CRIMINAL PRACTICE DIRECTIONS 2015 DIVISION V

EVIDENCE

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CrimPR Part 16 Witness statements

CPD V Evidence 16A: EVIDENCE BY WRITTEN STATEMENT

16A.1 Where the prosecution proposes to tender written statements in evidence under section 9 of the Criminal Justice Act 1967, it will frequently be necessary for certain statements to be edited. This will occur either because a witness has made more than one statement whose contents should conveniently be reduced into a single, comprehensive statement, or where a statement contains inadmissible, prejudicial or irrelevant material. Editing of statements must be done by a Crown Prosecutor (or by a legal representative, if any, of the prosecutor if the case is not being conducted by the Crown Prosecution Service) and not by a police officer.

Composite statements

16A.2 A composite statement giving the combined effect of two or more earlier statements must be prepared in compliance with the

requirements of section 9 of the 1967 Act; and must then be signed by the witness.

Editing single statements

16A.3 There are two acceptable methods of editing single statements. They are:-

(a) By marking copies of the statement in a way which indicates the passages on which the prosecution will not rely. This merely indicates that the prosecution will not seek to adduce the evidence so marked. The original signed statement to be tendered to the court is not marked in any way.
The marking on the copy statement is done by lightly striking out the passages to be edited, so that what appears beneath can still be read, or by bracketing, or by a combination of both. It is not permissible to produce a photocopy with the deleted material obliterated, since this would be contrary to the requirement that the defence and the court should be served with copies of the signed original statement.
Whenever the striking out / bracketing method is used, it will assist if the following words appear at the foot of the frontispiece or index to any bundle of copy statements to be tendered:
'The prosecution does not propose to adduce evidence of those passages of the attached copy statements which have been struck out and / or bracketed (nor will it seek to do so at the trial unless a notice of further evidence is served)'.

(b) By obtaining a fresh statement, signed by the witness, which omits the offending material, applying the procedure for composite statements above.

16A.4 In most cases where a single statement is to be edited, the striking out/ bracketing method will be the more appropriate, but the taking of a fresh statement is preferable in the following circumstances:

(a) When a police (or other investigating) officer's statement contains details of interviews with more suspects than are eventually charged, a fresh statement should be prepared and signed, omitting all details of interview with those not charged except, insofar as it is relevant, for the bald fact that a certain named person was interviewed at a particular time, date and place.

(b) When a suspect is interviewed about more offences than are eventually made the subject of charges, a fresh statement should be prepared and signed, omitting all questions and answers about the

uncharged offences unless either they might appropriately be taken into consideration, or evidence about those offences is admissible on the charges preferred. It may, however, be desirable to replace the omitted questions and answers with a phrase such as: *'After referring to some other matters, I then said, "… … …" ',* so as to make it clear that part of the interview has been omitted.

(c) A fresh statement should normally be prepared and signed if the only part of the original on which the prosecution is relying is only a small proportion of the whole, although it remains desirable to use the alternative method if there is reason to believe that the defence might itself wish to rely, in mitigation or for any other purpose, on at least some of those parts which the prosecution does not propose to adduce.

(d) When the passages contain material which the prosecution is entitled to withhold from disclosure to the defence.

16A.5 Prosecutors should also be aware that, where statements are to be tendered under section 9 of the 1967 Act in the course of summary proceedings, there will be a need to prepare fresh statements excluding inadmissible or prejudicial material, rather than using the striking out or bracketing method.

16A.6 Whenever a fresh statement is taken from a witness and served in evidence, the earlier, unedited statement(s) becomes unused material and should be scheduled and reviewed for disclosure to the defence in the usual way.

CPD V Evidence 16B: VIDEO RECORDED EVIDENCE IN CHIEF

16B.1 The procedure for making an application for leave to admit into evidence video recorded evidence in chief under section 27 of the Youth Justice and Criminal Evidence Act 1999 is given in CrimPR Part 18.

16B.2 Where a court, on application by a party to the proceedings or of its own motion, grants leave to admit a video recording in evidence under section 27(1) of the 1999 Act, it may direct that any part of the recording be excluded (section 27(2) and (3)). When such direction is given, the party who made the application to admit the video recording must edit the recording in accordance with the judge's directions and send a copy of the edited recording to the appropriate officer of the Crown Court and to every other party to the proceedings.

16B.3 Where a video recording is to be adduced during proceedings before the Crown Court, it should be produced and proved by the interviewer, or any other person who was present at the interview with the witness at which the recording was made. The applicant should ensure that such a person will be available for this purpose, unless the parties have agreed to accept a written statement in lieu of attendance by that person.

16B.4 Once a trial has begun, if, by reason of faulty or inadequate preparation or for some other cause, the procedures set out above have not been properly complied with and an application is made to edit the video recording, thereby necessitating an adjournment for the work to be carried out, the court may, at its discretion, make an appropriate award of costs.

CPD V Evidence 16C: EVIDENCE OF AUDIO AND VIDEO RECORDED INTERVIEWS

16C.1 The interrogation of suspects is primarily governed by Code C, one of the Codes of Practice under the Police and Criminal Evidence Act 1984 ('PACE'). Under that Code, interviews must normally be contemporaneously recorded. Under PACE Code E, interviews conducted at a police station concerning an indictable offence must normally be audio-recorded. In practice, most interviews are audio-recorded under Code E, or video-recorded under Code F, and it is best practice to do so. The questioning of terrorism suspects is governed separately by Code H. The Codes are available electronically on the Home Office website.

16C.2 Where a record of the interview is to be prepared, this should be in accordance with the current national guidelines, as envisaged by Note 5A of Code E.

16C.3 If the prosecution wishes to rely on the defendant's interview in evidence, the prosecution should seek to agree the record with the defence. Both parties should have received a copy of the audio or video recording, and can check the record against the recording. The record should be edited (see below) if inadmissible matters are included within it and, in particular if the interview is lengthy, the prosecution should seek to shorten it by editing or summary.

16C.4 If the record is agreed there is usually no need for the audio or video recording to be played in court. It is a matter for the discretion of the trial judge, but usual practice is for edited copies of the record to be provided to the court, and to the jury if there is one, and for the prosecution advocate to read the interview with the interviewing officer or the officer in the case, as part of the officer's evidence in chief, the officer reading the interviewer and the advocate reading the defendant and defence representative. In the magistrates' court, the Bench sometimes retire to read the

interview themselves, and the document is treated as if it had been read aloud in court. This is permissible, but CrimPR 24.5 should be followed.

16C.5 Where the prosecution intends to adduce the interview in evidence, and agreement between the parties has not been reached about the record, sufficient notice must be given to allow consideration of any amendment to the record, or the preparation of any transcript of the interview, or any editing of a recording for the purpose of playing it in court. To that end, the following practice should be followed.

(a) Where the defence is unable to agree a record of interview or transcript (where one is already available) the prosecution should be notified at latest at the Plea and Case Management Hearing ('PCMH'), with a view to securing agreement to amend. The notice should specify the part to which objection is taken, or the part omitted which the defence consider should be included. A copy of the notice should be supplied to the court within the period specified above. The PCMH form inquires about the admissibility of the defendant's interview and shortening by editing or summarising for trial.

(b) If agreement is not reached and it is proposed that the audio or video recording or part of it be played in court, notice should be given to the prosecution by the defence as ordered at the PCMH, in order that the advocates for the parties may agree those parts of the audio or video recording that should not be adduced and that arrangements may be made, by editing or in some other way, to exclude that material. A copy of the notice should be supplied to the court.

(c) Notice of any agreement reached should be supplied to the court by the prosecution, as soon as is practicable.

16C.6 Alternatively, if, the prosecution advocate proposes to play the audio or video recording or part of it, the prosecution should at latest at the PCMH, notify the defence and the court. The defence should notify the prosecution and the court within 14 days of receiving the notice, if they object to the production of the audio or video recording on the basis that a part of it should be excluded. If the objections raised by the defence are accepted, the prosecution should prepare an edited recording, or make other arrangements to exclude the material part; and should notify the court of the arrangements made.

16C.7 If the defendant wishes to have the audio or video recording or any part of it played to the court, the defence should provide notice to the prosecution and the court at latest at the PCMH. The defence should also, at that time, notify the prosecution of any proposals to edit the recording and seek the prosecution's agreement to those amendments.

16C.8 Whenever editing or amendment of a record of interview or of an audio or video recording or of a transcript takes place, the following general principles should be followed:

(i) Where a defendant has made a statement which includes an admission of one or more other offences, the portion relating to other offences should be omitted unless it is or becomes admissible in evidence;

(ii) Where the statement of one defendant contains a portion which exculpates him or her and partly implicates a co-defendant in the trial, the defendant making the statement has the right to insist that everything relevant which is exculpatory goes before the jury. In such a case the judge must be consulted about how best to protect the position of the co-defendant.

16C.9 If it becomes necessary for either party to access the master copy of the audio or video recording, they should give notice to the other party and follow the procedure in PACE Code E at section 6.

