

Office for Criminal Justice Reform

# Improving the Criminal Trial Process for Young Witnesses

## A Consultation Paper

June 2007

CRIMINAL JUSTICE SYSTEM





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A consultation paper produced by the Office for Criminal Justice Reform.  
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CRIMINAL JUSTICE SYSTEM





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# Foreword

The Government recognises that witnesses are vital to the success of the criminal justice process and is determined to ensure that young victims and witnesses have access to justice.

Giving evidence in court can be an onerous undertaking for many adults, and for children and young people it is an even more daunting prospect, particularly when they are asked to give evidence against people that they know, including members of their own family.

The Government has long recognised that young witnesses require particular assistance in court to enable them to give their best evidence and a chance for their voice to be heard. Much has already been done to provide that help. The Youth Justice and Criminal Evidence Act (YJCEA) 1999 made available a range of special measures to assist young witnesses in court and we have also rolled out Witness Care Units and the Code of Practice for Victims of Crime to ensure that their needs are identified and met.

Evidence indicates that we are on the right track but the Government recognises that there is more that can be done, such as providing more choice for individual young witnesses in how they give evidence and in making better use of new technology.

The purpose of this public consultation is twofold. It seeks the views of professional practitioners, victims, witnesses and the general public on a range of recommendations aimed at improving the way young witnesses give evidence in criminal proceedings. These include the implementation of section 28 of the YJCEA 1999, which provides for video-recorded pre-trial cross-examination and providing more flexibility in the range of measures that are available to young witnesses with the aim of giving them more choice.

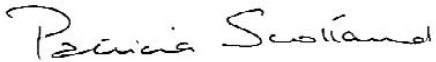
We also invite views and suggestions about how we might move forward on a number of general issues. This includes ways of making better use of technology. As this inevitably entails increased costs and as resources are limited, we wish to ensure that we opt for the most cost-effective approach and seek your assistance in identifying this. We are also seeking views on ways of improving the management of trials involving young witnesses, including reducing delay in proceedings and the quality and appropriateness of the questions put to young witnesses.

As part of the consultation process, we will be actively seeking out the views of young witnesses. Their views are crucial to understanding how the current measures are working and how they might best be improved.

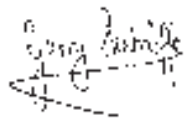
We are determined to improve the experience of young witnesses in court, both in the interests of justice and also in the interests of young people. We seek your views on how best to achieve this.



The Rt Hon Lord Goldsmith QC  
Attorney General



The Rt Hon Baroness Scotland of Asthal PC, QC, MP  
Minister of State  
Home Office



Gerry Sutcliffe MP  
Parliamentary Under-Secretary of State  
Ministry of Justice

# Chapter 1: Introduction

1.1 Giving evidence during the course of a criminal trial can be daunting and stressful for adult witnesses. For children the experience can be extremely intimidating.<sup>1</sup> They need more assistance in giving their evidence both before and during the criminal trial. Parliament has brought forward various measures over the last 20 years to help young witnesses, but it seems clear that more needs to be done particularly in addressing the gap between good policy and implementation on the ground. This consultation paper seeks your views on options for progress.

## A lot done

1.2 Over the last nine years the Government, working with the statutory and voluntary sector, has made major advancements in the area of young witness evidence. For example:

- introducing 'special measures' in the YJCEA 1999 to help relieve the stress of giving evidence and to facilitate communication for both young and adult witnesses with specific needs to help them give their best evidence
- reissuing the Young Witness Pack and making it available free of charge from the Office for Criminal Justice Reform (OCJR)
- boosting recognition of the needs of young witnesses
- bringing forward more general measures that impact on young witnesses, including:
  - expansion of the court-based Witness Service to all criminal courts
  - roll-out of 165 Witness Care Units by December 2005 to provide victims and prosecution witnesses with telephone support throughout the criminal justice process
  - launch of the statutory Code of Practice for Victims of Crime in April 2006 ensuring that victims get regular updates about the progress of their case. Vulnerable and intimidated witnesses are entitled to an enhanced service
  - development of a Witness Charter setting out the standards of service that all witnesses can expect to receive throughout the criminal justice process (this is planned to be implemented by April 2008).

1.3 Research shows that we are on the right track:

- 76% of child witnesses were satisfied with special measures.<sup>2</sup>

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1. Child witnesses are defined in section 16 of the YJCEA 1999 as all those under the age of 17 at the time of the hearing.

2. Hamlyn, B, Phelps, A, Turtle, J and Sattar, G, *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses* (London: Home Office Research Study No. 283; June 2004).

- One-third of witnesses would not have been able to give evidence without the assistance of special measures according to the same report (rising to 44% where the witness was a victim of a sexual offence).<sup>3</sup>
- Special measures, particularly live links, had helped most children.<sup>4</sup>

## More still to do

1.4 These are significant achievements, but there is no cause for complacency. Those working with children tell us that criminal justice agencies sometimes fail to identify young witnesses as eligible for special measures and are not referring them to the support that they need.<sup>5</sup> There are still too many delays, both before the trial and on the day of a hearing. And, although the position has got better, there remain concerns about the quality and appropriateness of the questions put to young witnesses, particularly during the trial.

1.5 Following the publication of *In Their Own Words*,<sup>6</sup> the Government launched a Review of Child Evidence in December 2004. The Review identified the following areas in particular as requiring reform:

- more choice for young witnesses in how they give evidence (based on witness needs rather than assuming they would always prefer to give evidence away from the courtroom)
- enhancement of the current special measures provisions
- the use and availability of newer technology for giving evidence
- pre-trial support for young witnesses, including an effective initial needs assessment
- pre-trial therapy and counselling
- special procedures for vulnerable defendants to ensure that they can participate effectively in their trials
- delays in proceedings
- standards of cross-examination and other matters relating to current practice, including the early identification of witness needs.<sup>7</sup>

1.6 It is on these issues that this consultation primarily focuses. Some of the measures may simply require the issuing of further guidance to criminal justice agencies to improve current practice. Others could require new primary legislation and may involve potentially significant costs for the agencies concerned depending on how the measure will be put into practice. No government commitment is therefore offered at this stage to pursuing particular proposals; rather we want to hear from practitioners and others with expertise in this area to help us formulate the best package of measures to assist young witnesses in the most cost-effective way. Our initial assessment of the potential cost implications of the proposals in this consultation are contained in the Partial Public Sector Regulatory Impact Assessment (at **Annex D**).

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3. *Ibid.*

4. Plotnikoff, J and Woolfson, R, *In Their Own Words: the experiences of 50 young witnesses in criminal proceedings* (NSPCC Policy Practice Research Studies (in partnership with Victim Support); 2004).

5. Burton, M, Evans, R and Sanders, A, *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies* (Home Office Online Report 01/06).

6. *Op. cit.* fn 4.

7. The Review has not been published.

# Chapter 2: Background

## Special measures

2.1 The 'special measures' introduced by the YJCEA 1999 originated from the 78 recommendations of the Home Office White Paper *Speaking Up For Justice* (1998).<sup>8</sup> This built on existing child evidence provisions such as live links (introduced by the Criminal Justice Act 1988) and video-recorded evidence-in-chief introduced by the Criminal Justice Act 1991 following the *Report of The Advisory Group on Video Evidence*<sup>9</sup> chaired by Judge Thomas Pigot (the Pigot Report). The Pigot Report had recommended that video-recorded interviews should be allowed as the evidence-in-chief for child witnesses in cases of abuse, and that no child witnesses should appear in an open court unless they wished to do so. It also introduced the concept of intermediaries for child witnesses.

2.2 The 1999 Act sets out a comprehensive 'menu' of special measures to assist two groups of witnesses; those eligible due to age or incapacity – *vulnerable witnesses* – and those eligible because of the fear or distress they are likely to suffer due to giving evidence – *intimidated witnesses*. Children aged under 17 are automatically deemed to be vulnerable.

2.3 The special measures are:

- screens in the courtroom – preventing the witness from seeing the defendant (section 23)
- evidence by live link – where a witness gives evidence from outside the courtroom (section 24)
- evidence given in private – where the courtroom is cleared (section 25)
- removal of wigs and gowns by lawyers and judges (section 26)
- video-recorded evidence-in-chief – where the police interview is visually recorded and played at trial as the witness' main evidence (section 27)
- video-recorded cross-examination – where any further evidence is recorded in advance of the trial and played on the day (section 28)
- intermediaries – people who act as 'go-betweens' to improve the communication and understanding of the witness (section 29)
- aids to communication – devices used by the witness to assist them in understanding questions and communicating their answers (section 30).

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8. *Speaking Up For Justice: report of the interdepartmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system* (London: Home Office; June 1998).

9. Pigot, T, *Report of the Advisory Group on Video Evidence* (London: Home Office; 1989).

2.4 Phased roll-out of the special measures began in July 2002. This has continued with the provision of live links for all vulnerable and intimidated witnesses in all courts from October 2005. The current availability of special measures is set out in Home Office Circular 39/2005.<sup>10</sup> The intermediary special measure is an innovative provision, so the Government has been trialling it in eight 'pathfinder' areas to evaluate the procedures, structures and resource requirements. On 12 June 2007, the Government announced that it would be rolled-out across the country.

## Research on the effectiveness of special measures

2.5 In October 2004, the National Society for the Prevention of Cruelty to Children (NSPCC) and Victim Support published research – *In Their Own Words*.<sup>11</sup> They concluded that while special measures (particularly live links) had helped to encourage most children to give evidence, who otherwise would have been reluctant, there was still a wide gap between policy objectives and delivery.

2.6 The research identified problems with pre-trial delay, delay on day of trial, lack of information provision on special measures and a subsequent curtailment of witness choice, quality of cross-examination and child witness identification as critical issues to be addressed if improvements in the way children are dealt with by the court were to be achieved.

2.7 Some of these findings are supported by recent Home Office research that evaluated the effectiveness of special measures, in particular the finding that criminal justice agencies are not identifying as many vulnerable or intimidated witnesses as they should be.<sup>12</sup> The research found that 24% of witnesses are likely to be vulnerable or intimidated (and the figure may even be as high as 54%) but criminal justice agencies were only identifying around 6% of witnesses as vulnerable or intimidated.

2.8 Previous research commissioned by the Home Office, which was published in 2004, showed that *one in three* witnesses said that they would not have been willing or able to give evidence without the assistance of special measures. Where they had given evidence with the help of special measures, they were *significantly more confident* in the criminal justice system.<sup>13</sup> Special measures work when they are applied for and used by witnesses.

## Consultation to date

2.9 On 21 July 2004, the Government informed Parliament that it did not propose to implement section 28 of the YJCEA 1999 as it stands. The Government also stated that the provisions in section 21 (the 'primary rule' which provides that courts must generally allow child witnesses to give evidence by video and via live link at trial) would be reviewed. The statement committed the Government to embarking on a wider review of how child evidence is taken and presented in criminal courts.

2.10 On 1 December 2004 Baroness Scotland, Minister of State for the Criminal Justice System, launched the Review of Child Evidence which was conducted by the OCJR.

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10. *The Implementation of 'Speaking Up For Justice': special measures provisions from the Youth Justice and Criminal Evidence Act 1999: Part II* (Home Office Circular 39/2005) at Appendix 1 ([www.knowledgenetwork.gov.uk/ho/circularnsf/79755433dd36a66980256d4f004d1514/3e81acb7a0adfae8025705000361c44?OpenDocument](http://www.knowledgenetwork.gov.uk/ho/circularnsf/79755433dd36a66980256d4f004d1514/3e81acb7a0adfae8025705000361c44?OpenDocument)).

11. *Op. cit.* fn 4.

12. *Op. cit.* fn 5.

13. *Op. cit.* fn 2.

## The Review of Child Evidence Working Group (the Review Group)

2.11 The Review Group was given the following terms of reference:

- review section 28 (video-recorded cross-examination and re-examination)
- review the performance of special measures as these are applied to child witnesses and other aspects of child evidence.

2.12 In March 2005, following the European Court of Human Rights judgment in the case of *SC v UK*,<sup>14</sup> the Review Group was asked to also consider measures for vulnerable child defendants.

