with full instructions and having seen any video tapes of the child's evidence, so that all relevant issues can be co-ordinated and planned in readiness for the trial. The checklist and its accompanying guidance was endorsed by the Lord Chief Justice in 1999 (Plea and Directions Hearing: Supplementary Pre-trial Checklist for Cases Involving Young Witnesses, Guidance Notes). It is vital that there is clear communication between the relevant legal representative and those providing support for the child witness, both before and subsequent to the PDH. The checklist covers the following areas:

- video recorded evidence
- television links
- screens around the witness box
- proposals for any support persons
- arrangements for the young witness to refresh his or her memory
- the young witness's preparation for Court (including meeting the legal representatives)
- breaks for the young witness
- special circumstances and arrangements made to accommodate these (such as learning difficulties, hearing problems or English not being the first language)
- the views of the witness about court dress
- scheduling and standby arrangements
- disclosure of third party records

Preparation for going to court

- 4.29** The aim of preparing witnesses for court is to make them feel more confident and better equipped to give evidence; to help them understand the legal process and their role within it; and to encourage them to reveal their fears and misapprehensions. For many witnesses, the court environment may increase their stress and decrease their ability to provide accurate testimony. Effective

preparation can assist the witness to give a more accurate and complete account and also help secure better post-trial adjustment.

- 4.30** The pre-trial supporter can provide the witness, or direct their carer or specialist service to information about the court process. For example, there is a witness pack available for supporters and child witnesses to use (NSPCC, 1998), including a video for 11-15 year olds, *Giving Evidence – what it’s really like?* and one for those with learning disabilities (VOICE). A range of materials in different formats is available (see Appendix G).

A pre-trial visit to the court

- 4.31** The witness is likely to benefit considerably from a pre-trial court visit. This will enable witnesses to familiarise themselves with the layout of the court, and may include the following:

- the location of the defendant in the dock
- Where court officials sit
- The location of the witness box
- A run through of basic court procedure and,
- the facilities available in the court
- discussion of any particular fears or concerns
- an explanation of the roles of different court personnel and what can be expected
- an outline of the services offered by the **Crown Court** Witness Service or **Magistrates Court** Witness Service, as appropriate, on the day of trial.

- 4.32** A pre-trial court visit will also make witnesses better informed about the particular Special Measures ordered by the court in their case to assist them to give evidence (see Chapter 5, and *National Standards for Young Witness Preparation*, Appendix J).

Refreshing the memory of the witness

- 4.33** Witnesses are entitled to see a copy of their statement before giving evidence. Where the investigative interview of the witness has been videotaped, the tape is often used to refresh the witness’s memory before the trial – the equivalent of reading the statement beforehand. Viewing the video ahead of time in more informal surroundings helps some witnesses familiarise themselves with seeing their own image on the screen and makes it more likely that they will concentrate on the task of giving evidence. Arrangements for memory refreshment for young witnesses are one of the items in the PDH supplementary pre-trial checklist for young witnesses (see paragraph 4.28).

- 4.34** It is Crown Prosecution Service policy that a videotaped interview may be shown to the witness before the trial for the purpose of refreshing memory unless the video has been ruled inadmissible. If such a ruling is made, the court will need to give guidance at the PDH or pre-trial hearing on an acceptable alternative method of refreshing the witness’s memory. Decisions about admissibility should be made in sufficient time to allow other steps to be taken. If the witness is to give live evidence-in-chief, the prosecutor should consider seeking a ruling on whether it is

appropriate to allow the witness to see the video before evidence is given. Supporters should be informed promptly about any decisions on video admissibility and editing.

- 4.35** The issues involved in planning for refreshment of a witnesses' memory will be brought to a PDH by the legal representatives. If memory refreshment is to proceed, the hearing will allow a decision to be made as to how the vulnerable witness should be supported during the process, and the implications for the supporter's role in any subsequent trial. A decision can be reached about the person who is best placed to support the witness while their memory is refreshed. Consideration will need to be given to any competing requirements for the witness supporter to continue their support for the witness during the remainder of criminal justice process.
- 4.36** It is the responsibility of the police to arrange for prosecution witnesses to read their statements or view videotaped interviews. They should consult the prosecution about where this should take place and who should be present, and keep a record of anything said at the viewing.
- 4.37** Witnesses need to receive appropriate explanations about the purpose of watching the video before the trial, and their views about this must be taken into account. Sometimes videos will be edited for legal reasons, e.g. if the video contains irrelevant material or inadmissible matters of fact or law. Witnesses need to be alerted to any editing so they will not be surprised, suspicious or confused when the recording does not match precisely their recollection of the interview.
- 4.38** The time interval between showing the video for the purpose of refreshment and actually giving evidence should take account of the witness's needs and concentration span. Minimising delay should be balanced against the difficulty experienced by some witnesses in concentrating through two viewings on the same day. The Crown Prosecution Service recommend that the first viewing of the videotape should not be on the morning of the trial, to avoid the child having to view the tape twice in one day. If the witness loses concentration or becomes distressed during the viewing, a break will be necessary.

Communication with the witness

- 4.39** Witnesses are likely to be anxious about the progress of the case and decisions about whether and how they will give evidence. Once a trial date has been arranged, the police and defence solicitor should provide their respective witnesses with as much notice as possible of the date and the time they are required to give evidence, at least within four working days of receipt of the list of witnesses to attend court. If it becomes apparent that the trial will not proceed, witnesses and their supporters should be told as soon as possible (see *Statement of National Standards of Witness Care and National Standards for Young Witness Preparation*, Appendix J).
- 4.40** While continuing efforts are made to minimise delays in the criminal justice system, witnesses should be forewarned at an early stage that some cases take a long time to reach trial or may be discontinued pre-trial; and that some trials may be adjourned for unforeseen reasons. They should also be advised beforehand of the possibility of waiting to give evidence on the day of trial. It may be possible for

witnesses to wait at locations at some distance from the court, and to be summoned by pager when their evidence is to be heard.

4.41 Witnesses should be told who is responsible for keeping them informed of significant developments in their case.

4.42 The police officer in charge of the case must keep the supporter informed about key decisions, for example about how the witness is to give evidence.

Provision of therapy prior to a criminal trial

4.43 There is a concern that some witnesses are denied therapy pending the outcome of a criminal trial for fear that their evidence could be considered tainted and the prosecution lost. This may conflict with ensuring that a witness is able to have immediate and effective treatment to assist recovery. Delay in seeking treatment may worsen the prognosis. Hence, witnesses should not be denied access to any therapeutic help prior to any criminal trial, in particular if they have a mental illness (see Chapter 2, paragraphs 2.90 and 2.91). Pre-trial therapy for child witnesses is the subject of joint guidance, see *Provision Of Therapy To Child Witnesses Prior To A Criminal Trial – Practice Guidance*, and *Provision of Therapy Prior to a Criminal Trial for vulnerable or intimidated witnesses: Practice Guidance*. Home Office with the CPS and the Department of Health, 2001.

4.44 Pre-trial therapy should be kept separate from preparation and support. Therapy includes both counselling and psychotherapy. The guidance has been prepared for childcare professionals as well as lawyers involved in making decisions about the provision of therapeutic help for child witnesses. It emphasises that the best interests of the child are paramount when deciding whether, and in what form, therapeutic help is given. Records of any therapeutic work should be kept because they may become relevant material at a forthcoming trial. Whenever possible before any therapeutic work is undertaken, there should be full discussion between the various agencies and professionals, as well as clear communications and named contact points within each agency. It is recommended that a locally agreed protocol is established within each area, so that the different issues involved in providing pre-trial therapy can be co-ordinated, and the best interests of the child held central. Separate guidance on pre-trial therapy for vulnerable or intimidated adult witnesses is in preparation.

Plans and communication concerning the trial

4.45 Directions for Special Measures can be made at the pre-trial hearing as well as in other circumstances (Chapter 5, paragraphs 5.24-5.42) and procedures for making applications will be set out in Rules of Court (in preparation). If the court rules that a witness is eligible for one or more Special Measures then this ruling and the details of the measures to be provided are binding on the trial court. Details of where, when, and how these are to be provided are set out in the form of Binding Directions (Section 20 of Act, see Chapter 5, paragraphs 5.43-5.44). This enables the pre-trial supporter to plan ahead with greater certainty. Frequent communication and coordinated planning is needed if more than one person is undertaking the pre-trial support for the witness and support within the court hearing.

4.46 Information about the witness's needs and wishes should be available to the person preparing the witness for court. This will include the items listed in form MG6

(4.25 above), together with additional information which the pre-trial supporter has gained during the preparation for court and the pre-trial visit.

Role of the Witness Service

4.47 The Witness Service is run by the national charity, Victim Support. It provides a service in every Crown Court centre in England and Wales. In addition the Witness Service will be available in every magistrates' court by April 2002 (it was already available in 40% of such courts by April 2001).

4.48 In addition to providing pre- and post-trial witness support, the Witness Service has an essential role in co-ordination of arrangements at the court building in liaison with the Court Officials and the Crown Court Liaison Officer where appropriate. Services provided include:

- general information on court proceedings
- emotional support
- accompanying the witness in the courtroom
- parking or drop-off arrangements
- the avoidance of confrontation between the witness, other parties and their supporters
- use of a side entrance for the witness to enter and leave the building
- arrangements for appropriate facilities for waiting
- the number of people required as escorts within the court building if there is more than one vulnerable or intimidated witness, to avoid allegations of cross-contamination of evidence
- co-ordinating arrangements during breaks, the lunch hour and on leaving court after giving evidence
- communicating additional witness requirements on the trial day

4.49 Courts should consider the order and timing of witness attendance, so as to minimise inconvenience. Such an approach will benefit vulnerable or intimidated witnesses. (see also Statement of *National Standards of Witness Care*, 1.3.2-4.).

The role of the Crown Court liaison officer

4.50 Each Crown Court has appointed a child witness officer responsible for producing a high level of service on behalf of the court in each case involving a child witness. This involves co-ordinating the provision of facilities and providing a focal point for liaison with other agencies. Duties include pre-trial familiarisation visits, liaising with the judge to ensure that the cases progress speedily and undertaking the practical arrangements on the day of trial e.g. ensuring that the video and TV link equipment is set up and working effectively, meeting the child and arranging separate waiting areas where possible. All Crown Court centres have identified witness liaison officers to ensure that the necessary arrangements are in play for any cases where Special Measures are approved by the court.