16C.10 If there is a challenge to the integrity of the master recording, notice and particulars should be given to the court and to the prosecution by the defence as soon as is practicable. The court may then, at its discretion, order a case management hearing or give such other directions as may be appropriate.

16C.11 If an audio or video recording is to be adduced during proceedings before the Crown Court, it should be produced and proved in a witness statement by the interviewing officer or any other officer who was present at the interview at which the recording was made. The prosecution should ensure that the witness is available to attend court if required by the defence in the usual way.

16C.12 It is the responsibility of the prosecution to ensure that there is a person available to operate any audio or video equipment needed during the course of the proceedings. Subject to their other responsibilities, the court staff may be able to assist.

16C.13 If either party wishes to present audio or video evidence, that party must ensure, in advance of the hearing, that the

evidence is in a format that is compatible with the court's equipment, and that the material to be used does in fact function properly in the relevant court room.

16C.14 In order to avoid the necessity for the court to listen to or watch lengthy or irrelevant material before the relevant part of a recording is reached, counsel shall indicate to the equipment operator those parts of a recording which it may be necessary to play. Such an indication should, so far as possible, be expressed in terms of the time track or other identifying process used by the interviewing police force and should be given in time for the operator to have located those parts by the appropriate point in the trial.

16C.15 Once a trial has begun, if, by reason of faulty preparation or for some other cause, the procedures above have not been properly complied with, and an application is made to amend the record of interview or transcript or to edit the recording, as the case may be, thereby making necessary an adjournment for the work to be carried out, the court may make at its discretion an appropriate award of costs.

16C.16 Where a case is listed for hearing on a date which falls within the time limits set out above, it is the responsibility of the parties to ensure that all the necessary steps are taken to comply with this Practice Direction within such shorter period as is available.

CrimPR Part 17 Witness summonses, warrants and orders

CPD V Evidence 17A: WARDS OF COURT AND CHILDREN SUBJECT TO CURRENT FAMILY PROCEEDINGS

17A.1 Where police wish to interview a child who is subject to current family proceedings, leave of the Family Court is only required where such an interview may lead to a child disclosing information confidential to those proceedings and not otherwise available to the police under Working Together to Safeguard Children (March 2013), a guide to inter-agency working to safeguard and promote the welfare of children: www.workingtogetheronline.co.uk/chapters/contents.html

17A.2 Where exceptionally the child to be interviewed or called as a witness in criminal proceedings is a Ward of Court then the leave of the court which made the wardship order will be required.

17A.3 Any application for leave in respect of any such child must be made to the court in which the relevant family proceedings are continuing and must be made on notice to the parents, any actual carer (e.g. relative or foster parent) and, in care proceedings, to the

local authority and the guardian. In private proceedings the Family Court Reporter (if appointed) should be notified.

17A.4 If the police need to interview the child without the knowledge of another party (usually a parent or carer), they may make the application for leave without giving notice to that party.

17A.5 Where leave is given the order should ordinarily give leave for any number of interviews that may be required. However, anything beyond that actually authorised will require a further application.

17A.6 Exceptionally the police may have to deal with complaints by or allegations against such a child immediately without obtaining the leave of the court as, for example

(a) a serious offence against a child (like rape) where immediate medical examination and collection of evidence is required; or

(b) where the child is to be interviewed as a suspect.

When any such action is necessary, the police should, in respect of each and every interview, notify the parents and other carer (if any) and the Family Court Reporter (if appointed). In care proceedings the local authority and guardian should be notified. The police must comply with all relevant Codes of Practice when conducting any such interview.

17A.7 The Family Court should be appraised of the position at the earliest reasonable opportunity by one of the notified parties and should thereafter be kept informed of any criminal proceedings.

17A.8 No evidence or document in the family proceedings or information about the proceedings should be disclosed into criminal proceedings without the leave of the Family Court.

CrimPR Part 18 Measures to assist a witness or defendant to give evidence

CPD V Evidence 18A: MEASURES TO ASSIST A WITNESS OR DEFENDANT TO GIVE EVIDENCE

18A.1 For special measures applications, the procedures at CrimPR Part 18 should be followed. However, assisting a vulnerable witness to give evidence is not merely a matter of ordering the appropriate measure. Further directions about vulnerable people in the courts, ground rules hearings and intermediaries are given in paragraphs I 3D to 3G.

18A.2 Special measures need not be considered or ordered in isolation. The needs of the individual witness should be ascertained, and a combination of special measures may be appropriate. For example, if a witness who is to give evidence by live link wishes, screens can be used to shield the live link screen from the

defendant and the public, as would occur if screens were being used for a witness giving evidence in the court room.

CPD V Evidence 18B: WITNESSES GIVING EVIDENCE BY LIVE LINK

18B.1 A special measures direction for the witness to give evidence by live link may also provide for a specified person to accompany the witness (CrimPR 18.10(f)). In determining who this should be, the court must have regard to the wishes of the witness. The presence of a supporter is designed to provide emotional support to the witness, helping reduce the witness's anxiety and stress and contributing to the ability to give best evidence. It is preferable for the direction to be made well before the trial begins and to ensure that the designated person is available on the day of the witness's testimony so as to provide certainty for the witness.

18B.2 An increased degree of flexibility is appropriate as to who can act as supporter. This can be anyone known to and trusted by the witness who is not a party to the proceedings and has no detailed knowledge of the evidence in the case. The supporter may be a member of the Witness Service but need not be an usher or court official. Someone else may be appropriate.

18B.3 The usher should continue to be available both to assist the witness and the witness supporter, and to ensure that the court's requirements are properly complied with in the live link room.

18B.4 In order to be able to express an informed view about special measures, the witness is entitled to practise speaking using the live link (and to see screens in place). Simply being shown the room and equipment is inadequate for this purpose.

18B.5 If, with the agreement of the court, the witness has chosen not to give evidence by live link but to do so in the court room, it may still be appropriate for a witness supporter to be selected in the same way, and for the supporter to sit alongside the witness while the witness is giving evidence.

CPD V Evidence 18C: VISUALLY RECORDED INTERVIEWS: MEMORY REFRESHING AND WATCHING AT A DIFFERENT TIME FROM THE JURY

18C.1 Witnesses are entitled to refresh their memory from their statement or visually recorded interview. The court should enquire at the PTPH or other case management hearing about arrangements for memory refreshing. The witness's first viewing of the visually recorded interview can be distressing or distracting. It should not be seen for the first time immediately before giving evidence. Depending upon the age and vulnerability of the witness several competing issues have to be considered and it may be that the assistance of the intermediary is needed to establish exactly how memory refreshing should be managed.

18C.2 If the interview is ruled inadmissible, the court must decide what constitutes an acceptable alternative method of memory refreshing.

18C.3 Decisions about how, when and where refreshing should take place should be court-led and made on a case-by-case basis in respect of each witness. General principles to be addressed include:

i. the venue for viewing. The delicate balance between combining the court familiarisation visit and watching the DVD, and having them on two separate occasions, needs to be considered in respect of each witness as combining the two may lead to 'information overload'. Refreshing need not necessarily take place within the court building but may be done, for example, at the police ABE suite.

ii. requiring that any viewing is monitored by a person (usually the officer in the case) who will report to the court about anything said by the witness.

iii. whether it is necessary for the witness to see the DVD more than once for the purpose of refreshing. The court will need to ask the advice of the intermediary, if any, with respect to this.

iv. arrangements, if the witness will not watch the DVD at the same time as the trial bench or judge and jury, for the witness to watch it before attending to be cross examined, (depending upon their ability to retain information this may be the day before).

18C.4 There is no legal requirement that the witness should watch the interview at the same time as the trial bench or jury. Increasingly, this is arranged to occur at a different time, with the advantages that breaks can be taken as needed without disrupting the trial, and cross-examination starts while the witness is fresh. An intermediary may be present to facilitate communication but should not act as the independent person designated to take a note and report to the court if anything is said.

18C.5 Where the viewing takes place at a different time from that of the trial bench or jury, the witness is sworn (or promises) just before cross-examination and, unless the judge otherwise directs:

(a) it is good practice for the witness to be asked by the prosecutor, (or the judge/magistrate if they so direct), in appropriate language if, and when, he or she has watched the recording of the interview;

(b) if, in watching the recording of the interview or otherwise the witness has indicated that there is something he or she wishes to correct or to add

then it is good practice for the prosecutor (or the judge/magistrate if they so direct) to deal with that before cross-examination provided that proper notice has been given to the defence.

CPD V Evidence 18D: WITNESS ANONYMITY ORDERS

18D.1 This direction supplements CrimPR 18.18 to 18.22, which govern the procedure to be followed on an application for a witness anonymity order. The court's power to make such an order is conferred by the Coroners and Justice Act 2009 (in this section, 'the Act'); section 87 of the Act provides specific relevant powers and obligations.

18D.2 As the Court of Appeal stated in *R v Mayers and Others* [2008] EWCA Crim 2989, [2009] 1 W.L.R. 1915, [2009] 1 Cr. App. R. 30 and emphasised again in *R v Donovan and Kafunda* [2012] EWCA Crim 2749, unreported, 'a witness anonymity order is to be regarded as a special measure of the last practicable resort': Lord Chief Justice, Lord Judge. In making such an application, the prosecution's obligations of disclosure 'go much further than the ordinary duties of disclosure' (*R v Mayers*); reference should be made to the Judicial Protocol on Disclosure, see paragraph IV 15A.1.

