

Early special measures discussions between the police and the Crown Prosecution Service

Practice Guidance

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Practice Guidance

Foreword

The Government is committed to putting victims and witnesses at the heart of the Criminal Justice System (CJS). The criminal justice agencies are working together to ensure that all victims and witnesses are treated properly and have a chance for their voice to be heard.

Vulnerable and intimidated witnesses are in particular need of assistance to ensure that their voice is heard in court. “Special measures” were introduced to enable vulnerable and intimidated witnesses in a criminal trial to give their best evidence.

Research has shown that special measures do indeed help vulnerable and intimidated witnesses to give their best evidence. To maximise the benefits of special measures, it is important that a witness’s eligibility for special measures is identified at an early stage.

The police and the Crown Prosecution Service (CPS) must discuss the needs of the witness, and act upon the discussion, as soon as possible. It is vital that the police and the CPS identify any witnesses who may be eligible for special measures and discuss which measure(s) would most assist the witness to give evidence. In some cases, the police and the CPS may consider seeking assistance from voluntary and support agencies.

When discussing the needs of witnesses, the police and the CPS must appreciate that time is often of the essence. This is of particular importance when considering whether an intermediary should be appointed.

This Practice Guidance is for police officers and prosecutors. It provides information on what special measures are, which witnesses are eligible for special measures, when early special measures discussions should be held and what should be discussed.

The CPS, the Association of Chief Police Officers and the Office for Criminal Justice Reform have produced this Practice Guidance. We believe that its use will contribute to enabling vulnerable and intimidated witnesses to give their best evidence in criminal proceedings.

Introduction

The police and the CPS have statutory and non-statutory obligations to victims and witnesses in criminal proceedings.

The Code of Practice for Victims of Crime (Victims' Code) states that all organisations with responsibilities under the Code should identify victims as vulnerable or intimidated as defined by the Code.¹

The Victims' Code places obligations on the police and the CPS as it provides that:

- *“the police must take all reasonable steps to identify vulnerable or intimidated victims” (paragraph 5.7);*
- *“... the police must explain to the victim the provision about special measures [provided by the Youth Justice and Criminal Evidence Act 1999] and record any views the victim expresses about applying for special measures” (paragraph 5.8); and*
- *“where a victim who is to be called as a witness in criminal proceedings in respect of relevant criminal conduct, has been identified as potentially vulnerable or intimidated, the CPS must have systems in place to assist prosecutors in considering whether or not to make an application to the court for a special measures direction...” (paragraph 7.8).*

The Witness Charter details the standards of care for witnesses in the CJS. The Witness Charter states:

- *“if you are a prosecution witness, the police will initially identify whether you may be a vulnerable or intimidated witness and will seek your views on measures that might help you” (standard 4); and*
- *“if you are eligible for special measures for giving evidence, the prosecution... having heard your views, can make an application to the court for the use of one or more measures...” (standard 11).*

The Victims' Code makes it a requirement that police officers identify vulnerable and intimidated witnesses. It is very important that police officers

communicate this information to the CPS.

The simple act of including the age or date of birth of the witness on the back of the MG11 form will ensure that the CPS prosecutor knows whether the witness is a child or an older person.

There is also a role for the joint police/CPS Witness Care Units in identifying vulnerable and intimidated victims and witnesses if identification has not taken place at an earlier stage, and bringing this to the attention of the CPS prosecutor. Witness Care Officers (WCOs) provide support and information about the progress of the case to victims and witnesses from the point of charge. This includes information about special measures. It is important, therefore, that the CPS prosecutor notifies the WCO of special measures applications made and the results of the applications.

It is important that police officers clearly communicate information concerning special measures to witnesses. Police officers must take care not to raise the expectations of witnesses with regard to special measures, and must avoid making promises to witnesses about the granting of special measures. For example, promising a witness that they will be able to give evidence at trial via live link may be misleading. It is always a decision for the court as to what, if any, special measures are needed for a particular witness. The supply of clear and accurate information to witnesses may reduce their concerns about the CJS, and assist in increasing their confidence in the CJS.

The early identification of a vulnerable or intimidated witness by the police and early discussion with the CPS prosecutor are essential to the conduct of the case. This is the earliest opportunity for a discussion of the witness's needs and enables the CPS prosecutor to make timely and informed decisions about which special measures are required. An example of this is the

¹ Paragraph 4.11.

appointment of an intermediary. Additionally, the early special measures discussion can be of benefit to the witness. It will also assist the police to record a statement in the most appropriate format to secure a witness's best evidence.

The discussion may be as early in the investigation as pre-statement or video-recorded interview and before pre-charge advice. In all relevant cases, the witness's needs should be discussed at the meeting with the CPS prosecutor making a charging decision. These early discussions will improve case progression and provide a level of reassurance for witnesses.

What are special measures for vulnerable and intimidated witnesses?

Special measures help vulnerable and intimidated witnesses to give evidence in the best way to increase its quality and with as little stress for the witness as possible.

Sections 23–30 of the Youth Justice and Criminal Evidence Act 1999 (“the 1999 Act”) provide for a range of special measures to enable vulnerable or intimidated witnesses in a criminal trial to give their best evidence.

The special measures provided by the 1999 Act and now in force are:

- **video-recorded evidence in chief** where the interview with the police is visually recorded. This can be played as the witness's evidence in the trial (NB available in England and Wales for complainants in sexual offence cases tried in the Crown Court for investigations commencing on or after 1 September 2007);
- a **live link** enabling the witness to give evidence during the trial from outside the courtroom through a televised link. The witness may be accommodated either within the court building or in a suitable location outside the court;
- **screens**, which may be made available to shield the witness from the defendant;
- **evidence given in private**. Exclusion from the court of members of the public and the press (except for one named person to represent the press) will be considered in cases involving sexual offences or intimidation;
- **removal of wigs and gowns** by judges and barristers;

- **examination of the witness through an intermediary**, who may be appointed by the court to assist the witness to give their evidence at court and during the video-recording of their initial evidence. This measure is available only to vulnerable witnesses; and
- **aids to communication**, which will be permitted to enable the witness to give best evidence whether through a communicator or interpreter, or **through a communication aid or technique**, provided that the communication can be independently verified and understood by the court. Again, this measure is only available to vulnerable witnesses.