Meeting the legal representative

- 4.51** The Bar Code of Conduct allows legal representatives to introduce themselves to witnesses and assist with procedural questions, provided the evidence is not discussed. It is CPS policy for the prosecution team to meet witnesses, including children, who are potentially available for Special Measures. It is the policy of the Law Society and Criminal Bar Association that the defence legal representative should meet witnesses. Supporters should ask witnesses whether they wish to meet their legal representative prior to giving their evidence.

Meeting the judge

- 4.52** An increasing number of judges, accompanied by the prosecution and defence legal representatives, meet young witnesses before they give evidence. Experience suggests that this can assist in demystifying the court process. Putting young witnesses more at ease assists them to give their best evidence (see PDH Supplementary pre-trial check list for cases involving young witnesses guidance notes).

SUPPORT AT THE HEARING

- 4.53** The Court witness supporter's role during the Court hearing is principally to provide emotional support for the witness in order to reduce anxiety or stress, and enable the witness to give their best evidence. Research has demonstrated that the presence of a support person known to the witness may reduce the witness's anxiety and improve the accuracy of his or her recall. As is the case for all support functions, the witness supporter during the hearing must be someone who has only basic information about the witnesses' evidence, and the supporter must avoid discussing the witnesses' testimony with him/her. In addition, the Court witness supporter will not be a party to the case but will have received appropriate training and where possible have a relationship of trust with the witness. It is likely that the court witness supporter will work alongside a specially trained court usher. At court he/she will be with the witness while waiting to give evidence and then accompany the witness to the court. The supporter will sit beside the witness and provide emotional support through their presence in a neutral and sympathetic manner, but without influencing the court proceedings in any direct way. The court witness supporter should also be able to comfort the witness should they become distressed and have prior arrangements agreed to enable the supporter to alert the judge in the event of problems arising while the witness gives evidence. (See Appendix F). In April 2001, the Justices' Clerk's Society and the Magistrates' Association jointly issued guidance on the presence of Victim Support volunteers in the Youth Court.

Planning for breaks in testimony

- 4.54** The court witness supporter will need to have prior arrangements to enable the court to be alerted to a vulnerable witness' need for a break in proceedings. This may either be direct or indirect, such as through a touch card (see Chapter 3, paragraph 3.89). Though judges and lawyers should invite vulnerable witnesses to tell the court when they need a break, the witness' ability to identify when this is necessary should not be relied upon. Supporters should ensure that information is passed to the CPS or in the case of a witness called by the defence, to the defendant's legal representative. This will enable the judge and legal

representatives to plan breaks in the witness's testimony. Scheduled breaks are also less likely to occur at a time that would favour one side over another.

Interpreters

- 4.55** In some circumstances arrangements will have been made for an interpreter to be present during the hearing. Interpreters might be required for those with limited or no understanding of English, or to assist with the use of communication devices or a form of sign language, (see Chapter 2, paragraphs 2.36-2.38). The role of the interpreter is solely to facilitate communication with the witness at court and is distinct from that of the court supporter. Similarly, the court may have approved the use of an intermediary to assist the witness give evidence. Again, the role of an intermediary is separate from that of the court supporter.

AFTERWARDS – DEALING WITH THE OUTCOME

- 4.56** Experience has shown that witnesses appreciate support given after the close of proceedings, a time when they may otherwise feel isolated and may have difficulty in coming to terms with the court verdict. Whether or not the witness gave evidence, the supporter should ensure that the witness is informed of the outcome as quickly as possible and offer the opportunity for a debriefing. Completion of post-trial questionnaires by the witness and the supporter will enable important feedback to be obtained for the management of future cases, and for the effectiveness and acceptability of support and preparation arrangements to be evaluated. The witness' own views, opinions, and responses to the measures taken will be of great value in the refinement of local procedures. Such feedback can be co-ordinated through the local Trials Issues Group.
- 4.57** The discussion after the hearing also provides a useful opportunity for the supporter to identify and make arrangements for continuing support, counselling and treatment in the light of the witness' needs. The pre-trial and/or court witness supporter can then liaise with the appropriate agency or professional to ensure that these needs are met. These tasks apply as much to those witnesses who are in the end not called to give evidence as it does to those who have provided evidence at trial.

SPECIAL PROVISIONS FOR CHILDREN

- 4.58** The UN Convention on the Rights of the Child emphasises the need for adults and organisations, when making decisions that affect children, to consider their best interests and their views. Reports to the Crown Prosecution Service should always include clear information about the wishes of the child, and his or her parents or carers, about going to court. The Crown Prosecution Service may in any event need to seek additional information from the joint investigating team.
- 4.59** The general points concerning pre-trial support and preparation apply to all young witnesses. Additional guidance is provided in the National Standards for Young Witness Preparation (see Appendix J) and the advice below should be read in conjunction with this document. Some added points are made below because of the particular situation of young witnesses. The majority of these special or added points derive from the developmental immaturity of children, and the requirement to take this into consideration so that they may give their best evidence. Central

among these developmental issues are:

- Children's understanding and appreciation of the world around them is not fully developed.
- Children's language and communication skills are not as developed as adults are.
- Children are dependent on adult carers to varying degrees during childhood.
- Children are used to adults being in charge of their lives, and may not appreciate or be familiar with the fact that their own views, perspectives and wishes are important.
- Children's ability to delay, postpone or inhibit their reactions to discomfort or distress may be underdeveloped.

4.60 Other vulnerabilities or disadvantages may compound these developmental issues. For example, learning disabilities, psychological or psychiatric problems, sensory or communication difficulties, issues deriving from cultural or ethnic group difference, or extreme poverty. Furthermore young witnesses, in addition to being developmentally immature, can be intimidated and may be subject to fear through threat, imagined or real. Such situations often occur in sexual abuse cases.

4.61 There may be special vulnerability for children who have suffered maltreatment which affects their attitudes towards adults in positions of authority or power and which might raise additional sensitivity to particular questions (e.g. those which imply guilt or responsibility residing with the victim) or questions relating to a requirement to demonstrate on themselves alleged sexual activities. Thus, child witnesses may be particularly distressed when asked to show on their own body where they were touched or to mimic sexual actions, and this should be avoided. The pre-trial supporter should discuss with the police and legal representatives whether the child may be asked to demonstrate intimate touching at court. If this is a possibility, consideration should be given to providing a doll, model or drawing to which the child can point. The judge's agreement should be sought on the use of an alternative method before the question arises.

4.62 These particular issues render children more vulnerable to adult influences in questioning. There are a number of measures that can be implemented at different stages in order to lessen the effects of these developmental issues and enable children to give their best evidence (see Boxes 4.3 and 4.4, and Chapter 5).

4.63 Most of the issues covered in Boxes 4.3 and 4.4. figure in the Supplementary Checklist which is completed at the Plea and Directions Hearing (PDH) (see paragraph 4.28 above). Completion of the checklist requires prior consultation with the witness, carer and pre-trial and/or court witness supporter and the forwarding of information to the prosecution before the PDH. It is important that the prosecution is given information from home or school about the young witness's attention span, bearing in mind that it is likely to be shorter in the stressful atmosphere of the court. This will enable the judge and legal representatives to plan breaks in the young witness's testimony.

4.64 It is important to have professionals with an aptitude and skill in being able to communicate effectively with children of different ages. The skills required include an ability to prepare the child witness to give their evidence without coaching them

in any way, familiarity with court procedures and the relevant legal processes, an ability to work with children of different ages and abilities, and communication skills (see also *National Standards for Young Witness Preparation*, Appendix J).

4.65 All information on witness preparation needs to be communicated to the Crown Prosecution Service in sufficient time to enable the necessary action to be taken. Such information can be provided separately by the police with the case file, by an early special measures meeting or through a Witness Support person. Some preparation schemes transmit a *Witness Preferences – Wishes and Feelings Checklist* to the Crown Prosecution Service. This form, which confirms that no promise has been made to the child, indicates the child's views on issues such as the gender and identity of a court witness supporter to accompany the child in the TV link room; the wearing of wigs and gowns by judges and legal representatives; meeting the prosecution legal representative; and viewing the video statement before the trial.

4.66 The child's stress is likely to increase with the length of time that the child waits to give evidence on the day of the trial. *The National Standards of Witness Care* promote the idea of 'standby' arrangements for vulnerable witnesses who are available on-call at another location. Some judges have issued a practice direction that no child witness should be brought to court before 12 noon on the first day of a trial. Others require preliminary matters to be dealt with on the first day of the trial with the child called as first witness on the second day. It may be preferable for young children to give evidence in the morning.

Box 4.4. Measures to assist child witnesses at the hearing, prior to giving evidence

- Minimising waiting time at court.
- Stand-by arrangements for vulnerable witnesses who can be on call in another location nearby.
- Appropriate waiting areas for the age of the child, equipped with children's toys, books etc.
- Waiting areas removed from access by the accused family or friends.
- Entrance to the courtroom to give evidence by side door, or other arrangements so as to avoid inappropriate contact with relatives or friends of the accused.
- Presence of a support person throughout the waiting arrangements.

Box 4.5. Special arrangements for children at court

- Screens
- Video recorded evidence-in-chief
- Video recorded pre-trial **cross-examination**
- Live CCTV link
- Support person
- **Intermediary** (when available)
- Interpreter
- Assistance with communication
- Adjustments to layout of witness area, with respect to height of seating arrangements
- Removal of wigs and gowns
- Appropriate arrangements for breaks, to take into account children's greater tendency to tire and reduced concentration span compared with adults
- Arrangements for children with physical disabilities
- Clearing the court in sex offences or cases involving intimidation

4.67 Cases need to be managed robustly to ensure that the case is ready for trial. The commitment to give high priority to child abuse cases is contained in many policy documents, including the 1996 *Victim's Charter*. It is CPS policy to give priority to child witness cases: section 53 of the Criminal Justice Act 1991 gives the prosecution discretion to avoid delay by transferring certain child witness cases directly from the magistrates' court to the Crown Court (if they have not already been sent there as indictable only cases under S51 of the Crime and Disorder Act 1998). The Lord Chancellor's Department *Guidelines for Crown Court Listing* states that child witness cases are to be given the earliest available fixed date and that trial dates must only be changed in exceptional circumstances. The Courts' Charter emphasises the need to assign the earliest possible date for a trial involving a child witness.