Case management

18D.3 Where such an application is proposed, with the parties' active assistance the court should set a realistic timetable, in accordance with the duties imposed by CrimPR 3.2 and 3.3. Where possible, the trial judge should determine the application, and any hearing should be attended by the parties' trial advocates.

Service of evidence and disclosure of prosecution material pending an application

18D.4 Where the prosecutor proposes an application for a witness anonymity order, it is not necessary for that application to have been determined before the proposed evidence is served. In most cases, an early indication of what that evidence will be if an order is made will be consistent with a party's duties under CrimPR 1.2 and 3.3. The prosecutor should serve with the other prosecution evidence a witness statement setting out the proposed evidence, redacted in such a way as to prevent disclosure of the witness' identity, as permitted by section 87(4) of the Act. Likewise the prosecutor should serve with other prosecution material disclosed under the Criminal Procedure and Investigations Act 1996 any such material appertaining to the witness, similarly redacted.

The application

18D.5 An application for a witness anonymity order should be made as early as possible and within the period for which CrimPR 18.3 provides. The application, and any hearing of it, must comply with the requirements of that rule and with those of rule 18.19. In accordance with CrimPR 1.2 and 3.3, the applicant must provide the court with all available information relevant to the considerations to which the Act requires a court to have regard.

Response to the application

18D.6 A party upon whom an application for a witness anonymity order is served must serve a response in accordance with CrimPR 18.22. That period may be extended or shortened in the court's discretion: CrimPR 18.5.

18D.7 To avoid the risk of injustice, a respondent, whether the Prosecution or a defendant, must actively assist the court. If not already done, a respondent defendant should serve a defence statement under section 5 or 6 of the Criminal Procedure and Investigations Act 1996, so that the court is fully informed of what is in issue. When a defendant makes an application for a witness anonymity order the prosecutor should consider the continuing duty to disclose material under section 7A of the Criminal Procedure and Investigations Act 1996; therefore a prosecutor's response should include confirmation that that duty has been considered. Great care should be taken to ensure that nothing disclosed contains anything that might reveal the witness' identity. A respondent prosecutor should provide the court with all available information relevant to the considerations to which the Act requires a court to have regard, whether or not that information falls to be disclosed under the 1996 Act.

Determination of the application

18D.8 All parties must have an opportunity to make oral representations to the court on an application for a witness anonymity order: section 87(6) of the Act. However, a hearing may not be needed if none is sought: CrimPR 18.18(1)(a). Where, for example, the witness is an investigator who is recognisable by the defendant but known only by an assumed name, and there is no likelihood that the witness' credibility will be in issue, then the court may indicate a provisional decision and invite representations within a defined period, usually 14 days, including representations about whether there should be a hearing. In such a case, where the parties do not object the court may make an order without a hearing. Or where the court provisionally considers an application to be misconceived, an applicant may choose to withdraw it without requiring a hearing. Where the court directs a hearing of the application then it should allow adequate time for service of the representations in response.

18D.9 The hearing of an application for a witness anonymity order usually should be in private: CrimPR 18.18(1)(a). The court has power to hear a party in the absence of a defendant and that defendant's representatives: section 87(7) of the Act and rule 18.18(1)(b). In the Crown Court, a recording of the proceedings will be made, in accordance with CrimPR 5.5. The Crown Court officer must treat such a recording in the same way as the recording of an application for a public interest ruling. It must be kept in secure conditions, and the arrangements made by the Crown Court officer for any transcription must impose restrictions that correspond with those under CrimPR 5.5(2).

18D.10 Where confidential supporting information is presented to the court before the last stage of the hearing, the court may prefer not to read that information until that last stage.

18D.11 The court may adjourn the hearing at any stage, and should do so if its duty under CrimPR 3.2 so requires.

18D.12 On a prosecutor's application, the court is likely to be assisted by the attendance of a senior investigator or other person of comparable authority who is familiar with the case.

18D.13 During the last stage of the hearing it is essential that the court test thoroughly the information supplied in confidence in order to satisfy itself that the conditions prescribed by the Act are met. At that stage, if the court concludes that this is the only way in which it can satisfy itself as to a relevant condition or consideration, exceptionally it may invite the applicant to present the proposed witness to be questioned by the court. Any such questioning should be carried out at such a time, and the witness brought to the court in such a way, as to prevent disclosure of his or her identity.

18D.14 The court may ask the Attorney General to appoint special counsel to assist. However, it must be kept in mind that, 'Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant': *R v H* [2004] UKHL 3, [2004] 2 A.C. 134 (at paragraph 22), [2004] 2 Cr. App. R. 10. Whether to accede to such a request is a matter for the Attorney General, and adequate time should be allowed for the consideration of such a request.

18D.15 The Court of Appeal in *R v Mayers* 'emphasise[d] that all three conditions, A, B and C, must be met before the jurisdiction to make a witness anonymity order arises. Each is mandatory. Each is distinct.' The Court also noted that if there is more than one

anonymous witness in a case any link, and the nature of any link, between the witnesses should be investigated: 'questions of possible improper collusion between them, or cross-contamination of one another, should be addressed.'

18D.16 Following a hearing the court should announce its decision on an application for a witness anonymity order in the parties' presence and in public: CrimPR 18.4(2). The court should give such reasons as it is possible to give without revealing the witness' identity. In the Crown Court, the court will be conscious that reasons given in public may be reported and reach the jury. Consequently, the court should ensure that nothing in its decision or its reasons could undermine any warning it may give jurors under section 90(2) of the Act. A record of the reasons must be kept. In the Crown Court, the announcement of those reasons will be recorded.

Order

18D.17 Where the court makes a witness anonymity order, it is essential that the measures to be taken are clearly specified in a written record of that order approved by the court and issued on its behalf. An order made in a magistrates' court must be recorded in the court register, in accordance with CrimPR 5.4.

18D.18 Self-evidently, the written record of the order must not disclose the identity of the witness to whom it applies. However, it is essential that there be maintained some means of establishing a clear correlation between witness and order, and especially where in the same proceedings witness anonymity orders are made in respect of more than one witness, specifying different measures in respect of each. Careful preservation of the application for the order, including the confidential part, ordinarily will suffice for this purpose.

Discharge or variation of the order

18D.19 Section 91 of the Act allows the court to discharge or vary a witness anonymity order: on application, if there has been a material change of circumstances since the order was made or since any previous variation of it; or on its own initiative. CrimPR 18.21 allows the parties to apply for the variation of a pre-trial direction where circumstances have changed.

18D.20 The court should keep under review the question of whether the conditions for making an order are met. In addition, consistently with the parties' duties under CrimPR 1.2 and 3.3, it is incumbent on each, and in particular on the applicant for the order, to keep the need for it under review.

18D.21 Where the court considers the discharge or variation of an order, the procedure that it adopts should be appropriate to the circumstances. As a general rule, that procedure should approximate to the procedure for determining an application for an order. The court may need to hear further representations by the applicant for the order in the absence of a respondent defendant and that defendant's representatives.

Retention of confidential material

18D.22 If retained by the court, confidential material must be stored in secure conditions by the court officer. Alternatively, subject to such directions as the court may give, such material may be committed to the safe keeping of the applicant or any other appropriate person in exercise of the powers conferred by CrimPR 18.6. If the material is released to any such person, the court should ensure that it will be available to the court at trial.

CPD V Evidence 18E: USE OF S. 28 YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999; PRE-RECORDING OF CROSS-EXAMINATION AND RE-EXAMINATION FOR WITNESSES CAPTURED BY S.16 YJCEA 1999.

18E.1 When Section 28 of the Youth Justice and Criminal Evidence Act 1999 (s.28 YJCEA 1999) is bought into force by Statutory Instrument for a particular Crown Court, under that S.I., a witness will be eligible for special measures under s.28 if

i. he or she is under the age of 18 at the time of the special measures hearing; or

ii. he or she suffers from a mental disorder within the meaning of the Mental Health Act 1983, or has a significant impairment of intelligence and social functioning, or has a physical disability or a physical disorder, and the quality of his or her evidence is likely to be diminished as a consequence.

18E.2 This process is governed by the Criminal Procedure Rules and careful attention should be paid to the court's case management powers and the obligations on the parties. Advocates should also refer to the annex of this practice direction which contains further detailed guidance on ground rules hearings.

18E.3 The Resident Judge may appoint a judicial lead from full time judges at the court centre who will be responsible for monitoring and supervision of the scheme. The Plea and Trial Preparation Hearing (PTPH) must be conducted by a full time judge authorised by the Resident Judge to sit on that class of case and who has been authorised to deal with s.28 YJCEA 1999 cases by the Resident Judge.

18E.4 Reference should be made to the joint protocol agreed between the police and the Crown Prosecution Service.

