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## **Interviewing and Interrogation: A Review of Research and Practice Since World War II**

Gavin E. Oxburgh, Trond Myklebust, Mark Fallon and Maria Hartwig (editors)

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**Front cover:** *The painting ‘Galileo Galilei Before the Inquisitors’ by Cristiano Banti (1824-1904) reminds us that interrogation, interviewing and questioning are not only ancient societal practices, but they frequently entail an imbalance of power which bears on the process of establishing facts. This anthology shows the significant strides in our knowledge about interrogation and interviewing since World War II, and it discusses in detail why coercion should not be used. The picture of the Banti painting above the title banner is used courtesy the Marri Collection, Palazzo Foresti, Carpi (near Modena). TOAEP thanks Dr. Alberto Marri for sharing his knowledge about the painting and the beautiful Marri Collection. Below the title banner is a photograph of an imagined extension of Banti’s painting, made by Mr. Stefano Ticci, Florence, for the purposes of this dust-jacket.*

**Back cover:** *Detail of eroded stone in the terrace at the entrance of Basilica San Miniato al Monte in Florence. Just as water and changing temperature erode the locally-quarried stone, so, by metaphor, the use of coercion in interviewing and interrogation erodes the quality and integrity of criminal justice. The back covers of books in this Publication Series show publicly accessible ground, frequently in Florence where TOAEP has an office.*

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## Achieving Best Evidence from Victims and Witnesses

Laura D. Farrugia and Katie Maras\*

### 18.1. Introduction

The evidence of victims and witness ('witnesses') is pivotal for successful criminal prosecutions; the quality of their evidence is often relied upon by the prosecution in proving their case. However, the reality is that many witnesses are children, vulnerable or intimidated and so require assistance in providing their best evidence, both at the investigation stage and during the trial. As such, there is a reliance on the criminal justice system to be able to understand and accommodate their needs. Historically, the legal and procedural systems were not considered to be adequate in doing so, and it was following a number of inquiries and revisions of guidance that has led to the development of current guidance for vulnerable witnesses.

In England and Wales, the interviewing of children and vulnerable witnesses is underpinned by guidance produced by the UK's MoJ, *Achieving Best Evidence in Criminal Proceedings* ('ABE').<sup>1</sup> In this chapter, we outline the rationale and development of the ABE framework within its policy and legislative context, what it entails and for whom, and the research that underpins it. We conclude with sections on recent update and limitations, highlighting both strengths and areas of concern of the framework, supported by research to date.

#### 18.1.1. Early Developments: The Memorandum of Good Practice

The predecessor to the ABE, the Memorandum of Good Practice<sup>2</sup> ('MoGP'), was borne out of an advisory group chaired by His Honour Judge Thomas Pigot KC. The group had been set up to consider the admissibility of video-recorded

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<sup>1</sup> MoJ, *Achieving Best Evidence in Criminal Proceedings*, UK Home Office, London, 2022 ('ABE').

<sup>2</sup> UK Home Office, *Memorandum of Good Practice*, His Majesty's Stationary Office London, 1992.

interviews with children in criminal cases. The Pigot Report (1989)<sup>3</sup> recommended that such interviews, conducted by a police officer or social worker, should be used as a substitute for the child's live examination-in-chief evidence at trial. Initially, the Report recommended that a 'Code of Practice' be drawn up to govern the conduct in which the interviews should be carried out in relation to rules of evidence. Recommendations extending the videotape principle to cross-examination and the use of intermediaries<sup>4</sup> were also proposed. In compiling a draft Code of Practice, the UK Home Office commissioned a number of professionals to assist. Following a number of revisions, the title changed from 'Code' to 'Memorandum of Good Practice' – this was done to reflect the guidance of the document, rather than it being viewed as containing inflexible rules. The MoGP was published by the UK Home Office in 1992 to assist and guide those responsible for conducting video-recorded interviews with children or vulnerable witnesses. The MoGP provided a number of recommendations; including that the interview should be conducted as soon as possible after the alleged offence is reported in an informal setting, and that it should last no more than one hour. Other recommendations related to interviewers being trained to interact with children. During the interview, the guidance suggested that children should be given every opportunity to tell their own story before being asked direct questions regarding the alleged offence and that questioning should use open questions to begin with and more direct questions towards the end of the interview, if necessary. The MoGP was launched in 1992 to coincide with the implementation of the Criminal Justice Act (1991).<sup>5</sup> This Act permitted the use of the videoed interview to serve as a child witness' evidence-in-chief at trial. Whilst the Act adopted the admissibility of video-recorded interviews as evidence-in-chief, it did not incorporate recommendations regarding cross-examination and the use of intermediaries in assisting the witness.<sup>6</sup>

Since the implementation of the MoGP, several research studies have been conducted regarding its use and impact. Butler (1993)<sup>7</sup> reported that of

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<sup>3</sup> UK Home Office, *Report of the Advisory Group on Video Evidence*, London, 1989.

<sup>4</sup> Intermediaries are self-employed communication specialists who assist vulnerable victims, witnesses and defendants to give their evidence during a police interview or trial. Registered Intermediaries are accredited by the MoJ and generally assist with victims and witnesses. See MoJ, "Ministry of Justice Witness Intermediary Scheme", 4 April 2022 (available on the UK government's web site) for more information.

<sup>5</sup> UK, Criminal Justice Act, 15 July 1991 (<https://www.legal-tools.org/doc/uahqyr/>).

<sup>6</sup> Graham H. Davies and Helen L. Westcott, "Interviewing Child Witnesses Under the Memorandum of Good Practice: A Research Review", Police Research Series Paper No. 115, UK Home Office, Policing and Reducing Crime Unit and Research, Development and Statistics Directorate, 1999.

<sup>7</sup> Anthony Butler, "Spare the Child", in *Police Review*, 2003, no. 14.

nearly 15,000 videotaped interviews conducted in its first nine months of operation, less than a quarter had been submitted to the Crown Prosecution Service ('CPS') and only 44 were known to have been played at trial. Legal delays and late guilty pleas were known to have impacted upon the figures, although the author did also note wide variations in video-recorded interviews being conducted and submitted to the CPS between police force areas. What followed was an evaluation commissioned by the UK Home Office.<sup>8</sup> They reported that 75 per cent of cases at trial included an application to show a video-recorded interview and a general acceptance of the value of recording evidence in this manner amongst police officers, social workers and judges. They also found that children who provided their evidence via video-recording were more relaxed than those who had testified at court. However, interviewers were not always found to follow the guidance regarding free narrative and open-ended questions.

Subsequent research has reported further mixed findings in its support of the MoGP. Some reported that the values of the Memorandum were doubted,<sup>9</sup> and that it failed to address the needs of children with special needs.<sup>10</sup> Whilst these criticisms have been reiterated, other research has found support for the principles included in the MoGP.<sup>11</sup>

### **18.1.2. Developing 'Achieving Best Evidence in Criminal Proceedings'**

In 1998, the UK Home Office tasked an inter-departmental working group with examining the barriers faced by vulnerable or intimidated witnesses in having their voices heard in court. Their resulting report, *Speaking Up for Justice*,<sup>12</sup> highlighted the high rates of attrition between initial police contact and court when vulnerable witnesses were involved.<sup>13</sup> The report produced wide-ranging recommendations to better support and assist vulnerable or intimidated witnesses.