Which witnesses are eligible for special measures?

The witnesses eligible for special measures under the 1999 Act include:

- a witness who is under the age of 17 at the time of the hearing (section 16 “vulnerable” witnesses);
- a witness who suffers from a mental disorder within the meaning of the Mental Health Act 1983, or who has a significant impairment of intelligence and social functioning, or who has a physical disability or disorder. In these cases, the court must be satisfied that the quality of the evidence given by the witness is likely to be diminished owing to the mental disorder etc (section 16); and
- a witness whose quality of evidence is, in the opinion of the court, likely to be diminished by reason of fear or distress about testifying (section 17 “intimidated” witnesses).

A witness may be eligible for special measures, but the measures will not be automatically made available at the trial. Special measures will not be granted unless the prosecution makes an application to the court, or the court of its own motion raises the issue whether such a direction should be given. The CPS prosecutor must make an application to the court for special measures (section 19).² It is therefore essential that the police and the prosecutor discuss, as soon as possible, which special measures would benefit the witness.

The application for special measures should be made in writing on a prescribed form (see Annex A for details as to when the court office must receive the application).

Once eligibility has been established, the court must then determine whether any of the special measures would be likely to improve the quality of the evidence given by the witness and, if so, which

² The court may also raise the issue of special measures.

of the special measures would maximise, as far as possible, the quality of the evidence of the witness (section 19(2)).

The court must then consider all the circumstances of the case and, in particular, the views of the witness and whether the special measure(s) might inhibit the effective testing of the evidence by the defendant (section 19(3)).

Child witnesses

Sections 21 and 22 of the 1999 Act detail some special provisions for child witnesses under the age of 17. The provisions create strong presumptions that apply to certain categories of child witnesses and concern how they will give their evidence. The provisions state that:

- where there is a child witness in a sexual offence case or one involving violence, abduction or neglect, the child witness is deemed to be “in need of special protection”. In such cases, the court does not have to consider whether the special measure(s) will improve the quality of the evidence; this will be assumed to be the case;
- all child witnesses in need of special protection will have the video-recording of their evidence admitted as evidence in chief, unless this is excluded by the court on the basis that to admit the video-recording would not be in the interests of justice;
- child witnesses in sexual or violent offence cases will normally be cross-examined and re-examined via the live link; and
- for all other child witnesses, there will be presumption that evidence in chief will be given by video-recording, if one has been made, and that cross-examination will be via the live link. However, the court will need to be satisfied that this will improve the quality of the evidence.

In cases involving children, prosecutors must be alert to the case of *R v Camberwell Youth Court and Others* [2005] UKHL 4.³

³ The House of Lords in *R v Camberwell Youth Court and Others* [2005] UKHL 4 held that the presumption for children in need of special protection did not breach Articles 6 or 14 of the European Convention on Human Rights. It also clearly stated that the norm for child witnesses giving evidence was by video evidence in chief (where one has been recorded) and live link for cross-examination. This applies equally to child witnesses for the prosecution and defence.

Case study

Adam Brown, aged 8 years, has witnessed a boy aged approximately 10 years being assaulted in a shopping precinct. Adam is the only witness to the assault. PC Charlton has arrested a man in connection with the assault.

PC Charlton has submitted a file to the CPS duty prosecutor for charging advice. PC Charlton has included, on the MG3 form, information relating to Adam and states that Adam demonstrates a good level of understanding. PC Charlton requests advice as to whether an intermediary should be appointed to facilitate communication during the “ABE” interview.”⁴

The CPS duty prosecutor asks PC Charlton about Adam’s communication skills. PC Charlton informs the prosecutor that Adam communicates in a confident and clear manner, and appears to understand what he is being asked, and that his responses are easily understood. PC Charlton and the duty prosecutor agree that it is not necessary to instruct an intermediary for the purpose of the ABE interview. The CPS duty prosecutor informs PC Charlton that, if Adam is required to give evidence, further consideration should be given by PC Charlton and the CPS as to whether an intermediary should be instructed.

Following the ABE interview, PC Charlton submits to the CPS an MG11 form concerning Adam’s evidence. The CPS reviewing lawyer notices that none of the MG forms submitted contain any information concerning Adam’s views on special measures. The reviewing lawyer requests an early special measures discussion.

The early special measures discussion is carried out by way of a telephone conversation. PC Charlton informs the CPS reviewing lawyer that he has not asked Adam about special measures, as it is almost guaranteed that Adam will give evidence by way of the live link. The CPS reviewing lawyer informs PC Charlton that special measures are not guaranteed, and that the CPS must make an application to the court for the measures.

⁴ *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures* describes good practice in interviewing witnesses, including victims, in order to enable them to give their best evidence in criminal proceedings.

The CPS reviewing lawyer requests that PC Charlton discusses with Adam and his parents the special measures provisions, and his eligibility for certain provisions. The CPS reviewing lawyer also requests that PC Charlton asks Adam and his parents which special measures he would wish to have in order to give his best evidence. PC Charlton is asked to inform Adam and his parents that the special measure for evidence by live link does not of itself prevent the defendant seeing the witness. In any event, the defendant will know what Adam looks like, as a copy of the video will have been served on his solicitors. The CPS reviewing lawyer informs PC Charlton that, if the thought of being seen by the defendant causes Adam distress, then it may be possible to request that the defendant's monitor is covered or, failing that, that Adam gives evidence from behind a screen in court. PC Charlton is advised to use the young witness pack to help explain the court process to Adam and his parents. The CPS reviewing lawyer advises PC Charlton to be careful about raising the expectations of Adam and his parents concerning the availability of special measures.

The following week, PC Charlton informs the CPS reviewing lawyer that he has spoken to Adam and his parents about special measures. Adam understands the live link provision and is happy to give evidence this way. However, his parents do have concerns about Adam being seen by the defendant. Adam's parents have requested that, should Adam be required to give evidence, they meet with the CPS reviewing lawyer to discuss the court arrangements and special measures available to Adam to prevent the defendant seeing Adam. The CPS reviewing lawyer notes Adam's parents' concerns and informs PC Charlton that a special measures application will be made for Adam to be screened from the defendant,⁵ and to give evidence by live link.⁶ This would mean that a screen could be used in the courtroom to prevent the defendant seeing Adam, or the defendant's monitor could be turned off when Adam is giving evidence.

