

PART 18

MEASURES TO ASSIST A WITNESS OR DEFENDANT TO GIVE EVIDENCE

**Contents of this Part**

**General rules**

When this Part applies	rule 18.1
Meaning of ‘witness’	rule 18.2
Making an application for a direction or order	rule 18.3
Decisions and reasons	rule 18.4
Court’s power to vary requirements under this Part	rule 18.5
Custody of documents	rule 18.6
Declaration by intermediary	rule 18.7

**Special measures directions**

Exercise of court’s powers	rule 18.8
Special measures direction for a young witness	rule 18.9
Content of application for a special measures direction	rule 18.10
Application to vary or discharge a special measures direction	rule 18.11
Application containing information withheld from another party	rule 18.12
Representations in response	rule 18.13

**Defendant’s evidence directions**

Exercise of court’s powers	rule 18.14
Content of application for a defendant’s evidence direction	rule 18.15
Application to vary or discharge a defendant’s evidence direction	rule 18.16
Representations in response	rule 18.17

**Witness anonymity orders**

Exercise of court’s powers	rule 18.18
Content and conduct of application for a witness anonymity order	rule 18.19
Duty of court officer to notify the Director of Public Prosecutions	rule 18.20
Application to vary or discharge a witness anonymity order	rule 18.21
Representations in response	rule 18.22

**Live link directions**

Exercise of court’s powers	rule 18.23
Content of application for a live link direction	rule 18.24
Application to discharge a live link direction, etc.	rule 18.25
Representations in response	rule 18.26

GENERAL RULES

**When this Part applies**

**18.1.** This Part applies—

- (a) where the court can give a direction (a ‘special measures direction’), under section 19 of the Youth Justice and Criminal Evidence Act 1999(a), on an application or on its own initiative, for any of the following measures—
  - (i) preventing a witness from seeing the defendant (section 23 of the 1999 Act),
  - (ii) allowing a witness to give evidence by live link (section 24 of the 1999 Act(b)),
  - (iii) hearing a witness’ evidence in private (section 25 of the 1999 Act(c)),
  - (iv) dispensing with the wearing of wigs and gowns (section 26 of the 1999 Act),
  - (v) admitting video recorded evidence (sections 27 and 28 of the 1999 Act(d)),
  - (vi) questioning a witness through an intermediary (section 29 of the 1999 Act(e)),
  - (vii) using a device to help a witness communicate (section 30 of the 1999 Act);
- (b) where the court can vary or discharge such a direction, under section 20 of the 1999 Act(f);
- (c) where the court can give, vary or discharge a direction (a ‘defendant’s evidence direction’) for a defendant to give evidence—
  - (i) by live link, under section 33A of the 1999 Act(g), or
  - (ii) through an intermediary, under sections 33BA and 33BB of the 1999 Act(h);
- (d) where the court can—
  - (i) make a witness anonymity order, under section 86 of the Coroners and Justice Act 2009(i), or
  - (ii) vary or discharge such an order, under section 91, 92 or 93 of the 2009 Act;
- (e) where the court can give or discharge a direction (a ‘live link direction’), on an application or on its own initiative, for a witness to give evidence by live link under—
  - (i) section 32 of the Criminal Justice Act 1988(j), or
  - (ii) sections 51 and 52 of the Criminal Justice Act 2003(k);
- (f) where the court can exercise any other power it has to give, vary or discharge a direction for a measure to help a witness give evidence.

### Meaning of ‘witness’

**18.2.** In this Part, ‘witness’ means anyone (other than a defendant) for whose benefit an application, direction or order is made.

*[Note. At the end of this Part is a summary of the circumstances in which a witness or defendant may be eligible for the assistance of one of the measures to which this Part applies.]*