4.68 Robust case management is still necessary where the cross-examination of children in need of **special protection** in sexual offence cases is to be videotaped before the trial. This will be the subject of separate guidance; judicial control will be necessary to avoid unnecessary delays.

SPECIAL PROVISIONS FOR ADULTS

Vulnerable Adults

4.69 Adult witnesses may be vulnerable for a variety of reasons. The Youth Justice & Criminal Evidence Act, 1999 recognises four categories of vulnerability among adults: those who are learning disabled, physically disabled, those who have mental disorder or illness, and witnesses suffering from fear or distress (intimidated witnesses). Notwithstanding difficulties in recognition, it is acknowledged that

special measures may need to be invoked for those who, because of age, personal circumstances, and the nature of the alleged offence, or by reason of their fear or distress, should be able to be provided with various special measures, including appropriate pre and post trial support. Some witnesses will be vulnerable, and some liable to intimidation, while still further witnesses could be both vulnerable and intimidated (see Chapter 1 paragraph 1.5). The object of this guidance is to identify such witnesses at an early stage so that investigators can establish whether they are likely to qualify for a special measures direction under the 1999 Act, taking into account the individual circumstances, together with the expressed needs and wishes of the witness. Social support can be received by the witness in addition to the special measures which may be available. This support can be provided at the interview during the pre-trial period and in Court.

- 4.70** Personal qualities of vulnerable adults may put them at particular disadvantage in relation to investigation and court proceedings. For example, some persons with mental disorder can be particularly sensitive to perceived challenge or criticism, or fear recurrence of traumatic events. Similarly, learning disabled people may have a relative lack of adaptability. These and similar differences and vulnerabilities might lead such witnesses to require longer and more extensive support and preparation. The precise type and amount will vary according to the alleged offence, the witnesses' character, the level of understanding, and life experience. It will also vary according to the purpose of the support; for example, whether it is designed to encourage the most reliable testimony or to reduce the trauma of proceedings on the witness, or both.
- 4.71** Delay within the criminal justice process can add disproportionately to the stress upon witnesses who are vulnerable. For example, learning disabled people may have particular difficulty understanding the basis and reasons for a delay. For this reason, and because delay is likely to adversely affect the memory of a person with learning disability, decision makers should be reminded of the need to treat such cases as a priority.
- 4.72** Witnesses have been found to give better evidence when they have a choice about the way in which it is given. This especially applies to vulnerable witnesses, many of whom need preparation and support in order to be able to make an informed choice. To the extent possible, vulnerable witnesses should have an active role in choosing how to give their evidence. The most appropriate method of doing so would depend not only on the individual's objective capacity, but also on what he or she wishes to do, taking into account the options that are available for them.
- 4.73** Box 4.6. highlights issues of special importance for those planning support for vulnerable adult witnesses:

Box 4.6. Issues of special importance for those planning support for vulnerable adult witnesses

- Taking account of witnesses' choice and views
- Amount of time needed
- Best time of day
- Designing appropriate breaks
- Method of asking for a break
- Witnesses level of understanding concerning courts and any prejudices they may have, such as a belief that it is the witness, who is on trial
- Familiarisation with the place of the hearings
- Explanations about video and closed circuit TV
- Short attention spans while giving evidence (especially for the learning disabled)
- Speech and communication aids
- Planning approach to the oath and/or admonishing the witness

Intimidated adults

- 4.74** Witnesses may suffer excessive fear or distress in a number of situations, such as domestic violence, assaults, sexual offences and crimes involving racism. They may also be intimidated because the alleged offence occurred over a long period of time, or in the context of a close relationship with the accused. Government policy to respect the Human Rights of vulnerable adults is important to take into consideration when considering those adults specifically intimidated because of their position as witnesses (See *No Secrets, Guidance on Developing and Implementing Multi-Agency Policies and Procedures to Protect Vulnerable Adults from Abuse* (Departments of Health and the Home Office, 2000 and *Living Without Fear: an Integrated Approach to Tackling Violence against Women* (The Cabinet Office, 1999)).
- 4.75** In the period leading up to the trial, there are a number of precautions that officers can take when dealing with fearful and intimidated witnesses. Throughout the course of the case, the police should develop coping strategies to enable the witness to handle the threat of possible reprisals, and should give the witness appropriate information and advice. Some forces issue a small booklet to all police officers outlining measures for witness support. Others use a pre-printed tear off sheet as part of the statement form, and this is handed to the witness.
- 4.76** The identification of suspects should make use of identification suites with screens and face-to-face identification should be avoided (see Appendix O for further information). Video identification procedures (see PACE code D) can serve to reduce stress on the witness. Witnesses should be kept informed of the progress of their case, as lack of knowledge (concerning e.g. the offender's whereabouts) can add to feelings of fear and uncertainty.

5 WITNESSES AT COURT

Aims

By the end of this chapter, those involved with witnesses at court should understand the law and best practice in relation to:

- Pre-trial planning (5.1-5.6)
- Judicial responsibility for witnesses (5.7-5.11)
- Responsibilities of **legal representatives** (5.12-5.23)
- **Special Measures** for **vulnerable** and **intimidated** witnesses (5.24-5.58)
- **Video-recorded** examination and **cross-examination** (5.59-5.76)
- The use of **intermediaries** (5.77-5.83)
- The use of communication aids (5.84-5.88)
- Special procedures in cases of rape or other **sexual offences** (5.89-5.99)

PRE-TRIAL PLANNING

- 5.1** Full and accurate information about special provision required to assist vulnerable and intimidated witnesses is needed to inform decision-making and pre-trial planning. In the **Crown Court**, it is preferable for issues to be raised and resolved as far as possible at the plea and directions hearing (PDH). It will be at this hearing that initial decisions will be taken, or a date fixed for rulings to be made, about the **Special Measures directions** which are possible under the 1999 Youth Justice and Criminal Evidence Act. It is important to achieve as much certainty as possible about how the witness will give evidence and arrangements for court attendance, preferably at an early stage of proceedings.
- 5.2** Where the guidance in Chapter 4 has been followed, the needs and wishes of vulnerable and intimidated witnesses will have been identified as part of the pre-trial preparation. It is vital that legal representatives taking part in the **PDH** in the Crown Court are given full instructions prior to the hearing, including up-to-date information from and about the witness, so that the judge will be in a position to complete the Judge's Questionnaire. Issues addressed in the Questionnaire include the mental or medical condition of the witness and staggered witness attendance. A copy of the Judge's Questionnaire, completed as far as possible with the agreement of both advocates, is handed in to the court prior to the start of the PDH hearing. Judges may be expected to ask for information about witnesses if it is not provided.
- 5.3** Other matters raised by the Questionnaire include applications for **Live link**, screens, pre-recorded evidence in chief and the use of video tape playback equipment at trial. The legal representatives need to have seen any videotaped evidence in advance of the PDH so that decisions can be made about the admissibility of the videotape and any issues such as the need for editing can be resolved in good time. Other issues which may depend on the admissibility of the

tape, such as the steps which may be taken to refresh the witness's memory (see Chapter 4, paragraphs 4.32-4.37) can then be the subject of a decision by the judge in advance of trial.

- 5.4** New information about a vulnerable or intimidated witness may become available after the PDH and before the trial. Such information may concern, amongst other matters, the condition of the witness (for example an improvement in or a degeneration of the witness's health) or the occurrence of relevant events (for example an act of intimidation directed at the witness, or the fact that the witness has had a birthday which is relevant to the age limits for eligibility for special measures). A witness's views may also change over time, for example a witness may become more apprehensive about confronting the **defendant** as the trial approaches. The steps which are taken by the court to enable the witness to give his or her best evidence may require to be reassessed in the light of changes of this sort, and legal representatives have a responsibility to keep the court informed about them. This means that procedures must be in place for channelling relevant information to the legal representatives.
- 5.5** Where a video tape has been edited prior to trial it is most important that the legal representatives should have viewed the edited version of the tape before the trial.
- 5.6** In **magistrates courts** and the **youth court** there is no PDH procedure, but there will be a similar need for information to be available in advance of the trial so that appropriate arrangements can be made for vulnerable or intimidated witnesses, and decisions taken about what Special Measures directions, if any, require to be made. It may be possible for the issues to be dealt with at a Pre-Trial Review (PTR) where one is to be held, or at a special hearing convened for the purpose. (*Details of procedures in magistrate's courts to be inserted later.*) It is as important for magistrates who try cases in these courts to be aware of all relevant information regarding vulnerable and intimidated witnesses as it is for the judges of the Crown Court, although the period of preparation before a trial by magistrates may not be as lengthy. Magistrates may be faced with particular issues such as the need to transfer a trial in order to take advantage of Live-Link facilities which are not available in their own area (see paragraph 5.48-5.51). Such matters require a degree of forward planning if trials are not to be unreasonably delayed.

Judicial responsibility for witnesses

- 5.7** Judges have a duty to protect the interests of the defendant at trial, where he or she is presumed in law to be innocent until proven guilty. However they also have a responsibility to ensure that all witnesses, including those who are vulnerable or intimidated, are enabled to give their evidence. Magistrates bear the same responsibility: lay magistrates have the assistance of a clerk on matters of law, including the appropriate use of the court's powers and responsibilities. Both Judges and magistrates have to strike a balance under Article 6 of the European Convention on Human Rights between protecting the defendant's interest in challenging the evidence against him or her, and ensuring that witnesses who give evidence in the case are enabled to do so to the best of their ability.
- 5.8** Judges and magistrates are expected to take an active role in the management of cases involving vulnerable and intimidated witnesses, and to ensure that elements of the court process which cause undue distress to such witnesses are minimised.

The Youth Justice and Criminal Evidence Act 1999 also creates an expectation that the court will be concerned that witnesses are enabled to give their best evidence. It is therefore of importance that they are alert to the possibility that a particular witness's evidence may be adversely affected not just by the distress of giving evidence, but by circumstances such as the witness's physical or mental health which may affect the witness's ability to recall relevant matters and to deal with questions about them. The existence of such circumstances may trigger the need for a Special Measures direction under the 1999 Act. Such a direction may also be required in respect of a witness, the quality of whose evidence is likely to be diminished by reason of fear in connection with testifying in the proceedings. Information relating to intimidation may be potentially prejudicial to a defendant, but must be made known to a court if it is relevant to the making of a Special Measures direction (even if, as is likely, it is **inadmissible** as proof of the offence to be tried). In a magistrate's court, because a Special Measures direction would normally be sought in advance of the trial date, it would be considered by different magistrates to those who hear the trial. If a direction is sought on the day of the trial, the magistrates might still be able to hear the trial subject to representations from the parties involved in the case.