2.13 The Review Group met regularly between December 2004 and July 2005 and was chaired by the OCJR with representation from the Crown Prosecution Service (CPS), Department for Constitutional Affairs (DCA), Association of Chief Police Officers (ACPO), NSPCC, Victim Support and an Area Child Protection Committee (Hull and East Riding).

2.14 It was agreed that the Review Group should seek the views of academics on the issues to be addressed. Additionally, in April 2005 four regional seminars were held to consult with a wide range of practitioners. Practitioners attended each seminar drawn from the judiciary, magistracy, Bar, solicitors, CPS, police, Her Majesty's Courts Service, Witness Care Units, voluntary services and social services childcare workers and lawyers (see **Annex C**). The aim was to build upon the views of the academics. The Criminal Justice Council was also consulted.

2.15 The Review Group submitted the report of the Review with their recommendations to Ministers in summer 2005 for their consideration. The full set of Review recommendations are listed in **Annex A** (see pages 45–49) and are also listed by number in the relevant section of the paper.

*The Government now seeks the views of those who have not necessarily had the opportunity to contribute to the process so far, to ensure that it takes account of a wide range of views on the issues before proceeding. It would welcome, in particular, the views of those who have expertise either personally or professionally in dealing with vulnerable young people in the criminal justice system.*

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<sup>14</sup>. (2005) 40 EHRR 10.

# Chapter 3: Video-recorded cross-examination or re-examination (section 28 of the YJCEA 1999)

## The provision and its origins

3.1 Section 28 provides for the video recording of cross-examination or re-examination of a witness prior to the trial and for the recording to be admitted as evidence. This originated in the Pigot Report as the fourth recommendation. Judge Pigot suggested that nobody should be present in the same room as the child witness other than the judge, advocate and a parent, guardian or supporter for the child; and that the defendant should be able to view the proceedings through a two-way mirror or via closed-circuit television; and instruct those representing them through an audio link. This would have the dual effect of removing the child from the oppressive environment of the courtroom by giving their evidence at an early preliminary hearing (while the evidence is still fresh in their mind),<sup>15</sup> and allowing the child to engage in therapeutic support at an earlier stage.

3.2 *Speaking Up For Justice*<sup>16</sup> recognised that the current legislative framework, with the need for full prosecution disclosure to have occurred before cross-examination, would make it very difficult to have a pre-trial hearing very much earlier than the actual trial. Nevertheless, the report recommended that the provision should be put on a statutory footing. The justification was mainly the benefit in removing the child from the courtroom,<sup>17</sup> though there is also the argument that this approach enables the evidence to be captured early, to guarantee the integrity of the interview (clarifying what was said and by whom) and to allow more accurate evidence to be given due to the early stage in the process.

## Difficulties with implementation

3.3 As already noted, this special measure has not yet been implemented. In order to inform the decision on how to proceed with section 28, Professor Diane Birch, an acknowledged expert in this field, was commissioned to produce a briefing paper<sup>18</sup> which considered the following matters:

- the rationale for the Pigot Report conclusions, together with a brief review of academic and professional opinion at the time
- changes that have occurred in the intervening years bearing on the implementation of section 28 in the present criminal justice system
- what practitioners and academics today regard as the major difficulties with implementing pre-trial cross-examination and re-examination.

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15. Sanders, A, Creton, J, Bird, S and Webster, L, *Witnesses with learning disabilities – a report to the Home Office* (unpublished; 1996).

16. *Op. cit.* fn 8.

17. *Op. cit.* fn 8 at paragraphs 8.55–8.60 and recommendations 45 and 46.

18. Birch, D and Powell, R, *Meeting the challenges of Pigot: Pre-trial cross-examination under s.28 of the Youth Justice and Criminal Evidence Act 1999* (unpublished; February 2004).

Professor Birch concluded that there was little reason to believe that piloting section 28 would provide tangible benefits for vulnerable witnesses. She recommended that the Government should explore alternatives because, without substantial revision, section 28 would not achieve the policy intended.

## The Review's consideration

3.4 During the Review process, it became clear that a majority saw considerable practical problems organising cross-examination before the trial proper. These concerned the availability of the relevant judges and advocates, who would need to be available for the pre-trial hearing as well as the trial. This could impede timeliness.

3.5 However, there was a significant minority who, while agreeing with the above, felt that there was a small group of the most vulnerable witnesses for whom this may be the only way by which they can give evidence. This would include very young children, those with a terminal or degenerative illness and those suffering from some form of mental incapacity who are nevertheless still able to give evidence. On this basis, they favoured retaining the legislation.

3.6 The general opinion among those involved in the Review process was that the main issue to be resolved is the delay experienced in cases coming to trial and in particular those caused by delays in third-party disclosure (see chapter 6). If this were solved, young witnesses would be more likely to be cross-examined when the evidence is still fresh in their memory. A reduction in trial delays combined with the use of remote live links (see below), where the witness would not have any need to attend the court (or at least the one where the trial is being heard), would satisfy two key principles of the Pigot Report.

### Recommendation 1

**That section 28 should be retained and implemented for use by the most vulnerable witnesses if this is the only way in which they would be able to give evidence.**

3.7 The categories of witness that the Review concluded as being in particular need of this provision were:

- very young children
- witnesses with a terminal/serious degenerative illness
- those with a mental incapacity but who are still capable of giving good evidence.

### Question 1

Do you agree that section 28 should be retained and implemented for the cross-examination of the most vulnerable witnesses if this is the only way in which they would be able to give evidence?

### Question 2

Have we identified all the categories of vulnerable witness for whom this measure would be most beneficial or would you suggest any others?

### Question 3

- (a) If we implemented this proposal, would you envisage any practical difficulties in doing so?
- (b) If so, do you have any suggestions as to how we could solve the practical problems this proposal presents?

3.8 The Regulatory Impact Assessment (at **Annex D**) contains further information on the potential practical difficulties with this provision.

## Use of live links in criminal trials

### Types of live link

3.9 There are a number of different types of live link which the court may use to assist a young witness in giving evidence:

- *Traditional*: This is the main type of live link where a separate room within the courthouse is linked to the courtroom where the trial is being held.
- *Court-to-court remote links*: It is possible for courts to link to other courts across the UK where the witness can give evidence from the 'remote' court.
- *Non-court remote links*: As well as linking to another court, the judge has the power to order that a witness may give their evidence from a non-court location. All references to remote links in this document cover both court and non-court locations.
- *Overseas*: Section 32 of the Criminal Justice Act 1988 provides for a witness to give evidence from an agreed location outside the UK.

### Greater use of remote links

#### (i) Court-to-court

3.10 The Review Group considered that priority should be given to installing remote live-link equipment in those court buildings where there are greater risks of witnesses encountering the other parties and where it is preferable that the witness gives evidence by remote link from another court. This may be where:

- there is no alternative to using the public entrance
- there is no direct private access from secure waiting areas to live-link rooms (for example witnesses have to cross public areas)
- there are no toilet facilities adjacent to the live-link room/waiting rooms, or
- there are no suitably equipped waiting rooms for children.

3.11 The Review Group noted that the DCA (now part of the Ministry of Justice) has set targets for providing separate waiting facilities for witnesses in all Crown Courts and 90% of magistrates' courts by 2008. The Department has developed priorities and desirable minimum standards against which courts have been surveyed. However, the Review Group considered that the use of court-to-court remote links would usefully complement the DCA's programme of witness waiting facilities improvements.

## (ii) Non-court remote links

3.12 The 1999 Act provision on live links does not specify from where the witness needs to give their evidence.<sup>19</sup> They may be in the courthouse where the trial is taking place, in another courthouse, or at a location other than a courthouse (this can be anywhere provided that the court is satisfied that it is in the interests of justice for the witness to give evidence from the suggested location).

3.13 Anecdotal evidence suggests that more use is now being made of remote live links from non-court locations. Each time an ad hoc remote link is used, this has cost implications for the agency responsible for the link (usually the CPS).

3.14 Details on the potential cost of expanding the use of remote live links are outlined in the Regulatory Impact Assessment (see **Annex D**).

*We want to establish the full extent of the use of remote links at present and be able to understand how we might maximise the potential for using existing equipment and facilities to increase the efficiency of the system while providing a better service for young witnesses. We would be particularly interested to hear from organisations that already have equipment which could be used for this purpose but is not used in this way at present (for example, university media studies departments, private firms or police stations with video suite facilities).*

*We would also particularly welcome information from Local Criminal Justice Boards on the availability of remote live-link facilities within their areas and their views on what role they might be able to play in both ensuring that the use of existing live links is optimised and in encouraging the development of new remote facilities.*

### **Recommendation 2**

**More focus should be placed on developing remote live links to keep witnesses out of the courthouse, if this is their choice, and there should be a presumption in favour of use where one exists.**

### Question 4

Do you think that a greater focus on developing remote live links to keep witnesses out of the courtroom would be a good use of resources?

### Question 5

Given the resource implications, do you think it is more important to develop further live links in courthouses or should the money be spent on developing non-court remote facilities? What are the reasons for your preference?

### Question 6

What are your views on the advantages and disadvantages of witnesses giving evidence by way of a remote live link?

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<sup>19</sup>. See section 24 of the YJCEA 1999.

#### Question 7

- (a) Have you any experience of the use of remote live links?
- (b) If so, what type of remote live link was used and what were the benefits and drawbacks? How were the exhibits managed?
- (c) If the witness gave evidence from a non-court location, who was present with the witness in the live-link room?

#### Question 8

Do you think there should be a legal presumption in favour of use where a live link exists and the witness wishes to use it?

#### Question 9

What non-court remote live links do you have in your area which are used, or could be used, for criminal court cases? What use is presently made of them for court purposes?

## Video recording evidence during the trial

3.15 One of the other benefits that the Review Group identified in having all of the witnesses' evidence pre-recorded is that it can be shown again at re-trials or appeals to the Crown Court from the magistrates' court (which are in the form of re-hearings), reducing the need for witnesses to go through the trauma of giving evidence at trial for a second, or even third time.

3.16 The Group thought that, where there has been no pre-recorded cross-examination, these benefits could be achieved by video recording the live-link testimony during the trial so that this could be used if necessary at subsequent hearings. If evidence-in-chief had also not been video recorded, then that should also be recorded at the trial.

3.17 There are very few cases that are appealed to the Crown Court or are re-tried (around 1% of magistrates' court cases are appealed).<sup>20</sup> However, we believe that it has the potential to have very real benefits for the child witnesses involved in that minority of cases.

3.18 The Review Group recognises that this proposal would have potentially very significant cost implications if it were to be implemented for all criminal trials involving child witnesses. Full consideration of the potential costs is included in the Regulatory Impact Assessment (see **Annex D**).

#### Recommendation 3

Consider video or digitally recording cross-examination and re-examination over live link for use in subsequent appeals or re-trials and also consider recording the examination where the evidence-in-chief was not video or digitally recorded.

20. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (London: The Stationery Office; 2001), p. 617.

#### Question 10

We would welcome your views on recording cross-examination and re-examination over live link for use in subsequent appeals to the Crown Court or re-trials, and also recording the examination where the evidence-in chief was not video or digitally recorded.

#### Question 11

In the light of the likely high costs:

(a) Do you consider that it would be practical to select cases in advance for recording during the trial where video or digital recording would benefit the young witness in the event of an appeal or a re-trial?

(b) If so, what criteria would you suggest should be applied in deciding which cases to video or digitally record?

#### Question 12

What practical difficulties would you envisage if we implemented this provision? Do you have any suggestions as to how we could solve the practical problems this measure presents?

# Chapter 4: The primary rule and special measures

## The primary rule for child witnesses

4.1 Section 21 of the YJCEA 1999 creates a 'primary rule' for child witnesses. A 'child witness in need of special protection'<sup>21</sup> (i.e. one giving evidence in sexual offence cases and those involving violence, kidnapping or neglect) must be allowed to give their evidence-in-chief in the form of a video recording, if such a recording is produced and is admissible, and otherwise to give their evidence by live link. In the absence of such a video recording, a child witness in need of special protection will give their evidence by live link. Diversion from video-recorded evidence-in-chief and live link is permitted only if the interests of justice require it.

4.2 For other young witnesses (a witness aged under 17 but where the offence does not fall into the defined categories), the primary rule creates a rebuttable presumption that video-recorded evidence-in-chief and live link will be used unless the court is satisfied that this would not be likely to maximise the quality of the witness' evidence, so far as is practicable.