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- (a) 1999 c. 23.
  - (b) 1999 c. 23; section 24 was amended by paragraph 385 of Schedule 8 to, and Schedule 10 to, the Courts Act 2003 (c. 39) and section 102(1) of the Coroners and Justice Act 2009 (c. 25).
  - (c) 1999 c. 23; section 25 was amended by paragraphs 1 and 3 of the Schedule to S.I. 2013/554. It is further amended by section 46 of the Modern Slavery Act 2015 (c. 30), with effect from a date to be appointed.
  - (d) 1999 c. 23; section 27 was amended by paragraph 384 of Schedule 8 to the Courts Act 2003 (c. 39), paragraph 73 of Schedule 3 and Part 4 of Schedule 37 to the Criminal Justice Act 2003 (c. 44) and sections 102(2), 103(1), (3), (4) and (5), 177(1) and (2) and 178 of, and paragraph 73 of Schedule 21, paragraph 23 of Schedule 22 and Part 3 of Schedule 23 to, the Coroners and Justice Act 2009 (c. 25).
  - (e) 1999 c. 23; section 29 was amended by paragraph 384(d) of Schedule 8 to the Courts Act 2003 (c. 39).
  - (f) 1999 c. 23; section 20(6) was amended by paragraph 384(a) of Schedule 8 to the Courts Act 2003 (c. 39).
  - (g) 1999 c. 23; section 33A was inserted by section 47 of the Police and Justice Act 2006 (c. 48).
  - (h) 1999 c. 23; sections 33BA and 33BB are inserted by section 104 of the Coroners and Justice Act 2009 (c. 25), with effect from a date to be appointed.
  - (i) 2009 c. 25.
  - (j) 1988 c. 33; section 32 was amended by section 55 of the Criminal Justice Act 1991 (c. 53), section 29 of, and paragraph 16 of Schedule 2 to, the Criminal Appeal Act 1995 (c. 35), section 62 of the Criminal Procedure and Investigations Act 1996 (c. 25), section 67 of, and Schedule 6 and paragraph 3 of Schedule 7 to, the Youth Justice and Criminal Evidence Act 1999 (c. 23) and paragraphs 24 and 26 of the Schedule to S.I. 2004/2035.
  - (k) 2003 c. 44.

**Making an application for a direction or order**

**18.3.** A party who wants the court to exercise its power to give or make a direction or order must—

- (a) apply in writing as soon as reasonably practicable, and in any event not more than—
  - (i) 28 days after the defendant pleads not guilty, in a magistrates' court, or
  - (ii) 14 days after the defendant pleads not guilty, in the Crown Court; and
- (b) serve the application on—
  - (i) the court officer, and
  - (ii) each other party.

*[Note. See also rule 18.10 (Content of application for a special measures direction), rule 18.15 (Content of application for a defendant's evidence direction), rule 18.19 (Content and conduct of application for a witness anonymity order) and rule 18.24 (Content of application for a live link direction).*

*The Practice Direction sets out forms for use in connection with—*

- (a) *an application under rule 18.10 for a special measures direction;*
- (b) *an application under rule 18.24 for a live link direction (otherwise than as a special measures direction).]*

**Decisions and reasons**

**18.4.—(1)** A party who wants to introduce the evidence of a witness who is the subject of an application, direction or order must—

- (a) inform the witness of the court's decision as soon as reasonably practicable; and
- (b) explain to the witness the arrangements that as a result will be made for him or her to give evidence.

**(2)** The court must—

- (a) promptly determine an application; and
- (b) allow a party sufficient time to comply with the requirements of—
  - (i) paragraph (1), and
  - (ii) the code of practice issued under section 32 of the Domestic Violence, Crime and Victims Act 2004**(a)**.

**(3)** The court must announce, at a hearing in public before the witness gives evidence, the reasons for a decision—

- (a) to give, make, vary or discharge a direction or order; or
- (b) to refuse to do so.

*[Note. See sections 20(5), 33A(8) and 33BB(4) of the Youth Justice and Criminal Evidence Act 1999 and sections 51(8) and 52(7) of the Criminal Justice Act 2003**(b)**.*

*Under section 32 of the Domestic Violence, Crime and Victims Act 2004, the Secretary of State for Justice must issue a code of practice as to the services to be provided by specified persons to a victim of criminal conduct.]*

**Court's power to vary requirements under this Part**

**18.5.—(1)** The court may—

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(a) 2004 c. 28; section 32 was amended by article 8 of, and paragraph 10 of the Schedule to, S.I. 2007/2128.  
(b) 2003 c. 44.

- (a) shorten or extend (even after it has expired) a time limit under this Part; and
  - (b) allow an application or representations to be made in a different form to one set out in the Practice Direction, or to be made orally.
- (2) A person who wants an extension of time must—
- (a) apply when serving the application or representations for which it is needed; and
  - (b) explain the delay.

### **Custody of documents**

- 18.6.** Unless the court otherwise directs, the court officer may—
- (a) keep a written application or representations; or
  - (b) arrange for the whole or any part to be kept by some other appropriate person, subject to any conditions that the court may impose.

### **Declaration by intermediary**

- 18.7.**—(1) This rule applies where—
- (a) a video recorded interview with a witness is conducted through an intermediary;
  - (b) the court directs the examination of a witness or defendant through an intermediary.
- (2) An intermediary must make a declaration—
- (a) before such an interview begins;
  - (b) before the examination begins (even if such an interview with the witness was conducted through the same intermediary).
- (3) The declaration must be in these terms—
- “I solemnly, sincerely and truly declare [*or I swear by Almighty God*] that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding.”