5.9 The responsibilities of judges and magistrates to protect the interests of vulnerable or intimidated witnesses may require the making of Special Measures directions in appropriate cases, but may also be discharged in other ways. Some witnesses may need breaks while giving their evidence, whether because they are giving distressing evidence or because they have a limited span of concentration. Such breaks can often be planned in advance if the court has been given the relevant information. Although judges and legal representatives should invite young and vulnerable witnesses to tell the court when they need a break, they should not rely on the witness's ability to identify when this is necessary. Planned breaks are less likely to occur at a time that would favour one side over another. (See Chapter 4, paragraph 4.51.)

5.10 The responsibility of the judge or magistrates also extends to the prevention of improper or inappropriate questioning by legal representatives (or the defendant, if he or she is conducting his own defence). Judges and magistrates have regard to the reasonable interests of witnesses, particularly those who are in court to give distressing evidence, but who are nevertheless entitled to be protected from avoidable distress in doing so. The sort of questioning likely to be ruled out is anything which lacks relevance, or is repetitive, oppressive or intimidatory. Questioning may be intimidatory because of its content, or because of the tone of voice employed. An advocate may be asked to rephrase a question if it is in a form or manner which is likely to lead to misunderstanding on the part of the witness. A young witness, or a learning disabled witness, for example, may easily be confused by questions which contain double negatives ("Is it not true that you were not there?"), or which ask two questions at the same time ("Is it true that you were there and you heard what was said?"). Judges and magistrates should be alert to the possibility that a witness might be experiencing a difficulty of understanding which, if not corrected, might lead to the giving of evidence which is not of the best quality that the witness could provide (see Chapter 2, paragraphs 2.108-2.111 and Chapter 3, paragraphs 3.131-3.136, for other examples of inappropriate questioning techniques).

5.11 In some cases a witness, particularly a young witness, may benefit from meeting the judge or magistrates before the case commences so that the witness can be put at ease. Some judges are prepared to meet young witnesses before they give evidence, provided that they are satisfied that this will not create an impression of bias in favour of the witness, as their experience suggests that this can assist in demystifying the court process. However, it is essential that the prosecution and defence legal representatives should be aware of the meeting and have a right to attend if they so wish in order to avoid any subsequent legal challenges (see Young Witness Checklist and Chapter 4, paragraphs 4.48-4.49).

The responsibility of legal representatives

5.12 Legal representatives have a responsibility, when dealing with a witness who is nervous, vulnerable or apparently the victim of criminal or similar conduct, to ensure that those facing unfamiliar court procedures are put as much at ease as possible. Meeting with the legal representative who is to call the witness to give **evidence in chief**, in as calm an environment as possible may be an effective way of preparing a witness (see Chapter 4, paragraph 4.48).

5.13 Legal representatives must assist the court, at any hearing where the matter arises, to make informed decisions about any Special Measures, or other steps which it may be necessary to take, to assist a particular witness. Both prosecution and defence legal representatives are expected to inform the judge of the special needs of any vulnerable or intimidated witness they intend to call.

5.14 Where applications are to be made for disclosure of relevant records held by third parties concerning the witness they should be made at an early stage to avoid delay.

5.15 The legal representatives of the defendant have a duty to promote the best interests of the defendant by all proper and lawful means. This may include **cross-examining** vulnerable and intimidated witnesses about matters which they may find extremely distressing. Such questioning is necessary, provided that it relates to matters which are relevant to the case and is not done merely to insult or annoy the witness. Allegations of misconduct by a witness may not be made unless the legal representative has reasonable grounds for making them. Some legal representatives routinely ask young witnesses “Do you tell lies?”, but this is a practice which ought to be avoided unless the legal representative has some grounds for thinking that the witness is a habitual liar (other than the fact that the witness’s evidence contradicts that of the defendant). The manner in which the legal representative cross-examines a witness must not be improper or inappropriate (in the sense described in paragraph 5.10 above) This may involve taking account of information about a witness’s special needs. Both the legal representative calling the witness to give evidence in chief and the legal representative cross-examining him or her or her should strive to avoid being the cause of a misunderstanding as a result of which the witness gives evidence that is not of the best quality that he or she could provide. The strategies necessary to avoid such a misunderstanding may include, for example, avoiding the use of a tone of voice which is intended only to sound firm but which might be intimidatory to a vulnerable witness and following a systematic and logical sequence of questioning (see Chapter 3, paragraphs 3.114-3.115).

- 5.16** The legal representatives of the prosecution have a duty to bear in mind the needs of a vulnerable or intimidated witness who is giving evidence for the prosecution. If the defence seek an adjournment, the legal representative for the prosecution should draw to the attention of the court any adverse effect this may have on the witness, particularly where the witness is a child or has a learning disability. The legal representative of the prosecution should also be alert to a witness's need for regular breaks, and to the possibility that questioning in **cross-examination** of the witness may be improper or inappropriate (in the sense described above). The legal representative of the prosecution should seek to shield the witness from such questioning by drawing it to the judge's or the magistrates' attention. In the same way, a defence legal representative should seek to ensure that the court bears in mind the needs of a defence witness while he or she is giving evidence.
- 5.17** Legal representatives also have particular duties with regard to the proper handling of video recordings which are to be used in court as the evidence in chief of a vulnerable or intimidated witness. The object of these special duties is to ensure that the recording does not fall into the wrong hands and is seen only by those who have a proper interest in doing so. (See Appendix K: Storage, Custody and Destruction of Video Recordings).
- Competence and capacity to be sworn**
- 5.18** A person who has been judged not to be **competent** to give evidence may not appear as a witness in criminal proceedings, and cannot therefore be **eligible** for Special Measures under the Youth Justice and Criminal Evidence Act 1999. Where a witness's **competence** is called into question, a decision will normally require to be made before the trial begins about whether they may give evidence at all, and, if so, whether it should be sworn or unsworn. The Youth Justice and Criminal Evidence Act 1999 Section 53 relaxes the old rules regarding competence (see also Chapter 2, paragraphs 2.16 on).
- 5.19** All people, whatever their age, are competent to act as witnesses unless they cannot understand questions asked of them in court, or cannot answer them in a way that can be understood with, if necessary, the assistance of Special Measures (1999 Act, Section 53).
- 5.20** It is the responsibility of the party calling the witness to give evidence in chief to satisfy the court that the witness is competent. If the witness's competence is challenged and he or she needs to be questioned, questions must be asked by the court, not the legal representative calling or cross-examining the witness. Any such questioning must be done in the presence of both the prosecution and the defence. When the court assesses the witness's competence, it must take into account any Special Measures it has granted or is planning to grant including, for example, communication aids or the giving of evidence through an **intermediary**. This is to avoid a potential witness being judged not to be competent if the use of Special Measures would make him or her competent. Courts may ask for expert advice about the witness's competence, for example from a psychologist who has examined the witness, or from a lay person who has special knowledge of the witness's abilities (1999 Act, Section 54).
- 5.21** The question of whether a witness is eligible to swear an oath or to affirm may be raised by the prosecution, the defence or the court. The procedure used to

determine this question is the same as the procedure outlined above for determining competence. No witness under the age of 14 is to be sworn. Witnesses of 14 or over are eligible to be sworn if they understand the solemnity of a criminal trial and that taking an oath places a particular responsibility on them to tell the truth. There is a presumption that witnesses of 14 or over are to be sworn unless evidence is offered suggesting that they do not understand those two matters (1999 Act, Section 55).

5.22 The question of whether a witness should be sworn is to be considered in the absence of the jury but in the presence of both the prosecution and the defence. Expert evidence can be received on this subject (1999 Act, Section 55). Anyone competent to be a witness but not allowed to give evidence on oath may give evidence unsworn (1999 Act, Section 56). Where a witness gives unsworn evidence in the courtroom, the judge or magistrates may “admonish” the witness to tell the truth. A convenient form of words which may be used is “Tell us all you can remember of what happened. Do not make anything up or leave anything out. This is very important”. This admonition may be best given by the judge in the introductory exchange with the witness and prior to any **examination in chief** or cross-examination.

5.23 Where the court decides a witness to whom Section 27 of the 1999 Act applies is competent to take the oath, and their evidence in chief has been given in the form of a video-recorded interview, there is no legal necessity for the witness to be sworn prior to the playing of the video at court. However, if the witness goes on to provide further evidence in person to the court, either in cross-examination or as supplementary evidence in chief, the oath must be administered before the evidence is heard. Again, any introductory exchange between the judge and witness provides an opportune moment for the administering of the oath. Failure to administer the oath does not render the witness’s evidence inadmissible. However the fact that it has been received unsworn may lead to it being accorded less weight than if it had been given on oath.

SPECIAL MEASURES DIRECTIONS UNDER THE YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

5.24 Special Measures which may be available to assist eligible witnesses in the preparation and delivery of their evidence are as follows:

- screens (Section 23)
- evidence by the Live Link (Section 24)
- evidence given in private (Section 25)
- removal of wigs and gowns (Section 26)
- video-recorded evidence in chief (Section 27)
- video-recorded cross-examination and re-examination (Section 28)
- examination of a witness through an intermediary (Section 29)
- aids to communication (Section 30).

In addition, the 1999 Act offers:

- protection of witnesses from cross-examination by the accused in person (Sections 34-38)
- restriction on evidence and questions about the **complainants'** sexual behaviour (Section 41)

Witness eligibility (Sections 16 and 17)

5.25 Witnesses are eligible for Special Measures to help them give evidence on one or more of the following grounds:

- they are under 17;
- they suffer from a mental disorder, or have a mental impairment or learning disability, that the court considers significant enough to affect the quality of their evidence. This might cover, for example, autistic spectrum disorders;
- they have a physical disorder or disability, including deafness, that the court considers likely to affect the quality of their evidence; or
- the court is satisfied that they are likely to suffer fear or distress in giving evidence, because of their own circumstances and those of the case, to an extent that is expected to affect the quality of their evidence.

5.26 In relation to the last of the four groups mentioned in 5.25 above, the 1999 Act lists a number of factors that the court must take into account in assessing whether the witness qualifies for any of the Special Measures. These include:

- The nature and circumstances of the offence.
- The age of the witness.
- The social and cultural background and ethnic origins of the witness.
- Any religious beliefs or political opinions of the witness.
- Any behaviour towards the witness on the part of the accused, his or her family or associates, or any other witness or co-accused.