4.3 The policy of the legislation was to ensure a greater degree of consistency, as in some courts children were almost never allowed to use the live link. However, the inflexibility of the primary rule and the complex nature of the eligibility criteria applicable to the menu of special measures has attracted criticism. Moreover, the distinctions between a child witness and one in need of special protection turn only on the *type of offence* rather than the characteristics and needs of the witness.

4.4 There was also clear support from the Review Seminars for applying the menu of special measures based on the needs of the witness regardless of the age or offence type.

4.5 A particular criticism of the primary rule is that it does not offer a choice to the witness. *In Their Own Words*<sup>22</sup> made it clear that while most young witnesses were content to give evidence by live link, some young witnesses wanted to be given a choice in terms of how they give their evidence. Some witnesses would have preferred to give their evidence live in the courtroom so as to have the opportunity to 'look the defendant in the eye', or preferred the option of being screened from the defendant while in the witness box in order to avoid being seen by the defendant.<sup>23</sup> In the latter connection, it is argued that some young witnesses may not be known by the defendant and would prefer not to be seen, as is the case where a video-recorded statement is used – as it is provided to the defendant before trial in order that they can properly instruct their representative. An adult vulnerable or intimidated witness who makes a written statement and then gives oral evidence in court from behind a screen is not exposed to that visual intrusion.

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21. A child witness is defined as being in need of 'special protection' if the offence or any of the offences to which the proceedings relate is: (a) a sexual offence (see section 35(3)(a) of the YJCEA 1999); or (b) an offence of kidnapping, assault, threats, etc. (see section 35(3)(b), (c) and (d) of the YJCEA 1999).

22. *Op. cit.* fn 4.

23. *Ibid.*

4.6 The Review Group considered that it was essential that young witnesses are provided with sufficient information and support in order to make an informed independent choice. The Review Group concluded that such witnesses should be allowed to express their view if they would prefer to give their evidence in court. However, determining the application in the court should take into consideration such things as the age and maturity of the witness and seek to ensure the quality of evidence.

## Concerns about the impact of special measures

4.7 The main purpose of special measures is to enable witnesses who previously would not have been willing or able to come to court at all to be assisted so that they can give evidence in a criminal trial. It should be recognised that before the introduction of special measures many vulnerable and intimidated witnesses would not have been able to give evidence at all due to their personal circumstances or their fear of the proceedings. With the introduction of special measures in the 1999 Act, these witnesses have been able not only to give evidence in criminal trials, but also to *achieve their best evidence*. This is a significant achievement.

4.8 While the outcome of the trial is of the highest importance it cannot of course be guaranteed, and the Review Group noted that the ability to participate by giving an account of what happened and being treated with respect can be of greater personal significance for some witnesses. *In Their Own Words* demonstrated that simply being thanked for their participation was much appreciated by young witnesses:

*[the supporters] said 'thank you' to me and told me that the jury said to say 'thank you' to me. The judge also said 'thank you' and [the supporter] said that everyone said 'well done!' I feel happy now that I don't have to go back but if I had to do it again I would.*

(Charlie, 12)<sup>24</sup>

4.9 Witnesses' confidence in the criminal justice system is a further significant goal that is assisted by special measures. Research commissioned by the Home Office in 2004 found that witnesses were *significantly more confident in the criminal justice system* following the introduction of special measures.<sup>25</sup>

4.10 Some commentators have expressed doubts that evidence given via a live link, or on video, is not as effective as evidence that is given live in the courtroom. The argument is that there is less impact but there is no research at present to support this view. Research by Davies in the late 1990s, where 'mock' jurors were interviewed, found that while jurors showed a preference for live testimony they did not appear to allow that to influence their decision making.<sup>26</sup> Recent research in this country<sup>27</sup> and in Australia<sup>28</sup> supports these findings. The research from Liverpool showed that where large plasma screens are used in court to display the live-link evidence, the impact of the evidence on the jury is stronger and it is less likely that there will be an acquittal compared with when it is displayed on small video units.<sup>29</sup> Home Office research has shown that 90% of vulnerable or intimidated witnesses found it helpful to give their evidence over a live link.<sup>30</sup>

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24. *Op. cit.* fn 4 at p. 57.

25. *Op. cit.* fn 10.

26. Davies, G, The impact of television on the presentation and reception of children's testimony, *International Journal of Law and Psychiatry* 1999; 22: 241–56.

27. *Research on vulnerable witness trials at Liverpool Crown Court* (January 2005–May 2006: HHJ Globe QC, unpublished).

28. Taylor, N, and Joudo, J, *The impact of pre-recorded video and closed-circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Canberra: Australian Institute of Criminology; 2005).

29. *Op. cit.* fn 20.

30. *Op. cit.* fn 2.

4.11 The Review Group's view is that, even if research were to show a reduced impact on the jury where evidence is given via live link, and that this had an impact on the trial outcome, there remains clear benefit in using special measures to ensure that witnesses who would not otherwise have been willing to give evidence at all agree to do so.

**Recommendation 4**

The distinction between children in need of special protection and other child witnesses should be removed. Applications for special measures should be based on the assessed need of the witness.

**Recommendation 5**

There should be a rebuttable presumption that any child witness in any trial of any offence should give their evidence by live link.

**Recommendation 6**

A child should be able to express a desire to give their evidence in the courtroom, but any decision taken by the court on whether to allow this should not result in a diminution in the quality of the child's evidence compared with a live link. The court should have a clearly defined set of factors to consider when making this decision.

**Recommendation 7**

There should be a presumption that, where it has been agreed that a child will give their evidence in the courtroom, they will be provided with a screen around the witness box. The court should have a clearly defined set of factors to consider when making this decision.

**Recommendation 8**

A child should be able to choose to give their evidence without a screen around the witness box, but the court's decision on whether to allow this should be based on clear criteria, including the impact of the decision on the quality of the child's evidence.

**Question 13**

Should a young witness be allowed the choice of giving their evidence in the courtroom as opposed to from a live-link room?

#### Question 14

What factors would the court need to take into consideration when making its decision to ensure that this will not result in a diminution of the quality of the young witness' evidence? For example:

- the age and maturity of the witness
- their level of development
- their understanding of the implications of their preference
- their relationship with the accused
- their social and cultural background.

#### Question 15

(a) Should there be a presumption that where a young witness does give evidence in court they do so with a screen around the witness box?

(b) If so, what factors should the court consider when making this decision to ensure that the quality of the young witness' evidence will not be reduced (see the examples listed in Question 14)?

#### Question 16

Do you agree that the distinction between children in need of special protection and other young witnesses should be removed and that special measures should be applied for based on the assessed need of the individual witness?

#### Question 17

Do you agree that there should be a rebuttable presumption that any young witness in any trial should give their evidence by live link?

## Giving evidence in private

4.12 In certain circumstances, the court will order that the evidence of a witness (or an entire trial) should be heard in private. This means that only certain specified individuals will be permitted to remain in court (such as officers of the court, the parties and their representatives, and designated members of the press). Under section 25 of the YJCEA 1999, a special measures direction may provide for evidence to be given in private where the proceedings relate to a sexual offence or where someone other than the accused has, or is likely to, intimidate the witness. Witnesses in the Youth Court routinely give their evidence in private.<sup>31</sup> The Review Group considered that if it is appropriate for child witnesses in the Youth Court to give their evidence in private then it was also appropriate, for the protection of young witnesses, that this be applicable in other criminal courts where young witnesses are giving evidence. This proposal would strengthen the existing special measure under section 25.

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31. Children and Young Persons Act 1933, section 47(2).

### Recommendation 9

There should be a presumption that child witnesses should give their evidence in private (section 25), with appropriate support, in all criminal courts unless they do not wish to do so.

### Question 18

Do you agree that there should be a presumption that all child witnesses should give their evidence in private, with appropriate support, in all criminal courts unless they do not wish to do so?

## Restricting the image of a child witness

4.13 While child witnesses are automatically classified as vulnerable by virtue of their age, feedback from practitioners says that many do in fact feel vulnerable to intimidation. The fear of threats and reprisals can deter many young witnesses from testifying, particularly in cases where they are not known to the defendant. This may be compounded by fear, knowing that the defendant is going to be watching them giving their evidence.

4.14 The Review Group considers that, where the court agrees, the visual image of the young witness should be restricted from the defendant during the proceedings. The implications of this are as follows:

- *Video-recorded statement:* At present, the witness' image is disclosed to the defendant before the trial (an intimidated adult witness could provide a written statement and then give any further evidence from behind a screen in the courtroom). The removal of the young witness' image would need to be the subject of an application to the court before the tape is copied to the defence.
- *Live link:* The defendant's monitor should be turned off and they should be prevented from seeing other monitors. The defendant should still be able to hear the witness give evidence. Doubts have been raised as to whether it is practically possible to conceal the young witness' image when they are presented on the new larger plasma screens installed in some courts.
- *Screens:* Where a witness wants to give their evidence in the court then a screen should be used to prevent the defendant from seeing the witness.

4.15 The effects of these arrangements must be made clear to all young witnesses at the earliest opportunity *and they should be used only to restrict the visual image of the witness from the defendant and not to enable the witness to give evidence anonymously.*

## Case study – concealing the image of young victims and witnesses

4.16 Fourteen-year-old Chris had his mobile phone and some money stolen by a group of older boys whom he did not previously know, although he had seen them in the neighbourhood. He reported the incident to the police and gave a statement which was video recorded by the police. He found this to be a very supportive experience. Chris was willing to give evidence at court because he thought this might help get his phone or money back and because he was told arrangements could be made for him to give evidence via a live link.

4.17 The interviewing police officer then informed Chris that his video-recorded statement would be sent to the defence ahead of the trial. Chris was very distressed by this as he did not want the

defendants to be able to identify him. A few months later he visited the court with his mother to look around and see how the live-link room worked. He was told that the defendants would be able to see him on their television monitor as he gave evidence. Chris again became anxious that they would be able to see him as he gave evidence and decided that he was not going to be able to give evidence at the trial as he was too frightened of reprisals from the gang. He now feels unsafe every time he leaves his house.

4.18 Tom, a 15-year-old prosecution witness who was also unknown to the defendants, had given his initial statement in written form and so the defendants had not seen his visual image prior to the trial. Tom also accepted the offer of a pre-trial visit organised by his witness care officer and Victim Support's Witness Service. When the Witness Service volunteer showed Tom the large plasma screen that his image would be projected on from the live-link room, he became very distressed as he knew the gang had a reputation for being violent. It was explained to him that he could give evidence from behind a screen in court as long as the court agreed to this. He chose to do this instead.

#### **Recommendation 10**

**Young witnesses testifying in cases where their visual image is not known to the defendant should, with the agreement of the court, have their image restricted from the defendant's view where there is fear of reprisal or intimidation.**

#### **Recommendation 11**

**Young witnesses suffering fear and distress at the defendant watching them giving their evidence can, with the agreement of the court, have their image concealed when giving their evidence by live link, or have a screen to prevent them being seen by the defendant, if giving evidence from the witness box.**

#### **Question 19**

**Do you agree that where young witnesses testify in cases where their visual image is not known to the defendant it should be possible, with the agreement of the court, to restrict their image from the defendant where there is fear of reprisal or intimidation?**

#### **Question 20**

**Do you agree that young witnesses suffering fear and distress at the defendant watching them giving their evidence should be able to, with the agreement of the court, have their image concealed when giving their evidence by live link, or have a screen to prevent them being seen by the defendant, if giving evidence from the witness box?**

#### **Question 21**

**What practical difficulties would you envisage if we implemented these proposals? Do you have any suggestions as to how we could solve the problems presented by these proposals?**

# Chapter 5: Child defendants

5.1 The case of *SC v UK*<sup>32</sup> underlined the need to consider whether child defendants should have access to similar measures to those that are currently available to child witnesses. Defendants are explicitly excluded from the special measures regime under the YJCEA 1999.