## **SPECIAL MEASURES DIRECTIONS**

### **Exercise of court’s powers**

- 18.8.** The court may decide whether to give, vary or discharge a special measures direction—
- (a) at a hearing, in public or in private, or without a hearing;
  - (b) in a party’s absence, if that party—
    - (i) applied for the direction, variation or discharge, or
    - (ii) has had at least 14 days in which to make representations.

### **Special measures direction for a young witness**

- 18.9.**—(1) This rule applies where, under section 21 or section 22 of the Youth Justice and Criminal Evidence Act 1999<sup>(a)</sup>, the primary rule requires the court to give a direction for a special measure to assist a child witness or a qualifying witness—
- (a) on an application, if one is made; or
  - (b) on the court’s own initiative, in any other case.

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(a) 1999 c. 23; sections 21 and 22 were amended by sections 98, 100 and 178 of, and Part 3 of Schedule 23 to, the Coroners and Justice Act 2009 (c. 25).

(2) A party who wants to introduce the evidence of such a witness must as soon as reasonably practicable—

- (a) notify the court that the witness is eligible for assistance;
- (b) provide the court with any information that the court may need to assess the witness' views, if the witness does not want the primary rule to apply; and
- (c) serve any video recorded evidence on—
  - (i) the court officer, and
  - (ii) each other party.

*[Note. Under sections 21 and 22 of the Youth Justice and Criminal Evidence Act 1999, a 'child witness' is one who is under 18, and a 'qualifying witness' is one who was a child witness when interviewed.*

*Under those sections, the 'primary rule' requires the court to give a direction—*

- (a) *for the evidence of a child witness or of a qualifying witness to be admitted—*
  - (i) *by means of a video recording of an interview with the witness, in the place of examination-in-chief, and*
  - (ii) *after that, by live link; or*
- (b) *if one or both of those measures is not taken, for the witness while giving evidence to be screened from seeing the defendant.*

*The primary rule always applies unless—*

- (a) *the witness does not want it to apply, and the court is satisfied that to omit a measure usually required by that rule would not diminish the quality of the witness' evidence; or*
- (b) *the court is satisfied that to direct one of the measures usually required by that rule would not be likely to maximise, so far as practicable, the quality of the witness' evidence.]*

### **Content of application for a special measures direction**

**18.10.** An applicant for a special measures direction must—

- (a) explain how the witness is eligible for assistance;
- (b) explain why special measures would be likely to improve the quality of the witness' evidence;
- (c) propose the measure or measures that in the applicant's opinion would be likely to maximise, so far as practicable, the quality of that evidence;
- (d) report any views that the witness has expressed about—
  - (i) his or her eligibility for assistance,
  - (ii) the likelihood that special measures would improve the quality of his or her evidence, and
  - (iii) the measure or measures proposed by the applicant;
- (e) in a case in which a child witness or a qualifying witness does not want the primary rule to apply, provide any information that the court may need to assess the witness' views;
- (f) in a case in which the applicant proposes that the witness should give evidence by live link—
  - (i) identify someone to accompany the witness while the witness gives evidence,
  - (ii) name that person, if possible, and
  - (iii) explain why that person would be an appropriate companion for the witness, including the witness' own views;

- (g) in a case in which the applicant proposes the admission of video recorded evidence, identify—
  - (i) the date and duration of the recording,
  - (ii) which part the applicant wants the court to admit as evidence, if the applicant does not want the court to admit all of it;
- (h) attach any other material on which the applicant relies; and
- (i) if the applicant wants a hearing, ask for one, and explain why it is needed.

*[Note. The Practice Direction sets out a form of application for use in connection with this rule.]*

**Application to vary or discharge a special measures direction**

**18.11.**—(1) A party who wants the court to vary or discharge a special measures direction must—

- (a) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
  - (b) serve the application on—
    - (i) the court officer, and
    - (ii) each other party.
- (2) The applicant must—
- (a) explain what material circumstances have changed since the direction was given (or last varied, if applicable);
  - (b) explain why the direction should be varied or discharged; and
  - (c) ask for a hearing, if the applicant wants one, and explain why it is needed.