Those eligible for Special Measures under these criteria in the preceding paragraph may include a wide range of witnesses, including victims of sexual offences and of domestic violence, as well as victims of racially motivated offences.

5.27 A witness under the age of 17 is always eligible for help. In the case of witnesses who are, or who claim to be, victims of sexual offences (complainants) there is a presumption that they are eligible for assistance unless they inform the court otherwise. Otherwise, in deciding eligibility courts must consider witnesses' own views about their status. (Figure 5-1 shows the factors relevant to eligibility in the case of witnesses under 17, and Figure 5-2 the factors relevant to eligibility for adult witnesses.)

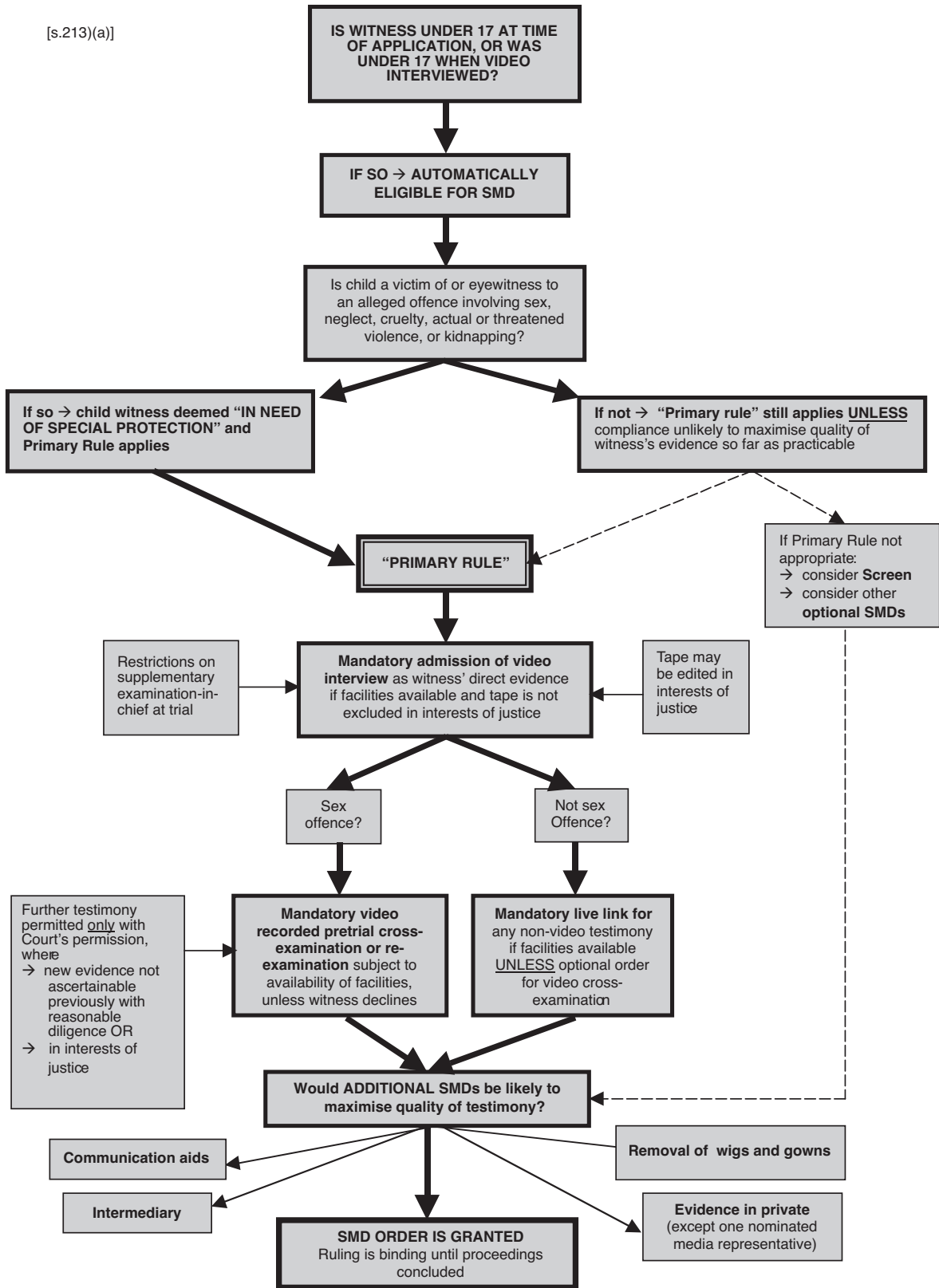
5.28 The examination of a witness through an intermediary and the use of a communication aid are not available under the 1999 Act to witnesses who are eligible only on the ground of fear or distress.

- 5.29** The court has some limited inherent powers to make measures available to assist witnesses who do not qualify as eligible or who need measures for reasons other than age, incapacity, fear or distress. These powers pre-date the 1999 Act and are untouched by it. They extend, for example, to the provision of screens and aids to interpretation, the removal of wigs and gowns, and the provision of a foreign language interpreter.
- 5.30** Although a defendant may be a witness for the defence, the Special Measures provisions of the 1999 Act do not apply to a person who is on trial. Again, the court may use its inherent discretion to offer measures which were available before the 1999 Act. These inherent powers, preserved by Section 19 of the 1999 Act, may be of particular importance when the court considers that a fair trial under the Human Rights Act can be ensured only if the accused is given assistance which is comparable to the Special Measures available to other witnesses when testifying.
- 5.31** Special Measures can only be authorised where they are likely to improve the **quality** of a witness's evidence. 'Quality' encompasses coherence, completeness and accuracy. Coherence in this sense means that the witness is able to address the questions put and give answers which can be understood, both as separate answers and when taken together as a complete statement of the witness's evidence.
- 5.32** The circumstances in which Special Measures may be invoked may thus range from a case where the witness's evidence would otherwise be unintelligible (for example, the provision of an intermediary to assist a very young child to communicate) to cases where the evidence, though intelligible, would otherwise be of a worse quality than it could be, because of the circumstances making the witness eligible for help. This might occur, for example, where the witness has poor long term memory but pre-recorded evidence in chief and cross-examination can ensure that the court hears a more complete account.

Special provisions relating to young witnesses (Section 21)

- 5.33** A special set of provisions apply where courts are dealing with witnesses under the age of 17 (child witnesses). These provisions include the "**primary rule**" which directs a court to start from an assumption, when deciding whether a child witness needs special measures, that a child will normally benefit from the admission of a **video recording** as his or her evidence in chief, provided that the measure is available in the area where the proceedings take place and provided also that the recording is not excluded on the grounds that it is not in the **interests of justice** to admit it. Such a child would normally give the rest of his or her evidence by Live Link. Courts do not have to first decide that these measures will improve the quality of the child's evidence: that requirement is treated as being satisfied. *This is the minimum level of protection currently afforded to such children: when available, the court will, for example, require that the cross-examination of witnesses who are subject to the primary rule should be pre-recorded if to do so would yield better evidence.*
- 5.34** The primary rule as it applies to child witnesses who do not qualify for **special protection** (i.e. children who are witnesses in cases other than those covered by paragraph 5.35 below) is subject to an exception if the court considers that the application of the rule would not maximise the quality of the child's evidence. (The application of the primary rule is shown in Figure 5-1.)

Figure 5-1: Special Measures Directions [SMD] for Young Witnesses
 © Laura C. H. Hoyano



5.35 Two groups of children are considered to be in need of ‘special protection’ over and above that normally offered by the primary rule:

- Children giving evidence regarding a **sexual offence**
- children giving evidence in a case involving an offence of violence (actual or threatened), abduction, cruelty or neglect

Children in need of ‘special protection’ benefit from stronger presumptions about how they will give evidence. Children in sexual offence cases receive a particularly high level of protection.

5.36 Those in need of special protection have a video recording of their evidence-in-chief admitted, unless it is excluded on the grounds that it is not in the interests of justice – to admit it. Young witnesses giving evidence in sexual offence cases may go on to be cross-examined at a pre-trial hearing recorded on video (when available), unless they inform the court that they do not want this measure to apply to them. Those giving evidence in violent offence cases are cross-examined through Live Link at trial (*Again this is a minimum level of protection: for example the court will be able, when the measure is available, to order that the cross-examination of witnesses giving evidence in relation to offences of violence can be pre-recorded if to do so would enable them to give their best evidence.*) The use of special measures for children in need of special protection is dealt with in Figure 5-1.

Witnesses over 17 (Sections 21 and 22)

5.37 If a court makes a Special Measures direction in respect of a child witness who was eligible on grounds of youth only, and the witness turns 17 before beginning to give evidence, the direction no longer has effect. If such a witness turns 17 after beginning to give evidence, the Special Measures direction continues to apply.