5.2 *SC v UK* involved an 11-year-old defendant, convicted of robbery, who was judged to have a cognitive age of between six and eight years. The argument was that, while he was fit to plead, he was so confused by the proceedings that he had not been able to participate effectively in his trial. The European Court of Human Rights agreed with this and required action to be taken by the UK to assist defendants in their understanding of the proceedings in which they are being tried. The judgment does not specify how this should be done. In *SC v UK*, the defendant had been supported throughout his trial by a social worker who sat with him, but the European Court of Human Rights found that he had not understood key features of the process.

5.3 The Review found general agreement that there should be extra support for vulnerable child defendants. However, some lawyers considered that they would never use a live link for the defendant because they believed that it adversely affected the immediacy of the evidence and could thereby jeopardise a successful outcome for their client.

5.4 The UK Government has responded in part to the judgment. Section 33A of the YJCEA 1999 now permits certain accused persons to be able to use a live link where their ability to participate effectively in the proceedings is compromised by their level of intellectual ability or social functioning and a live link would help them to be able to participate effectively.<sup>33</sup> The Review Group supports the following additional procedures suggested to assist vulnerable defendants (as defined in the Police and Justice Act 2006):

- advisory opening statement by the bench
- appropriate adult/supporter working with the defendant and the defence advocates to ensure that the defendant understands the proceedings and is able to participate in them
- on-the-record 'stock takes' by the court, at each resumption of business, of the defendant's understanding
- live links (this has been approved by Parliament)
- reporting restrictions
- intermediaries to assist poor communicators in giving evidence.

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32. (2005) 40 EHRR 10.

33. As inserted by section 47 of the Police and Justice Act 2006.

5.5 These recommendations should be put into a young defendant's handbook and should also be considered for victims and witnesses. Regular stock takes during the giving of their evidence may also be helpful to them.

**Recommendation 12**

Child defendants should qualify for assistance via a menu of special procedures ensuring that they understand the function and process of the trial and the potential outcome for them.

**Question 22**

Can you suggest any other measures that would assist these vulnerable defendants to participate more effectively in the trial process?

## Equality between witnesses and defendants

5.6 Currently, youth defendants are classified as those under 18. Child witnesses eligible for special measures, on the other hand, as defined in section 16 of the Youth Justice and Criminal Evidence Act 1999, are those under 17. The Review Group considered that given the proposal to extend assistance to child defendants this situation should be rationalised and that child witnesses under the age of 18 also qualify for special measures.

**Recommendation 13**

Child witnesses under 18 years old should qualify for special measures.

**Question 23**

Do you agree that young witnesses should qualify for special measures if aged under 18?

# Chapter 6: Third-party disclosure

6.1 Delay to legal proceedings as a result of difficulties with disclosure from third parties (most commonly local authority children's social care) is the issue that greatly exercised academics and practitioners involved in the Review process. Such difficulties reflected deep differences of approach between lawyers and social workers.

6.2 A common view from those in social services was that children in receipt of services from local authority children's social care were already the most vulnerable and disadvantaged in society and that disclosing these records put them at a further disadvantage compared with children not involved with local authority children's social care. There was also concern that the nature of children's social care recording was incident centred and tended to include even minor misbehaviour, giving a misleading and unbalanced impression of a child's credibility. Moreover, while local authority solicitors acknowledged complaints from defence solicitors about delays, they countered that files could be voluminous, that requests were often very vague and that they had a duty to safeguard and promote the welfare of children known to the local authority. While the defendant has a fundamental human right to a fair trial, there was also the individual's right to respect for a private and family life.

6.3 An interdepartmental working group has been tasked separately with a review of third-party disclosure and our Review has reported its findings to that group which will form part of the consultation on third-party disclosure.

# Chapter 7: Day of trial: delay factors

7.1 Many children experience long delays waiting to give their evidence on the day of the trial.<sup>34</sup> This adds to the overall stress and trauma and the Review Group considered that every effort should be made to minimise this.

7.2 It has become practice in some court centres to list trials involving child witnesses to begin in the afternoon. This allows for initial legal arguments, jury selection and swearing in and the opening speech by the advocate for the prosecution to be dealt with on the first day, leaving the principal child witness to give his or her evidence on the commencement of the second day of the trial. This both reduces the wait for the witness and ensures that he or she gives evidence when they are fresh in the morning rather than the afternoon after a wait of several hours. Lord Justice Judge, as he then was, wrote to all resident judges in England and Wales on 14 December 2004 expressing his support for arrangements of this sort where this is possible. The Group are humbly supportive of this.

7.3 The Review Group noted that in July 2005, the Lord Chief Justice issued guidance on *Listing of Cases*,<sup>35</sup> emphasising the importance of 'meeting the needs of victims and witnesses; each of whom may have differing needs – the young and the vulnerable require particular attention'. The guidance also highlights the need to ensure 'the timely trial of cases' and states that 'priority should be given to the trial of young defendants, and cases where there are vulnerable or young witnesses'. The practice in some courts of listing more than one case for the same court, either at the same time or in quick succession, where it is unrealistic to complete two trials in one day, should therefore be discouraged in cases with child witnesses.

## **Recommendation 19**

**Those listing cases should, as far as possible, manage trials to ensure that a child witness' testimony can be taken at the beginning of day two, when the witness will be fresh and with the minimum of waiting. Such considerations should ideally apply to all child witnesses, regardless of when they are scheduled to give evidence during a trial.**

34. See for example *In Their Own Words*, *op. cit.* fn 4 at pp. 10–14.

35. The *Listing of Cases* is available in Part 16 of the Crown Court Manual and Annex A to the Criminal Case Management Framework ([www.cjsonline.gov.uk/framework/ccmf/annex/a.html](http://www.cjsonline.gov.uk/framework/ccmf/annex/a.html)).

#### Question 24

Do you agree that for all young witnesses, regardless of when they are scheduled to give evidence, trials should begin in the afternoon to allow young witnesses' testimony to be either:

- at the start of the second day when they will be fresh and with the minimum of waiting or
- at the start of the day for those young witnesses scheduled to give evidence later in the trial?

#### Question 25

If so, what are the obstacles to achieving this and how could they be overcome?

# Chapter 8: Standards of cross-examination

8.1 The Review Group recognises that there is greater awareness among the legal community of the need for higher standards when cross-examining children. However, *In Their Own Words* indicates that there is still considerable progress to be made. A Home Office survey also indicated that 46% of child witnesses reported that some questions they were asked were unclear or not straightforward.<sup>36</sup> Also, 33% of child witnesses had been 'upset a lot' by cross-examination.<sup>37</sup>

8.2 The Review Group recognises that defendants have a fundamental right to a fair trial and this includes the ability to test and challenge the evidence against them. We also accept that the experience is unavoidably stressful and likely to promote anxiety. Nevertheless, the Group takes the view that the court should take account of the level of a young person's development which can leave them more open to suggestion through established techniques of questioning than an adult.

8.3 Some of those we consulted said that advocates appearing in the Youth Court are generally less experienced in cross-examining young witnesses than in the Crown Court. It is very important that everyone who acts in cases of this type should have received the same accredited level of training.

## **Recommendation 20**

**The Law Society and Bar Council (Criminal Bar Association) should establish accredited panels of practitioners to act in cases with child witnesses ensuring that they have successfully completed specific training devoted to cross-examining children in criminal proceedings.**

## **Question 26**

**Do you think that there should be established accredited panels of practitioners to ensure that those questioning young witnesses have successfully completed specific training?**

8.4 In 1998, the Young Witness Pack was produced which provided children and young people with information to help prepare them for trial. In 2003, this was supplemented by *A Case for Special Measures* which took into account the special measures introduced in Part II of the YJCEA 1999 for vulnerable and intimidated witnesses. These were both produced by an inter-agency working group.

<sup>36</sup>. *Op. cit.* fn 2 at p. 56.

<sup>37</sup>. *Op. cit.* fn 2 at p. 53.

8.5 Guidance on the examination of child witnesses is included in *Achieving Best Evidence*, published in 2002<sup>38</sup> (shortly to be updated). In 1997 the NSPCC and Childline charities produced a video *A Case for Balance*, which dealt with the appropriate treatment of child witnesses in the Crown Court. It was aimed at the legal profession and has been widely used as training material since its launch. The publication states that it is the responsibility of the judge or magistrate to prevent improper or inappropriate questioning by legal representatives.<sup>39</sup>

8.6 *In Their Own Words* found that judges could have a very positive impact on the experience of young witnesses. One young witness said: "Thank you – when I couldn't answer you stepped in. You were very helpful." Another said of the judge in his case: "Well done, really. I felt that the judge stuck up for me in a kind of way."<sup>40</sup>

8.7 However, the consensus before the Review Group was that practice varies and that, in general, the judiciary and magistracy should be more active in controlling inappropriate cross-examination. In particular, they should be vigilant to rule out questioning that lacks relevance, is repetitive, oppressive or intimidating.

8.8 The Review Group considered that training for judges and magistrates should continue to include *A Case for Balance* and *A Case for Special Measures* but that the former should be reviewed and relaunched with the aim of increasing the awareness for how cross-examination with child witnesses should be conducted. The Group also noted feedback from the consultation seminars that training was less specific for magistrates in the adult court than for judges and magistrates in the Youth Court. Given the number of cases heard in the magistrates' court, this needs to be addressed.

#### **Recommendation 22**

**The Judicial Studies Board should review training for magistrates who try cases involving child witnesses in the adult court, reinforcing guidance in *Achieving Best Evidence*, *A Case for Balance* and *A Case for Special Measures*.**

#### **Question 27**

How could the court ensure that inappropriate cross-examination does not take place? Would this process be best facilitated by the judge or bench discussing the ground rules with the advocates in advance?

#### **Question 28**

Do you think that training for magistrates who try cases involving young witnesses in the adult court should reinforce guidance in *Achieving Best Evidence*, *A Case for Balance* and *A Case for Special Measures*?

8.9 The Review Group considered that cross-examination could be better managed if the court were more informed of the witness' level of development. This need could be met by more use of the 'intermediaries' special measure (section 29, YJCEA 1999) when they become more widely available for

38. *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children* (London: Home Office; 2002).

39. *Ibid.* at paragraph 5.10.

40. *Op. cit.* fn 4 at p. 66.

young witnesses who have difficulties with communication and understanding due to their age or other factors. Intermediaries are communication specialists who act as 'go-betweens' for the witness and the court at trial or police officer during the initial interview. They are there to help a witness with learning or communication difficulties to be able to tell the court what happened and are able to provide an assessment of the witness' needs in advance of the trial to assist in planning the trial more effectively.

8.10 The intermediary special measure is not available throughout the country at present. It is being piloted in eight pathfinder areas to identify good practice and to test structures, procedures and resources. On 12 June 2007, the Government announced that the intermediary special measure will be rolled-out across the country.

### Case study – intermediaries

8.11 Intermediaries have been involved in a range of different cases. An example is the case of a 13-year-old boy with a hearing impairment and learning disabilities who was able to give his evidence with the assistance of an intermediary at trial.

8.12 Prior to the trial, the intermediary produced a report detailing the witness' communication needs and explaining what types of questions he could understand and respond to. At the trial, the intermediary ensured that the witness was kept focused on the person questioning him and that he was positioned to lip-read from the live-link room. By referring to the intermediary's report, the advocates were able to phrase their questions to ensure that the witness could understand them. Where necessary, the intermediary also repeated some questions to the witness and relayed his answers, to ensure that all parties understood.

8.13 The case resulted in a conviction. Everyone involved agreed that the intermediary's presence in court and the report that the intermediary had provided contributed to the quality of the witness' evidence. The intermediary was able to make a comprehensive assessment of the witness' ability to understand and respond to questions, which directly benefited the criminal justice practitioners involved in the case.

#### Recommendation 23

**The prosecution and defence should consider making more use of intermediaries for children as they provide a useful assessment of the witness' ability to understand questions put during cross-examination.**

#### Question 29

Do you agree that the prosecution and defence should consider using intermediaries more widely for young witnesses as they provide a useful assessment of the young witness' ability to understand questions put during cross-examination?

# Chapter 9: Pre-trial support, assessment and therapy

9.1 The Review Group believes strongly that a young witness who receives proper assessment and effective support before the trial is far more likely to give evidence and for that evidence to be their best possible evidence.

9.2 The OCJR is currently conducting an evaluation of the provision of such support services with a view to judging their effectiveness and disseminating guidance on best practice. This has the potential for building on and improving the service that child witnesses receive and bringing more offenders to justice.