*[Note. Under section 20 of the Youth Justice and Criminal Evidence Act 1999, the court can vary or discharge a special measures direction—*

- (a) on application, if there has been a material change of circumstances; or*
- (b) on the court's own initiative.]*

**Application containing information withheld from another party**

**18.12.**—(1) This rule applies where—

- (a) an applicant serves an application for a special measures direction, or for its variation or discharge; and
  - (b) the application includes information that the applicant thinks ought not be revealed to another party.
- (2) The applicant must—
- (a) omit that information from the part of the application that is served on that other party;
  - (b) mark the other part to show that, unless the court otherwise directs, it is only for the court; and
  - (c) in that other part, explain why the applicant has withheld that information from that other party.
- (3) Any hearing of an application to which this rule applies—
- (a) must be in private, unless the court otherwise directs; and
  - (b) if the court so directs, may be, wholly or in part, in the absence of a party from whom information has been withheld.
- (4) At any hearing of an application to which this rule applies—
- (a) the general rule is that the court must consider, in the following sequence—

- (i) representations first by the applicant and then by each other party, in all the parties' presence, and then
  - (ii) further representations by the applicant, in the absence of a party from whom information has been withheld; but
- (b) the court may direct other arrangements for the hearing.

*[Note. See section 20 of the Youth Justice and Criminal Evidence Act 1999.]*

**Representations in response**

**18.13.**—(1) This rule applies where a party wants to make representations about—

- (a) an application for a special measures direction;
- (b) an application for the variation or discharge of such a direction; or
- (c) a direction, variation or discharge that the court proposes on its own initiative.

(2) Such a party must—

- (a) serve the representations on—
  - (i) the court officer, and
  - (ii) each other party;
- (b) do so not more than 14 days after, as applicable—
  - (i) service of the application, or
  - (ii) notice of the direction, variation or discharge that the court proposes; and
- (c) ask for a hearing, if that party wants one, and explain why it is needed.

(3) Where representations include information that the person making them thinks ought not be revealed to another party, that person must—

- (a) omit that information from the representations served on that other party;
- (b) mark the information to show that, unless the court otherwise directs, it is only for the court; and
- (c) with that information include an explanation of why it has been withheld from that other party.

(4) Representations against a special measures direction must explain, as appropriate—

- (a) why the witness is not eligible for assistance;
- (b) if the witness is eligible for assistance, why—
  - (i) no special measure would be likely to improve the quality of the witness' evidence,
  - (ii) the proposed measure or measures would not be likely to maximise, so far as practicable, the quality of the witness' evidence, or
  - (iii) the proposed measure or measures might tend to inhibit the effective testing of that evidence;
- (c) in a case in which the admission of video recorded evidence is proposed, why it would not be in the interests of justice for the recording, or part of it, to be admitted as evidence.

(5) Representations against the variation or discharge of a special measures direction must explain why it should not be varied or discharged.

*[Note. Under sections 21 and 22 of the Youth Justice and Criminal Evidence Act 1999, where the witness is a child witness or a qualifying witness the special measures that the court usually must direct must be treated as likely to maximise, so far as practicable, the quality of the witness' evidence, irrespective of representations to the contrary.]*

DEFENDANT'S EVIDENCE DIRECTIONS

**Exercise of court's powers**

**18.14.** The court may decide whether to give, vary or discharge a defendant's evidence direction—

- (a) at a hearing, in public or in private, or without a hearing;
- (b) in a party's absence, if that party—
  - (i) applied for the direction, variation or discharge, or
  - (ii) has had at least 14 days in which to make representations.

**Content of application for a defendant's evidence direction**

**18.15.** An applicant for a defendant's evidence direction must—

- (a) explain how the proposed direction meets the conditions prescribed by the Youth Justice and Criminal Evidence Act 1999;
- (b) in a case in which the applicant proposes that the defendant give evidence by live link—
  - (i) identify a person to accompany the defendant while the defendant gives evidence, and
  - (ii) explain why that person is appropriate;
- (c) ask for a hearing, if the applicant wants one, and explain why it is needed.

*[Note. See sections 33A and 33BA of the Youth Justice and Criminal Evidence Act 1999.]*

**Application to vary or discharge a defendant's evidence direction**

**18.16.—**(1) A party who wants the court to vary or discharge a defendant's evidence direction must—

- (a) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
- (b) serve the application on—
  - (i) the court officer, and
  - (ii) each other party.

(2) The applicant must—

- (a) on an application to discharge a live link direction, explain why it is in the interests of justice to do so;
- (b) on an application to discharge a direction for an intermediary, explain why it is no longer necessary in order to ensure that the defendant receives a fair trial;
- (c) on an application to vary a direction for an intermediary, explain why it is necessary for the direction to be varied in order to ensure that the defendant receives a fair trial; and
- (d) ask for a hearing, if the applicant wants one, and explain why it is needed.

*[Note. See sections 33A(7) and 33BB of the Youth Justice and Criminal Evidence Act 1999.]*

**Representations in response**

**18.17.—**(1) This rule applies where a party wants to make representations about—

- (a) an application for a defendant's evidence direction;
- (b) an application for the variation or discharge of such a direction; or
- (c) a direction, variation or discharge that the court proposes on its own initiative.