PC Charlton confirms that he has advised Adam's parents to contact the Witness Care Unit should there be any change to their contact details or if they have any concerns.

⁵ Section 23 of the 1999 Act.

⁶ Section 24 of the 1999 Act.

Further information concerning special measures for child witnesses is contained in the CPS policy statement *Children and Young People*.

Further information concerning the joint police/ CPS Witness Care Units is provided at Annex B.

Provisions related to special measures

- Section 34 of Part II of the 1999 Act prohibits the cross-examination in person by defendants of complainants in sexual cases.
- Section 35 of Part II of the 1999 Act prohibits the cross-examination in person by unrepresented defendants of certain “protected witnesses” (child complainants and other child witnesses).
- Section 36 of Part II of the 1999 Act permits a court to make an order prohibiting the cross-examination in person by a defendant of a witness where the prohibitions in sections 34 and 35 do not apply (such as for certain categories of intimidated witnesses).
- Section 46 of Part IV of the 1999 Act enables courts to make a reporting direction in relation to adult witnesses which prohibits any matter relating to the witness to be included in any publication during the lifetime of the witness if it is likely to lead members of the public to identify the individual as a witness in criminal proceedings.
- Rules 29–31 of the Criminal Procedure Rules 2005 concern special measures (Rule 29 concerns special measures directions; Rule 30 concerns live links; Rule 31 concerns cross-examination).

Case study

On Saturday evening, Clarissa and Alex Larmond, both aged 30 years, attended a party. At the party, Alex had been very flirtatious with Clarissa's friend. After the party, Clarissa and Alex returned to their home. Clarissa confronted Alex about his behaviour at the party and they argued. Alex punched Clarissa in the chest on two occasions. Clarissa called the police and Alex was arrested by Sgt Ford.

Clarissa has informed Sgt Ford that Alex is very controlling and that he has assaulted her on previous occasions, but she has not supported the prosecutions. Clarissa is afraid that, if she has to face Alex in court, she will not be able to give her evidence properly owing to nervousness. Also, Alex has warned Clarissa that if she ever supported a case against him, he would cross-examine her himself, because he knows all her secrets.

Sgt Ford has identified that Clarissa may be an intimidated witness, as the quality of her evidence is likely to be diminished owing to her fear or distress about testifying.⁷ Sgt Ford considers that she will require the reassurance of special measures in order for her to support a prosecution. Sgt Ford completes an MG2 form to inform the CPS duty prosecutor of her initial witness assessment, and an MG3 form indicating that she thinks it would be beneficial to have an early special measures discussion. Sgt Ford contacts the CPS duty prosecutor in order to seek charging advice.

As part of the charging advice, the CPS duty prosecutor specifically asks Sgt Ford about her assessment of Clarissa as being an "intimidated witness". The duty prosecutor agrees that Clarissa is eligible for special measures. The duty prosecutor and Sgt Ford discuss what support could be offered to Clarissa in order for her to attend court and give her best evidence.

The duty prosecutor informs Sgt Ford that the CPS can apply to the court to make an order that prohibits the cross-examination in person by an unrepresented defendant.⁸ The duty prosecutor advises Sgt Ford to speak to Clarissa and inform her of this court order, as well as other special measures for which she is eligible, such as a screen to shield Clarissa from the accused. The duty prosecutor advises Sgt Ford to check what, if any, support Clarissa is receiving from voluntary agencies. Sgt Ford is also advised to check whether there are any civil court orders relating to Alex, as well as pending civil proceedings.

Sgt Ford records the early special measures discussion on an MG3 form and completes the action plan to reflect the outcome. Sgt Ford knows that she must now contact Clarissa and will record Clarissa's wishes for special measures on a Victim Personal Statement, as well as including the details on an MG6 and an MG11 form.

⁷ Section 17 of the 1999 Act.

⁸ Section 36, Part II of the 1999 Act.

Early special measures discussions

An early special measures discussion is an opportunity for the police officer to inform the CPS prosecutor of the needs of the prosecution witnesses who may be considered to be vulnerable or intimidated.

The police officer and CPS prosecutor should discuss, in particular, witness eligibility for special measures. The following issues might also be discussed:

- the ability of the witness to give evidence;
- whether the witness may have other support needs for which referrals may need to be made;
- the basis upon which the witness is eligible for one or more of the special measures (consideration will need to be given as to whether any expert evidence will be required in order to establish eligibility);
- which of the special measures will be required to assist the particular witness and how the court is to be satisfied of the matters that it must consider under sections 19(2) and 19(3) of the 1999 Act;
- the views of the witness as to which of the special measures should be applied for (police officers and CPS prosecutors must not make assumptions concerning the views of the witness or their preferences for special measures); and
- the appropriate individuals, such as an intermediary, to attend any subsequent meetings between the CPS prosecutor and the witness.

If the early special measures discussion concerns the victim, the police officer should provide the CPS prosecutor with copies of any Victim Personal Statements made by the victim. The CPS prosecutor should always ask the police officer whether the victim has made a Victim Personal Statement.

The police officer and CPS prosecutor must appreciate that time is of the essence, especially where the use of an intermediary is being contemplated.

If an issue arises as to the competence of a witness to give evidence or whether the witness should give sworn or unsworn evidence, this should also be discussed by the police officer and the CPS prosecutor.⁹

Police officers and CPS prosecutors must not assume that a witness will want special measures. It is essential that the police officer explains to the witness about special measures and asks which measures they want. The prosecutor must know which measure(s) the witness wants before making the decision to apply to the court.

Where there is a disagreement concerning applications for special measures, the final decision rests with the CPS prosecutor.