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<sup>8</sup> Graham H. Davies, Clare Wilson, Rebecca Mitchell and John Milsom, *Videotaping Children's Evidence: An Evaluation*, UK Home Office, London, 1995.

<sup>9</sup> Beverley Hughes, Howard Parker and Bernard Gallagher, *Policing Child Sexual Abuse: The View from Police Practitioners*, Home Office Police Research Group, London, 1996.

<sup>10</sup> Helen L. Westcott and Jocelyn Jones (eds.), *Perspectives on the Memorandum: Policy, Practice and Research in Investigative Interviewing*, Ashgate Publishing, 1997.

<sup>11</sup> Graham H. Davies, Emma Marshall and Noelle Robertson, "Child Abuse: Training Investigating Officers", Police Research Series Paper No. 94, UK Home Office Policing and Reducing Crime Unit, London, 1998.

<sup>12</sup> UK Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*, UK Home Office Procedures and Victims Unit, London, 1998.

<sup>13</sup> Graham H. Davies and Helen L. Westcott, "Preventing the Withdrawal of Complaints and Psychological Support for Victims", in Mark R. Kebell and Graham H. Davies (eds.), *Practical Psychology for Forensic Investigations and Prosecutions*, Wiley, Chichester, 2006, pp. 183–202.

To legislate these recommendations, the Youth Justice and Criminal Evidence Act (1999)<sup>14</sup> set out a range of ‘special measures’ to enable vulnerable witnesses to give improved evidence which may be allowed by the court if they are likely to improve the quality of a witness’ evidence. These include:

- Section 23: allowing witnesses to give evidence in court from behind a screen;
- Section 24: the use of live link for cross-examination (including from within the court building where the trial is taking place or from an alternative, authorized remote location);
- Section 25: evidence being provided in private, which involves the public gallery being closed and only one media representative having permitted access;
- Section 26: removal of court dress (wigs and gowns);
- Section 27: allowing evidence-in-chief to be presented in the form of a pre-recorded investigative (police) interview, usually an ABE interview;
- Section 28: pre-recorded cross-examination (via video link);
- Section 29: communication through a ‘Registered Intermediary’; and
- Section 30: aids to communication (such as communication boards, signs or symbols) to enable the witness to give their best evidence.

Some of these measures were already available to children prior to this through the Criminal Justice Act (1991) and accompanying MoGP. However, this neglected a large proportion of vulnerable people, such as adults with psycho-social difficulties who are at greater risk of victimization.<sup>15</sup> As the Youth Justice and Criminal Evidence Act (1999) extended the option of video-taped evidence-in-chief, along with providing for further special measures (as mentioned above) to all groups of vulnerable witnesses, a small team of specialists were commissioned by the government to draft a new set of guidelines for interviewing vulnerable adults as well as children. The ABE is largely consistent with the MoGP in terms of the style of interviewing it advises, and that its primary purpose is to capture on video the vulnerable witness’ evidence for use in the investigation. However, the ABE further differs from the MoGP in that it offers additional guidance regarding support for vulnerable witnesses prior to police interviews and at court. As such, ABE guidance is intended not just for

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<sup>14</sup> UK, Youth Justice and Criminal Evidence Act, 27 July 1999 (<https://www.legal-tools.org/doc/267f70/>).

<sup>15</sup> Louise Ellison, Vanessa E. Munro, Katrin Hohl and Paul Wallang, “Challenging Criminal Justice? Psychosocial Disability and Rape Victimization”, in *Criminology & Criminal Justice*, 2015, vol. 15, no. 2, pp. 225–244.

police but for all those involved in the legal process, including lawyers and judges.

Following the Youth Justice and Criminal Evidence Act (1999), special measures are all now available (at the discretion of the court) to both children and vulnerable adult witnesses, who are defined by the Act as:

- children under 18 years of age;
- any witness whose quality of evidence is likely to be diminished because they:
  - are suffering from a mental disorder (as defined by Section 1(2) of the Mental Health Act (1983) and amended into a single definition by Section 1(2) of the Mental Health Act (2007) as any disorder or disability of the mind);<sup>16</sup>
  - have a significant impairment of intelligence and social functioning;
  - have a physical disability or are suffering from a physical disorder;
  - or
  - are suffering from fear or distress in relation to testifying in the case (complainants in sexual offences are automatically defined as falling within this category unless they wish to opt out).

One of the key measures that can be implemented for these groups is the ABE interview which is set out in the guidance document, *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children*.<sup>17</sup>

## 18.2. Overview of the ABE Framework

The ABE framework provides overall guidance on interviewing victims and witnesses that may require special measures. Although the framework provides extensive guidance, it focusses specifically on four main areas: (i) planning and preparation; (ii) conducting the interview; (iii) witness support and preparation for court; and (iv) witnesses in court. For the purposes of this chapter, each aspect will be discussed in more detail below.

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<sup>16</sup> UK, Mental Health Act, 9 May 1983 (<https://www.legal-tools.org/doc/zrz03a/>); *id.*, Mental Health Act, 19 July 2007 (<https://www.legal-tools.org/doc/vum89x/>).

<sup>17</sup> MoJ, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and using Special Measures*, UK Home Office, London, 2011 ('ABE: Guidance on Interviewing Victims and Witnesses, and using Special Measures'); *id.*, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and using Special Measures*, UK Home Office, London, 2022.

### 18.2.1. Planning and Preparation for the ABE Interview

Planning and preparation prior to the ABE interview are well documented as critical for the success of an interview and thus also the subsequent investigation.<sup>18</sup> Indeed, the ABE guidance highlights that “a well-conducted interview will only occur if appropriate planning has taken place”.<sup>19</sup> Historically, however, officers’ planning and preparation of interviews has been found to be satisfactory at best,<sup>20</sup> highlighting the need for more emphasis on the importance of planning and preparation ahead of an interview.<sup>21</sup> The ABE guidance highlights key areas in planning and preparing for the ABE interview, from making initial contact with the witness to using planning information to inform an interview plan.

#### 18.2.1.1. Initial Contact With Witnesses

ABE guidance on planning and preparation includes early witness contact. Prior to the ABE interview, there will inevitably be some form of initial contact with the victim or witness; for example, to take immediate action regarding the securing of forensic evidence or obtaining medical attention. Some preliminary questioning may also be necessary to elicit a brief account of what the victim or witness is alleging to have occurred. The ABE guidance recommends that only a brief account should occur at this stage, focussing specifically on where and when the alleged offence took place and who was involved or present at the time. Such initial accounts should be brief and obtained using appropriate questioning strategies such as open questions, to avoid contaminating the witness’ original memory trace.<sup>22</sup> The initial account should also be documented and subsequently made available to assist in the planning of the formal interview conducted at a later stage.