18E.5 Witnesses eligible for special measures under s.28 YJCEA 1999 should be identified by the police. The police and Crown Prosecution Service should discuss, with the witness or with the witness' parent or carer, special measures available and the witness' needs, such that the most appropriate package of special measures can be identified. This may include use of a Registered Intermediary. See Criminal Practice Directions of 2015 (CPD) General matters 3D: Vulnerable people in the courts and 3F: Intermediaries.

18E.6 For access to special measures under s.28 YJCEA 1999, the witness' interview must be recorded in accordance with the Achieving Best Evidence ('ABE') guidance which is available on the Ministry of Justice website.

18E.7 For timetabling of the case, it is imperative that the investigators and prosecutor commence the disclosure process at the start of the investigation. The *Judicial Protocol on Disclosure of Unused Material in Criminal Proceedings* (November 2013) must be followed, and if applicable, the *2013 Protocol and Good Practice Model on Disclosure of information in cases of alleged child abuse and linked criminal and care directions*. Local Implementation Teams (LITs) should encourage all appropriate agencies to endorse and follow both the Protocol and the Good Practice Model. LITs should monitor compliance and issues should initially be raised at the LITs.

The first hearing in the magistrates' court

18E.8 Initial details of the prosecution case must be served in accordance with Part 8 of the Rules.

18E.9 The prosecutor must formally notify the court at the first hearing that the case is eligible for special measures under s.28 YJCEA 1999.

18E.10 At the hearing the court must follow part 9 of the Rules (Allocation) and refer to the Sentencing Council's guideline on Allocation. This practice direction applies only where the defendant indicates a not guilty plea or does not indicate a plea, and the case is sent for trial in the Crown Court, either with or without allocation.

18E.11 If the case is to be sent to the Crown Court, the prosecutor should inform the court and the defence if not already notified that the prosecution will seek special measures including under s.28 YJCEA 1999.

18E.12 In any case that is sent to the Crown Court for trial in which the prosecution has notified the court of its intention to make an

application for special measures under s.28 of the YJCEA 1999 the timetable is that as established by the Better Case Management initiative. The Court must be mindful of its duties under Parts 1 and 3 of the Rules to manage the case effectively. Wherever the Crown Prosecution Service will seek a s.28 YJCEA 1999 special measures direction this should, where possible, be listed for PTPH within 28 days of the date of sending from the magistrates' court. Section 10.2 of *A protocol between the Association of Chief Police Officers, the Crown Prosecution Service and Her Majesty's Courts and Tribunals Service to expedite cases involving witnesses under 10 years* does not apply.

18E.13 From the point of grant of the s.28 YJCEA 1999 special measures application, timescales provided by section 8.6 of *A protocol between the Association of Chief Police Officers, the Crown Prosecution Service and Her Majesty's Courts and Tribunals Service to expedite cases involving witnesses under 10 years* will cease to apply and the case should be managed in accordance with the timescales established in this practice direction.

Before the PTPH hearing in the Crown Court

18E.14 On being notified of the sending of the case by the magistrates' court, the case should be flagged as a s.28 case and referred to the Resident Judge or the judicial lead at that Crown Court, according to instructions issued by the Resident Judge.

18E.15 A transcript of the ABE interview and the application for special measures, including under s.28 YJCEA 1999, must be served on the Court and defence at least 7 days prior to the PTPH. The report of any Registered Intermediary must be served with the application for special measures.

18E.16 Any defence representations about the application for special measures must be served before the PTPH, within 28 days from the first hearing at the magistrates' court, when notice was first given of the application.

Plea and Trial Preparation Hearing

18E.17 The s.28 YJCEA 1999 part of the PTPH form should, on enquiry of the parties, be completed by the judge during the hearing. Orders should be recorded on the form, and uploaded onto the Digital Case System (DCS) as the record of orders made by the court. Any unrepresented defendant should be served with a paper copy of the orders.

18E.18 A plea should be taken and recorded and the defence required to identify the issues. The detail of a defence statement is not

required at this stage, but the defence should identify the core issues in dispute.

The application

18E.19 The judge may hear submissions from the advocates and will rule on the application. If it is refused (see the assumptions to be applied by the courts in s.21 and s.22 of the YJCEA 1999), this practice direction ceases to apply.

18E.20 If the application is granted, the judge should make orders and give directions for preparation for the recorded cross-examination and re-examination hearing and advance preparation for the trial, including for disclosure of unused material. The correct and timely application of the Criminal Procedure and Investigations Act 1996 ('CPIA 1996') will be vital and close attention should be paid to the *2013 Protocol and Good Practice Model on Disclosure* (November 2013), above.

18E.21 The orders made are likely to include:

i. Service of the prosecution evidence within 50 days of sending ;
ii. Directions for service of defence witness requirements;
iii. Service of initial disclosure; under the CPIA 1996, as soon as reasonably practical; in this context, this should be interpreted as being simultaneous with the service of the prosecution evidence, i.e. within 50 days of sending for both bail and custody cases. This will be within 3 weeks of the PTPH;
iv. Orders on disclosure material held by a third party;
v. Service of the defence statement; under the CPIA 1996, this must be served within 28 days of the prosecutor serving or purporting to serve initial disclosure;
vi. Any editing of the ABE interview;
vii. Fixing a date for a ground rules hearing, about one week prior to the recorded cross-examination and re-examination hearing, see CPD General matters 3E: Ground rules hearings to plan questioning of a vulnerable witness or defendant;
viii. Service of the Ground Rules Hearing Form by the defence advocate;
ix. Making arrangements for the witness to refresh his or her memory by viewing the recorded examination-in-chief ('ABE interview'), see CPD Evidence 18C: Visually recorded interviews: memory refreshing and watching at a different time from the jury;
x. Making arrangements for the recorded cross-examination and re-examination hearing under s.28, including fixing a date, time and location;
xi. Other special measures;

xii. Directions for any further directions hearing whether at the conclusion of the recorded cross-examination and re-examination hearing or subsequently;
xiii. Fixing a date for trial.

18E.22 The timetable should ensure the prosecution evidence and initial disclosure are served swiftly. The ground rules hearing will usually be soon after the deadline for service of the defence statement, the recorded cross-examination and re-examination hearing about one week later. However, there must be time afforded for any further disclosure of unused material following service of the defence statement and for determination of any application under s.8 of the CPIA 1996. Subject to judicial discretion applications for extensions of time for service of disclosure by either party should generally be refused.

18E.23 Where the defendant may be unfit to plead, a timetable for s.28 should usually still be set, taking into account extra time needed for the obtaining of medical reports, save in cases where it is indicated that it is unlikely that there would be a trial if the defendant is found fit.

18E.24 As far as possible, without diminishing the defendant's right to a fair trial, the timing and duration of the recorded cross-examination should take into account the needs of the witness. For a young child, the hearing should usually be in the morning and conclude before lunch time.

18E.25 An application for a witness summons to obtain material held by a third party, should be served in advance of the PTPH and determined at that hearing, or as soon as reasonably practicable thereafter. The timetable should accommodate any consequent hearings or applications, but it is imperative parties are prompt to obtain third party disclosure material. The prosecution must make the court and the defence aware of any difficulty as soon as it arises. As noted above, the *2013 Protocol and Good Practice Model on Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings* should be followed, if applicable. Engagement with the Protocol is to be overseen by LITs. A single point of contact in each relevant agency can facilitate speedy disclosure.

18E.26 The needs of other witnesses should not be neglected. Witness and intermediary availability dates should be available for the PTPH.

Prior to ground rules hearing and hearing under section 28

18E.27 It is imperative parties abide by orders made at the PTPH, including the completion and service of the Ground Rules Hearing

Form by the defence advocate. Delays or failures must be reported to the judge as soon as they arise; this is the responsibility of each legal representative. If ordered, the lead lawyer for the prosecution and defence must provide a weekly update to the court Case Progression Officer, copied to the judge and parties, detailing the progress and any difficulties or delays in complying with orders. The court may order a further case management hearing if necessary.

18E.28 Any applications under s.100 of the Criminal Justice Act 2003 ('CJA 2003') (non-defendant's bad character) or under s.41 of the YJCEA 1999 (evidence or cross-examination about complainants sexual behaviour) or any other application which may affect the cross-examination must be made promptly, and responses submitted in time for the judge to rule on the application at the ground rules hearing. Parts 21 and 22 of the Rules apply to applications under s.100 and s.41 respectively.

18E.29 The witness' court familiarisation visit must take place, including an opportunity to practice on the live link/recording facilities, see the Code of Practice for Victims of Crime, October 2013, Chapter 3, paragraph 1.22. The witness must have the opportunity to view his or her ABE interview to refresh his or her memory. It may or may not be appropriate for this to take place on the day of the court visit: CPD Evidence 18C must be followed.

18E.30 When the court has deemed that the case is suitable for the witness to give evidence from a remote site then a familiarisation visit should take place at that site. At the ground rules hearing the judge and advocates should consider appropriate arrangements for them to talk to the witness before the cross examination hearing.

18E.31 Applications to vary or discharge a special measures declaration must comply with Rule 18.11. Although the need for prompt action will make case preparation tight.