The police officer and CPS prosecutor should also discuss the arranging and timing of a pre-trial familiarisation visit for the witness.¹⁰ If the witness would like a pre-trial familiarisation visit and where the Witness Care Officer (WCO) is the single point of contact for the witness, the WCO will refer the witness to the Witness Service.¹¹ Pre-trial familiarisation visits should take place in advance of the day of the trial, not on the day

⁹ A witness is competent if he/she is able to understand questions put and give answers that can be understood (section 53 of the 1999 Act). When determining the issue of competence, the court will have regard to any special measures direction that has been made or is proposed to be made under section 19 (section 54 of the 1999 Act).

¹⁰ *Are special measures for vulnerable and intimidated witnesses working?*, Home Office research from January 2006, shows that, of the non-statutory measures available, the court familiarisation visit is the most effective.

¹¹ The WCO will not necessarily be the single point of contact for all witnesses. CPS Areas should have a local protocol in place for cases being handled by specialist units to ensure that all parties are aware of their role and responsibilities, which will include any referral to the Witness Service to arrange a pre-trial familiarisation visit.

itself. The visit allows the witness to see the courtroom and the different types of special measures available. This will usually be conducted by a Witness Service volunteer. However, this is unlikely to take place until after the special measures application has been made, so it is vital to enable a witness to make an informed choice about special measures at the earliest opportunity.

It is important that the police officer and CPS prosecutor have early special measures discussions in order to ensure that applications for special measures are made in a timely and effective manner.¹²

How will a case involving a vulnerable or intimidated witness be identified?

The police have a crucial role in the identification of vulnerable and intimidated witnesses (paragraph 5.7 of the Victims' Code, see Annex C). It is essential that vulnerable and intimidated witnesses are identified at the earliest possible opportunity, as strict timescales determine when an application for special measures should be made to the court (see Annex A).

Police officers must understand how the various special measures can help vulnerable and intimidated witnesses to give their best evidence (paragraph 5.8 of the Victims' Code, see Annex C).

It is essential that the police officer dealing with the vulnerable or intimidated witness does not raise unrealistic expectations on the part of the witness. The decision to apply for special measures will be made by the CPS prosecutor. The decision to grant special measures will be made by the court.

Where the police have not identified the case as involving vulnerable or intimidated witnesses, the CPS prosecutor may request an early special measures discussion with the police officer.

An example of such a situation may be where the police officer has not identified a child witness as being a vulnerable witness and therefore eligible for special measures.

The CPS must have systems in place to assist prosecutors in considering whether or not to make an application to the court for a special measures direction (paragraph 7.8 of the Victims' Code, see Annex C).

¹² Paragraph 2.4 of *The Code for Crown Prosecutors* states: "Crown Prosecutors should provide guidance and advice to investigators throughout the investigative and prosecuting process. This may include lines of inquiry, evidential requirements and assistance in any pre-charge procedures."

CPS prosecutors should always give consideration as to whether an early special measures discussion should be held, particularly when a case is likely to be contested. CPS prosecutors must also consider the possibility of provisionally allocating a trial advocate to the case and taking their views.

It is important that the police officer informs the CPS prosecutor whether the vulnerable or intimidated witness is receiving therapy, or whether it is proposed or has been undertaken (see Annex D).

The early identification of vulnerable and intimidated witnesses allows for the necessary support and information to be supplied within set timescales. CPS and WCU staff should identify vulnerable and intimidated witnesses on the CMS¹³ and WMS¹⁴ IT systems by applying the relevant “flags” (see Annex E).

Is an early special measures discussion required in every case?

It is the responsibility of the investigating police officer to decide whether the circumstances of the particular case require an early special measures discussion. CPS prosecutors also have a responsibility to consider whether the case requires an early special measures discussion.

Where there is any doubt about issues such as whether an interview should be video-recorded or an intermediary appointed, the police officer should request an early special measures discussion with the CPS prosecutor.

¹³ CMS is the national electronic case management system that the CPS uses in preparation of the prosecution of cases.

¹⁴ WMS is the witness care IT system, designed to support the Witness Care Units.

When will the early special measures discussion take place?

There are no strict rules as to when the early special measures discussion should take place. The need for an early discussion should be considered by both the officer in the case and the reviewing prosecutor. The need for an initial, or further, early special measures discussion should be kept under regular review.

The early special measures discussion should take place as soon as possible after the need for the discussion has been identified by the investigating officer or the CPS prosecutor (see the flowchart at Annex F). However, in appropriate cases, the investigating police officer and the CPS prosecutor must consider special measures at the charging stage. (Paragraphs 5.2, 5.6, 7.2(i) and 7.4 of the *Guidance to Police Officers and Crown Prosecutors Issued by the Director of Public Prosecutions under S37A of the Police and Criminal Evidence Act 1984* have particular relevance to the early discussion of special measures by police officers and prosecutors. Annex G provides further details).

Where the investigating police officer has not identified the need for an early special measures discussion, the CPS prosecutor should request the discussion. An early special measures discussion can be held after the CPS prosecutor has made an initial decision to proceed with a prosecution.

When planning an early special measures discussion, police officers and CPS prosecutors must always consider any time constraints that may apply to the case, such as custody time limits.

In cases where the witness has become vulnerable or intimidated as the case has progressed or where there are new prosecution witnesses, the special measures discussion must be held without delay.

How should police officers inform CPS prosecutors of the need for an early special measures discussion?

Police officers should contact the CPS duty prosecutor, by telephone, as soon as possible in cases in which they have identified a witness as being vulnerable or intimidated and it is believed that an early special measures discussion would assist the case progression. The telephone consultation can be prior to a statement being made.

If the witness has made a statement, the police officer should complete the MG2 form to record their initial witness assessment. The MG2 form must provide sufficient and comprehensive information to enable CPS prosecutors to make an application to the court for special measures. If the witness has given a Victim Personal Statement containing any information about issues relevant to their status as a vulnerable or intimidated witness, this should also be made available. The police officer may need to inform the CPS prosecutor of conversations with the witness and a description of their demeanour. The report must be individual to the witness and meaningful.

Police officers should complete the MG3 form and indicate the need for an early special measures discussion with the CPS prosecutor. The police officer must record the views of the witness concerning special measures on the MG3 form.