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<sup>18</sup> Rebecca Milne and Ray Bull, *Investigative Interviewing: Psychology and Practice*, Wiley, Chichester, 1999; Kevin Smith and Rebecca Milne, “Planning the Interview”, in Michael E. Lamb, David J. La Rooy, Lindsay C. Malloy and Carmit Katz (eds), *Children’s Testimony: A Handbook of Psychological Research and Forensic Practice*, Wiley, Chichester, 2011, pp. 87–107.

<sup>19</sup> ABE: Guidance on Interviewing Victims and Witnesses, and using Special Measures, p. 17, para. 2.1, see *supra* note 17.

<sup>20</sup> David W. Walsh and Rebecca Milne, “Keeping the PEACE? A Study of Investigative Interviewing Practices in the Public Sector”, in *Legal and Criminological Psychology*, 2008, vol. 13, pp. 39–57.

<sup>21</sup> Smith and Milne, 2011, see *supra* note 18.

<sup>22</sup> Elizabeth Loftus, “Make-Believe Memories”, in *American Psychologist*, 2003, vol. 58, no. 11, pp. 867–873.



### **18.2.1.2. Planning Information**

Collating relevant information about the individual witness is critical in order to plan an appropriate and effective interview with them. This will usually be gathered through a witness assessment carried out by the interviewing officer in the first instance, although specialist advice (for example, from a Registered Intermediary or psychologist) may be necessary, particularly if the witness has (or is suspected to have) a learning disability or developmental or mental health condition. A mental health assessment by a psychiatrist or psychologist may also take place if such issues are identified, with the aim of informing the childcare planning process (where applicable) and/or assessing the witness' ability to provide reliable evidence and the effect that this might have on mental and physical health. However, these assessments can also (with the agreement of the mental health professional) be used to assist the planning of the video interview, if applicable.

The interviewer should have clear objectives for the assessment and not encourage the witness to talk about the alleged event during the interview (although the witness should not be interrupted if they do freely recall significant events). The focus should be on collating relevant information about the witness' circumstances and individual characteristics that may impact on the interview. These include factors such as age, gender, culture and religion, language and communication, social and cognitive functioning, mental health, welfare and social care issues (and the impact that these, in turn, may have on their mental and emotional state), their relationship to the alleged offender, the need for safeguarding, and whether they have any physical disability. Other factors to be explored include the witness' ability and willingness to talk within a formal interview setting (either to a police officer, social worker or any other trained interviewer), potential issues around compliance, whether communication aids are needed (for example, for witnesses with hearing and communication difficulties) and whether there are any special requirements (for example, if they have separation anxiety). The ABE guidance sets out the importance of establishing the witness' ability to give informed consent to the interview; if not, parent or guardian consent will be required. It is imperative that a witness is able to understand the implications of them being interviewed and, if videoed, how their videoed interview will be used. A full explanation and discussion of the possible special measures that may be implemented must also be explained to a vulnerable witness.

As noted in the ABE guidance, identifying vulnerability (and hence the need for support) in adults can be more difficult because of the fluctuating nature of many mental disorders and often hidden vulnerabilities in conditions such as

autism<sup>23</sup> and mild learning disabilities. It is also problematic to generalize the nature and extent of difficulties across (and indeed within) different mental health, learning and developmental conditions. Currently, there is no accepted or consistent approach to the assessment of witness competence for those with mental health conditions and, as noted in the ABE guidance, varying criteria may be used by experts to make assessments. It is also important to note that some people may be reluctant to disclose that they have a learning disability or mental health condition, highlighting the importance of establishing positive early contact with a witness to ensure that they feel comfortable in – and understand the potentially positive implications of – disclosing their diagnosis.<sup>24</sup>

There are also other issues around potential discrimination (perceived or real and implicit or explicit) based on factors such as the witness having a previous history of abuse and neglect, domestic violence, disability or racism. For example, possible side effects of having experienced abuse and neglect include poor self-esteem and heightened anxiety<sup>25</sup> and decreased cognitive functioning,<sup>26</sup> which, in turn, can result in episodic memory difficulties<sup>27</sup> and heightened compliance.<sup>28</sup> Being sensitive to such issues and preparing the witness for the interview and establishing rapport is an essential step towards mitigating against such effects. Ensuring the witness is familiar with the interviewer and other personnel present (including the intermediary) and providing a safe and non-judgemental environment for the witness is crucial. Similarly, intimidated witnesses (that is, those whose quality of evidence is likely to be diminished by reason of fear or distress) particularly need to feel safe and may require support and encouragement to participate in an interview. This may include an interview supporter, enrolment in a protection scheme and special measures such as the use of screens in court or giving their evidence in court via live television link.

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<sup>23</sup> Nicholas Chown, “Do You Have Any Difficulties That I May Not Be Aware of? A Study of Autism Awareness and Understanding in the UK Police Service”, in *International Journal of Police Science & Management*, 2010, vol. 12, no. 2, pp. 256–273.

<sup>24</sup> Laura Crane *et al.*, “Experiences of Autism Spectrum Disorder and Policing in England and Wales: Surveying Police and the Autism Community”, in *Journal of Autism and Developmental Disorders*, 2016, vol. 46, no. 6, pp. 2028–2041.

<sup>25</sup> Çiğdem Berber Çelik and Hatice Odacı, “Does Child Abuse Have an Impact on Self-Esteem, Depression, Anxiety and Stress Conditions of Individuals?”, in *International Journal of Social Psychiatry*, 2020, vol. 66, no. 2, pp. 171–178.

<sup>26</sup> Andrea L. Roberts *et al.*, “Childhood Abuse and Cognitive Function in a Large Cohort of Middle-Aged Women”, in *Child Maltreatment*, vol. 27, no. 1, pp. 100–113.

<sup>27</sup> Eija Airaksinen, Maria Larsson and Yvonne Forsell, “Neuropsychological Functions in Anxiety Disorders in Population-Based Samples: Evidence of Episodic Memory Dysfunction”, in *Journal of Psychiatric Research*, 2005, vol. 39, no. 2, pp. 207–214.

<sup>28</sup> Robert J. Chandler, Ailsa Russell and Katie L. Maras, “Compliance in Autism: Self-report in Action”, in *Autism*, 2019, vol. 23, no. 4, pp. 1005–1017.

The ABE guidance also discusses issues around competency to give evidence. This is broadly defined as the witness' ability to understand questions put to them and to give answers which can be understood, bearing in mind the various special measures that are available to support them in this. Where a witness is competent to give evidence, they are usually also compellable and thus *may* be legally required to attend trial (although they are not necessarily also legally required to provide a preliminary statement to the police). The interviewer will need to have *some* contextual knowledge of the alleged offence (for example, the type of offence(s), its approximate time and location and how it came to the notice of the police) in order to plan the areas for general investigation during the interview. Although more specific details about case may be made available at a later stage (after an attempt has been made to elicit and clarify the witness' account), it is critical to ensure there is no potential contamination from the interviewer when eliciting the witness' initial account(s).