Ground rules hearing

18E.32 Advocates should master the toolkits available through The Advocate's Gateway. These provide guidance on questioning a vulnerable witness, see CPD General matters 3D and the annex to this practice direction.

18E.33 Any appointed Registered Intermediary must attend the ground rules hearing, see CPD General matters 3E.2.

18E.34 The defence advocate at the ground rules hearing must be she or he who will conduct the recorded cross-examination. See listing

and allocation below on continuity of counsel and release from other cases.

18E.35 Topics for discussion and agreement at the ground rules hearing will depend on the individual needs of the witness, and an intermediary may provide advance indications. CPD General matters 3E must be followed. Topics that will need discussion in every case will include:

i. the overall length of cross-examination;
ii. cross-examination by a single advocate in a multi-handed case;
iii. any restrictions on the advocate's usual duty to 'put the defence case'.

iv.

18E.36 It may be helpful to discuss at this stage how any limitations on questioning will be explained to the jury.

18E.37 At the ground rules hearing, the judge should:

i. rule on any application under s.100 of the CJA 2003 or s.41 of the YJCEA 1999, or other applications that may affect the cross-examination;
ii. decide how the witness may view exhibits or documents;
iii. review progress in complying with orders made at the preliminary hearing and make any necessary orders.

Recording of cross-examination and re-examination: hearing under s.28

18E.38 At the hearing, the witness will be cross-examined and re-examined, if required, via the live link from the court room to the witness suite (unless provision has been made for the use of a remote link) and the examination will be recorded. It is the responsibility of the designated court clerk to ensure in advance that all of the equipment is working and to contact the provider's Service Desk if support is required. Any other special measures must be in place and any intermediary or supporter should sit in the live link room with the witness. The intermediary's role is transparent and therefore must be visible and audible to the judge and advocates at the cross-examination and in the subsequent replaying.

18E.39 The judge, advocates and parties, including the defendant will usually assemble in the court room for the hearing. In some cases the judge and advocates may be in the witness suite with the witness, for example when questioning a very young child or where the witness has a particular communication need. The court will decide this on a case-by-case basis. The defendant should be able to communicate with his or her representatives and should be able to hear the witness via the live link and see the proceedings:

s.28 (2). Whether the witness is screened or not will depend on the other special measures ordered, for example screens may have been ordered under s.23 YJCEA 1999.

18E.40 On the admission of the public or media to the hearing, please see below.

18E.41 At the conclusion of the hearing, the judge will issue further orders, such as for the editing of the recorded cross-examination and may set a timetable for progress.

18E.42 Under s.28(4) YJCEA 1999, the judge, on application of any parties or on the court's own motion may direct that the recorded examination is not admitted into evidence, despite any previous direction. Such direction must be given promptly, preferably immediately after the conclusion of the examination.

18E.43 Without exception, editing of the ABE interview/examination-in-chief or recorded cross-examination is precluded without an order of the court.

18E.44 The ability to record simultaneously from a court and a witness room and to play back the recording at trial will be provided in all Crown Courts as an additional facility within the existing Justice Video Service (JVS). Courts will book recording slots with the Service Desk who will launch the recording at the scheduled time when the court is ready. Recordings will be stored in a secure data centre with backup and resiliency, for authorised access.

After the recording

18E.45 Following the recording the judge should review compliance with orders and progress towards preparation for trial, make any further orders necessary and confirm the date of the trial. Any further orders made by the judge should be recorded and uploaded onto the relevant section of the DCS.

18E.46 If the defendant enters a guilty plea, the judge should proceed towards sentence, making any appropriate orders, such as for a Pre-Sentence Report and setting a date for sentencing. Any reduction for a guilty plea shall reflect the day of the recorded cross-examination as the first day of trial; the Sentencing Council guideline on guilty plea reductions should be applied.

Preparation for trial

18E.47 Parties must notify the court promptly if any difficulties arise or any orders are not complied with. The court may order a further case management hearing (FCMH).

18E.48 In accordance with orders, either after recorded cross-examination or at the FCMH, necessary editing of the ABE interview/examination-in-chief and/or the recorded cross-examination must be done only on the order of the court. Any editing must be done promptly.

18E.49 Recorded cross-examinations and re-examinations will be stored securely by the service provider so as to be accessible to the advocates and the court. It will not usually be necessary to obtain a transcript of the recorded cross-examination, but if it is difficult to comprehend, a transcript should be obtained and served. The ground rules hearing form outlines questions to the witness that might be completed electronically by the judge during cross-examination forming a contemporaneous note of the hearing, served on the parties as an agreed record.

18E.50 Editing, authorised by the judge, is to be submitted by the court to the Service Desk, who produce an edited copy. The master and all edited copy versions are retained in the secure data centre from where they can be accessed. Courts book playback timeslots with the Service Desk for the trial date. The court may authorise parties to view playback at JVS endpoints, by submitting a request form to the Service Desk. Access for those so authorised is via the Quickcode (recording ID) and a security PIN (password) on the courtroom touch panel or remote control.

18E.51 No further cross-examination or re-examination of the witness may take place unless the criteria in section 28(6) are satisfied and the judge makes a further special measures direction under section 28(5). Any such further examination must be recorded via live link as described above.

18E.52 Section 28(6) of the YJCEA 1999 provides as follows:
(6) The court may only give such a further direction if it appears to the court—

(a) that the proposed cross-examination is sought by a party to the proceedings as a result of that party having become aware, since the time when the original recording was made in pursuance of subsection (1), of a matter which that party could not with reasonable diligence have ascertained by then, or

(b) that for any other reason it is in the interests of justice to give the further direction.

18E.53 Any application under section 28(5) must be in writing and be served on the court and the prosecution at least 28 days before the date of trial. The application must specify:

i. the topics on which further cross-examination is sought;

ii. the material or matter of which the defence has become aware since the original recording;
iii. why it was not possible for the defence to have obtained the material or ascertained the matter earlier; and
iv. the expected impact on the issues before the court at trial.

18E.54 The prosecution should respond in writing within 7 days of the application. The judge may determine the application on the papers or order a hearing. Any further cross-examination ordered must be recorded via live link in advance of the trial and served on the court and the parties.

Trial

18E.55 In accordance with the judge's directions, the ABE interview/examination-in-chief and the recorded cross-examination and re-examination, edited as directed, should be played to the jury at the appropriate point within the trial.

18E.56 The jury should not usually receive transcripts of the recordings, and if they do these should be removed from the jury as soon as the recording has been played, see CPD Trial 26L.2.

18E.57 If the matter was not addressed at the ground rules hearing, the judge should discuss with the advocates how any limitations on questioning should be explained to the jury before summing-up.

After conclusion of trial

18E.58 Immediately after the trial, the ABE interview/examination-in-chief and the recorded cross-examination and re-examination should be stored securely on the cloud.

Listing and allocation

18E.59 **Advocates:** It is the responsibility of the defence advocate, on accepting the brief, to ensure that he or she is available for both the ground rules hearing and the hearing under section 28; continuity at trial is obligatory except in exceptional circumstances. The judge and list office will make whatever reasonable arrangements are possible to achieve this, assisted by the Resident Judge where necessary.

18E.60 When the timetable for the case is being set, advocates must have their up to date availability with them (in so far as is possible). When an advocate who is part-heard in another trial at a different Crown Court centre finds themselves in difficulties in attending either the ground rules hearing, s.28 hearing itself or the trial where s.28 has been utilised, they must inform the Resident Judges

of both courts as soon as practicable. The Resident Judges must resolve any conflict with the advocate's availability. The starting point should be that the case involving s.28 hearing takes priority. However, due consideration should also be given to custody time limits, other issues which make either case particularly complex or sensitive, high profile cases and anything else that the judges should take into consideration in the interests of justice.

18E.61 **Judicial**: All PTPHs must be listed before judges who have been authorised to deal with s.28 cases by the Resident Judge at the relevant court centre. The nominated lead judge (if there is one) or Resident Judge may allocate individual cases to one of the judges in the court centre identified to deal with the case if necessary. The Resident Judge, lead judge or allocated judge may make directions in the case if required.

18E.62 It is essential that the ground rules hearing and the s. 28 YJCEA 1999 hearing are before the same judge. Once the s.28 hearing has taken place, any judge, in accordance with CPD XIII Listing E, including recorders, can deal with the trial.

18E.63 LITs should be established with all relevant agencies represented by someone of sufficient seniority. Their task will be to monitor the operation of the scheme and compliance with this practice direction and other relevant protocols.

18E.64 **Listing**: Due to the limited availability of recording facilities, the hearing held under section 28 must take precedence over other hearings. Section 28 hearings should be listed as the first matter in the morning and will usually conclude before lunch time. Ground rules hearings may be held at any time, including towards the end of the court day, to accommodate the advocates and intermediary (if there is one) and to minimise disruption to other trials.

Public, including media access, and reporting restrictions

18E.65 Open justice is an essential principle of the common law. However, certain automatic statutory restrictions may apply, and the judge may consider it appropriate in the specific circumstances of a case to make an order applying discretionary restrictions. CPD Preliminary proceedings 16B must be followed and the templates published by the Judicial College (available on LMS) should be used. The parties to the proceedings, and interested parties such as the media, should have the opportunity to make representations before an order is made.