If an early special measures discussion is required after the CPS prosecutor has made the charging decision, the police officer should record the information on form MG6 and submit it to the CPS.

The MG6 form must include:

- the basis upon which the witness is deemed to be vulnerable or intimidated (sections 16 and 17 of the 1999 Act);
- the special measures that may be appropriate and how they will improve the quality of the evidence of the witness;
- the views of the witness;
- the opinions of others, as appropriate; and
- a short description of the discussion with the witness, to inform the prosecutor that the officer has canvassed all special measures options with the witness, and that the witness's view is properly informed.

Police officers should always use the MG3 and action plan forms to record the detail and outcome of early special measures discussions with the CPS prosecutor.

Who should be involved in the early special measures discussion?

The police officer in the case should discuss with the CPS prosecutor the special measures required by the vulnerable or intimidated witness. If the officer in the case has not had contact with the vulnerable or intimidated witness, then the officer who has had that contact should also be involved.

If the early special measures discussion takes place prior to the witness being interviewed, it is likely that the police officer and CPS prosecutor will discuss the case by means of a telephone conversation.

If the early special measures discussion takes place after the witness has been interviewed, the police officer or CPS prosecutor may consider that an expert witness or an intermediary should be involved in the discussion (see Annex H for details of who is liable to pay for the attendance of an expert or an intermediary at an early special measures discussion). The expert may be able to provide information concerning a particular disability. The intermediary may provide particular information relating to the communication needs of the witness. The police officer and CPS prosecutor must discuss the possible involvement of experts and/or intermediaries in cases in which an intermediary has had an involvement with the witness at the investigative stage.

Case study

Claire Dean is 37 years old and has learning disabilities and Asperger's Syndrome. She also has difficulty communicating and when unsure how to respond to a question, routinely replies "Yes". She is confused by days and dates. She attends, on a daily basis, a drop-in centre operated by the local authority.

Over a period of three months, Claire has been the victim of thefts of cash from her purse. The thefts have all happened while she has been at the drop-in centre. Claire suspects that a member of staff at the drop-in centre has taken the cash from her purse. She has informed the manager of the drop-in centre of the thefts. The manager has encouraged her to report the incidents to the police, and accompanies her to the police station.

At the police station, PC Edwards meets Claire and the drop-in centre manager. The manager informs PC Edwards of the thefts and explains that Claire has a learning disability and difficulties with communication. PC Edwards takes a statement from the manager, and explains to Claire and the drop-in centre manager that he will make enquiries as to how she can give her best evidence.

PC Edwards and colleagues investigate the thefts at the drop-in centre. A member of staff is arrested in connection with the thefts.

PC Edwards has heard of the intermediary special measure, but is unsure whether Claire would benefit from the assistance provided by an intermediary. He is aware of the eligibility criteria for using an intermediary to assist vulnerable witnesses. He contacts his colleague co-ordinating the appointment of intermediaries and is then able to have an early special measures discussion with the CPS. The CPS duty prosecutor is of the opinion that PC Edwards should make a referral for an intermediary.

A referral is made for an intermediary and an ABE interview with Claire is conducted with the assistance of an intermediary. The CPS duty prosecutor views the ABE interview and considers all additional evidence and a charge is authorised. The MG3 form is endorsed with regard to the use of the intermediary and a further special measures meeting is recommended to prepare the special measures application and trial.

Should a record be kept of the early special measures discussion?

Yes. It is important that a record is kept of discussions and decisions made concerning special measures.

The police officer must record, on an MG3 form, their discussion with the witness concerning the provision of special measures and the witness's preference. The MG3 and the action plans must be completed, by the police officer, to record the early special measures discussion with the CPS prosecutor.

If the early special measures discussion relates to a case for which a file has been created on CMS, the CPS prosecutor must record on CMS the early special measures discussion and outcome.

What should happen after the early special measures discussion?

As soon as possible after the early special measures discussion, the police officer in the case should contact the witness to:

- inform the witness of the decisions made by the CPS prosecutor concerning applications for special measures; and
- respond to any issues the witness raises, including explaining the reasons for any decisions taken which were not in accordance with the witness's wishes.

The police officer should remind the witness that the CPS prosecutor makes the final decision as to which, if any, special measures are to be applied for, **but** the witness **must** be told that the court decides which, if any, measures will be made available to the witness. The court will take into consideration the wishes of the witness, as well as having regard to the need to ensure that the defendant will have a fair trial.

The police officer should ask the witness whether, if they are required to give evidence in the case, they wish to meet with the CPS prosecutor to discuss matters relating to the special measures decisions. A witness may not wish to have such a meeting and their wishes must be respected. However, if the witness does wish to meet the CPS prosecutor, the police officer should complete and submit to the CPS an MG3 form and action plan. The police officer should also inform the witness that the Witness Care Unit will contact the witness as soon as possible after it is known that the witness will be required to give evidence, in order to make arrangements for the meeting (paragraph 6.3 of the Victims' Code refers, see Annex C).

The police officer must also:

- explain to the witness that a record of the meeting will be kept and will normally be disclosed to the defence;
- confirm the current contact details for the witness;
- request the witness to inform the Witness Care Unit of changes to their contact details; and
- ask the witness to inform the Witness Care Unit of any change of needs or circumstances that might affect the special measures to be applied for.

This information must be recorded on the MG3 form and submitted to the CPS.

Consequences of not having early special measures discussions

The failure to identify the witness as being vulnerable or intimidated and the failure to discuss, with the prosecutor, their eligibility for special measures may result in:

- the witness's needs not being identified;
- the witness's statement being recorded in an inappropriate form;
- insufficient support being given to the witness to allow them to give their best evidence;
- the prosecutor making assumptions about which, if any, special measures to apply to the court for;
- the prosecutor making late applications for special measures;
- a lack of assurance for the witness about their attendance at court;
- witnesses lacking confidence in the CJS; and
- unsuccessful prosecutions.

Meetings between the CPS prosecutor and the witness

There will be cases in which the witness requests a meeting with the CPS prosecutor to discuss the decisions made concerning special measures.¹⁵

Where the CPS prosecutor has decided not to apply for any special measures, an explanation should be given to the witness of the reasons for that decision. The CPS prosecutor must take into account any comments or views expressed by, or on behalf of, the witness and, if appropriate, reconsider the decision not to apply for special measures.