(2) Such a party must—



- (a) serve the representations on—
  - (i) the court officer, and
  - (ii) each other party;
- (b) do so not more than 14 days after, as applicable—
  - (i) service of the application, or
  - (ii) notice of the direction, variation or discharge that the court proposes; and
- (c) ask for a hearing, if that party wants one, and explain why it is needed.

(3) Representations against a direction, variation or discharge must explain why the conditions prescribed by the Youth Justice and Criminal Evidence Act 1999 are not met.

#### WITNESS ANONYMITY ORDERS

#### **Exercise of court's powers**

**18.18.**—(1) The court may decide whether to make, vary or discharge a witness anonymity order—

- (a) at a hearing (which must be in private, unless the court otherwise directs), or without a hearing (unless any party asks for one);
- (b) in the absence of a defendant.

(2) The court must not exercise its power to make, vary or discharge a witness anonymity order, or to refuse to do so—

- (a) before or during the trial, unless each party has had an opportunity to make representations;
- (b) on an appeal by the defendant to which applies Part 34 (Appeal to the Crown Court) or Part 39 (Appeal to the Court of Appeal about conviction or sentence), unless in each party's case—
  - (i) that party has had an opportunity to make representations, or
  - (ii) the appeal court is satisfied that it is not reasonably practicable to communicate with that party;
- (c) after the trial and any such appeal are over, unless in the case of each party and the witness—
  - (i) each has had an opportunity to make representations, or
  - (ii) the court is satisfied that it is not reasonably practicable to communicate with that party or witness.

#### **Content and conduct of application for a witness anonymity order**

**18.19.**—(1) An applicant for a witness anonymity order must—

- (a) include in the application nothing that might reveal the witness' identity;
- (b) describe the measures proposed by the applicant;
- (c) explain how the proposed order meets the conditions prescribed by section 88 of the Coroners and Justice Act 2009(a);
- (d) explain why no measures other than those proposed will suffice, such as—
  - (i) an admission of the facts that would be proved by the witness,
  - (ii) an order restricting public access to the trial,

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(a) 2009 c. 25.

- (iii) reporting restrictions, in particular under sections 45, 45A or 46 of the Youth Justice and Criminal Evidence Act 1999(a),
  - (iv) a direction for a special measure under section 19 of the Youth Justice and Criminal Evidence Act 1999,
  - (v) introduction of the witness' written statement as hearsay evidence, under section 116 of the Criminal Justice Act 2003(b), or
  - (vi) arrangements for the protection of the witness;
- (e) attach to the application—
- (i) a witness statement setting out the proposed evidence, edited in such a way as not to reveal the witness' identity,
  - (ii) where the prosecutor is the applicant, any further prosecution evidence to be served, and any further prosecution material to be disclosed under the Criminal Procedure and Investigations Act 1996, similarly edited, and
  - (iii) any defence statement that has been served, or as much information as may be available to the applicant that gives particulars of the defence; and
- (f) ask for a hearing, if the applicant wants one.
- (2) At any hearing of the application, the applicant must—
- (a) identify the witness to the court, unless at the prosecutor's request the court otherwise directs; and
  - (b) present to the court, unless it otherwise directs—
    - (i) the unedited witness statement from which the edited version has been prepared,
    - (ii) where the prosecutor is the applicant, the unedited version of any further prosecution evidence or material from which an edited version has been prepared, and
    - (iii) such further material as the applicant relies on to establish that the proposed order meets the conditions prescribed by section 88 of the 2009 Act.
- (3) At any such hearing—
- (a) the general rule is that the court must consider, in the following sequence—
    - (i) representations first by the applicant and then by each other party, in all the parties' presence, and then
    - (ii) information withheld from a defendant, and further representations by the applicant, in the absence of any (or any other) defendant; but
  - (b) the court may direct other arrangements for the hearing.
- (4) Before the witness gives evidence, the applicant must identify the witness to the court—
- (a) if not already done;
  - (b) without revealing the witness' identity to any other party or person; and
  - (c) unless at the prosecutor's request the court otherwise directs.

**Duty of court officer to notify the Director of Public Prosecutions**

**18.20.** The court officer must notify the Director of Public Prosecutions of an application, unless the prosecutor is, or acts on behalf of, a public authority.

**Application to vary or discharge a witness anonymity order**

**18.21.—**(1) A party who wants the court to vary or discharge a witness anonymity order, or a witness who wants the court to do so when the case is over, must—

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(a) 1999 c. 23; section 45A was inserted by section 78 of the Criminal Justice and Courts Act 2015 (c. 2).  
 (b) 2003 c. 44.