### 18.2.1.3. Use of Planning Information

The information gathered during the planning and preparation stage should then be used to inform decision-making about *what* should be covered in the interview (usually the responsibility of an interview advisor) and *how* to elicit and probe the account.<sup>29</sup> The decision to complete an ABE interview with a vulnerable witness is usually made at a strategy meeting. This will involve setting the objectives for the interview, which is particularly important in giving direction and structure to the interview, and determining specific interview techniques. Generally, this will be governed according to the witness and the type of offence and may include techniques used in the Cognitive Interview ('CI') (see Chapter 16) and the National Institute of Child Health and Human Development (see Chapter 17). The use of drawings, pictures, photographs, symbols, dolls, figures and props may also be considered to help assess level of understanding but also to support the verbal recall of a witness' account. Although research has indicated that such communicative aids can assist,<sup>30</sup> the ABE guidance indicates that interviewers need to be aware of pitfalls or risks. This can relate to legal challenges at trial, the use of props and dolls leading the witness to provide an inaccurate account or encouraging fantasy play.<sup>31</sup> The format of the interview

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<sup>29</sup> Smith and Milne, 2011, see *supra* note 18.

<sup>30</sup> Michelle L.A. Mattison, Coral J. Dando and Thomas C. Ormerod, "Sketching to Remember: Episodic Free Recall Task Support for Child Witnesses and Victims With Autism Spectrum Disorder", in *Journal of Autism and Developmental Disorders*, 2015, vol. 45, no. 6, pp. 1751–1765.

<sup>31</sup> Michael E. Lamb, Irit Hershkowitz, Yael Orbach and Phillip W. Esplin, *Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses*, Wiley-Blackwell, Chichester, 2008.

including who will conduct the interview, the location and timing will also be determined, as well as support for the witness post-interview.

A witness' account can be obtained via either a written statement or, in order for it to be later considered as evidence-in-chief, a video-recorded interview. However, a video interview is only usually allowed if the witness is vulnerable or intimidated as per the definitions in Sections 16 and 17 of the Youth Justice and Criminal Evidence Act (1999), and if any special measures are likely to improve the quality of the witness' evidence. It should be noted that this is also the choice of the witness; where a witness does not consent to be visually recorded, a written statement should be taken.

Early qualitative work examining the perceptions of police officers, lawyers and members of the judiciary regarding the use of video and audio taped evidence suggested unanimous support for videoed interviews as a method of obtaining evidence.<sup>32</sup> However, concerns were nevertheless raised regarding the frequent absence of a coherent account and the level of detail required to prove the various offences, as well as the inability to scrutinize questions asked prior to the recording of the interview. However, other scholars have highlighted advantages of recording the interview. Archambault and Lonsway (2020)<sup>33</sup> report that recording interviews allows for more details to be recorded and more accurately when compared to a written statement, and that interviewers are able to actively listen to witnesses rather than interrupt their narrative to write down their recall. Furthermore, the recording of an interviews conveys the impact that an alleged offence has had on a witness.

### **18.2.2. Conducting the ABE Interview**

In England and Wales, the ABE guidance emphasizes the importance of the following four phases during any interview conducted with a witness. These are: (i) rapport; (ii) free recall; (iii) questions; and (iv) closure (see Figure 1). Each of these will be discussed, in turn, in relation to the ABE guidance and the psychological literature.

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<sup>32</sup> Martine B. Powell and Rebecca Wright, "Professionals' Perceptions of Electronically Recorded Interviews With Vulnerable Witnesses", in *Current Issues in Criminal Justice*, 2009, vol. 21, no. 2, pp. 205–218.

<sup>33</sup> Joanne Archambault and Kimberly A. Lonsway, *Recording Victim Interviews*, End Violence Against Women International, 2020.

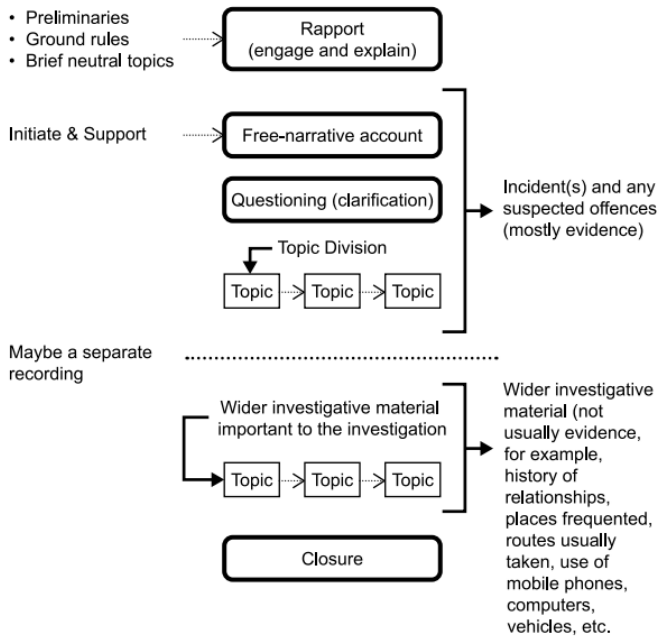


Figure 1: Typical interview structure provided in current ABE guidance.<sup>34</sup>

### 18.2.2.1. Rapport

Establishing good rapport with a witness is key and critical aspect of investigative interviewing. It helps to gain trust, which, in turn, leads to more co-operation from the interviewee and the recall of more information.<sup>35</sup> This can be especially crucial for vulnerable witnesses, who may feel shame, embarrassment or fear about disclosing information (particularly on personal matters) and may worry about the potential negative adverse implications this might have for themselves or others on whom they are dependant.<sup>36</sup>

There is not a firm consensus on the definition of rapport, although there is general agreement that it consists of mutual attention, positivity, like and respect. Researchers have attempted to manipulate rapport in different ways, including voice tone, body posture, level of engagement and the use of the

<sup>34</sup> ABE, see *supra* note 1.

<sup>35</sup> Allison Abbe and Susan E. Brandon, “The Role of Rapport in Investigative Interviewing: A Review”, in *Journal of Investigative Psychology and Offender Profiling*, 2013, vol. 10, no. 3, pp. 237–249; *id.*, “Building and Maintaining Rapport in Investigative Interviews”, in *Police Practice and Research*, 2014, vol. 15, no. 3, pp. 207–220.

<sup>36</sup> Michael E. Lamb, “Difficulties Translating Research on Forensic Interview Practices to Practitioners: Finding Water, Leading Horses, But Can We Get Them to Drink?”, in *American Psychologist*, 2016, vol. 71, no. 8, p. 710.

interviewee's name by the interviewer.<sup>37</sup> As noted by Hope and Gabbert (2019),<sup>38</sup> the lack of a precise definition of rapport limits the extent to which it can be robustly tested, trained and used in practice.