The meeting can be held prior to or after the CPS prosecutor applies to the court for a special measures direction. It is preferable for the meeting to be held before making the application to the court, as this provides an opportunity for the CPS prosecutor to gain information directly from the witness which may be relevant to the application.

Where the meeting is held prior to the CPS prosecutor applying to the court for the special measures direction, the purpose of the meeting may be to confirm the views of the witness as to which of the special measures should be applied for.

Where the meeting is held after the CPS prosecutor has applied for a special measures direction, the purpose of the meeting may be to inform the witness of the binding effect of the court's direction.

When meeting with witnesses, the CPS prosecutor must be alert to the case of *R v Momodou and R v Limani* [2005] EWCA Crim 177 which provides clear guidance on the subject of not coaching witnesses.

Further details about meetings between the CPS prosecutor and the witness can be found in *Special measures meetings between the Crown Prosecution Service and Witnesses: Practice Guidance*.

¹⁵ The *Prosecutors' Pledge* requires the prosecutor to "address the specific needs of a victim and where justified seek to protect their identity by making an appropriate application to the court".

Key messages

- The needs and circumstances of witnesses may change from the reporting of the crime to the court hearing. The police officer should ask the witness to notify the WCU of changes to their circumstances that may affect their eligibility for special measures. If the WCO has any queries in relation to the special measures, he/she will refer them to the CPS prosecutor.
- It is possible that the police officer and CPS prosecutor will meet on many occasions to discuss the progression of a case. However, it is essential that the early special measures discussion is not forgotten or overlooked because of the other meetings.
- Police officers and CPS prosecutors should bear in mind that a witness may initially say that they do not want special measures, but may later realise that they do and are afraid to say so.
- CPS prosecutors should make decisions concerning special measures as early as possible in order to provide certainty for the witness.
- An early special measures discussion and possible meeting with the witness is different from a pre-trial witness interview. If the prosecutor meets with the witness to discuss special measures, the meeting will be held after the CPS prosecutor has made an initial decision to proceed with the prosecution.

Useful material

Annex I provides details of further useful material.

Annex A

Timescales for the submission, to the court officer, of the application for special measures

Application to the youth court

Within 28 days of the date on which the defendant first appears or is brought before the court in connection with the offence.

Application to a magistrates' court

Within 14 days of the defendant indicating their intention to plead not guilty to any charge brought against them and in relation to which a special measures direction may be sought.

Application to the Crown Court

Within 28 days of:

- (i) the committal of the defendant, or
- (ii) the consent to the preferment of a bill of indictment in relation to the case, or
- (iii) the service of a notice of transfer under section 53 of the Criminal Justice Act 1991, or
- (iv) where a person is sent for trial under section 51 of the Crime and Disorder Act 1998, the service of copies of the documents containing the evidence on which the charge or charges are based under paragraph 1 of Schedule 3 to that Act, or
- (v) the service of a Notice of Appeal from a decision of a youth court or a magistrates' court.

Annex B

Witness Care Units

Witness Care Units are jointly operated by the police and the CPS. The units are staffed by Witness Care Officers (WCOs) who provide information and access to support to victims and witnesses from the point of charge through to case completion.

Dedicated WCOs act as a single point of contact from the point of charge in the majority of cases. In some cases, such as child abuse and domestic violence, a specialist police officer may act as the single point of contact. The single point of contact will keep victims and witnesses informed about the progress of the case via their preferred means of contact. This includes the outcome of the case and thanking them for their time and contribution.

WCOs also undertake a detailed needs assessment of each victim and witness. This provides an in-depth understanding of an individual's needs and requirements. The WCOs then have at their disposal a range of interventions to provide tailored support to those victims and witnesses who need it.

Annex C

Extracts from the Victims' Code

Paragraph 5.7

“Police must take all reasonable steps to identify vulnerable or intimidated victims”

Paragraph 5.8

“Where a vulnerable or intimidated victim may be called as a witness in criminal proceedings, and may be eligible for assistance by way of a special measure ... the police must explain to the victim the provision about special measures in that Act and record any views the victim expresses about applying for special measures”

Paragraph 6.3

“The joint police/CPS Witness Care Units must notify victims of any requirement of them to give live evidence, and any subsequent amendment to this requirement, within one working day of receiving the notification from the CPS”

Paragraph 7.8

“Where a victim who is to be called as a witness in criminal proceedings... has been identified as potentially vulnerable or intimidated, the CPS must have systems in place to assist prosecutors in considering whether or not to make an application to the court for a special measures direction... The outcome of that consideration must be recorded”

Annex D

Pre-trial therapy

The best interests of the vulnerable or intimidated witness are paramount when deciding whether, when and in what form therapeutic help is given.¹⁶

Witnesses who are vulnerable or intimidated may be undertaking or considering undertaking pre-trial therapy. It is important that the police and CPS are aware that therapy is proposed, is being undertaken or has been undertaken.

It is a common misapprehension that the CPS will not prosecute a case in which a child or an adult has received pre-trial therapy. In fact, it is the nature of the therapy that is a key issue, rather than the occurrence itself, and many forms of therapy will have no adverse impact on the criminal case.

Whether a witness should receive therapy before the criminal trial is not a decision for the police or CPS and those involved in the prosecution have no authority to prevent any witness from receiving therapy. It is for the witness/their carers, in conjunction with the professional agencies providing support, to decide whether or not to undertake therapy.

The nature of the therapy should be explained so that consideration can be given to whether or not the provision of such therapy is likely to impact on the criminal case. Certain therapeutic approaches very definitely present problems so far as evidential reliability is concerned. These would include hypnotherapy, psychodrama, regression techniques and unstructured groups.

Timing of therapeutic work

Delaying therapy, pending the outcome of a criminal trial, for fear that the witness's evidence could be considered tainted and the prosecution lost, conflicts with the need to ensure that child and vulnerable adult victims are able to receive immediate and effective treatment to assist their recovery. In the context of this potential conflict the following matters are relevant:

- Many victims express the wish to see their abuser convicted and punished.
- There is a wider public interest in ensuring that abusers are brought to justice to prevent further abuse.
- All accused persons are entitled to a fair trial.