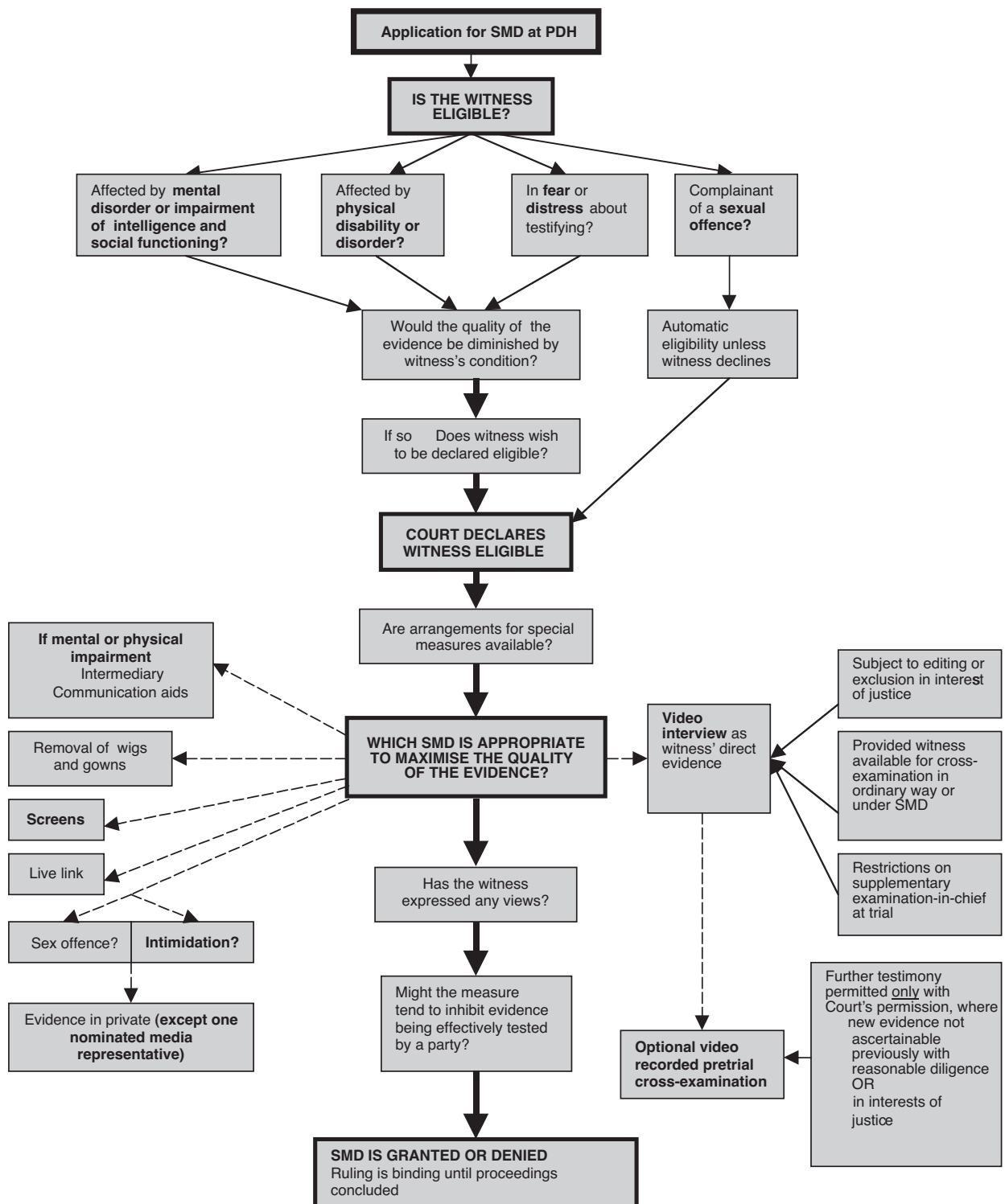
5.38 If a witness was under 17 when evidence in chief or cross-examination (*when available*) was video-recorded before the trial but the witness has since turned 17, the video recording is still capable of being used as evidence.

5.39 Witnesses over 17 at the beginning of the trial but who made a video recording as their evidence-in-chief when they were under 17 are eligible for Special Measures in the same way that they would be if they were under 17, and the same presumptions apply to them. That includes being considered ‘in need of special protection’ if they are giving evidence in a **sexual case**, or one involving violence, neglect or abduction. (See Figure 5-2.)

Special Measures directions (Sections 16-19)

5.40 Special Measures directions can be made at a pre-trial hearing, before the beginning of the trial or before a “Newton” hearing to which witnesses are called to settle the factual basis upon which sentence will be passed. While it is important that directions be made in advance of trial where possible (see paragraph 5.1) it may be necessary for a court to react to a situation at a later stage of proceedings by making a direction to assist a witness to give evidence. New directions are needed for a retrial or appeal.

Figure 5-2: Special Measures Directions [SMD] for Adult Witnesses
 © Laura C. H. Hoyano



5.41 When courts decide, on application from the prosecution or defence or of their own accord, whether Special Measures might be appropriate for a witness they must consider:

- whether the witness is eligible (see 5.26)
- (except in the case of a witness to whom the special provisions in 2.3 and 2.4 apply), *whether* special measure(s) would improve the quality of the evidence of an eligible witness in the circumstances of the case (which include the witness's own views and the possibility that the measures might tend to inhibit the evidence being tested effectively)
- (except in the case of a witness to whom the special provisions in 2.3 and 2.4 apply), if special measure(s) would improve the quality of the witness's evidence, *which of the measures*, alone or in combination, would be most likely to maximise the quality of the witness's evidence (again, the court has to bear in mind the views of the witness and the possibility that the measures might tend to inhibit the evidence being tested effectively)
- the details of *where, when and how* measure(s) specified should be provided.

5.42 The need to take account of any views expressed by the witness when resolving the issues identified in the previous paragraph underlines the need for the court to be provided with up-to-date information about the witness's preferences (see 5.1. above and Chapter 4 paragraphs 4.16-4.18). The considerations applicable when making a Special Measures direction for adult witnesses are shown in Figure 5-2.

Binding directions (Section 20)

5.43 Special Measures directions are binding until the end of the trial, although courts can alter or discharge a direction if it seems to be in the interests of justice to do so. Either party can apply for the direction to be altered or discharged, but must show that there has been a significant change of circumstances since the court made the direction or since an application for it to be altered was last made. This provision is intended to create some certainty for witnesses, by encouraging the party calling the witness to make applications for Special Measures as early as possible and by preventing re-applications on grounds the court has already found unpersuasive.

5.44 The court must record its reasons for giving, altering or discharging a Special Measures direction or refusing an application so that it is clear to everyone involved in the case what decision has been made and why it was made. This is intended to include, for example, the court's reasons for deciding that a witness is ineligible for help. Applications for Special Measures are subject to the Rules of Court. (*Rules of Court are in preparation.*)

THE SPECIAL MEASURES

Screening the witness from the accused

5.45 Screens may be authorised to shield the witness from seeing the defendant. The screen is normally erected around the witness rather than the defendant. It must not prevent the judge, magistrates or jury and at least one legal representative of each party to the case (i.e. the prosecution and each defendant) seeing the witness, and the witness seeing them. If an intermediary or an interpreter is appointed to assist

the witness, they too must be able to see and be seen. The 1999 Act does not specifically provide for the witness's need to see the court witness support person (if there is one) but the court should ensure that this need is met where a screen is erected.

- 5.46** The court is also authorised to provide for an “arrangement” which is not a screen, but which has the same effect of preventing the witness from seeing the defendant. An arrangement used in some older cases was to require defendants to move from the dock to a position in court where they could not be seen by the witness. Such an arrangement might have the undesirable effect of making it more difficult for the defendant to communicate with his legal representatives, which could become a factor in determining whether he or she was accorded a “fair trial” within the meaning of Article 6 of the European Convention on Human Rights. If such an arrangement is adopted, therefore, careful consideration requires to be given to ensuring that the rights of the defendant are properly preserved, for example by ensuring that a break in the witness's evidence is taken in order to afford the defendant an opportunity to consult with his legal representative about any further questions which require to be put in the light of what the witness has said.
- 5.47** Where the trial involves a jury, the judge may warn them not to be prejudiced against the defendant as a consequence. This is done as part of the judge's duty to protect the accused from the unfairness which would ensue if, for instance, the jury were to assume that the defendant must have done something wrong to merit the erection of a screen.

Evidence by Live link

- 5.48** ‘Live link’ usually means a closed circuit television link, but also applies to any technology with the same effect. The essential element of a Live link is that it enables the witness to be absent from the place where the proceedings are being held, but at the same time to see and hear, and be seen and heard by, the judge, the magistrates or jury, at least one legal representative of each party to the case, and any intermediary or an interpreter appointed to assist the witness. The judge, magistrates, court clerk or justices clerk control the equipment, and should be comfortable with it and familiar with any likely difficulties such as the distorted image which may appear on the witness's monitor if those in court lean too close to the camera. Judges and magistrates must also ensure that the witness understands what is happening. This is most obviously of importance for a child witness, or a witness who is learning disabled, but it should not be assumed that any witness is conversant with the equipment. It may be useful to discover whether the witness has paid a pre-trial visit to the court at which the facility has been explained and/or demonstrated (see Chapter 4, paragraphs 4.30-4.31).
- 5.49** There is a presumption that a witness who gives evidence by Live link for a part of the proceedings will continue to give evidence by this means throughout. Where a party to the proceedings argues that the method of receiving the witness's evidence should change, the court can make a direction to this effect if the interests of justice so require.
- 5.50** If there are no Live link facilities at the magistrates' court where the proceedings would normally be held, the proceedings may be transferred to another court where a Live link is available. Alternatively, if the witness is an adult and screening them

is considered to be equally likely to enable them to give their best evidence, then the court may choose to screen the witness instead. A young witness who is required by Section 21 or Section 22 of the Act (2.4) to give all or part of his evidence by Live link must do so, unless a Live link is not available at all in the area where the proceedings are to take place.

- 5.51** The 1999 Act makes the Live link available to vulnerable and intimidated witnesses whether or not their evidence in chief is presented in the form of a video recording, and there may be some witnesses for whom the Live link provides the only special measure required to enable them to give their best evidence. Even in the case of a child witness who is subject to a presumption that a recording will be used as evidence in chief (see paragraph 2.3), it may be necessary to resort to the use of the Live link alone if no recording is available, or an available recording has been ruled inadmissible.

Choosing between live-link and screens

- 5.52** Where the witness who is eligible for Special Measures is not a young witness to whom the special presumptions in Section 21 or Section 22 applies, the court making a Special Measures direction will be able to choose between a screen and a Live link as a means of assisting a witness to give their best evidence. The Live link has the advantage that the witness does not have to be physically present in the courtroom. It may also be more accessible for some physically disabled witnesses, including wheelchair users. But the screen is not necessarily an inferior alternative to the Live link in all cases. Screens are flexible, easy to use and permit the witness to stay in court. It is also easier for the jury or magistrates to gain an impression of some physical attributes of the witness where this is relevant, for example in a case where the issue is whether the accused used reasonable force to restrain the witness.

- 5.53** The views of the witness are likely to be of great importance in deciding which of the two very similar measures is most suitable. A witness who is greatly distressed at the prospect of being in the same room with the accused is likely to give better evidence if permitted to use the Live link

- 5.54** Where the witness is a child witness, or a witness over 17 to whom Sections 21 or 22 apply (see paragraphs 5.37-5.39), there is normally no choice to be made between Live link and screening, as Live link is taken to be the more appropriate measure provided that it is available in the area where the proceedings are to take place.

Evidence given in private

- 5.55** The principle of open justice normally requires that evidence is given in open court, in other words in the presence of representatives of the press and of members of the public who wish to attend. There are statutory restrictions on attendance and reporting in the Youth Court for the protection of children and young persons. However, the Government has encouraged Youth Courts to make fuller use of their discretion within the statutory framework, to admit interested parties and to lift reporting restrictions where it is in the public interest to do so.