There is also a balance between ensuring the witness feels comfortable enough with the interviewer to disclose information, without the supportiveness being potentially viewed as suggestive and thus undermining the credibility of the interviewee's account. It should not therefore be contingent on specific responses, but instead be a more generic supportive social environment.<sup>39</sup> This can be achieved through the interviewer engaging with the interviewee about neutral topics that are not related to the event in question and which can be answered positively in order to foster a positive mood. The ABE guidance also advises that interviews be similarly open in nature to those that will be used during the rest of the interview, so that the interviewee becomes familiar with this style of interaction and practises proving elaborative responses. The rapport phase should not, however, be so long as to exhaust the interviewee or confuse them regarding the purpose of the interview. If the interview plan suggests that a lengthy discussion of neutral topics may be beneficial for that witness then this should take place as part of witness preparation before the interview session itself.

The witness should receive an explanation of the outline of the interview and the ground rules for what is expected of them. An investigative interview is an unusual social interaction in that it requires a significant level of specific detail that would not be appropriate in other social situations. Most witnesses will therefore naturally withhold reporting of information that they consider irrelevant,<sup>40</sup> but certain vulnerable witnesses (such as those with intellectual disability) may be particularly reluctant to recall a high level of detail due to insecurities about their own cognitive ability.<sup>41</sup> Providing explicit instructions about

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<sup>37</sup> Roger Collins, Robyn Lincoln and Mark G. Frank, "The Effect of Rapport in Forensic Interviewing", in *Psychiatry, Psychology and Law*, 2002, vol. 9, no. 1, pp. 69–78; Holmberg and Madsen, "Rapport Operationalized as a Humanitarian Interview in Investigative Interview Settings", in *Psychiatry, Psychology and Law*, 2014, vol. 21, no. 4, pp. 591–610.

<sup>38</sup> Lorraine Hope and Fiona Gabbert, "Interviewing Witnesses and Victims", in Neil Brewer and Amy Bradfield Douglass, *Psychological Science and the Law*, The Guildford Press, 2019, pp. 56–74.

<sup>39</sup> Walsh and Milne, 2008, see *supra* note 20.

<sup>40</sup> Fiona Gabbert *et al.*, "The Role of initial Witness Accounts Within the Investigative Process", in Gavin Oxburgh, Trond Myklebust, Tim Grant and Rebecca Milne (eds.), *Communication in Investigative and Legal Contexts: Integrated Approaches from Forensic Psychology, Linguistics and Law Enforcement*, Wiley-Blackwell, 2015, pp. 107–132.

<sup>41</sup> Katie Maras and Rachel Wilcock, "Suggestibility in Vulnerable Groups: Witnesses With Intellectual Disability, Autism Spectrum Disorder, and Older People", in Anne M. Ridley, Fiona

the level and type of detail required (including a reminder that the interviewer was not present at the event and does not yet know what happened) is therefore important in overcoming this. At the same time, however, it is crucial for the interviewer to emphasize the importance of the witness saying ‘I don’t know’ or ‘I can’t remember’ in order to preserve the accuracy of information reported.<sup>42</sup> They should also inform the witness that they can ask for a break at any time. This is especially important for vulnerable witnesses who may have limited attentional and cognitive resources and become tired more easily.

Ensuring understanding of truth and lies should be carried out with children and some (but not all) vulnerable adult witnesses. If applicable, this should be carried out towards the end of the rapport phase, after the ground rules have been established. This usually takes the form of a short story, whereby the witness demonstrates their understanding of the difference between a truth and a lie. Where they show no appreciation of the distinction between truth and lies, an expert assessment should be commissioned before proceeding with the interview to avoid jeopardizing the evidential value of the interview.

#### **18.2.2.2. Free Narrative Account**

The interviewer should invite the witness to provide a free narrative account of the event using open-ended prompts such as ‘Tell me what happened’ and ‘Is there any more you can tell me?’. A witness must be allowed to provide their account without interruptions to avoid disrupting their flow. The ABE guidance encourages interviewers to use non-specific prompts such as ‘Did anything else happen?’ or ‘Is there more you can tell me?’. In addition, ‘active listening’ is recommended (for example, by reflecting back on what the witness has just said in their account) to let the witness know that the interviewers are attending to their account. Concerns relating to compliance, acquiescence and reticence are documented though.

#### **18.2.2.3. Questioning**

The aim of the questioning phase is to ask the witness to expand and clarify upon the account they provided during free recall. Emphasizing again the importance of saying ‘I don’t know’ or ‘I can’t remember’ is crucial for vulnerable witnesses, who may be more prone to guessing due to heightened compliance or suggestibility.<sup>43</sup>

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Gabbert and David J. La Rooy (eds.), *Investigative Suggestibility: Theory, Research and Applications*, Wiley-Blackwell, Oxford, 2013, pp. 149–170.

<sup>42</sup> Ronald P. Fisher and R. Edward Geiselman, *Memory-Enhancing Techniques in Investigative Interviewing: The Cognitive Interview*, Charles C Thomas, Springfield, 1992.

<sup>43</sup> Roberts *et al.*, 2020, see *supra* note 26.

The gold standard here is the use of more open of ‘TED’ (*Tell, Explain and Describe*) questions, in order to elicit more detailed and accurate responses that would be achieved through more closed or specific questions.<sup>44</sup> However, for some vulnerable witnesses (for example, children, autistic witnesses, the elderly and those with intellectual disability), this may elicit information that is accurate, but not particularly detailed. Thus, more focussed but still open and non-leading prompting may then be required. This can be achieved using ‘WH’ questions (*Who, What, Where, When and How*). Although these types of questions tend to produce shorter responses than more open questions,<sup>45</sup> they can be useful for focussing on and clarifying investigation-relevant information. Finally, if TED and WH questions fail to produce sufficient information that the witness is believed to remember about the event, closed questions (for example, that only require a ‘yes/no’ type response) may be used. However, given that these types of questions can force witnesses to guess, they should only be based on what the witness has already said (for example, asking ‘Was his hat red?’ only if they had already mentioned that the perpetrator was wearing a hat). Closed questions should only be used as a last resort if absolutely necessary and at the end of the interview, as vulnerable witnesses are more likely to acquiesce to them and they may contaminate the witness’ subsequent account.<sup>46</sup>

Other question types should be avoided altogether. Questions with multiple parts (for example, ‘On the night of June 12th, were you in the park and on the following morning did you see Beth?’) and leading, tag and negative questions (for example, ‘Nick didn’t tell you he was home all evening, did he?’) and can be difficult for most witnesses, resulting in heightened suggestibility.<sup>47</sup> However, they are particularly problematic for those with executive function and language processing difficulties and often result in acquiesce or heightened suggestibility.<sup>48</sup> The use of jargon and technical terminology can cause confusion, and some vulnerable witnesses may struggle to grasp concepts such as dates, times, weights and heights. An interview that moves back and forth between topics may also confuse the witness and should be avoided; instead, topics should be probed in turn, that is, one at a time, using simple language (see Figure 1).

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<sup>44</sup> Gavin Oxburgh, Trond Myklebust and Tim Grant, “The Question of Question Types in Police Interviews: A Review of the Literature from a Psychological and Linguistic Perspective”, in *International Journal of Speech, Language and the Law*, 2010, vol. 17, no. 1, pp. 45–66.

<sup>45</sup> Airaksinen, Larsson and Forsell, 2005, see *supra* note 27.