- (a) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
  - (b) serve the application on—
    - (i) the court officer, and
    - (ii) each other party.
- (2) The applicant must—
- (a) explain what material circumstances have changed since the order was made (or last varied, if applicable);
  - (b) explain why the order should be varied or discharged, taking account of the conditions for making an order; and
  - (c) ask for a hearing, if the applicant wants one.
- (3) Where an application includes information that the applicant thinks might reveal the witness' identity, the applicant must—
- (a) omit that information from the application that is served on a defendant;
  - (b) mark the information to show that it is only for the court and the prosecutor (if the prosecutor is not the applicant); and
  - (c) with that information include an explanation of why it has been withheld.
- (4) Where a party applies to vary or discharge a witness anonymity order after the trial and any appeal are over, the party who introduced the witness' evidence must serve the application on the witness.

*[Note. Under sections 91, 92 and 93 of the Coroners and Justice Act 2009, the court can vary or discharge a witness anonymity order—*

- (a) on an application, if there has been a material change of circumstances since it was made or previously varied; or*
- (b) on the court's own initiative, unless the trial and any appeal are over.]*

### **Representations in response**

**18.22.**—(1) This rule applies where a party or, where the case is over, a witness, wants to make representations about—

- (a) an application for a witness anonymity order;
  - (b) an application for the variation or discharge of such an order; or
  - (c) a variation or discharge that the court proposes on its own initiative.
- (2) Such a party or witness must—
- (a) serve the representations on—
    - (i) the court officer, and
    - (ii) each other party;
  - (b) do so not more than 14 days after, as applicable—
    - (i) service of the application, or
    - (ii) notice of the variation or discharge that the court proposes; and
  - (c) ask for a hearing, if that party or witness wants one.
- (3) Where representations include information that the person making them thinks might reveal the witness' identity, that person must—
- (a) omit that information from the representations served on a defendant;
  - (b) mark the information to show that it is only for the court (and for the prosecutor, if relevant); and
  - (c) with that information include an explanation of why it has been withheld.

(4) Representations against a witness anonymity order must explain why the conditions for making the order are not met.

(5) Representations against the variation or discharge of such an order must explain why it would not be appropriate to vary or discharge it, taking account of the conditions for making an order.

(6) A prosecutor's representations in response to an application by a defendant must include all information available to the prosecutor that is relevant to the conditions and considerations specified by sections 88 and 89 of the Coroners and Justice Act 2009.

#### LIVE LINK DIRECTIONS

*[Note. The rules in this Section do not apply to an application for a special measures direction allowing a witness to give evidence by live link: as to which, see rules 18.8 to 18.13.]*

#### Exercise of court's powers

**18.23.** The court may decide whether to give or discharge a live link direction—

- (a) at a hearing, in public or in private, or without a hearing;
- (b) in a party's absence, if that party—
  - (i) applied for the direction or discharge, or
  - (ii) has had at least 14 days in which to make representations in response to an application by another party.

#### Content of application for a live link direction

**18.24.—**(1) An applicant for a live link direction must—

- (a) unless the court otherwise directs, identify the place from which the witness will give evidence;
- (b) if that place is in the United Kingdom, explain why it would be in the interests of the efficient or effective administration of justice for the witness to give evidence by live link;
- (c) if the applicant wants the witness to be accompanied by another person while giving evidence—
  - (i) name that person, if possible, and
  - (ii) explain why it is appropriate for the witness to be accompanied;
- (d) ask for a hearing, if the applicant wants one, and explain why it is needed.

(2) An applicant for a live link direction under section 32 of the Criminal Justice Act 1988(a) who wants the court also to make a European investigation order must—

- (a) identify the participating State in which, and the place in that State from which, the witness will give evidence;
- (b) explain why it is necessary and proportionate to make a European investigation order;
- (c) if applicable, explain how the requirements of regulation 14 of the Criminal Justice (European Investigation Order) Regulations 2017(b) are met (Hearing a person by videoconference or telephone); and
- (d) attach a draft order in the form required by regulation 8 of the 2017 Regulations (Form and content of a European investigation order) and Directive 2014/41/EU.

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(a) 1988 c. 33; section 32 was amended by section 55 of the Criminal Justice Act 1991 (c. 53), section 29 of, and paragraph 16 of Schedule 2 to, the Criminal Appeal Act 1995 (c. 35), section 62 of the Criminal Procedure and Investigations Act 1996 (c. 25), section 67 of, and Schedule 6 and paragraph 3 of Schedule 7 to, the Youth Justice and Criminal Evidence Act 1999 (c. 23) and paragraphs 24 and 26 of the Schedule to S.I. 2004/2035.