9.3 Progress has already been made in this area. Some 165 Witness Care Units are now operational, covering every area of England and Wales. They carry out a basic needs assessment of all witnesses over the telephone and provide a single point of contact for information and tailored support for prosecution witnesses between charge and trial.

9.4 The Review Group was particularly interested in reports of the Liverpool Witness Support, Preparation and Profiling Scheme which provides support to some of the most vulnerable adult witnesses who are giving evidence in criminal proceedings locally. The scheme also provides support for witnesses with learning disabilities and is involved in an assessment of the individual's potential to be a credible and competent witness at trial.

9.5 The Liverpool scheme monitors feedback from the witnesses who use their scheme and share their findings with the CPS to ensure that lessons on good, and bad, practice are learnt. This scheme was recommended as good practice in the report of Her Majesty's Crown Prosecution Service Inspectorate.<sup>41</sup> The CPS encouraged its 42 areas to establish a similar service.

9.6 During the Review Group's consultation there was a high level of support for a fuller assessment of child witnesses' development and understanding. This would assist in helping to inform the prosecution, defence and court of what special measures, if any, are appropriate for a witness to enable them to give their best evidence. It would also help advocates make sure that questions to the witness could be understood and were appropriate, and would assist the judge or magistrate in judging when they were not.

## **Recommendation 24**

**The Government should evaluate the witness profiling scheme in Liverpool to assess its potential application for all vulnerable witnesses including children.**

41. *Report on the joint inspection into the investigation and prosecution of cases involving allegations of rape* (London: HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary; 2002; available at [www.hmcpso.gov.uk/reports/jirapeins.pdf](http://www.hmcpso.gov.uk/reports/jirapeins.pdf)).

### Question 30

Should the OCJR evaluate the witness profiling scheme in Liverpool to assess its potential application for all witnesses including children?

### Question 31

Are you aware of any other similar schemes for young witnesses which could also be evaluated?

## Pre-trial therapy

9.7 'Therapy' as used here refers to a wide range of interventions, such as counselling or psychotherapy but not including physical treatments. The guidance on pre-trial therapy stipulates that the decision, about the provision of therapy<sup>42</sup> should be made with the best interests of the child as the paramount consideration. This guidance document is currently being reviewed by the OCJR. The guidance states:

*Whether a child should receive therapy before the criminal trial is not a decision for the police or the Crown Prosecution Service. Such decisions can only be taken by all of the professionals from the agencies responsible for the welfare of the child, in consultation with the carers of the child and the child him or herself, if the child is of sufficient age and understanding. The **best interests of the child** are the paramount consideration in decisions about the provision of therapy before the criminal trial.*

(at paragraphs 4.3–4.4)

9.8 A recent policy document published by the CPS makes it clear that the CPS will never say that a child cannot have therapy until the trial is over.<sup>43</sup>

9.9 Therapy should be clearly distinguished from formal preparation of the witness for the giving of evidence in court. The purpose of therapy is not to prepare a witness for giving evidence, even though it may have beneficial effects. The existing guidance makes it clear that the evidence the child will give at trial should not be discussed. Anything the child says about the allegations themselves or about additional allegations must be recorded by the counsellor. Any such information, or anything that potentially undermines the case against or assists the case for the defendant may have to be disclosed to the defence in accordance with the Criminal Procedure and Investigations Act 1996.

9.10 The Review Group discovered that, while clear guidance on the provision of therapy has been issued, it is not universally known about, applied or understood. As a result, there is confusion and uncertainty about whether young witnesses can have access to pre-trial therapy.

9.11 The Group suggests that, to ensure that the guidance is applied correctly in the future, compliance should be promoted and monitored by an appropriate body.

42. *Provision of Therapy for Child Witnesses Prior to a Criminal Trial: Practice Guidance* (London: CPS, Department of Health and Home Office; 2001).

43. *Children and Young People: CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses* (London: CPS Policy Directorate; June 2006; available at [www.cps.gov.uk/victims\\_witnesses/children\\_policy.pdf](http://www.cps.gov.uk/victims_witnesses/children_policy.pdf)).

9.12 In addition to the pre-trial therapy guidance document, the Review Group is aware that some local areas have produced protocols on pre-trial therapy. Such a protocol is intended to complement the guidance (stressing the need for communication between the social worker, the CPS and the police about young witness' needs) and includes a pro forma for recording any inconsistencies, new allegations or abusive experiences disclosed during the sessions. The Review Group considered that the development of local protocols was a good way of embedding the guidance material into practice.

**Recommendation 25**

**All areas should develop pre-trial therapy protocols. The implementation and effective use of these protocols should be monitored by an appropriate body.**

**Question 32**

Do you think that the current guidance on pre-trial therapy for children is effective?  
Would you suggest any changes?

**Question 33**

Do you agree that all areas should develop pre-trial therapy protocols?

**Question 34**

Which body/organisation is best placed to monitor the implementation and effective use of these protocols? Why?

# Chapter 10: Child witness supporter in the live-link room

10.1 A child witness may be entitled to support while he or she is giving evidence. *Achieving Best Evidence* (shortly to be updated) suggests that the role of the court witness supporter is, by their presence, to provide emotional support to the witness and reduce anxiety and stress when giving evidence, thereby ensuring that the witness has the opportunity to give their best evidence.<sup>44</sup> They should be someone with whom the witness has a relationship of trust but they should not be involved in the case, should have no knowledge of the evidence and should not have discussed the evidence with the witness. They should also be suitably trained in their role and conduct.<sup>45</sup>

10.2 It was previously the case that only the court usher could act as a supporter in the live-link room. There were concerns from the judiciary that if anyone else was present with the witness, particularly if it was somebody they knew, then that person might influence the way in which a child gave evidence. The Lord Chief Justice issued a Practice Direction in 2002, which states that ‘an increased degree of flexibility is now appropriate as to who can act as supporter of a witness giving evidence by live television link’. It explains that, provided a person is completely independent of the witness and has no previous knowledge or personal involvement in the case, then the witness supporter does not need to be an usher or court official.<sup>46</sup> Despite this, it is clear from the four regional seminars that were held with practitioners that very different standards are being applied across England and Wales.

10.3 Moreover, it is the view of the Review Group that if child witnesses have received pre-trial support from an independent supporter, known and trusted by the witness, this person would be best placed to meet the emotional needs of a witness during the trial itself. They would also meet the key characteristics for anyone acting in this capacity.

10.4 *In Their Own Words* highlighted this as a serious issue for many child witnesses and that being accompanied by someone they had only met once before or even on the day of the trial did not provide the level of emotional support that they required. The research also found that having an effective supporter can be highly beneficial for the child. Legislating would provide greater certainty for the young witness and would also mirror legislation currently applicable in Scotland.<sup>47</sup>

10.5 The Review Group concluded that effective emotional support in the live-link room could increase the quality of the evidence and recommended that this be added to the current list of special measures and placed on a statutory footing.

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44. *Op. cit.* fn 38 at Appendix F – Court witness supporter in CCTV link room: national standards.

45. *Ibid.*

46. *Consolidated Criminal Practice Direction*, Part III.29.

47. *Vulnerable Witnesses (Scotland) Act 2004*, section 22.

10.6 Until such legislation is introduced in England and Wales, the guidance in *Achieving Best Evidence* (shortly to be updated) and the Judicial Studies Board's *Equal Treatment Bench Book* should be reinforced to ensure that there is uniform application across the country. The current Practice Direction from the Lord Chief Justice could be revised, if necessary, to clarify who is allowed to accompany the child.

**Recommendation 26**

**Legislation to make a supporter in the live-link room a special measure should be implemented.**

**Question 35**

Do you agree with the Review Group's recommendation that the Government should legislate to make a supporter in the live-link room a special measure?

**Question 36**

What safeguards would be needed to ensure that the trial is fair but that the young witness is provided with proper emotional support?

**Question 37**

Who should be permitted to act as a young witness supporter in the live-link room?

**Question 38**

What, if any, further safeguards do you think are necessary to ensure that the integrity of the evidence is not open to question?

# Chapter 11: Other issues

## Performance and monitoring statistics

11.1 *In Their Own Words* showed that the average waiting time for a trial to begin was almost 12 months. This was based on interviews with 50 young witnesses and the view of the Review Group is that, for young witnesses, the criminal justice system should routinely collect and publish data on waiting times in cases with child witnesses, both before and during the trial, and other information, such as data about child witnesses who have to give their evidence more than once, instead of relying on irregular independent research.

11.2 In addition, a regular stock take of the experiences of young witnesses, similar to that research, would provide the criminal justice system with a valuable insight into the effect of current policy and would help shape future policy development.

11.3 Another key issue for improved performance in delivering services for child witnesses is ensuring that their needs are identified at an early stage in the prosecution process. The recent joint Chief Inspectors' report, *Safeguarding Children*,<sup>48</sup> on arrangements to safeguard children identified many cases where the involvement of children had not been identified and their safety and interests were not considered. The report also showed that, in some areas, potential eligibility for special measures was not identified early enough, in some cases not until the day of the trial itself.<sup>49</sup> The Review Group takes the view that for the purpose of monitoring the support for child witnesses as they progress through the criminal justice process, early identification by the prosecution team is essential and should begin at the investigative pre-charge stage.

### **Recommendation 27**

**The Government should routinely collect and publish data on the time taken between charge and trial in cases involving child witnesses in order to establish the causes of delay, with a view to tackling them.**

### **Recommendation 28**

**The Government should conduct regular research into the experiences of young witnesses within the criminal justice system.**

48. *Safeguarding Children: The second joint Chief Inspectors' Report on Arrangements to Safeguard Children* (London: Commission for Social Care Inspection et al.; 2005; available at [www.safeguardingchildren.org.uk/docs/safeguards\\_imagefree.pdf](http://www.safeguardingchildren.org.uk/docs/safeguards_imagefree.pdf))

49. *Op. cit.* fn 5 at p. vii.

### Recommendation 29

For the purpose of monitoring the support for child witnesses as they progress through the criminal justice process, early identification by the prosecution team is vital and should begin at the investigative pre-charge stage.

## Refreshing memory

11.4 The *Achieving Best Evidence* guidance makes it clear that all young witnesses should be allowed to refresh their memory of their video-recorded evidence-in-chief interview by viewing the recording. This should occur before they give evidence but not on the day they give evidence (shortly to be updated).<sup>50</sup> Some children interviewed for *In Their Own Words* had been denied this opportunity, which is no different from a witness reading their written statement before giving evidence. Lord Justice Judge, as he then was, wrote in December 2004 to all resident judges stating that this was no different from someone reading their statement before the trial and that he saw no reason why a request to view the video should not be allowed. The Review Group humbly endorse this view.

11.5 It is important that anyone who is going to act as the child's supporter in the live-link room is not present when the child is watching the interview for the purposes of refreshing their memory. However, if an intermediary has been appointed for the young witness, it may be necessary for the intermediary to be present in order to facilitate communication.

### Recommendation 30

Child witnesses should be allowed the opportunity to refresh their memory of the video or digitally recorded or written statement before the day they give evidence in line with *Achieving Best Evidence* guidance (paragraph 4.33).

### Question 39

How can we ensure that processes are put in place to ensure that young witnesses can watch their video, or see their written statement, in advance of the trial?

## Witness Care Units

11.6 Witness Care Units, part of the No Witness No Justice initiative to provide a seamless, single-point-of-contact service for witnesses, have been established in each of the 42 criminal justice areas in England and Wales. There are now 165 active units.

11.7 In order to assist in ensuring that child witnesses are identified, a child witness checklist was developed by the No Witness No Justice programme for all Witness Care Units, which was disseminated with a recommendation that it be used in all appropriate cases. The checklist takes account of many of the complaints child witnesses made in *In Their Own Words* and, if applied consistently, should lead to a much better service for child witnesses, giving them a greater say in how they want to give their evidence. Gathering these views at this stage will ensure that applications for special measures are not

<sup>50</sup> *Achieving Best Evidence*, op. cit. fn 37, paragraphs 4.33–38.

made at the last minute and that proper planning can be conducted, thus reassuring the witness of their value and their importance in the judicial process.