<sup>46</sup> Roberts *et al.*, 2020, see *supra* note 26.

<sup>47</sup> Airaksinen, Larsson and Forsell, 2005, see *supra* note 27.

<sup>48</sup> Roberts *et al.*, 2020, see *supra* note 26.



The interviewer should ensure witnesses have ample time to process a question and allow them space to formulate their response. This is important for all witnesses, but especially for children, elderly witnesses and adults with cognitive and developmental conditions, who may have executive function and language processing difficulties.<sup>49</sup> Moreover, rapid-fire closed questions tend to result in witnesses becoming more passive question answerers, which is at odds with the witness compatible questioning advocated by the CI.<sup>50</sup>

After the witness' account of the incident has been probed, the interviewer can move on to probing about case-specific information that was identified as important to the investigation at the planning and preparation stage. The ABE guidance recommends that this is done separately at the end to avoid distracting the witness from recounting their version of events, and that it may only be relevant to the investigation (but not trial) in any case.

#### **18.2.2.4. Closure**

Once the free narrative and questioning phases appear to have finished, the interviewer should, if appropriate, summarize the witness' account. This is particularly important as it assists the witness in ensuring that what the interviewer has recalled is accurate. Summarizing the witness' account may also lead to further retrieval from the witness. It is not recommended to complete this if the witness is showing signs of fatigue, has a short attention span or is particularly emotional. Here, the interviewer may return to the more neutral topics discussed in the rapport-building phase. Regardless of how the closure stage is conducted, it is important that it is completed so that the witness does not feel that they have disappointed the interviewer.

#### **18.2.3. Witness Support and Preparation for Court**

Many witnesses will have neither attended court nor given evidence as part of a trial. As such, it is imperative that they are provided with the appropriate support and preparation. This may take the form of providing appropriate information about the process including the explanation of special measures. It is recommended that in doing so, the support and preparation provided is tailored to the witness' specific needs and users of the ABE guidance are recommended to also read the statutory Code of Practice for Victims of Crime<sup>51</sup> to ensure that witnesses receive the enhanced level of service they are entitled to.

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<sup>49</sup> Laura Farrugia, *Interviewing of Suspects With Mental Health Conditions and Disorders in England and Wales: A Paradigm Shift*, Routledge, London, 2022.

<sup>50</sup> Hope and Gabbert, 2019, see *supra* note 38.

<sup>51</sup> MoJ, *The Code of Practice for Victims of Crime in England and Wales and Supporting Public Information Materials*, London, 2020.

### **18.2.3.1. Support during the Investigation**

As part of the investigation, information may emerge that indicates that expert assistance is required for the witness to give their best evidence, particularly during the interview. For example, the witness may have communication difficulties. Here, the ABE guidance recommends the assistance of an interpreter (where English is not the first language) or the use of a Registered Intermediary. The latter conducts an assessment regarding the communication abilities of the vulnerable witness and will provide advice and recommendations to the interviewing officer on how best to communicate effectively with the witness to ensure that best evidence is obtained. The Registered Intermediary will also provide a report to the court communicating their recommendations for the witness to give their best evidence during trial.<sup>52</sup>

In the interval between the interview and the trial, a witness care officer will provide the witness with regular updates regarding the progression of the case. In addition, an early special measures discussion between the investigating officer and the CPS may take place where relevant to ensure that the witness' needs are taken into account when considering special measures. The ABE guidance highlights how it is the responsibility of both counsels (prosecution and defence) to communicate any special needs the witness may have.

### **18.2.3.2. Support before the Trial or Hearing**

As well as support during the investigation, it is helpful for support to be provided before the trial so that the witness feels equipped to deal with the demands this stage can bring. This occurs in a number of ways but perhaps the most important is the plea and case management hearing. This hearing provides the opportunity for the court to discuss applications for special measures so that all necessary directions are given by the judge in preparation of the trial starting. These may include (but are not limited to) a pre-trial visit, the use of a supporter, the use of a Registered Intermediary to assist whilst the witness gives their evidence (including when the ground rules hearing will be), how the witness will refresh their memory (for example, re-reading their statement or viewing their video-recorded interview), how the witness will access the court and any reporting restrictions on the trial and any use of electronic equipment (for example, the use of a video link room). The witness care officer will continue to provide updates regarding the progression of the trial and any significant developments.

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<sup>52</sup> Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants*, Policy Press, Bristol, 2015.

#### **18.2.4. Witnesses in Court**

Generally, if the ABE guidance is followed, the needs and wishes of the vulnerable witness and the necessary preparations will have been identified and put in place. In cases where a Registered Intermediary is to be used, ground rules will have been set to ensure the quality of the witness' evidence is maximized. As before the trial, the court has a duty to ensure that all witnesses are enabled to give their best evidence; this is usually enacted through the directions of special measures, but the ABE guidance also recommends the active role that the court plays in ensuring distress is minimized.

This is also the case for the legal representatives involved in the case. The ABE guidance indicates that their responsibilities include putting the witness at ease as much as possible; one way of doing so may be to meet the witness prior to them giving their evidence. Legal representatives are expected to assist the court to make informed decisions about special measures. Whilst the defence counsel's duty is to promote the best interests of the defendant they represent, the manner in which they cross-examine a witness must not be inappropriate. Indeed, there exists much guidance and assistance on how to cross examine vulnerable witnesses<sup>53</sup> and it is expected that all legal representatives maintain their current knowledge and expertise.

##### **18.2.4.1. Other Protections for Witnesses**

In addition to the special measures that vulnerable and intimidated witnesses are entitled to, there are other protections that are afforded for this type of witness too. For example, protection from cross-examination by the defendant in certain circumstances such as cases whereby sexual offences are alleged. This ensures that the witness is not intimidated any further. Defendants are not able to cross-examine children in cases involving offences of a violent or sexual nature. The courts can also prohibit any defendant from cross-examining any type of witness if they are satisfied that the direction be made in the interests of justice. Restrictions relating to evidence and questions about the witness' sexual behaviour can also be made; this not only ensures that the witness is protected from humiliation and invasion of privacy, but also that the jury is not distracted by information that may not be relevant to the case. When this direction is made, only questions relating to the alleged offence can be asked. Other protections include reporting restrictions. Whilst the general rule is that justice must be enacted in public, the court can impose restrictions if it is felt that the reporting will lead to the identification of witnesses or if the witness is experiencing fear and distress

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<sup>53</sup> See, for example, the Advocate Gateway's web site.

in giving their evidence. There is an automatic ban on the reporting of witnesses involved in sexual offences.

### **18.3. Does the Framework Achieve Best Evidence?**

It was initially thought that vulnerable witnesses were unable to provide evidence. This may be in part due to the age of the witness, vulnerabilities including mental illness and learning disabilities of adult witnesses and the impact of trauma.<sup>54</sup> Thus, they were rarely given the help they required.<sup>55</sup> However, since the implementation of the ABE guidance, vulnerable witnesses are now able to participate within the judicial system and provide their evidence via the special measures made available to them.