18E.66 The statutory powers most likely to be available to the judge are listed below. The judge should consider the specific statutory requirements necessary for the making of the particular order carefully, and the order made must be in writing.

a) Provisions to exclude the public from hearings:
   i. Section 37 of the Children and Young Persons Act 1933, applicable to witnesses under 18;
   ii. Section 25 of the YJCEA 1999, applicable to the evidence of a child or vulnerable adult in sexual offences cases.

b) Automatic reporting restrictions:
   i. Section 1 of the Sexual Offences (Amendment) Act 1992, applicable to the complainant in any sex offence case.

c) Discretionary reporting restrictions:
   i. Section 45 of the YJCEA 1999, applicable to under 18s concerned in criminal proceedings;
   ii. Section 46 of the YJCEA 1999, applicable to an adult witness whose evidence would be diminished by fear or distress.

d) Postponement of fair and accurate reports under section 4(2) of the Contempt of Court Act 1981.

18E.67 Note that public access to information held by the court is now the subject of Rule 5.8 and CPD General matters 5B that must be followed.

Annex for section 28 ground rules hearings at the Crown Court when dealing with witnesses under s.16 YJCEA 1999

Introduction

1. This annex is designed to assist all advocates in their preparation for cross-examination of vulnerable witnesses.

2. Adherence to the principles below will avoid interruption during the pre-recorded cross-examination and reduce any ordered editing.

3. Issues concerning the vulnerable witness and the nature of the cross-examination will be addressed by the judge at the Ground Rules Hearing (GRH).

4. In appropriate cases and in particular where the witness is of very young years or suffers from a disability or disorder it is expected that the advocate will have prepared his or her cross-examination in writing for consideration by the court.

5. It is thus incumbent on the Defence to ensure that full instructions have been taken prior to the GRH.

Required preparation prior to the GRH

6. All advocates should be familiar with the relevant toolkits, available through **The Advocates Gateway** www.theadvocatesgateway.org/toolkits

which provide guidance on questioning a vulnerable witness. A synopsis of this guidance, which advocates should have read prior to any GRH, is included in this annex.

Attendance at, and procedure during, the GRH

7. In preparation for trial, courts must take every reasonable step to facilitate the participation of witnesses and defendants CPR 3.8(4) (d). The court should order that the defendant attends the GRH.

8. The defence advocate must complete and submit the Ground Rules Hearing form by the time and date ordered at the PTPH.

9. The hearing facilitates the judge's duty to control questioning if and when necessary.

10. The hearing enables the court to ensure its process is adapted to enable the witness to give his or her best evidence whilst ensuring the defendant's right to a fair trial is not diminished. Accordingly the ground rules and the nature of the questioning of the witness by the advocate (and limitations imposed if necessary in accordance with principles above) will be discussed.

11. Prior to the hearing it is necessary for both advocates and the judge to have viewed the ABE evidence.

12. The judge will state what ground rules will apply. The advocates must comply with them.

13. Any intermediary must attend the GRH. It is the responsibility of those instructing the intermediary to ensure this.

14. The defendant's advocate attending the hearing must be the same advocate who will be conducting the recorded cross-examination (and the subsequent trial, if any).

15. Any intermediary for the witness should only be warned for the GRH and the section 28 hearing they are assisting with. An Intermediary should not be instructed unless available to attend the GRH and the section 28 hearings ordered by the court.

16. Topics for discussion and agreement at the GRH will depend on the individual needs of the witness. CPD I General Matters 3E must be followed.

17. Topics of discussion at the hearing will include the length of cross-examination and any restrictions on the advocate's usual duty to "put the defence case". As was made plain by the Vice President of the Court of Appeal Criminal Division in *Regina v Lubemba and Pooley* 2014 EWCA Crim 2064, advocates cannot insist upon any supposed right "to put one's

case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness. It is expected that all advocates will be familiar with and have read this case.

18. At the GRH counsel need to agree with the judge how and when the matters referred to in paragraph 11 will be explained to the jury. This explanation will normally be done by the judge, but may exceptionally, and only with the permission of the judge, be explained by counsel. If there is no agreement the judge will rule on it.

19. A Section 28 Defence GRH form should be completed as far as possible prior to attendance at the GRH before the judge.

20. Rulings will be made on any application under section 100 of the CJA 2003 or section 41 of the YCEA 1999, and on any other application that may affect the conduct of the cross examination. Any ruling will be included in the trial practice note.

21. A review will take place of the progress made by the parties in complying with the orders made at the PTPH and the court will make any other necessary orders.

22. Additional information can be found in the Inns of Court College of Advocacy training document "Advocacy and the vulnerable: 20 principles of questioning" at the following link:

    www.icca.ac.uk/images/download/advocacy-and-the-vulnerable/20-principles-of-questioning.pdf

    This document is part of a suite of training materials available to assist advocates in dealing with questioning vulnerable victims in the criminal justice system.

Court of Appeal guidance

In a series of decisions the Court of Appeal has made it clear that there has to be a different and fresh approach to the cross-examination of, in particular, children of tender years, and witnesses who are vulnerable as a result of mental incapacity. The following propositions have support in decisions on appeal: (*R v B 2010 EWCA Crim 4; R v F 2013 EWCA Crim 424; Wills v R 2011 EWCA Crim 1938; R v Edwards 2011 EWCA Crim 3028; R v Watts 2010 EWCA Crim 1824; R v W and M 2010 EWCA Crim 1926)*

"The reality of questioning children of tender years is that direct challenge that he or she is wrong or lying could lead to confusion and, worse, to capitulation which the child does not, in reality, accept.

Capitulation is not a consequence of unreliability but a function of the youngster's age. Experience has shown that young children are scared of disagreeing with a mature adult whom they do not wish to confront.

It is common, in the trial of an adult, to hear, once the nursery slopes of cross-examination have been skied, the assertion ' you were never punched or kicked, as you have suggested, were you?'

It was precisely that approach which the Court is anxious to avoid. Such an approach risks confusion in the minds of the witness whose evidence was bound to take centre stage, and it is difficult to see how it can be helpful. We struggle to understand how the defendant's right to a fair trial was in any way compromised simply because Mr X was not allowed to ask the question ' Simon did not punch you in the way you suggest?"

"The overriding objective. The Criminal Procedure Rules objective is that criminal cases be dealt with justly. Dealing with a criminal case justly includes dealing with the case efficiently and expeditiously in ways that take account of the gravity of the offence alleged and the complexity of what is in issue.

In our collective experience the age of a witness is not determinative of his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated for what they are, not what they will, in the years ahead, grow to be.

There is undoubtedly a danger of a child witness wishing simply to please. There is undoubtedly a danger of a child witness assenting to what is put rather than disagreeing during the questioning process in an endeavour to bring that process to a speedier conclusion.

It is particularly important in the case of a child witness to keep a question short and simple, and even more important than it is with an adult witness to avoid questions which are rolled up and contain, inadvertently two or three questions at once. It is generally recognised that, particularly with child witnesses, short and untagged questions are best at eliciting the evidence. By untagged we mean questions that do not contain a statement of the answer which is sought. That said, when it comes to directly contradicting a particular statement and inviting the witness to face a directly contradictory suggestion, it may often be difficult to examine otherwise.

No doubt if a way can be found of engaging the witness to tell the story, and the content then differs from what had been said before, that will be a yet better indication that the original account is wrong. But that is difficult to achieve and indeed may itself have the disadvantage of prolonging the child's time giving evidence. Even then there may be no guarantee as to which account is the more reliable.

Most of the questions which produced the answers which were chiefly relied upon, unlike many others, constituted the putting of direct suggestions with an indication of the answer ' this happened didn't it '? Or "this didn't happen, did it?" The consequence of that is that it can be very difficult to tell whether the child is truly changing her account or simply taking the line of least resistance.

At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken, when claiming that the defendant behaved indecently towards him or her, it should not be over problematic for the advocate to formulate short, simple questions, which put the essential elements of the defendant's case to the witness, and fully ventilate before the jury the areas of evidence which bear on the child's credibility.

Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury. However it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child, and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury, in any event, from different sources.

Notwithstanding some of the difficulties; when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well-rehearsed untruthful script, learned by rote; or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension; and are therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.

Clear limitations have to be imposed on the cross-examination of vulnerable young complainants."

CrimPR Part 19 Expert evidence

CPD V Evidence 19A: EXPERT EVIDENCE

19A.1 Expert opinion evidence is admissible in criminal proceedings at common law if, in summary, (i) it is relevant to a matter in issue in the proceedings; (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and (iii) the witness is competent to give that opinion.

19A.2 Legislation relevant to the introduction and admissibility of such evidence includes section 30 of the Criminal Justice Act 1988, which provides that an expert report shall be admissible as evidence in criminal proceedings whether or not the person making it gives oral evidence, but that if he or she does not give oral evidence then the report is admissible only with the leave of the court; and CrimPR Part 19 , which in exercise of the powers conferred by section 81 of the Police and Criminal Evidence Act 1984 and section 20 of the Criminal Procedure and Investigations Act 1996 requires the service of expert evidence in advance of trial in the terms required by those rules.