- 5.56** In trials on **indictment** and in the magistrates' courts a further exception is justified in sexual cases, partly because the evidence may be of an intimate nature, and partly because the presence of the defendant's supporters or of members of the

public with a prurient interest in the proceedings may make the giving of evidence exceptionally difficult. Another exception is made in cases where the court believes that someone, other than the accused, may take advantage of their entitlement to attend the proceedings in order to intimidate the witness. In such cases, Section 25 permits the courtroom to be cleared of people who do not need to be present while a witness gives evidence. The Special Measures direction will describe individuals or groups of people, rather than areas of the court, and mostly affects those in the public gallery and the press gallery. The court has to allow at least one member of the press to remain if one has been nominated by the press. The freedom of any member of the press excluded from the courtroom under this chapter to report the case will be unaffected, unless a reporting restriction is imposed separately.

- 5.57** The court also has the power under Section 37 of the Children and Young Persons Act 1933 to clear the public gallery where a person under 18 gives evidence in proceedings relating to conduct which is indecent or immoral.

Removal of wigs and gowns

- 5.58** The courts have traditionally exercised a direction to dispense with the wearing of wigs and gowns by the judge and by legal representatives in cases where child witnesses are concerned. The inclusion of this power as a special measure in the 1999 Act makes it clear that the same dispensation can be made in the case of vulnerable adult witnesses. Not all witnesses want the court to depart from its traditional way of dressing: some feel more comfortable if the judge and legal representatives are dressed in the way which is most familiar to them, perhaps from watching television drama.

Video-recorded evidence in chief

- 5.59** A video-recorded interview can take the place of a witness's evidence in chief. (References in this Chapter to an interview should be taken to include, where appropriate, the case where a court is also asked to receive a supplementary interview or interviews: see also Chapter 2, paragraphs 2.135-2.136). Under the previous law the use of video evidence was restricted to children giving evidence in certain types of case. Under the 1999 Act any eligible **witness** may be permitted to give evidence in this way. In the case of a **child witness**, or a witness over 17 to whom the special provisions mentioned above apply (see paragraphs 2.3 and 2.4) the nature of the offence will be relevant to which measures are presumed to benefit the child. The fact that a witness may give evidence in this way does not necessarily mean that he or she will have taken part in a video-recorded interview early in the investigation of an alleged offence. The decision to record evidence in chief may be taken at a later stage, for example as a consequence of a PDH in the Crown Court.
- 5.60** Video recordings can be excluded and edited if the interests of justice so require. In deciding whether to allow only an edited recording to be used in evidence, courts must consider whether the parts sought to be excluded are so prejudicial as to outweigh the desirability of using the whole recording.
- 5.61** It may be contrary to the interests of justice to use a video, or part of a video in evidence where the interviewer has neglected to follow the guidance on interviewing in this Guidance. It should not be supposed that courts will exclude or edit recordings as a sanction for non-compliance with a minor detail. Before

making a decision to exclude or edit a recording a court will consider the nature and extent of any breaches which have occurred, and the extent to which the evidence affected by the breaches is supported by other evidence in the recording which is not so affected, or by other evidence in the case as a whole. If there has been a substantial failure to comply with the Guidance the consequence may well be that video evidence is excluded altogether, or the relevant parts edited out.

- 5.62** An interview with a witness which is conducted entirely properly may still be excluded in the interests of justice, for example where the witness subsequently retracts the statements made in the video and it is clear that he or she no longer associates themselves with the views expressed in it.
- 5.63** Where a Special Measures direction has been made for a recording to be shown to the court, the court can later exclude the recording if there is not enough information available about how and where the recording was made or if the witness who made the recording is not available for further questioning (whether by video, in court or by Live link) and the parties to the case have not agreed that this is unnecessary. (See Figures 5-1 and 5-2.) Such a recording might be admissible under Section 23 of the Criminal Justice Act 1988, depending on the reason for not calling the witness (for example, (see Appendix B) if he or she has become too ill to attend as a witness).
- 5.64** The video recording (as edited, where that is required) normally forms the whole of a witness's evidence in chief, and will be watched by the witness before cross-examination takes place. The witness will normally have had an opportunity to see the recording on a previous occasion too, in order to refresh their memory in preparation for the trial (see Chapter 4, paragraphs 4.32-4.37). Some witnesses may require breaks when watching the recording.
- 5.65** Exceptionally, the witness may be asked to give supplementary evidence about matters not dealt with in the recorded interview, or about matters which are not adequately covered in the recorded interview. Courts can give permission for such evidence to be given, either on their own initiative or on an application by one of the parties, if that party can show that there has been a material change of circumstances since the direction to admit the video recording was made. (See Figures 5-1 and 5-2.)
- 5.66** If the witness is asked to give further evidence, then courts can direct that the evidence will be given by the Live link. As in other circumstances where a Live link is provided, the 1999 Act allows temporary facilities to be authorised for magistrates' courts. In the case of witnesses who are not subject to the special rules which apply to young witnesses (see paragraph 5.36), the court may decide that the witness can give the further evidence in the courtroom, protected if necessary by a screen.
- 5.67** Witnesses aged 14 or over who make a video recording that is intended to take the place of their evidence-in-chief are not expected to take the oath before making the recording, although they will be required to do so before cross-examination or supplementary evidence-in-chief. The one exception to this is if it has been decided that they will give unsworn evidence instead. The most convenient point to administer the oath may be as part of any introductory exchanges between the judge and the witness. Under the 1999 Act a witness' evidence may be received

unsworn even though he or she is capable of giving evidence on oath, so the absence of an oath at the time of the recording does not render it inadmissible. If the witness is to be cross-examined on oath, however, it might be helpful for them to be asked, before cross-examination begins, whether what they said in the recording was true.

5.68 A recording of an interview with a witness which is not used as evidence in chief may be used for other purposes. If a witness gives evidence at the trial and has previously made a video containing statements which are inconsistent with the evidence given at trial, the video recording may be used in cross-examination to detract from the credit to be given to his evidence at trial.

5.69 Where a witness who has recorded an interview subsequently attends an identification parade or a similar procedure under the Code of Practice for the Identification of Persons by Police Officers (Police and Criminal Evidence Act 1984 Code D), it may be necessary to supplement the witness's video-recorded evidence in order to include the outcome of such a procedure. A positive identification of a defendant by a prosecution witness may be important evidence in the case, and a witness who gives evidence in chief in the normal fashion at trial would normally be asked to confirm that such an identification took place. Although it is possible to prove that the identification was made by relying on evidence other than the testimony of the witness, in a case where the correctness of the identification of the defendant is contested, it is helpful if there is evidence on the point from the witness. Appendix H outlines some of the special considerations for identification parades involving vulnerable and/or intimidated witnesses.

Video-recorded cross-examination or re-examination (Section 28) (*when available*)

5.70 Where the court has already decided that a video recording can be used as the witness's main evidence, it may also decide that the witness should be cross-examined before trial, and the cross-examination, and any re-examination, recorded on video for use at trial.

5.71 The cross-examination is not recorded in the physical presence of the defendant, although he or she has to be able to see and hear the cross-examination and be able to communicate with his legal representative. This can be achieved through a Live link or earpiece receiver, for example.

5.72 The video-recorded cross-examination may, but need not, take place in the physical presence of the judge or magistrates and the defence and prosecution legal representatives. However, a judge or magistrate has to control the proceedings. It is intended that the judge or magistrate in charge of this process will normally be the trial judge. All the people mentioned in this paragraph have to be able to see and hear the witness being cross-examined and communicate with anyone who is in the room with the witness (such as an intermediary).

5.73 As with video-recorded evidence in chief, a video recording of cross-examination may afterwards be excluded if there have been serious departures from the rules of court governing the cross-examination.

5.74 Witnesses who have been cross-examined on video are not to be cross-examined again unless the court makes a direction permitting another video-recorded cross-examination. It may do so if the subject of the proposed cross-examination is relevant to the trial and something which the party seeking to cross-examine did not know about at the time of the original cross-examination (and could not reasonably have found out about by then) or if it is otherwise in the interests of justice to do so. Information that has not yet been disclosed to the other party would usually count as information that the party could not reasonably have known. It is envisaged that a direction permitting further cross-examination will only occur in exceptional cases, and that the cross-examiner will make all reasonable efforts to be ready to deal with all the issues at the first attempt. The likelihood of a further cross-examination will need to be taken into account if therapy becomes an issue subsequent to the recorded cross-examination (see Chapter 2, paragraphs 2.90-2.91, and Figures 5-1 and 5-2).

Choosing between videotaped and live cross-examination

5.75 The 1999 Act introduces videotaped cross-examination for the first time. Its advantages include reducing the stress which is involved when a witness has to come to court to give evidence, and minimising the delay between examination in chief and cross-examination. The witness is also removed from any difficulties arising out of postponement or adjournments in the trial itself. The matters with which the witness will be expected to deal will be the same as when cross-examination takes place at the trial in the normal way. Witnesses who have completed a video cross-examination will (other than in the exceptional cases where it is necessary to put further questions at a later stage) be able to put the experience behind them and take advantage of therapy without the risk of a claim being made that this will distort their evidence.

5.76 Although procedural constraints such as the rules governing disclosure of material to the defence may lead to the cross-examination being conducted some time after the examination in chief was recorded, research in other jurisdictions suggests that the availability of pre-recorded cross-examination may still have the advantage that the witness' evidence is completed significantly earlier than if it were given at trial. This measure may therefore hold worthwhile advantages for many vulnerable and intimidated witnesses for whom it is an option, as well as for child witnesses in sexual cases for whom the 1999 Act provides that is the normal method of undergoing cross-examination. (*Further rules and guidance on video-recorded pre-trial cross-examination will be forthcoming*)

Use of intermediaries (*when available*)

5.77 Witnesses may give evidence through an intermediary:

- When a video-recorded statement is being made which may be admitted as the witness's evidence-in-chief
- during video-recorded pre-trial cross-examination or re-examination
- during examination and/or cross-examination in the court room
- during examination and/or cross-examination via live TV link.