However, early research work suggested that the use of rapport, closure and free recall were found to be variable,<sup>56</sup> little preparation had been conducted and the interview did not tend to follow the four-phased approach set out in the ABE guidelines.<sup>57</sup> More recently, research has continued to suggest mixed findings. Hill and Davies (2013)<sup>58</sup> identified the positive effects of ABE guidance on the rapport-building phase of the interview, in addition to setting ground rules and using appropriate examples of lying. But when comparing interviews conducted under the MoGP and the ABE guidance, there were little differences observed and there was a failure to include all four phases of the interview as well as inappropriate question typologies being used. Such findings were echoed to some extent when researchers examined what worked well in ABE interviews with child witnesses in Northern Ireland.<sup>59</sup> Whilst their results suggested an overall positive view of the ABE practice including high levels of awareness, high levels of engagement with specialist training and refresher courses and regular use of cognitive interviewing techniques, they also identified barriers that may prevent good practice from happening. These included:

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<sup>54</sup> Julia C. Davidson and Antonio Bifulco, “Investigating Police Practice in the UK: Achieving Best Evidence in Work With Young Victims of Abuse”, in *Pakistan Journal of Criminology*, 2009, vol. 1, no. 3, pp. 19–46.

<sup>55</sup> Camilla Macpherson, “The Youth Justice and Criminal Evidence Act 1999: Achieving Best Evidence?”, in *Medicine, Science and the Law*, 2001, vol. 41, no. 3, pp. 230–236.

<sup>56</sup> Helen L. Westcott and Sally Kynan, “Interviewer Practice in Investigative Interviews for Suspected Child Sexual Abuse”, in *Psychology, Crime & Law*, 2006, vol. 12, no. 4, pp. 367–338.

<sup>57</sup> Brenda Robinson, “ABE Interviews: Is the Child’s ‘Best Evidence’ Being Achieved in Alleged Sexual Abuse Cases? (Part 1)”, in *Family Law Week*, 2008 (available on its web site).

<sup>58</sup> Emily Hill and Graham M. Davies, “Has the Quality of Investigative Interviews With Children Improved With Changes in Guidance? An Exploratory Study”, in *Policing: A Journal of Policy and Practice*, 2013, vol. 7, no. 1, pp. 63–71.

<sup>59</sup> Lisa Bunting, Nicola Carr, David Hayes and James Marshall, *Good Practice in Achieving Best Evidence Interview With Child Witnesses in Northern Ireland – Criminal Justice Perspectives*, Northern Ireland Department of Justice, April 2015.

1. *Planning, preparation and flexibility*: Participants identified that the specialist skills and time required for ABE interviewers were not recognized or understood by some, in addition to very few interviewers being available;
2. *Practice and rapport*: Participants were worried that the use of practice interviews could be considered as ‘coaching’ and others indicated that there was not enough time to conduct practice interviews or build rapport;
3. *Interview skills and techniques*: The use of techniques including mental reinstatement of context was not well understood by some participants, with others feeling concerned about what is allowed in the formal interview; and
4. *Feedback and review*: Participants highlighted that there is a lack of ongoing monitoring and review process and those that are in supervisory roles may not have the knowledge to evaluate such interviews.

Despite detailed ABE guidance emphasizing the importance of using more open-ended questions, in practice interviewers rarely maintain this, often reverting back to the use of closed questions.<sup>60</sup> Nevertheless, there are other specialized interview techniques that are not covered in the ABE guidance that may be acceptable to the courts as an alternative method. For example, the CI has been shown to be ineffective for autistic witnesses, reducing the accuracy of their accounts<sup>61</sup> and free recall questions, in particular, are difficult for autistic people.<sup>62</sup> This is problematic because questions should be based on what a witness has already said; if free recall is reduced then there is less for the interviewer to follow-up on. To circumvent this problem, an alternative ‘Witness-Aimed First Account’ (‘WAF’) interview technique was recently developed,<sup>63</sup> in which the witness is asked to self-segment their memory of the event into their own discrete parameter-bound ‘topic boxes’ at the outset, before engaging in an exhaustive free recall retrieval attempt (followed by interviewer probing)

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<sup>60</sup> Graham M. Davies, Helen L. Westcott and Noreen Horan, “The Impact of Questioning Style on the Content of Investigative Interviews With Suspected Child Sexual Abuse Victims”, in *Psychology, Crime & Law*, 2000, vol. 6, no. 2, pp. 81–97; Kathleen J. Sternberg, Michael E. Lamb, Graham M. Davies and Helen L. Westcott, “The Memorandum of Good Practice: Theory Versus Application”, in *Child Abuse & Neglect*, 2001, vol. 25, no. 5, pp. 669–681; Lamb, 2016, p. 710, see *supra* note 36.

<sup>61</sup> Katie L. Maras and Demot M. Bowler, “The Cognitive Interview for Eyewitnesses With Autism Spectrum Disorder”, in *Journal of Autism and Developmental Disorders*, 2010, vol. 40, no. 11, pp. 1350–1360.

<sup>62</sup> Katie L. Maras, “Obtaining Testimony from People With ASD”, in Fred R. Volkmar, Rachel Loftin, Alexander Westphal and Marc Woodbury-Smith (eds.), *Handbook of Autism and the Law*, Springer, Cham, 2021, pp. 145–183.

<sup>63</sup> Katie L. Maras *et al.*, “The Witness-Aimed First Account (WAF): A New Method for Interviewing Autistic Witnesses and Victims”, in *Autism*, 2020, vol. 24, no. 6, pp. 1449–1467.

within the parameters of each topic box in turn. Displaying the topic boxes on post-it notes serves as a reminder of the structure of the event and reduces the amount of event information that they have to hold ‘online’, freeing up cognitive resources and allowing the witness to focus their search and retrieval strategies within individual segments. Findings indicate that the WAFA interview elicits more detailed and accurate recall from both autistic and ‘typically developing’ witnesses than a standard best practice interview.<sup>64</sup>

#### **18.4. Recent Updates: Achieving Best Evidence (2022)**

The ABE framework has recently been updated and is now in its fourth edition. Whilst much of the main framework remains the same, there have been some key changes that give witnesses more choice as they progress through the criminal justice system. For example, witnesses are now able to choose the gender of their interviewer during the ABE interview given the Code of Practice for Victims<sup>65</sup> that came into force in April 2020. Vulnerable and intimidated witnesses are now able to provide their evidence at court via pre-recorded cross-examination, and the revised Witness Charter<sup>66</sup> states that the standards that can be expected as part of the journey through the criminal justice system. In addition, more understanding around trauma and witness support is included based on advancements in research recently and to ensure that witnesses remain engaged with the process. However, perhaps the most significant update is that the ABE guidance now extends to witnesses of modern slavery and domestic abuse.

#### **18.5. Limitations: Achieving Best Evidence (2022)**

Although the ABE framework has recently been updated, there still remains some limitations that are yet to be addressed. These relate to how key concepts, such as rapport, empathy and questioning typologies are explained in the ABE guidance and the interview techniques that are suggested for vulnerable witnesses.