19A.3 In the Law Commission report entitled 'Expert Evidence in Criminal Proceedings in England and Wales', report number 325, published in March, 2011, the Commission recommended a statutory test for the admissibility of expert evidence. However, in its response the government declined to legislate. The common law, therefore, remains the source of the criteria by reference to which the court must assess the admissibility and weight of such evidence; and CrimPR 19.4 lists those matters with which an expert's report must deal, so that the court can conduct an adequate such assessment.

19A.4 In its judgment in *R v Dlugosz and Others* [2013] EWCA Crim 2, the Court of Appeal observed (at paragraph 11): "It is essential to recall the principle which is applicable, namely in determining the issue of admissibility, the court must be satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted. If there is then the court leaves the opposing views to be tested before the jury." Nothing at common law precludes assessment by the court of the reliability of an expert opinion by reference to substantially similar factors to those the Law Commission recommended as conditions of admissibility, and courts are encouraged actively to enquire into such factors.

19A.5 Therefore factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:

(a) the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;

(b) if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);

(c) if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

(d) the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

(e) the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

(f) the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

(g) if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

(h) whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

19A.6 In addition, in considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:

(a) being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

(b) being based on an unjustifiable assumption;

(c) being based on flawed data;

(d) relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

(e) relying on an inference or conclusion which has not been properly reached.

CPD V Evidence 19B: STATEMENTS OF UNDERSTANDING AND DECLARATIONS OF TRUTH IN EXPERT REPORTS

19B.1 The statement and declaration required by CrimPR 19.4(j), (k) should be in the following terms, or in terms substantially the same as these:

'I (name) DECLARE THAT:

1. I understand that my duty is to help the court to achieve the overriding objective by giving independent assistance by way of objective, unbiased opinion on matters within my expertise, both in preparing reports and giving oral evidence. I understand that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied with and will continue to comply with that duty.

2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.

3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.

4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.

5. I will advise the party by whom I am instructed if, between the date of my report and the trial, there is any change in circumstances which affect my answers to points 3 and 4 above.

6. I have shown the sources of all information I have used.

7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.

8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.

9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others including my instructing lawyers.

10. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction or qualification.

11. I understand that:

(a) my report will form the evidence to be given under oath or affirmation;

(b) the court may at any stage direct a discussion to take place between experts;

(c) the court may direct that, following a discussion between the experts, a statement should be prepared showing those issues which are agreed and those issues which are not agreed, together with the reasons;

(d) I may be required to attend court to be cross-examined on my report by a cross-examiner assisted by an expert.

(e) I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.

12. I have read Part 19 of the Criminal Procedure Rules and I have complied with its requirements.

13. I confirm that I have acted in accordance with the code of practice or conduct for experts of my discipline, namely *[identify the code]*

14. [For Experts instructed by the Prosecution only] I confirm that I have read guidance contained in a booklet known as *Disclosure: Experts' Evidence and Unused Material* which details my role and documents my

responsibilities, in relation to revelation as an expert witness. I have followed the guidance and recognise the continuing nature of my responsibilities of disclosure. In accordance with my duties of disclosure, as documented in the guidance booklet, I confirm that:

(a) I have complied with my duties to record, retain and reveal material in accordance with the Criminal Procedure and Investigations Act 1996, as amended;

(b) I have compiled an Index of all material. I will ensure that the Index is updated in the event I am provided with or generate additional material;

(c) in the event my opinion changes on any material issue, I will inform the investigating officer, as soon as reasonably practicable and give reasons.

I confirm that the contents of this report are true to the best of my knowledge and belief and that I make this report knowing that, if it is tendered in evidence, I would be liable to prosecution if I have wilfully stated anything which I know to be false or that I do not believe to be true.'

CPD V Evidence 19C: PRE-HEARING DISCUSSION OF EXPERT EVIDENCE

19C.1 To assist the court in the preparation of the case for trial, parties must consider, with their experts, at an early stage, whether there is likely to be any useful purpose in holding an experts' discussion and, if so, when. Under CrimPR 19.6 such pre-trial discussions are not compulsory unless directed by the court. However, such a direction is listed in the magistrates' courts Preparation for Effective Trial form and in the Crown Court Plea and Trial Preparation Hearing form as one to be given by default, and therefore the court can be expected to give such a direction in every case unless persuaded otherwise. Those standard directions include a timetable to which the parties must adhere unless it is varied.

19C.2 The purpose of discussions between experts is to agree and narrow issues and in particular to identify:

(a) the extent of the agreement between them;

(b) the points of and short reasons for any disagreement;

(c) action, if any, which may be taken to resolve any outstanding points of disagreement; and

(d) any further material issues not raised and the extent to which these issues are agreed.

19C.3 Where the experts are to meet, that meeting conveniently may be conducted by telephone conference or live link; and experts' meetings always should be conducted by those means where that will avoid unnecessary delay and expense.

19C.4 Where the experts are to meet, the parties must discuss and if possible agree whether an agenda is necessary, and if so attempt to agree one that helps the experts to focus on the issues which need to be discussed. The agenda must not be in the form of leading questions or hostile in tone. The experts may not be required to avoid reaching agreement, or to defer reaching agreement, on any matter within the experts' competence.

19C.5 If the legal representatives do attend:

(a) they should not normally intervene in the discussion, except to answer questions put to them by the experts or to advise on the law; and

(b) the experts may if they so wish hold part of their discussions in the absence of the legal representatives.

19C.6 A statement must be prepared by the experts dealing with paragraphs 19C.2(a) - (d) above. Individual copies of the statements must be signed or otherwise authenticated by the experts, in manuscript or by electronic means, at the conclusion of the discussion, or as soon thereafter as practicable, and in any event within 5 business days. Copies of the statements must be provided to the parties no later than 10 business days after signing.

19C.7 Experts must give their own opinions to assist the court and do not require the authority of the parties to sign a joint statement. The joint statement should include a brief re-statement that the experts recognise their duties, which should be in the following terms, or in terms substantially the same as these:

'We each DECLARE THAT:

1. We individually here re-state the Expert's Declaration contained in our respective reports that we understand our overriding duties to the court, have complied with them and will continue to do so.

2. We have neither jointly nor individually been instructed to, nor has it been suggested that we should, avoid reaching agreement, or defer reaching agreement, on any matter within our competence.'

19C.8 If an expert significantly alters an opinion, the joint statement must include a note or addendum by that expert explaining the change of opinion.

CrimPR Part 21 Evidence of bad character
CPD V Evidence 21A: SPENT CONVICTIONS

21A.1 The effect of section 4(1) of the Rehabilitation of Offenders Act 1974 is that a person who has become a rehabilitated person for the purpose of the Act in respect of a conviction (known as a

'spent' conviction) shall be treated for all purposes in law as a person who has not committed, or been charged with or prosecuted for, or convicted of or sentenced for, the offence or offences which were the subject of that conviction.

21A.2 Section 4(1) of the 1974 Act does not apply, however, to evidence given in criminal proceedings: section 7(2)(a). During the trial of a criminal charge, reference to previous convictions (and therefore to spent convictions) can arise in a number of ways. The most common is when a bad character application is made under the Criminal Justice Act 2003. When considering bad character applications under the 2003 Act, regard should always be had to the general principles of the Rehabilitation of Offenders Act 1974.

21A.3 On conviction, the court must be provided with a statement of the defendant's record for the purposes of sentence. The record supplied should contain all previous convictions, but those which are spent should, so far as practicable, be marked as such. No one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require. When passing sentence the judge should make no reference to a spent conviction unless it is necessary to do so for the purpose of explaining the sentence to be passed.

CrimPR Part 22 Evidence of a complainant's previous sexual behaviour
CPD V Evidence 22A: USE OF GROUND RULES HEARING WHEN DEALING WITH S.41 YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999 (YJCEA 1999) (EVIDENCE OF COMPLAINANT'S PREVIOUS SEXUAL BEHAVIOUR)

22A.1 When a defendant wishes to introduce evidence, or cross-examine about the previous sexual behaviour of the complainant, then it is imperative that the timetable and procedure as laid down in the Criminal Procedure Rules Part 22 is followed. The application must be submitted in writing as soon as reasonably practicable and not more than 14 days after the prosecutor has disclosed material on which the application is based. Should the prosecution wish to make any representations then these should be served on the court and other parties not more than 14 days after receiving the application.

22A.2 The application must clearly state the issue to which the defendant says the complainant's sexual behaviour is relevant and the reasons why it should be admitted. It must outline the evidence which the defendant wants to introduce and articulate the questions which it is proposed should be asked. The application must identify the statutory exception to the prohibition in s.41 YJCEA 1999 on which the defendant relies and give the name and date of birth of any witness whose evidence about the complainant's sexual behaviour the defendant wants to introduce.