- 5.78** The intermediary communicates to the witness questions asked by the court, defence and prosecution, and then communicates the answers the witness gives in reply. The intermediary is allowed to explain questions and answers if that is necessary to enable the witness and the court to communicate. The intermediary does not decide what questions to put. The use of an intermediary does not lessen the responsibility of the judge or magistrates, or of the legal representative, to ensure that the questions put to a witness are not improper, and are appropriate to the level of understanding of the witness.
- 5.79** **Intermediaries** must be approved by the court and declare that they will perform their function faithfully. They have the same obligation as interpreters to refrain from wilfully making false or misleading statements to the witness or the court.
- 5.80** **Intermediaries** may be used to help a witness to communicate who has difficulty understanding questions or framing evidence coherently. They will normally be a specialist, through training or unique knowledge of the witness, or have skills to overcome specific communication problems, such as those caused by deafness. Deaf witnesses can choose to rely on administrative arrangements for the provision in court of interpreters for deaf people, or if it is more appropriate to their particular needs, to apply for an intermediary or communication aid under the Act's provisions.
- 5.81** The use of an intermediary is not available to witnesses eligible for Special Measures on the ground of fear or distress alone.
- 5.82** When an intermediary is used at trial, the judge or magistrates and at least one legal representative for both the prosecution and the defence must be able to see and hear the witness giving evidence and be able to communicate with the intermediary. The jury will also be able to see and hear the witness unless the evidence is being video-recorded, in which case they will see the recording when it is shown to them later.
- 5.83** Where intermediaries are used at an early stage of an investigation or proceedings, and subsequently an application is made to admit as evidence in chief a video-recorded interview in which they were involved, then a Special Measures direction to admit the recording can be given despite the judge, magistrates or legal representatives not having been present. Before the recording can be admitted, however, the intermediary must be approved by the court retrospectively.

Communication aids

- 5.84** The use of communication aids, such as sign and symbol boards (see Chapter 2, paragraphs 2.36-2.41), may be authorised to overcome physical difficulties with understanding or answering questions. The use of a communication device is not available to witnesses eligible for Special Measures on the ground of fear or distress alone.

The presence of a court witness supporter while the witness gives evidence

- 5.85** The presence of a court witness supporter is designed to provide emotional support and helps reduce the witness's anxiety and stress and contribute to the witness's ability to give his/her best evidence. A court witness supporter can be anyone known to the witness who is not a party to the proceedings and has no detailed knowledge of the evidence in the case. If evidence is to be given by Live link, or

if it is proposed that a supporter sit near the witness in court, it is a matter for the judge to determine who should accompany the witness. The identity of this person should be discussed and agreed as part of the preparation for trial (see Chapter 4, paragraph 4.53).

The address of the witness

- 5.86** Witnesses should not be asked to give their address aloud in court unless for a specific reason. This change in practice was approved by the Lord Chief Justice in 1996, following a recommendation by the Trial Issues Group. Witnesses who are nervous about the possibility of retaliation should be advised of this rule. If the witness's address is necessary for evidential purposes, it should be possible for it to be written down rather than read out in open court.

The use of a sign language interpreter

- 5.87** When a witness gives evidence assisted by a sign language interpreter, all persons present in the court room (including the defendant) should be able to see the witness and the interpreter. If it is decided that such a witness should not give evidence in open court, either the TV link should be used, ensuring the picture includes a view of the witness's hands, or screens should be used in combination with a video camera giving the defendant a view of the witness.
- 5.88** Allowance should be made for proceedings to take longer than usual. Sign language interpretation is very tiring. Depending on the length of testimony and the number of witnesses using the interpreter, it will be necessary to take frequent breaks or to have more than one interpreter available.

PROTECTION OF WITNESSES FROM CROSS-EXAMINATION BY THE ACCUSED IN PERSON

- 5.89** It is a general rule in criminal trials that a defendant may choose to conduct his or her own defence, and may cross-examine the witnesses for the prosecution. The Youth Justice and Criminal Evidence Act 1999 makes new exceptions to the principle that the unrepresented defendant (as such a defendant is called) may cross-examine prosecution witnesses. The 1999 Act builds on the foundations laid by the Criminal Justice Act 1988, which restricted the right to cross-examine child witnesses in certain types of case. If the defendant fails to appoint a legal representative, then the court is empowered to appoint a representative to act for the defendant, so that the witness's evidence will not go untested. (Section 38 of the 1999 Act.)

Complainants in proceedings for sexual offences

- 5.90** Section 34 of the 1999 Act prevents defendants who are charged with rape or other sexual offences from personally cross-examining the **complainant** of the offence. The ban is absolute, in order to provide a measure of reassurance to complainants that in no circumstances will they be required to undergo cross-examination by the alleged offender. It extends to any other offences with which the defendant is charged in the proceedings. It follows cases in which defendants have sought to abuse their position as cross-examiner by, for example, dressing in the clothes which were worn at the time of the rape.

Complainants and other witnesses who are children

5.91 Section 35 of the Act replaces and extends the provision made by Section 34A of the Criminal Justice Act 1988, which prohibited unrepresented defendants from cross-examining child witnesses in sexual cases and cases involving allegations of violence or cruelty. Unrepresented defendants will now also be prohibited from cross-examining in person any child who is a complainant of, or a witness to, an offence of kidnapping, false imprisonment or abduction. The change follows an expression of surprise by the courts that such offences were not expressly included in the 1988 Act.

5.92 The prohibition on cross-examining child witnesses extends to witnesses whose age when they gave their evidence in chief meant that they then counted as children, even if they have passed that age limit by the time of the cross-examination. For the purposes of this provision witnesses count as children if under 17 in the case of **sexual offences**, and if under 14 in the case of the other offences to which the provision applies.

Other cases

5.93 Section 36 of the 1999 Act gives courts the power to prohibit unrepresented defendants from cross-examining witnesses in any case, other than those already covered by the mandatory ban described in Sections 4.2. and 4.3. above. Before exercising the power the court must be satisfied that the circumstances of the witness and the case merit the prohibition, and that it would not be contrary to the interests of justice to impose it.

5.94 Section 37 provides that directions made under Section 36 are binding unless and until the court considers that the direction should be discharged in the interests of justice. Courts will have to record their reasons for making, refusing or discharging directions.

RESTRICTION ON EVIDENCE AND QUESTIONS ABOUT COMPLAINANT'S SEXUAL BEHAVIOUR

5.95 Section 41 of the 1999 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. A House of Lords' judgement (in *R v A*) has subsequently qualified these restrictions. Restricting the use of such evidence serves two functions: it protects the complainant from humiliation and the unnecessary invasion of his or her privacy, and it prevents the jury from being prejudiced by information which might divert them from the real issues they have to consider. The House of Lords in *R v A* fully accepted the need for such restrictions. However, it was also stated that evidence of the complainant's sexual behaviour might be so important that to exclude it would endanger the fairness of the defendant's trial. In such a case it would be the duty of the court to interpret section 41 so as to admit the evidence. The courts have to find a balance between protecting the interests of the complainant and ensuring that the trial is fair.

5.96 The restrictions in section 41 apply to all complainants in sexual cases, whether male or female, adult or child. The defence may not normally ask any question or bring any evidence about the complainant's sexual behaviour on occasions other than those that are the subject of the charges at trial, and this includes questions and

evidence about the complainant's previous relationships with the defendant himself. Section 41 does not restrict the provision of relevant information by the prosecution about a complainant: for example where it is the prosecution's case that the defendant raped his own wife, and his defence is consent, there would be no difficulty about informing the jury of the previous relationship between the defendant and the complainant as it would be relevant to the background of the case.

5.97 If the defence wishes to introduce evidence or ask questions about the complainant's sexual behaviour, it will have to make an application to the court. The court will grant leave in a case where:

- The evidence/question relates to a specific instance of alleged sexual behaviour by the complainant

AND

- To refuse it might have the result of rendering unsafe a conclusion on a relevant issue (such as a conviction by a jury arrived at in ignorance of the complainant's sexual behaviour)

AND one of the following four conditions is also satisfied:

- The evidence/question is relevant to an issue in the case that is not an issue of consent (such as the issue whether intercourse took place). The defendant's honest but mistaken belief in consent, which is currently a defence to a crime such as rape where lack of consent is an element of the offence, falls into this category, as it is not an issue of consent as such.
- The issue is whether the complainant consented and the evidence/question relates to sexual behaviour that took place at or about the same time as the event which has given rise to the charge. This might cover cases where a couple were seen in an intimate embrace shortly before or after one is alleged to have sexually assaulted the other. "At or about the same time" is unlikely to cover behaviour occurring more than a day before the incident which is the subject of the charges.
- The issue is whether the complainant consented and the evidence/question relates to behaviour which is so similar to the defendant's version of events at or about the time of the alleged offence that it cannot reasonably be dismissed as coincidence. The House of Lords in *R v A* decided that this exception would have to be given a broad interpretation to cover any case where the evidence is so relevant to the issue of consent that to exclude it would endanger the fairness of the defendant's trial. It was accepted that this might involve stretching the language of the Act. The particular concern of the House in *R v A* was whether the defence should be able to allude to a previous sexual relationship between the complainant and the defendant where consensual intercourse had taken place some time before the alleged rape. It was thought that there were cases where this would be necessary to ensure a fair trial even though it could not strictly be said that the previous behaviour was so similar that it could not be dismissed as coincidence. It does not follow that in every case where the defendant and the complainant have had such a relationship that it will fall within this exception, but the House of Lords accepted that it is more likely that the court will need to

be told about a previous relationship between the complainant and the defendant himself than between the complainant and a different person.

- The evidence/question is intended to dispute or explain evidence brought by the prosecution about the complainant's sexual behaviour. This might include a case where the prosecution adduce evidence to show that the complainant was a virgin before the defendant allegedly raped her, and the evidence the defence wishes to bring shows that she was not.

5.98 An application to ask questions/bring evidence about the complainant's sexual behaviour is made in private, and the complainant is not allowed to be present, although the defendant may attend. The court must give reasons in open court for allowing or refusing an application and specify the extent to which they are allowing any evidence to be brought in or questions to be put. This makes it clear to the complainant, as well as to the legal representatives, how far the questioning can go, and in relation to which issues.

5.99 Because the issue of whether evidence or questions regarding sexual behaviour may be permitted can only be resolved by a court, and at a stage of proceedings where the defence case is fairly clearly defined, it is highly unlikely that any assurances can be given to a complainant that his or her sexual history will not be the subject of any revelations at the trial. In the light of the decision in *R v A* it is advisable that a complainant should be warned to expect that any claims by the defendant that he or she has had a sexual relationship with the complainant are likely to be discussed in court.