11.8 The Review Group welcomes the introduction of the checklist and supports the No Witness No Justice programme's recommendation that it be used in all appropriate cases. The Group would now like to gauge the extent to which the checklist is currently used by Witness Care Units and invite comments from witness care officers and others who may have experienced the use of such checklists.

#### **Recommendation 31**

**The proposed child witness checklist should be recommended for use by Witness Care Units to assist in providing child witness support.**

#### **Question 40**

To what extent, if any, are you using the child witness checklist in appropriate cases, and if so do you find it an effective tool in assisting the provision of child witness support?

#### **Question 41**

Is there anything that is not included in the checklist which might be helpful, or which should be removed or changed?

## **Impact Assessments**

11.9 As part of this consultation exercise, we have completed a Partial Public Sector Regulatory Impact Assessment and an Equality Impact Assessment (at **Annexes C and D** respectively). The purpose of these documents is to set out the likely costs to central government if any of the proposals in this consultation were implemented (including the costs for implementing the various proposals in different ways) and the possible impact that the proposals may have on any equality target groups.

#### **Question 42**

(a) Do you consider that any of the proposals in this consultation document could or would have a differential impact upon any equality target group(s) or any other group(s)?

(b) If so, what are the reasons for your view and what do you suggest that the Government could do to address these concerns?

# Chapter 12: Consultation questions

## Chapter 3

### Question 1

*Do you agree that section 28 should be retained and implemented for the cross-examination of the most vulnerable witnesses if this is the only way in which they would be able to give evidence?*

### Question 2

*Have we identified all the categories of vulnerable witness for whom this measure would be most beneficial or would you suggest any others?*

### Question 3

- (a) If we implemented this proposal, would you envisage any practical difficulties in doing so?*
- (b) If so, do you have any suggestions as to how we could solve the practical problems this proposal presents?*

### Question 4

*Do you think that a greater focus on developing remote live links to keep witnesses out of the courtroom would be a good use of resources?*

### Question 5

*Given the resource implications, do you think it is more important to develop further live links in courthouses or should the money be spent on developing non-court remote facilities? What are the reasons for your preference?*

### Question 6

*What are your views on the advantages and disadvantages of witnesses giving evidence by way of a remote live link?*

### Question 7

- (a) Have you any experience of the use of remote live links?*
- (b) If so, what type of remote live link was used and what were the benefits and drawbacks? How were the exhibits managed?*
- (c) If the witness gave evidence from a non-court location, who was present with the witness in the live link room?*

### Question 8

*Do you think there should be a legal presumption in favour of use where a live link exists and the witness wishes to use it?*

### **Question 9**

*What non-court remote live links do you have in your area which are used, or could be used, for criminal court cases? What use is presently made of them for court purposes?*

### **Question 10**

*We would welcome your views on recording cross-examination and re-examination over live link for use in subsequent appeals to the Crown Court or re-trials, and also recording the examination where the evidence-in-chief was not video or digitally recorded.*

### **Question 11**

*In the light of the likely high costs:*

- (a) Do you consider that it would be practical to select cases in advance for recording during the trial where video or digital recording would benefit the young witness in the event of an appeal or a re-trial?*
- (b) If so, what criteria would you suggest should be applied in deciding which cases to video or digitally record?*

### **Question 12**

*What practical difficulties would you envisage if we implemented this provision? Do you have any suggestions as to how we could solve the practical problems this measure presents?*

## **Chapter 4**

### **Question 13**

*Should a young witness be allowed the choice of giving their evidence in the courtroom as opposed to from a live-link room?*

### **Question 14**

*What factors would the court need to take into consideration when making its decision to ensure that this will not result in a diminution of the quality of the young witness' evidence? For example:*

- *the age and maturity of the witness*
- *their level of development*
- *their understanding of the implications of their preference*
- *their relationship with the accused*
- *their social and cultural background.*

### **Question 15**

*(a) Should there be a presumption that where a young witness does give evidence in court they do so with a screen around the witness box?*

*(b) If so, what factors should the court consider when making this decision to ensure that the quality of the young witness' evidence will not be reduced (see the examples listed in Question 14)?*

### **Question 16**

*Do you agree that the distinction between children in need of special protection and other young witnesses should be removed and that special measures should be applied for based on the assessed need of the individual witness?*

### **Question 17**

*Do you agree that there should be a rebuttable presumption that any young witness in any trial should give their evidence by live link?*

### **Question 18**

*Do you agree that there should be a presumption that all child witnesses should give their evidence in private, with appropriate support, in all criminal courts unless they do not wish to do so?*

### **Question 19**

*Do you agree that where young witnesses testify in cases where their visual image is not known to the defendant it should be possible, with the agreement of the court, to restrict their image from the defendant where there is fear of reprisal or intimidation?*

### **Question 20**

*Do you agree that young witnesses suffering fear and distress at the defendant watching them giving their evidence should be able to, with the agreement of the court, have their image concealed when giving their evidence by live link, or have a screen to prevent them being seen by the defendant, if giving evidence from the witness box?*

### **Question 21**

*What practical difficulties would you envisage if we implemented these proposals? Do you have any suggestions as to how we could solve the problems presented by these proposals?*

## **Chapter 5**

### **Question 22**

*Can you suggest any other measures that would assist these vulnerable defendants to participate more effectively in the trial process?*

### **Question 23**

*Do you agree that young witnesses should qualify for special measures if aged under 18?*

## **Chapter 7**

### **Question 24**

*Do you agree that for all young witnesses, regardless of when they are scheduled to give evidence, trials should begin in the afternoon to allow young witnesses' testimony to be either:*

- *at the start of the second day when they will be fresh and with the minimum of waiting or*
- *at the start of the day for those young witnesses scheduled to give evidence later in the trial?*

### **Question 25**

*If so, what are the obstacles to achieving this and how could they be overcome?*

## **Chapter 8**

### **Question 26**

*Do you think that there should be established accredited panels of practitioners to ensure that those questioning young witnesses have successfully completed specific training?*

### **Question 27**

*How could the court ensure that inappropriate cross-examination does not take place? Would this process be best facilitated by the judge or Bench discussing the ground rules with the advocates in advance?*

**Question 28**

*Do you think that training for magistrates who try cases involving young witnesses in the adult court should reinforce guidance in Achieving Best Evidence, A Case for Balance and A Case for Special Measures?*

**Question 29**

*Do you agree that the prosecution and defence should consider using intermediaries more widely for young witnesses as they provide a useful assessment of the young witness' ability to understand questions put during cross-examination?*

## Chapter 9

**Question 30**

*Should the OCJR evaluate the witness profiling scheme in Liverpool to assess its potential application for all witnesses including children?*

**Question 31**

*Are you aware of any other similar schemes for young witnesses which could also be evaluated?*

**Question 32**

*Do you think that the current guidance on pre-trial therapy for children is effective? Would you suggest any changes?*

**Question 33**

*Do you agree that all areas should develop pre-trial therapy protocols?*

**Question 34**

*Which body/organisation is best placed to monitor the implementation and effective use of these protocols? Why?*

## Chapter 10

**Question 35**

*Do you agree with the Review Group's recommendation that the Government should legislate to make a supporter in the live-link room a special measure?*

**Question 36**

*What safeguards would be needed to ensure that the trial is fair but that the young witness is provided with proper emotional support?*

**Question 37**

*Who should be permitted to act as a young witness supporter in the live-link room?*

**Question 38**

*What, if any, further safeguards do you think are necessary to ensure that the integrity of the evidence is not open to question?*

## Chapter 11

### Question 39

*How can we ensure that processes are put in place to ensure that young witnesses can watch their video, or see their written statement, in advance of the trial?*

### Question 40

*To what extent, if any, are you using the child witness checklist in appropriate cases, and if so do you find it an effective tool in assisting the provision of child witness support?*

### Question 41

*Is there anything that is not included in the checklist which might be helpful, or which should be removed or changed?*

### Question 42

*(a) Do you consider that any of the proposals in this consultation document could or would have a differential impact upon any equality target group(s) or any other group(s)?*

*(b) If so, what are the reasons for your view and what do you suggest that the Government could do to address these concerns?*

# Annex A: Recommendations of the Review of Child Evidence (2005)

## Recommendation 1

That section 28 should be retained and implemented for use by the most vulnerable witnesses if this is the only way in which they would be able to give evidence.

## Recommendation 2

More focus should be placed on developing remote live links to keep witnesses out of the courthouse, if this is their choice, and there should be a presumption in favour of use where one exists.

## Recommendation 3

Consider video or digitally recording cross-examination and re-examination over live link for use in subsequent appeals or re-trials and also consider recording the examination where the evidence-in-chief was not video or digitally recorded.

## Recommendation 4

The distinction between children in need of special protection and other child witnesses should be removed. Applications for special measures should be based on the assessed need of the witness.

## Recommendation 5

There should be a rebuttable presumption that any child witness in any trial of any offence should give their evidence by live link.

#### Recommendation 6

A child should be able to express a desire to give their evidence in the courtroom, but any decision taken by the court on whether to allow this should not result in a diminution in the quality of the child's evidence compared with a live link. The court should have a clearly defined set of factors to consider when making this decision.

#### Recommendation 7

There should be a presumption that, where it has been agreed that a child will give their evidence in the courtroom, they will be provided with a screen around the witness box. The court should have a clearly defined set of factors to consider when making this decision.

#### Recommendation 8

A child should be able to choose to give their evidence without a screen around the witness box, but the court's decision on whether to allow this should be based on clear criteria, including the impact of the decision on the quality of the child's evidence.

#### Recommendation 9

There should be a presumption that child witnesses should give their evidence in private (section 25), with appropriate support, in all criminal courts unless they do not wish to do so.

#### Recommendation 10

Young witnesses testifying in cases where their visual image is not known to the defendant should, with the agreement of the court, have their image restricted from the defendant's view where there is fear of reprisal or intimidation.

#### Recommendation 11

Young witnesses suffering fear and distress at the defendant watching them giving their evidence can, with the agreement of the court, have their image concealed when giving their evidence by live link, or have a screen to prevent them being seen by the defendant, if giving evidence from the witness box.

#### Recommendation 12

Child defendants should qualify for assistance via a menu of special procedures ensuring that they understand the function and process of the trial and the potential outcome for them.

Recommendation 13

Child witnesses under 18 years old should qualify for special measures.

Recommendation 14

The judiciary should consider more rigorous management of disclosure in accordance with new case management rules.

Recommendation 15

Where third-party disclosure is necessary, social services records should be readily accessible to the police at investigation stage – to avoid delays later on in the criminal proceedings.

Recommendation 16

The Department for Education and Skills should consider raising awareness among social services practitioners of how social services records are used in criminal proceedings and of the need to ensure that recording practices do not further disadvantage vulnerable children.

Recommendation 17

The planned review of third-party disclosure should take into account the impact of delays in cases involving child witnesses and should consider the use of independent counsel by social services departments to examine files.

Recommendation 18

Guidance in *Achieving Best Evidence* on best practice of joint interviewing between police and social services leading to earlier disclosure to the prosecution team should be restated.

Recommendation 19

Those listing cases should, as far as possible, manage trials to ensure that a child witness' testimony can be taken at the beginning of day two, when the witness will be fresh and with the minimum of waiting. Such considerations should ideally apply to all child witnesses, regardless of when they are scheduled to give evidence during a trial.

Recommendation 20

The Law Society and Bar Council (Criminal Bar Association) should establish accredited panels of practitioners to act in cases with child witnesses ensuring that they have successfully completed specific training devoted to cross-examining children in criminal proceedings.

Recommendation 21

The judiciary and magistracy should consider how they could be more active in controlling inappropriate cross-examination based on *Achieving Best Evidence* and *A Case for Balance*.

Recommendation 22

The Judicial Studies Board should review training for magistrates who try cases involving child witnesses in the adult court, reinforcing guidance in *Achieving Best Evidence*, *A Case for Balance* and *A Case for Special Measures*.

Recommendation 23

The prosecution and defence should consider making more use of intermediaries for children as they provide a useful assessment of the witness' ability to understand questions put during cross-examination.

Recommendation 24

The Government should evaluate the witness profiling scheme in Liverpool to assess its potential application for all vulnerable witnesses including children.