It therefore follows that both care professionals and forensic investigators have a mutual interest in ensuring, wherever possible, that witnesses who receive therapy prior to a criminal trial are regarded as able to give reliable testimony.

Once the statement or video-recorded interview is complete, it should be possible for appropriate counselling and therapy to take place. Therapy is not usually encouraged before that stage because of the risk that it might be considered to affect or taint the witness's evidence and the likelihood of a prosecution being jeopardised can therefore be greater. However, if therapy is already under way, a decision about how to proceed may be best made after discussion at a multi-disciplinary meeting which includes a therapist.

¹⁶ CPS legal guidance, *Safeguarding Children. Guidance on Children as Victims and Witnesses*.

If there is a demonstrable need for the provision of therapy and it is possible that the therapy will prejudice the criminal proceedings, consideration may need to be given to abandoning those proceedings in the interests of the witness's wellbeing. In order that such consideration can be given, it is essential that information regarding therapy is communicated to the prosecutor.

Alternatively, there will be some witnesses for whom it will be preferable to delay therapy until after the criminal case has been heard, to avoid the benefits of the therapy being undone.

Full guidance can be found in *Provision of Therapy for Child Witnesses Prior to a Criminal Trial (Practice Guidance)* published in 2001 and in *Provision of Therapy for Vulnerable or Intimidated Adult Witnesses Prior to a Criminal Trial (Practice Guidance)* published in 2002. These documents can be found at www.cps.gov.uk/publications/docs/therapychild.pdf and www.cps.gov.uk/publications/docs/pretrialadult.pdf

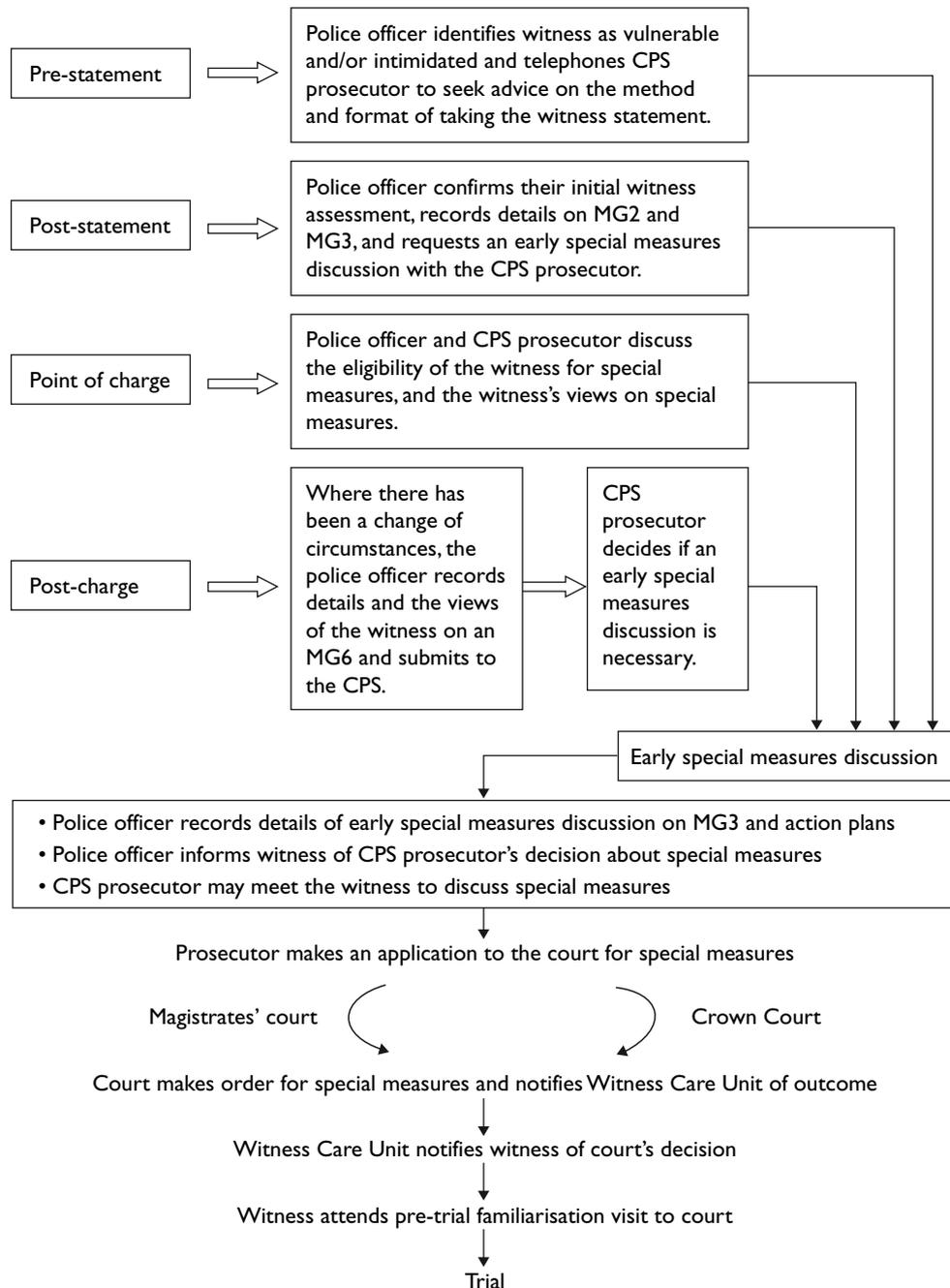
Annex E

“Flagging” of cases on CMS and WMS IT systems

CPS staff should apply the relevant “snooker” balls on the CMS IT system when data inputting cases involving vulnerable and/or intimidated victims and witnesses. The same functionality is also available to Witness Care Unit (WCU) staff who are using WMS to manage their cases. In addition, there are two questions on the detailed needs assessment, which ask Witness Care Officers (WCOs) whether the victim or witness was vulnerable and/or intimidated and which WCOs are required to answer before they can finalise a case on WMS. The responses to these questions form part of the secondary measures data that is produced by the WMS Management Information System. It is important for both CPS and WCU staff to ensure that they “flag” the status of vulnerable and/or intimidated victims and witnesses, so that victims and witnesses are provided with the necessary support and information within the timescale.