The hearing

22A.3 When determining the application, the judge should examine the questions with the usual level of scrutiny expected at a ground rules hearing. For each question that it is sought to put to a witness, or evidence it is sought to adduce, the defence should identify clearly for the judge the suggested relevance it has to an issue in the case. In order for the judge to rule on which evidence can be adduced or questions put, the defence must set out individual questions for the judge; merely identifying a topic is not sufficient for this type of application. The judge should make it clear that if the application is granted then no other questions on this topic will be allowed to be asked, unless with the express permission of the court.

22A.4 The application should be dealt with in private and in the absence of the complainant, but the judge must state in open court, without the jury or complainant present, the reasons for the decision, and if leave is granted, the extent of the questions or evidence that is allowed.

Late applications

22A.5 Late applications should be considered with particular scrutiny especially if there is a suggestion of tactical thinking behind the timing of the application and/or when the application is based on material that has been available for some time. If consideration of a late application has the potential to disrupt the timetabling of witnesses, then the judge will need to take account of the potential impact of delay upon a witness who is due to give evidence. If necessary, the judge may defer consideration of any such application until later in the trial.

22A.6 By analogy, following the approach adopted by the Court of Appeal in *R v Musone* [2007] 1 WLR 2467, the trial judge is entitled to refuse the application where (s)he is satisfied that the applicant is seeking to manipulate the court process so as to prevent the respondent from being able to prepare an adequate response. This may be the only remedy available to the court to ensure that the fairness of the trial is upheld and will be particularly relevant when the application is made on the day of trial.

22A.7 Where the application has been granted in good time before the trial, the complainant is entitled to be made aware that such evidence is part of the defence case.

At the trial

22A.8 Advocates should be reminded that the questioning must be conducted in an appropriate manner. Any aggressive, repetitive and oppressive questioning will be stopped by the judge. Judges

should intervene and stop any attempts to refer to evidence that might have been adduced under s 41, but for which no leave has been given and/or should have formed the basis of a s41 application, but did not do so. When evidence about the complainant's previous sexual behaviour is referred to without an application, the judge may be required to consider whether the impact of that happening is so prejudicial to the overall fairness of the trial that the trial should be stopped and a re-trial should be ordered, should the impact not be capable of being ameliorated by way of jury direction.

CrimPR Part 23 Restriction on cross-examination by a defendant
CPD V Evidence 23A: CROSS-EXAMINATION ADVOCATES

23A.1 At the first hearing in the court in the case, and in a magistrates' court in particular, there may be occasions on which a defendant has engaged no legal representative, within the meaning of the Criminal Procedure Rules, for the purposes of the case generally, but still intends to do so – for example, where he or she has made an application for legal aid which has yet to be determined. Where the defendant nonetheless has identified a prospective legal representative who has a right of audience in the court; where the court is satisfied that that representative will be willing to cross-examine the relevant witness or witnesses in the interests of the defendant should it transpire that the defendant will not be represented for the purposes of the case generally; and if the court is in a position there and then to make, contingently, the decision required by section 38(3) of the Youth Justice and Criminal Evidence Act 1999 ('the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a legal representative appointed to represent the interests of the accused'); then the court may appoint that representative under section 38(4) of the 1999 Act contingently, the appointment to come into effect only if, and when, it is established that the defendant will not be represented for the purposes of the case generally.

23A.2 Where such a provisional appointment is made it is essential that the role and status of the representative is clearly established at the earliest possible opportunity. The court's directions under CrimPR 23.2(3) should require the defendant to notify the court officer, by the date set by the court, whether:

(i) the defendant will be represented by a legal representative for the purposes of the case generally, and if so by whom (in which event the court's provisional appointment has no effect);

(ii) the defendant will not be represented for the purposes of the case generally, but the defendant and the legal representative provisionally

appointed by the court remain content with that provisional appointment (in which event the court's provisional appointment takes effect); or

(iii) the defendant will not be represented for the purposes of the case generally, but will arrange for a lawyer to cross-examine the relevant witness or witnesses on his or her behalf, giving that lawyer's name and contact details.

If in the event the defendant fails to give notice by the due date then, unless it is apparent that she or he will, in fact, be represented for the purposes of the case generally, the court may decide to confirm the provisional appointment and proceed accordingly.

Supply of case papers

23A.3 For the advocate to fulfil the duty imposed by the appointment, and to achieve a responsible, professional and appropriate treatment both of the defendant and of the witness, it is essential for the advocate to establish what is in issue. To that end, it is likewise essential for the advocate to have been supplied with the material listed in CrimPR 23.2(7).

23A.4 In the Crown Court, much of this this can be achieved most conveniently by giving the advocate access to the Crown Court Digital Case System. However, material disclosed by the prosecutor to the defendant under section 3 or section 7A of the Criminal Procedure and Investigations Act 1996 is not stored in that system and therefore must be supplied to the advocate either by the defendant or by the prosecutor. In the latter case, the prosecutor reasonably may omit from the copies supplied to the advocate any material that can have no bearing on the cross-examination for which the advocate has been appointed – the medical or social services records of another witness, for example.

23A.5 In a magistrates' court, pending the introduction of comparable electronic arrangements:

i. in some instances the advocate may have received the relevant material at a point at which he or she was acting as the defendant's legal representative subject to a restriction on the purpose or duration of that appointment notified under CrimPR 46.2(5) – for example, pending the outcome of an application for legal aid.

ii. in some instances the defendant may be able to provide spare copies of relevant material. Where that material has been disclosed by the prosecutor under section 3 or section 7A of the Criminal

Procedure and Investigations Act 1996 then its supply to the advocate by the defendant is permitted by section 17(2)(a) of the 1996 Act (exception to the prohibition against further disclosure where that further disclosure is 'in connection with the proceedings for whose purposes [the defendant] was given the object or allowed to inspect it').

iii. in some instances the prosecutor may be able to supply the relevant material, or some of it, at no, or minimal, expense by electronic means.

iv. in the event that, unusually, none of those sources of supply is available, then the court's directions under CrimPR 23.2(3) should require the court officer to provide copies from the court's own records, as if the advocate were a party and had applied under CrimPR 5.7.

Obtaining information and observations from the defendant

23A.6 Advocates and courts should keep in mind section 38(5) of the 1999 Act, which provides 'A person so appointed shall not be responsible to the accused.' The advocate therefore cannot and should not take instructions from the defendant, in the usual sense; and to avoid any misapprehension in that respect, either by the defendant or by others, some advocates may prefer to avoid direct oral communication with the defendant before, and even perhaps during, the trial.

23A.7 However, as remarked above at paragraph 23A.3, for the advocate to fulfil the duty imposed by the appointment it is essential for him or her to establish what is in issue; which may require communication with the defendant both before and at the trial as well as a thorough examination of the case papers. CrimPR 23.2(7)(a) in effect requires the advocate to have identified the issues on which the cross-examination of the witness is expected to proceed before the court begins to receive prosecution evidence, and to have taken part in their discussion with the court. To that end, communication with the defendant may be necessary.

Extent of cross-examination advocate's appointment

23A.8 In *Abbas v Crown Prosecution Service* [2015] EWHC 579 (Admin); [2015] 2 Cr.App.R. 11 the Divisional Court observed:

> "The role of a section 38 advocate is, undoubtedly, limited to the proper performance of their duty as a cross examiner of a particular witness. Sections 36 and 38 are all about protecting vulnerable witnesses from cross examination by the accused. Therefore, it should not be thought that an advocate appointed under section 38 has a free ranging remit to conduct the trial on the accused's behalf. Their professional duty and their statutory duty would be to

> ensure that they are in a position properly to conduct the cross examination. Their duties might include therefore applications to admit bad character of the witness and or applications for disclosure of material relevant to the cross examination. That is as far as one can go. All these matters must be entirely fact specific. The important thing to note is that the section 38 advocate must ensure that s/he performs his/her duties in accordance with the words of the statute.
>
> It means also that their appointment comes to an end, under section 38, at the conclusion of the cross examination, save to the extent that the court otherwise determines. Technically the lawyer no longer has a role in the proceedings thereafter. However, if the lawyer is prepared to stay and assist the defendant on a pro bono basis, I see nothing in the Act and no logical reason why the court should oblige them to leave. The advocate may well prove beneficial to the efficient and fair resolution of the proceedings.
>
> The aim of the legislation as I have said is simply to stop the accused cross examining the witness. It is not to prevent the person appointed to cross examine from playing any other part in the trial."

23A.9 Advocates will be alert to, and courts should keep in mind, the extent of the remuneration available to a cross-examination advocate, in assessing the amount of which the court has only a limited role: see section 19(3) of the Prosecution of Offences Act 1985, which empowers the Lord Chancellor to make regulations authorising payments out of central funds 'to cover the proper fee or costs of a legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 and any expenses properly incurred in providing such a person with evidence or other material in connection with his appointment', and also sections 19(3ZA) and 20(1A)(d) of the 1985 Act and the Costs in Criminal Cases (General) Regulations 1986, as amended.

23A.10 Advocates and courts must be alert, too, to the possibility that were an advocate to agree to represent a defendant generally at trial, for no payment save that to which such regulations entitled him or her, then the statutory condition precedent for the appointment might be removed and the appointment in consequence withdrawn.