Recommendation 25

All areas should develop pre-trial therapy protocols. The implementation and effective use of these protocols should be monitored by an appropriate body.

Recommendation 26

Legislation to make a supporter in the live-link room a special measure should be implemented.

Recommendation 27

The Government should routinely collect and publish data on the time taken between charge and trial in cases involving child witnesses in order to establish the causes of delay, with a view to tackling them.

Recommendation 28

The Government should conduct regular research into the experiences of young witnesses within the criminal justice system.

**Recommendation 29**

For the purpose of monitoring the support for child witnesses as they progress through the criminal justice process, early identification by the prosecution team is vital and should begin at the investigative pre-charge stage.

**Recommendation 30**

Child witnesses should be allowed the opportunity to refresh their memory of the video or digitally recorded or written statement before the day they give evidence in line with *Achieving Best Evidence* guidance (paragraph 4.33).

**Recommendation 31**

The proposed child witness checklist should be recommended for use by Witness Care Units to assist in providing child witness support.

# Annex B: About this consultation paper

## Indicative list of persons and bodies consulted

Ann Craft Trust

Professor Andrew Ashworth

Professor Ray Bull

Association of Chief Police Officers (ACPO)

Association of Directors of Social Services (ADSS)

Professor Diane Birch

British Medical Association (BMA)

Council of Her Majesty's Circuit Judges

Crime and Disorder Reduction Partnerships

Criminal Bar Association

Crown Prosecution Service (CPS)

Professor Graham Davies

General Council of the Bar

General Medical Council (GMC)

His Honour Judge Globe QC

Laura Hoyano

Institute of Legal Executives

Dr David Jones

Sir Igor Judge (President of the Queen's Bench Division)

Justice

Justices' Clerks' Society

Professor Michael Lamb

Law Society of England and Wales

Lexicon Ltd

Liberty

Liverpool City Council

Local Criminal Justice Boards  
Local Safeguarding Children Boards  
Magistrates' Association  
MENCAP  
MIND  
Nacro (National Association for the Care and Re-settlement of Offenders)  
National Autistic Society  
National Society for the Prevention of Cruelty to Children (NSPCC)  
Lord Phillips of Worth Matravers (Lord Chief Justice of England and Wales)  
Police Federation of England and Wales  
Police Superintendents' Association of England and Wales  
Respond  
Professor John Spencer  
Professor Jennifer Temkin  
Victim Support  
Voice UK  
Whitehall Prosecutors Group  
Youth Justice Board

## Responses to this consultation paper

Responses should be sent to:

Guy Wilson  
Better Trials Unit  
Office for Criminal Justice Reform  
Ground Floor, Fry Building  
2 Marsham Street  
London SW1P 4DF  
Tel: 020 7035 8490  
Fax: 020 7035 8601  
Email: [guy.wilson@cjs.gsi.gov.uk](mailto:guy.wilson@cjs.gsi.gov.uk)

The final date for receipt of responses is **Friday 19 October 2007**.

## Responses: confidentiality and disclaimer

The information you send us may be passed to colleagues within the Ministry of Justice, government departments or related agencies.

Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

**If you want the information that you provide to be treated as confidential**, please be aware that, under the Freedom of Information Act, there is a statutory Code of Practice with which public authorities must comply and which deals, among other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Please ensure that your response is marked clearly if you wish your response and name to be kept confidential.

Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

The Department will process your personal data in accordance with the Data Protection Act – in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Alternative formats

Please contact the Better Trials Unit if you require a copy of this consultation paper in any other format, for example Braille, large print or audio.

## Post-consultation information

We aim to publish a summary of the responses received within three months of the closing date for this consultation, which will be made available on our website at: [www.cjsonline.gov.uk](http://www.cjsonline.gov.uk)

## The consultation criteria

The Code of Practice on Written Consultation issued by the Cabinet Office recommends the following criteria:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated Consultation Co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

(The full Code of Practice is available at: [www.cabinetoffice.gov.uk/regulation/consultation/](http://www.cabinetoffice.gov.uk/regulation/consultation/))

## Consultation Co-ordinator

If you have a complaint or comment about the Ministry of Justice's approach to consultation, you should contact the Ministry of Justice Consultation Co-ordinator, Laurence Fiddler.

**Please DO NOT send your response to this consultation to Laurence Fiddler.**

The Consultation Co-ordinator works to promote best practice standards set by the Cabinet Office, advises policy teams on how to conduct consultations and investigates complaints made against the Ministry of Justice. He does not process your response to this consultation.

The Consultation Co-ordinator can be emailed at:  
consultation@justice.gov.uk

Or write to:

Laurence Fiddler  
Consultation Co-ordinator  
Ministry of Justice  
9th Floor Selborne House  
54–60 Victoria Street  
London SW1E 6QW

## Contact point

If you have any enquiries about the proposals, Partial Public Sector Regulatory Impact Assessment or Equality Impact Assessment, please contact:

Stephen Underwood  
Better Trials Unit  
Office for Criminal Justice Reform  
Ground Floor, Fry Building  
2 Marsham Street  
London SW1P 4DF  
Tel: 020 7035 8474  
Fax: 020 7035 8601  
Email: stephen.underwood@cjs.gsi.gov.uk

# Annex C: Those consulted so far

## Review Group members

Barbara Esam, National Society for the Prevention of Cruelty to Children (NSPCC)

Shirley Ford, Victim Support

Kathy Rowe, Hull and East Riding Area Child Protection Committee (ACPC)

Mark Aslett, Association of Chief Police Officers (ACPO)

Martin Kirby-Sykes/Michael Wrigglesworth, Crown Prosecution Service (CPS)

Amrita Dhaliwal/John Wright/David Harmer, Department for Constitutional Affairs (DCA)

Gillian Harrison/Warwick Maynard, Office for Criminal Justice Reform (OCJR) (Chair)

Richard Pugh, OCJR (Secretary)

Virginia Gaywood/Rebekah Griffiths, OCJR (Minutes Secretary)

## Academic consultees

Professor Diane Birch, University of Nottingham

Laura Hoyano, Wadham College, Oxford

Professor Michael Lamb, Faculty of Social and Political Sciences, Cambridge

Joyce Plotnikoff, Researcher, Lexicon Ltd

Professor John Spencer, Selwyn College, Cambridge

Professor Jennifer Temkin, University of Sussex

## Practitioner seminar consultees

Detective Sergeant (DS) Tessa Adams, Devon and Cornwall Police

Ken Andrews, Witness Service, Grimsby

Jo Balderson, Northampton Social Services

Ken Bell, Avon and Somerset CPS

Janice Bellamy, Northumbria CPS

Detective Chief Inspector (DCI) Insp Larry Bill, Avon and Somerset Police

Jane Birkenshaw, East Riding Social Services

Beatrice Brown JP, Newcastle Magistrates' Court  
Janique Burden, NSPCC Northern Ireland  
Karen Burrows, NSPCC Swansea  
Nicola Cassidy, Victim Support  
Ian Coffey, Newcastle Magistrates' Court  
Rosie Collins, Barrister  
Malcolm Colmer JP, Liverpool (City) Magistrates' Court  
Paul Cox, DCA  
His Honour Judge (HHJ) Thomas Crowther QC, Bristol Crown Court  
DCI Martin Davies, Dyfed-Powys Police  
Detective Superintendent Jack Dees, Greater Manchester Police  
Peter Duncan, Northamptonshire Social Services  
Dr Andrew Durham, Warwickshire Social Services  
Mark Eddis, West Mercia Police  
Alistair Evans, Northamptonshire CPS  
Deborah Evans, Bolton Social Services  
John Evans, Barrister  
Kieran Fielding, Solicitor  
Detective Inspector (DI) Susan Ford, Merseyside Police  
Kirsten Foster, CPS Police Directorate  
HHJ Henry Globe QC, Liverpool Crown Court  
Lindsay Harper, Swansea Social Services  
Leanne Higgins, Wirral Magistrates' Court  
DI Paul Hughes, West Midlands Police  
Caroline Jennings, Northampton Magistrates' Court  
Judy Kemp JP, Bristol Magistrates' Court  
Norman Larkin, Merseyside CPS  
Marie Lebacqz, Stoke-on-Trent Social Services  
Ian Lock, Witness Service, Bath Magistrates' Court  
HHJ Richard Lowden, Durham Crown Court  
Julie Mills, Bristol Magistrates' Court  
DCI Tony Mole, Greater Manchester Police  
Janis Mulraney, Liverpool Crown Court  
Nigel Northeast, Bristol Crown Court  
Ruth Parker, Bristol Crown Court  
Peter Phillipson, Newcastle Crown Court

DS Dave Philpot, Kent Police  
DCI Insp Andy Potts, Northumbria Police  
DI Dave Prangnell, Hampshire Constabulary  
Beverley Radcliffe, Victim Support  
Amanda Rippon, Barrister  
Roy Rogers, Witness Service, Wallasey Magistrates' Court  
Lisa Saxby, Northampton Crown Court  
Tony Schofield, Avon and Somerset CPS  
Dorothy Starkey OBE, Bristol Crown Court  
Inspector Diane Steventon, Staffordshire Police  
Detective Superintendent Tom Stoddart, Cleveland Police  
Kathryn Stone, Voice UK  
Lynne Summers, Northampton Crown Court  
DI Tom Thompson, Northamptonshire Police  
Sue Walker-Russell, South Sefton Magistrates' Court  
John Weate, Solicitor  
HHJ Charles Wide QC, Northampton Crown Court  
Barry Wilson, Liverpool Crown Court  
June Wolfendale, Bolton ACPC  
DI Carolyn Woods, Leicestershire Police  
Suzanne Wright, Northamptonshire Social Services  
DI Gary Young, Nottinghamshire Police

## **Criminal Justice Council members**

Sir Igor Judge, President of the Queen's Bench Division (Chair)  
HHJ Henry Globe, Circuit Judge  
Sir Duncan Nichol, Chairman, Parole Board  
Dame Helen Reeves DBE, Chief Executive, Victim Support  
Judge Davinder Lachhar, District Judge  
George Mitchell CBE JP, Magistrate  
Rodney Warren, Solicitor, Law Society  
Nicholas Purnell QC, Barrister, Bar Council  
Withiel Cole, Special Casework Project Manager, CPS  
Professor Diane Birch, School of Law, Nottingham University  
Professor John Raine, Institute of Local Government Studies, University of Birmingham  
Claire Cooper, Commission for Racial Equality

Neil Clarke, Justices' Clerks' Society

Richard Collins, Director, Criminal Defence Service

Paul Cavadino, Chief Executive, Nacro

John Ransford, Director of Education and Social Policy, Local Government Association

Dianne Jeffrey, Chair, NHS Confederation

Peter Gilroy, Association of Directors of Social Services

David A'Herne, Director, Crime Reduction Unit, National Assembly of Wales

Professor Graham Zellick, Chair, Criminal Cases Review Commission

Frank Warburton, Chief Executive, DrugScope

Roger Howard, Chief Executive, Crime Concern

# Annex D: Partial Public Sector Regulatory Impact Assessment

Giving evidence during the course of a criminal trial can be extremely daunting and stressful for adult witnesses; for children this experience can be even more intimidating. Measures have been on the statute book for nearly 20 years now to assist young witnesses in giving evidence, but it is recognised that more needs to be done, particularly in addressing the gap between good policy and implementation on the ground (the ‘implementation gap’).

The proposals in this consultation paper, if introduced into criminal proceedings, will help these young witnesses have the access to justice that they deserve by being supported appropriately and assured of being enabled to give their best evidence if they are needed at trial.

Only four of the recommendations in this consultation have been identified as incurring costs – recommendations 1, 2, 3 and 27.

## Recommendation 1

*That section 28 should be retained and implemented for use by the most vulnerable witnesses if this is the only way in which they would be able to give evidence.*

Section 28 would enable the cross-examination and re-examination of witnesses to be pre-recorded. The Review Group considers that this measure would apply only when there is a strong case for recording the evidence of the child witness, because the child is terminally ill or is so young that their memory would be unreliable by the time of the trial. We have estimated that there may be 250 cases each year.

The options for implementing this proposal have been identified as follows:

Option 1: Do nothing.

Option 2: All the parties attend where the child is located (i.e. at their home or in a hospital).