(b) S.I. 2017/730.

- (3) Where the court makes a European investigation order, the court officer must promptly—
- (a) issue an order in the form required by regulation 8 of the 2017 Regulations (Form and content of a European investigation order) and Directive 2014/41/EU;
  - (b) where the applicant is a constable or a prosecuting authority, serve that order on the applicant;
  - (c) in any other case, serve that order on the appropriate authority in the participating State in which the measure or measures are to be carried out.

*[Note. See section 32 of the Criminal Justice Act 1988, section 51 of the Criminal Justice Act 2003(a) and regulation 6 of the Criminal Justice (European Investigation Order) Regulations 2017.*

*The Practice Direction sets out a form of application for use in connection with this rule.]*

### Application to discharge a live link direction, etc.

- 18.25.**—(1) A party who wants the court to discharge a live link direction must—
- (a) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
  - (b) serve the application on—
    - (i) the court officer, and
    - (ii) each other party.
- (2) The applicant must—
- (a) explain what material circumstances have changed since the direction was given;
  - (b) explain why it is in the interests of justice to discharge the direction; and
  - (c) ask for a hearing, if the applicant wants one, and explain why it is needed.
- (3) An applicant for the variation or revocation of a European investigation order made on an application under rule 18.24 must demonstrate that the applicant is, as the case may be—
- (a) the person who applied for the order;
  - (b) a prosecuting authority; or
  - (c) any other person affected by the order.
- (4) Where the court varies or revokes such an order, the court officer must promptly notify the appropriate authority in the participating State in which the measure or measures are to be carried out.

*[Note. See section 32(4) of the Criminal Justice Act 1988(b), section 52(3) of the Criminal Justice Act 2003(c) and regulation 10 of the Criminal Justice (European Investigation Order) Regulations 2017.]*

### Representations in response

- 18.26.**—(1) This rule applies where a party wants to make representations about an application for a live link direction or for the discharge of such a direction.
- (2) Such a party must—
- (a) serve the representations on—
    - (i) the court officer, and
    - (ii) each other party;

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(a) 2003 c. 44.

(b) 1988 c. 33; section 32(4) was amended by article 3 of, and paragraphs 24 and 26 of the Schedule to S.I. 2004/2035.

(c) 2003 c. 44.

- (b) do so not more than 14 days after service of the application; and—
- (c) ask for a hearing, if that party wants one, and explain why it is needed.

(3) Representations against a direction or discharge must explain, as applicable, why the conditions prescribed by the Criminal Justice Act 1988 or the Criminal Justice Act 2003 are not met.

### *Summary of eligibility for measures to which this Part applies*

#### *Special measures direction*

*Under section 16 of the Youth Justice and Criminal Evidence Act 1999(a), a witness is eligible for the assistance of a special measures direction given under section 19 of that Act if—*

- (a) *the witness is under 18; or*
  - (b) *the witness has—*
    - (i) *a mental disorder, or a significant impairment of intelligence and social functioning,*  
*or*
    - (ii) *a physical disability or disorder*
- and the court considers that the completeness, coherence and accuracy (the ‘quality’) of evidence given by the witness is likely to be diminished by reason of those circumstances.*

*Under section 17 of the 1999(b) Act, a witness is eligible for such assistance if—*

- (a) *the court is satisfied that the quality of evidence given by the witness is likely to be diminished because of his or her fear or distress in connection with giving evidence, taking account particularly of—*
  - (i) *the circumstances of the offence,*
  - (ii) *the witness’ age, social and cultural background, ethnic origins, domestic and employment circumstances, religious beliefs or political opinions,*
  - (iii) *any behaviour towards the witness on the part of the defendant, the defendant’s family or associates, or any other potential defendant or witness, and*
  - (iv) *the witness’ own views;*
- (b) *the witness is the complainant in respect of a sexual offence, and has not declined such assistance; or*
- (c) *the offence is one of a list of offences involving weapons, and the witness has not declined such assistance.*

*Section 28 of the 1999 Act (video recorded cross-examination or re-examination) is not yet in force. With that exception, all the special measures listed in rule 18.1 potentially are available where the witness is eligible for assistance under section 16 of the Act. Those numbered (i) to (v) are available where the witness is eligible for assistance under section 17.*

*As a general rule, but with exceptions, the court must give a special measures direction—*

- (a) *under section 21 or 22 of the 1999 Act(c), where the witness—*
    - (i) *is under 18, or*
    - (ii) *was under that age when interviewed*
- whether or not an application for a direction is made;*

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(a) 1999 c. 23.