Developing rapport and empathy is central to conducting an effective interview. Indeed, all major interviewing and interrogation guidelines advocate for the use of rapport-building techniques to assist with co-operation and achieving best evidence.<sup>67</sup> Similarly, the recently updated ABE framework makes

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<sup>64</sup> Abbe and Brandon, 2013, see *supra* note 35.

<sup>65</sup> MoJ, 2020, see *supra* note 51.

<sup>66</sup> MoJ, *The Witness Charter: Standards of Care for Witnesses in the Criminal Justice System*, London, 2013.

<sup>67</sup> Fisher and Geiselman, 1992, see *supra* note 42; Michael E. Lamb *et al.*, “A Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews With Children: A Review of Research Using the NICHD Investigative Interview Protocol”, in *Child Abuse & Neglect*, 2007, vol. 31, nos. 11–12, pp. 1201–1231.

reference to this and indicates that establishing and maintaining a good rapport is central (see para. 2.25), that the lead interviewer should be the individual who has established rapport with the interviewee (see para. 2.43), and that preparing the witness for interview and a rapport stage prior to formal questioning is essential (see para. 2.103). Thus, the concept of rapport is mentioned throughout the ABE guidance and interviewers are directed to use topics established during the rapport stage in the closing phase of the interview (see para. 3.90). However, the ABE framework does not offer any definition of what rapport is, how it can be developed and how it can be maintained despite recent publications, including a systematic review, in the psychological literature.<sup>68</sup> This is also true regarding empathy. The current ABE framework makes brief mention of empathy by indicating that in order to develop rapport, empathy must be communicated (see para. H.2.2.6). However, there is no further mention of empathy, how to identify and interpret it and the importance of using empathy during the interview.<sup>69</sup>

Perhaps one of the biggest issues in the recently updated ABE guidance is the conceptualization of question typologies. The general consensus in the psychological literature and, indeed, which drives most of the contemporary guidance regarding interviewing, is that open questions and probing questions are best practice in eliciting accurate and reliable information.<sup>70</sup> Open questions are generally understood as TED questions. The ABE framework advocates for the use of open questions, for example, in initiating a free-narrative account (see para. 3.29), and provides appropriate examples of such questions (paras. 3.51–3.53). But, confusion lies with how probing questions are described. Within the psychological literature, probing questions are described as the five WH questions.<sup>71</sup> However, in the ABE framework, these are defined as ‘specific-closed questions’ and no reference is made to ‘how’ questions. In addition, the ABE guidance refers also to these types of questions (specific-closed) as open questions (para. 3.56). Thus, there appears to be confusion regarding what constitutes an open question and a specific-closed question (or probing) in the recently updated ABE framework. Perhaps more concerning is that reference is made to

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<sup>68</sup> Fiona Gabbert *et al.*, “Exploring the Use of Rapport in Professional Information-Gathering Contexts by Systematically Mapping the Evidence Base”, in *Applied Cognitive Psychology*, 2021, vol. 35, no. 2, pp. 329–341.

<sup>69</sup> Garry E. Oxburgh, James Ost, Paul Morris and Julie Cherryman, “The Impact of Question Type and Empathy on Police Interviews With Suspects of Homicide, Filicide and Child Sexual Abuse”, in *Psychiatry, Psychology and Law*, 2014, vol. 21, no. 6, pp. 904–917.

<sup>70</sup> Brent Snook, Kirk Luther, Heather Quinlan and Rebecca Milne, “Let ‘Em Talk! A Field Study of Police Questioning Practices of Suspects and Accused Persons”, in *Criminal Justice and Behaviour*, 2012, vol. 39, no. 10, pp. 1328–1339.

<sup>71</sup> Oxburgh, Myklebust and Grant, 2010, see *supra* note 44.

using forced-choice questions and leading questions as a last resort (para. 3.51), thus appearing to contradict existing literature that indicates that a vulnerable individual may exhibit an increased risk of suggestibility, compliance and acquiescence if interviewed using such questions.<sup>72</sup>

Aside from issues with how key concepts are defined and operationalized in the updated ABE framework, the interview techniques suggested for use with vulnerable witnesses warrant some attention, primarily, the recommendation for the use of the Enhanced CI.<sup>73</sup> Generally, this evidence-based interview technique is widely used and has been shown to increase the amount of correct information recalled by witnesses.<sup>74</sup> However, this technique has been proven ineffective with vulnerable individuals even when components have been changed (such as sketching to reinstate the context).<sup>75</sup> For example, those with autism require specific parameters when providing their recall due to their set of difficulties they experience.<sup>76</sup> The ABE framework does not appear to take into account recently developed interview models that seek to accommodate the most vulnerable individuals.<sup>77</sup>

## 18.6. Conclusion

There is doubt that the ABE framework is a key development in England and Wales. Building on previous guidance developed for interviewing children (such as, the MoGP), the ABE was first introduced in 2011 and its fourth iteration was recently published in 2022. It offers a framework for supporting vulnerable victims and witnesses (both children and vulnerable adults) to provide evidence from the initial investigative interviewing stages through to court. This includes consideration of an individual's specific vulnerabilities, adapted interviewing techniques, communication support and special measures that can be made to alleviate some of the stresses associated with providing evidence in court (such as allowing the witness to be cross-examined via a live link or in a pre-recorded cross-examination). Research to date generally supports the recommendations outlined in the ABE guidance, and the recently updated version allows more

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<sup>72</sup> Gisli H. Gudjonsson, *The Psychology of False Confessions: Forty Years of Science and Practice*, John Wiley & Sons Ltd., London, 2018; Farrugia, 2022, see *supra* note 49.

<sup>73</sup> Fisher and Geiselman, 1992, see *supra* note 42.

<sup>74</sup> Amina Memon, Christian A. Meissner and Joanne Fraser, "The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years", in *Psychology, Public Policy, and Law*, 2010, vol. 16, no. 4, pp. 340–372.

<sup>75</sup> Michelle Mattison, Coral J. Dando and Thomas C. Ormerod, "Drawing the Answers: Sketching to Support Free and Probed Recall by Child Witnesses and Victims With Autism Spectrum Disorder", in *Autism*, 2018, vol. 22, no. 2, pp. 181–194.

<sup>76</sup> Maras *et al.*, 2020, see *supra* note 63.

<sup>77</sup> *Ibid.*



choice for witnesses as they navigate their way through the criminal justice system. It is positive to see more understanding around trauma and the inclusion of witnesses of modern day slavery and domestic abuse. However, there remain some concerns regarding limited explanations relating to key concepts of rapport and empathy, especially given recent publications in the psychological literature. Furthermore, how questions are defined and conceptualized and the suggestion for use of questions that are likely to increase the vulnerability of an interviewee require some further attention. The ABE framework must be able to provide appropriate guidance for interviewers to implement it, and so consideration should also be given to the recommendations for interview techniques that are not entirely suitable for vulnerable witnesses.

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## **Interviewing and Interrogation: A Review of Research and Practice Since World War II**

Gavin E. Oxburgh, Trond Myklebust, Mark Fallon and Maria Hartwig (editors)

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