Annex F

Early special measures discussions between the police and the Crown Prosecution Service



Special measures discussions can take place at any stage in the process and may need to happen at more than one point, particularly as new circumstances/witnesses emerge.

Annex G

Guidance to Police Officers and Crown Prosecutors Issued by the Director of Public Prosecutions under S37A of the Police and Criminal Evidence Act 1984

The above-mentioned guidance does not include a specific provision concerning early special measures discussions between the police officer and the CPS prosecutor. However, the following provisions have particular relevance and govern compliance:

Paragraph 5.2

“Early consultation and advice may be sought and given in any case (including those in which the police may themselves determine the charge) and may include lines of enquiry, evidential requirements and any pre-charge procedures. In exercising this function, Crown Prosecutors will be pro-active in identifying and, where possible, rectifying evidential deficiencies and identify those cases that can proceed to court for an early guilty plea as an expedited report.”

Paragraph 5.6

“Where during the course of a consultation or following receipt of the Report to Crown Prosecutor for a Charging Decision (MG3) it is clear that a charging decision in the case cannot be reached at that stage, the Crown Prosecutor consulted will advise on the further steps to be taken, including the evidence to be gathered or the statements to be obtained before the decision can be reached and will agree with the investigating officer the action to be taken and the time in which that is to be achieved. This agreement will be recorded on the MG3 and a copy will be provided to an officer involved in the investigation. A copy will be retained by the Crown Prosecutor.

In providing such advice, Crown Prosecutors should avoid simply requiring full files to be produced but will specify the precise evidence required or to be sought in accordance with Paragraph 7.2 below. Persons will not be charged until all agreed actions have been completed.”

Paragraph 7.2(i)

“All cases proceeding to the Crown Court or expected to be contested: Evidential Report

Where it is clear that the case is likely to or will proceed to the Crown Court or is likely to be contested, the Report to Crown Prosecutor for a Charging Decision (MG3) must be accompanied by an Evidential Report containing the key evidence upon which the prosecution will rely together with any unused material which may undermine the prosecution case or assist the defence (including crime reports, initial descriptions and any previous convictions of key witnesses).

The evidential report must also be accompanied by suggested charge(s), a record of convictions and cautions of the person, and any observations of the reporting or supervising officer.”

Paragraph 7.4

“Requirement for early consultation in Evidential Report Cases

Early consultation with a Duty Prosecutor should be undertaken to identify those cases in which an evidential file will be required and to agree the timescales for the completion and submission of the Report to Crown Prosecutor for a Charging Decision (MG3). An officer involved in the investigation must submit the completed Report to Crown Prosecutor for a Charging Decision (MG3) within the agreed timescale together with the evidential material referred to in Paragraphs 5.6 and 7.2(i) above.”

Annex H

Payment for the attendance of an expert witness or an intermediary at an early special measures discussion

The following guidelines will apply in deciding whether the police or the CPS is liable for the payment of the fees and expenses of an expert witness or an intermediary in connection with early special measures discussions. The guidelines apply to the fees and expenses incurred in preparing for and attending an early special measures discussion.

The police are responsible for the cost of the investigation process and the provision of evidence to the CPS. The police will be liable for the payment of the fees and expenses for an expert witness or an intermediary to attend an early special measures discussion in the following circumstances:

- if the need for an expert witness or an intermediary arises pre-charge;
- if, post-charge, further advice is needed from an expert witness to support the evidence, to satisfy the test of a realistic prospect of conviction as set out in the Code for Crown Prosecutors; or
- if expert evidence is required to deal with an issue as to the competence of a witness to give evidence.

The CPS is responsible for the costs of the presentation of evidence in court. The CPS will be liable for the payment of the fees and expenses for an expert witness or an intermediary to attend an early special measures discussion in the following circumstances:

- if, post-charge, the CPS needs to seek the advice of an expert witness or an intermediary in connection with the presentation of the evidence by the witness;
- if expert evidence is required to deal with an issue as to whether a witness should give sworn or unsworn evidence; or
- if the expert witness or intermediary attends court, the CPS will be responsible for their fees and expenses.

Annex I

Useful material

Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures

www.cps.gov.uk/publications/docs/Achieving_Best_Evidence_FINAL.pdf

The Code of Practice for Victims of Crime

www.homeoffice.gov.uk/documents/victims-code-of-practice?view=Binary

The Code for Crown Prosecutors

www.cps.gov.uk/victims_witnesses/code.html

Guidance to Police Officers and Crown Prosecutors Issued by the Director of Public Prosecutions under S37A of the Police and Criminal Evidence Act 1984

www.cps.gov.uk/publications/docs/dpp_guidance.pdf

The Prosecutors' Pledge

www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html

Children and Young People. CPS policy on prosecuting criminal cases involving children and young people as victims and witnesses

www.cps.gov.uk/victims_witnesses/children_policy.pdf

Policy for Prosecuting Cases of Domestic Violence

www.cps.gov.uk/publications/docs/DomesticViolencePolicy.pdf

Intermediary procedural guidance manual

http://lcjb.cjsonline.gov.uk/area15/library/Intermediaries/Intermediary_Procedural_Manual.pdf

Provision of Therapy for Child Witnesses Prior to a Criminal Trial (Practice Guidance)

www.cps.gov.uk/publications/docs/therapychild.pdf

Provision of Therapy for Vulnerable or Intimidated Adult Witnesses Prior to a Criminal Trial (Practice Guidance)

www.cps.gov.uk/publications/docs/pretrialadult.pdf

Are special measures for vulnerable and intimidated witnesses working?

www.homeoffice.gov.uk/rds/pdfs06/rdsolr0106.pdf

Safeguarding Children. Guidance on Children as Victims and Witnesses

www.cps.gov.uk/legal/v_to_z/safeguarding_children_as_victims_and_witnesses



Criminal Justice System: working together for the public