(b) 1999 c. 23; section 17 was amended by section 99 of the Coroners and Justice Act 2009 (c. 25) and paragraphs 1 and 2 of the Schedule to S.I. 2013/554. It is further amended by section 46 of the Modern Slavery Act 2015 (c. 30), with effect from a date to be appointed.

(c) 1999 c. 23; sections 21 and 22 were amended by sections 98, 100 and 178 of, and Part 3 of Schedule 23 to, the Coroners and Justice Act 2009 (c. 25).

- (b) *under section 22A of the 1999 Act(a), where an application is made in the Crown Court for the evidence of a witness who is the complainant of a sexual offence to be admitted by means of a video recording of an interview with the witness in the place of examination-in-chief.*

### **Defendant's evidence direction**

*Under section 33A of the 1999 Act(b), the court can allow a defendant to give evidence by live link, or (when the Coroners and Justice Act 2009 comes into force) under section 33BA(c) can allow a defendant to give evidence through an intermediary, if—*

- (a) *the defendant—*
- (i) *is under 18, and the defendant's ability to participate effectively as a witness giving oral evidence is compromised by his or her level of intellectual ability or social functioning; or*
  - (ii) *suffers from a mental disorder or some other significant impairment of intelligence and social functioning and cannot participate effectively as a witness giving oral evidence for that reason;*
- (b) *the use of a live link—*
- (i) *would enable the defendant to participate more effectively, and*
  - (ii) *is in the interests of justice;*
- (c) *the examination of the defendant through an intermediary is necessary to ensure that the defendant receives a fair trial.*

### **Witness anonymity order**

*Under section 86 of the Coroners and Justice Act 2009(d), a witness anonymity order is an order that specifies measures to be taken to ensure that the identity of a witness is not disclosed, such as withholding the witness' name from materials disclosed to a party to the proceedings, the use of a pseudonym, the screening of the witness from view, the modulation of the witness' voice, and the prohibition of questions that might reveal his or her identity. Before making such an order, the court must—*

- (a) *be satisfied that three conditions prescribed by the Act are met (section 88 of the 2009 Act); and*
- (b) *have regard to considerations specified by the Act (section 89 of the 2009 Act).*

### **Live link direction**

*Under section 32 of the Criminal Justice Act 1988, the court can allow a witness who is outside the United Kingdom to give evidence by live link—*

- (a) *in proceedings in a youth court, or on appeal from such proceedings; or*
- (b) *at a trial in the Crown Court, or on appeal from such a trial.*

*Under section 51 of the Criminal Justice Act 2003, on an application or on its own initiative, the court can allow a witness who is in the United Kingdom, but outside the building in which the proceedings are held, to give evidence by live link. The court must be satisfied that that is in the interests of the efficient or effective administration of justice.*

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(a) 1999 c. 23; section 22A was inserted by section 101 of the Coroners and Justice Act 2009 (c. 25).

(b) 1999 c. 23; section 33A was inserted by section 47 of the Police and Justice Act 2006 (c. 48).

(c) 1999 c. 23; section 33BA is inserted by section 104 of the Coroners and Justice Act 2009 (c. 25), with effect from a date to be appointed.

(d) 2009 c. 25.

*The Criminal Justice (European Investigation Order) Regulations 2017 give effect in the United Kingdom to Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. Under regulation 6 of the 2017 Regulations the court can make an order specifying one or more ‘investigative measures’ that are to be carried out in a State listed in Schedule 2 to those Regulations (a ‘participating State’). One such measure is hearing in proceedings in England and Wales, by live video or, potentially, audio link (described in the Regulations as ‘videoconference or other audio visual transmission’ and as ‘telephone conference’ respectively), a witness who is in a participating State. See also regulations 6(4)(c) and 14 of the 2017 Regulations, and regulation 9 which governs the transmission of an order to the participating State.*

*Under regulations 6(4)(b) and 11 of the 2017 Regulations any such measure must be one that could have been ordered or undertaken under the same conditions in a similar domestic case; but under regulation 11(5) that does not require the court to take into account any provision of domestic law imposing a procedural requirement which the court considers cannot effectively be applied when making a European investigation order for the measure concerned.*

*If a witness is eligible for the assistance of a special measures direction (as to which, see the note above), the court can allow the witness to give evidence by live link under sections 19 and 24 of the 1999 Act<sup>(a)</sup>. See rules 18.8 to 18.13.*

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(a) 1999 c. 23; section 24 was amended by paragraph 385 of Schedule 8 to, and Schedule 10 to, the Courts Act 2003 (c. 39) and section 102(1) of the Coroners and Justice Act 2009 (c. 25).