Option 3: The parties are in the courtroom and the child, with a court official present, gives evidence from their location (i.e. their home or hospital). This would require a combination of a remote link facility (the costs of which are given in the assessment of recommendation 2 below) and also a recording facility (costs are given in the assessment of recommendation 3 below).

Option 4: The parties are in the courtroom and the child gives evidence from a non-courtroom site where there is a remote link already in existence. This would require the equipment to be installed that is proposed in recommendation 3.

Option 5: All the parties, including the child, attend the court.

## Benefits

Option 1: There would be no financial cost with this option.

Option 2: This option would be of most benefit to the young witness, particularly if the witness was suffering from condition(s) where moving them might prevent them from achieving their best evidence.

Option 3: This would be of great benefit to the witness as they would not be required to go to court. The defendant would be able to observe proceedings without being in close proximity to the witness. The witness would be kept separate from the trial participants, including the defendant.

Option 4: Similar benefits as option 3; however, option 4 would cost less in the longer term as permanent, rather than ad hoc, facilities would be used

Option 5: This option would minimise costs; the Crown Prosecution Service would benefit as it would not have to pay for a remote site, or, if the defence were responsible, then there would be no cost to the Community Legal Services fund. This option would also help avoid the effects of memory loss.

## Costs

Option 1: By leaving the situation as it is, no financial costs would accrue. However, there would be a cost in the sense that the small category of cases identified by the Review would not benefit from this special measure and this may result in cases not being prosecuted.

Option 2: Estimated costs for this option will vary depending on such matters as the number of participants (for example, if an intermediary is required), special measures, the location and the standard of telecommunication infrastructure at the location. There would need to be allowance for the presence of the defendant. Using this option would also dilute the benefits of section 28 as it would not keep the witness separate from the other trial participants.

Option 3: This option would require an ad hoc remote link facility, costing approximately £2,500 per case. There would also be recording costs estimated as a one-off instalment of approximately £175 per case for recording the live-link transmission if it was done on an exceptional basis.

Option 4: This option would cost approximately £175 per case.

Option 5: This option dilutes the intended benefits of section 28 and would also cost approximately £175 per case.

It should be noted that Scotland has a similar provision to section 28, the special measure of taking evidence by a commissioner. The cost of an operator setting up and using the recording equipment is estimated at £75 per commission.

## Recommendation 2

*More focus should be placed on developing remote live links to keep witnesses out of the courthouse, if this is their choice, and there should be a presumption in favour of use where one exists.*

The costs of remote links vary depending on the type of link. The different types of remote live links were set out in paragraph 3.8 of the consultation document – traditional, court-to-court, non-court and overseas.

All main Crown Court centres have live links installed, either to assist witnesses when giving their evidence in court, or to link to prisons. Out of 529 Crown courtrooms, 110 have the potential to be used as remote links at present (as opposed to the traditional link described in paragraph 3.8 which is used in all Crown Court centres). The majority of these courtrooms would also be used for prison video links and care would need to be taken to balance priorities. It may also be necessary to expand the capacity of the network if more courtrooms are to simultaneously connect to remote locations.

Out of 1,409 magistrates' courtrooms, 246 have the potential to be used as remote links at present (as opposed to the traditional link described on paragraph 3.8, which is used in 77% of magistrates' courts).

### Court-to-court remote links

The cost of installing a permanent new live link with ISDN lines to enable court-to-court use is approximately £20,000 for a magistrates' court and £40,000 for a Crown Court. Annual operational costs for either would be £1,632.

### Non-court remote links

The start-up costs for permanent non-court links include room modifications, air conditioning, soundproofing, DVD players, books and the link equipment.

The running costs would include heating, lighting and air conditioning when the room is used, and administration costs.

### Ad hoc link

This is an example of possible costs, based partly on a 2005 case at Exeter Crown Court in which the victim was in a nursing home and too ill to travel. The CPS had to pay a year's line rental and hire video-conferencing facilities. The line rental plus installation cost £621, while the video-conferencing equipment cost £1,762; the total cost was £2,383.

Enquiries have shown that other contractors could provide this facility for a blanket charge of between £2,383 and £2,743.

#### Type of link

Court-to-court remote links

#### Costs

Start-up:

Approximately £20,000 (magistrates' court)

Approximately £40,000 (Crown Court)

Operational cost per annum thereafter: £1,632

Non-court remote links\*

Start-up: £37,000

Staff per year: £8,678\*\*

Ad hoc link

Approximately £2,500 per case

\* Costs based on Leicester Crime and Disorder Reduction Partnership.

\*\* Assumes two cases per week.

## Training costs

There would be training costs for Her Majesty's Courts Service if the use of remote live links were expanded. These would vary depending on the degree of expansion. Estimated total costs for training all court clerks are between £20,000 and £40,000 in total, depending on the extent to which the training is done externally.

Additionally, there may be travel and subsistence costs. If the training were delivered in-house, the displacement costs would be £80 per day for each member of staff.

Production of training materials would cost between £800 and £3,000, depending upon who produced them.

## Storage and destruction costs

In relation to recommendations 1 and 2, there are storage and destruction costs. These would be the responsibility of the prosecuting body. However, if digital audio recording is introduced into the Crown Court (DAR+), the contracted provider would be responsible for storing the evidence electronically.

## Recommendation 3

*Consider video or digitally recording cross-examination and re-examination over live link for use in subsequent appeals or re-trials and also consider recording the examination where the evidence-in-chief was not video or digitally recorded.*

Recording costs would vary according to the extent to which the recommendation was implemented.

Appeals from the magistrates' courts, which entail a re-trial in the Crown Court, are cases where recommendation 3 would be pertinent. In 2005, the Crown Court dealt with 12,843 appeals. However, this is approximately 0.5% of the decisions in the magistrates' court that resulted in a guilty verdict.

## Digital audio recording (DAR+)

The proposed introduction of digital audio recording in to the Crown Court (DAR+) could act as a vehicle for recommendation 3.

Should the recommendation be implemented so that cross-examination and re-examination are routinely recorded, then the likely preferred solution would be to enhance the proposed DAR+ audio recording project such that it also video records the evidence. This will mean scaling all parts of the product to meet the higher requirements of digital video and the costs are likely to be significant. Great care would need to be taken to ensure that any proposed design does not further add to the workload of court clerks, for example, by them becoming responsible for monitoring the real-time recording of cross-examination and pausing proceedings to change DVDs etc.

## Exceptional recording

Cases in which there are witnesses who fall into the category suggested by the Review as appropriate for the section 28 provision could be considered for exceptional recording as outlined in recommendation 1.

If the recording is to be by exception only, it may then be an option to connect a DVD recorder to the existing live-link systems. However, given that the court clerks are going to be occupied with running

the courtroom, there is a risk that the recording may not be perfect (i.e. they may not have time to change the disk at the appropriate time). This represents a significant risk to the courts' ability to view the evidence at a later date.

Estimated costs for a contractor providing a DVD recorder ad hoc, bringing it into the court, attaching it to the live-link system and collecting it at the next planned annual maintenance visit would work out at a cost of approximately £175, plus a small hire charge. If the equipment were installed as part of a maintenance visit, there would be a smaller cost.

Recommendation 3 may potentially involve some training need in the courts. Without a precise design, it is difficult to estimate how great the training need would be. Any training needs in the future could be addressed by means of written guidance, otherwise a figure would need to include displacement costs of £40 per member of staff (half a day).

## **Recommendation 27**

*The Government should routinely collect and publish data on the time taken between charge and trial in cases involving child witnesses in order to establish the causes of delay, with a view to tackling them.*

This recommendation would incur costs as neither Libra in the magistrates' courts nor the Crown Court Electronic Support System (CREST) in the Crown Court record whether the witness is an adult or a child, nor do they record the date of charge.

### **Libra**

This is the IT and business change system used in magistrates' courts

For Libra, recording the fact that there is a child witness will be a chargeable change to the application. The costs cannot be estimated more accurately without a much clearer definition of the change. However, approximate estimated costs would be in the order of £20,000. To provide data on timeliness would also require an enhancement to the Libra Management Information System with a further approximate estimate of £7,500. So, the approximate total one-off cost would be £27,500.

### **CREST**

This is the Crown Court IT system which records all management information on cases from receipt to conclusion.

For CREST, recording the fact that there is a child witness is estimated to cost £12–15,000. Providing new data on timeliness would require extensive testing and could cost up to another £35,000 depending on how much information is required. So, the approximate total one-off cost would be £47–50,000.

# Annex E: Equality Impact Assessment

The remit of the Child Evidence Review was to review section 28 (video-recorded cross-examination and re-examination) and review the performance of special measures as these are applied to child witnesses and other aspects of child evidence, including vulnerable young defendants.

The aim of the recommendations in the consultation document is to find further ways of assisting young people to achieve their best evidence, a crucial part of which is improving the experience of giving evidence for young witnesses.

There is evidence that people from black and minority ethnic (BME) groups are disproportionately represented at each stage of the criminal justice process, from initial contact to sentencing, and that this is unlikely to be because people from these groups are more likely to offend.<sup>51</sup>

However, the overall picture is subject to some variations, depending on which aspect of the process is examined. For example, the same document highlights the disproportionate use of stop and search against BME suspects (page 9). It explains (page 11) that there is currently no comprehensive ethnic data on the main area of relevance to the proposals, proceedings in the magistrates' court and the Crown Court. However, BME defendants were substantially more likely to be acquitted in the Crown Court than white defendants (page 12). It is noted on the same page that previous CPS research indicated a tendency for the police to bring charges against black and Asian defendants with weaker evidence. Charging arrangements have changed as a result of the new statutory charging system introduced in the Criminal Justice Act 2003. An initial race and gender assessment of charging decisions under these arrangements found no ethnic differential (page 11).

The Social Exclusion Unit report *A better education for children in care*, published in September 2003, found that some BME children were over-represented in care.<sup>52</sup> These are vulnerable children who are often in care owing to abuse they have suffered and, due to their vulnerable nature, are liable to be abused within the care system. Thus, these proposals will benefit BME children in care who are victims of crime, providing their abuse is brought to the attention of the criminal justice agencies.

This information, taken as a whole, would suggest that the policy proposals contained in this paper may be relevant to the race equality duty. The question, therefore, is whether there is any reason to believe that different people could be affected differently in any way by the proposed changes.

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51. OCJR, *Race and the Criminal Justice System: An overview to the complete statistics 2003–2004* (London: CJS; 2005) pp. iv and 7, available at: [www.homeoffice.gov.uk/rds/pdfs05/s95overview.pdf](http://www.homeoffice.gov.uk/rds/pdfs05/s95overview.pdf)

52. Social Exclusion Unit, *A better education for children in care* (London: ODPM/SEU; 2003), available at: <http://archive.cabinetoffice.gov.uk/seu/downloaddocdac1.pdf?id=32>

There are no reliable statistics currently available on the number of BME child witnesses. The Government recognises this as an issue. The increased monitoring discussed in chapter 11 of the consultation document would hopefully help address this issue and ensure that special measures are working effectively for BME child witnesses.

However, it is difficult to assess with any degree of accuracy how the proposals might differentially impact on BME child witnesses. If some of the proposals were taken forward, such as the increased use of supporters, then consideration would need to be given to the potentially differing requirements of BME child witnesses (for example, a young witness from a particular ethnic group may wish to be supported by someone of the same ethnic background).

Regarding those proposals that are aimed to assist witnesses, it is difficult to see how these would impact disproportionately on a particular group of defendants. As these proposals are to help witnesses achieve their best evidence, which is outcome neutral, it is difficult to see how these proposals would adversely affect defendants as a whole.

However, there is a proposal in the consultation aimed specifically at vulnerable young defendants with limited cognitive function. As indicated earlier, people from BME groups are disproportionately represented at every stage of the criminal justice process and, to the extent that this over-representation carries over to child defendants, it will have a positive impact on those groups.

It is not thought, for these reasons, that the proposals in the paper are likely to fall short of the statutory race equality duty. However, views on this conclusion are welcome. As part of the consultation exercise, we intend to canvass the views of a number of organisations that represent diverse groups, and we will be sending the document to them in order to actively seek their views.

It is intended that these provisions should have a beneficial impact on disabled witnesses as these witnesses will often qualify for special measures as vulnerable witnesses.





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