



COVERT RECORDINGS IN FAMILY LAW PROCEEDINGS CONCERNING CHILDREN: FAMILY JUSTICE COUNCIL GUIDANCE

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References & Appendices

Appended to this guidance is a list of source material with hyperlinks, together with the following Appendices:

Appendix 1: Summary of General Principles and Case Management considerations

Appendix 2: Parents recording social workers – an extract from the Transparency Project’s guidance note for parents and professionals.

Appendix 3: Exemplar of template letters setting out expectations and consent to the recording of professional meetings, with thanks to NAGALRO, the professional

association for Children's Guardians, Family Court Advisers and Independent Social Workers.

Appendix 4: Guidance relating to case management of intimate images : Extract from M (A Child: Private Law Children Proceedings: Case Management: Intimate Images) [2022] EWHC 986 (Fam)

1. Introduction and scope of the Guidance

1.1. The family courts and the professionals which serve them are grappling with the consequences of a new reality, succinctly described by Peter Jackson J (as he then was):

“Advances in technology empower anyone with a mobile phone or a tablet to make recordings that would be the envy of yesterday's spies.”¹

1.2. Covert recordings are any recordings made without the express knowledge and permission of the people being recorded whether by video or audio. The sophistication and miniaturisation of modern recording equipment means it is relatively simple to record conversations on readily available and affordable devices without the knowledge of the person being recorded, and in recent years the court is increasingly being asked to consider such recordings as evidence within family court proceedings.

1.3. In 2017 in the case of Re B (A Child) the then President of the Family Division, Sir James Munby identified the need for guidance in respect of covert recordings in clear terms: *“...covert recording in the context of the family courts potentially involves a myriad of issues, very few of which, despite all the judgments to which I have referred, have, even now, been systematically considered either at first instance or in this court.”²*

1.4. The Court of Appeal identified there are at least three categories of covert recording, each of which raise a variety of different issues – the covert recording of children, the covert recording of professionals, and the covert recording of other family members. The court invited the Family Justice Council to develop guidance which considered in broad terms (i) the lawfulness of what has been done; (ii) considerations as to who is doing the recording and why (iii) best practice outside the court room (iv)

¹ M v F (Covert Recording of Children) [2016] EWFC 29

² Re B (A Child) [2017] EWCA Civ 1579

the admissibility of the recording in evidence; and (v) other evidential and practice issues.

1.5. This Guidance should not be read as a guide on how to achieve covert recordings which will be admissible in court. Whilst some covert recordings have been shown to have evidential value, the inherent intrusion of covert recordings on parents, children and professionals can also have harmful and sometimes unintended consequences. At all times the family court is charged with the welfare of the child, and the conduct of individuals who covertly record is likely to feature in consideration of their case. The costs consequences of the satellite litigation which is required for the court to manage the admissibility and weight attached to any covert recordings are significant, both in time and money.

1.6. In producing this Guidance, it became apparent that despite the ease with which covert recording can now take place, and the increase in the frequency with which it was seen as a legitimate methodology by private individuals, published guidance in relation to the management of covert and overt recordings by professional bodies serving the family justice system was extremely sparse, and has not kept pace with need. It is to be hoped that this Guidance will not only inform an understanding of good practice but will encourage the development of such guidance by professional bodies and organisations.

2. Relevant law and statutory framework

Is it lawful? The legal framework for covert recordings by private individuals

2.1. Covert recordings can be used for both legitimate and illegitimate purposes. This guidance is not intended to consider the implications and practice of public agencies including local authorities which can exceptionally engage in covert surveillance/recording under a strict legal framework in order to establish key evidential matters in relation to suspected harm of individuals for whom they have responsibility. In contrast to private individuals public agencies are constrained in obtaining covert recordings by the scope of detailed laws and regulation. Failure to adhere to the statutory framework comes with serious civil and even criminal consequences. A significant distinction can be made regarding the law governing public bodies and commercial enterprises, and the law as it relates to private individuals. The focus of this guidance is on private individuals, where the contrasting lack of clear constraints regarding the legality of the making of the recording, and the protection of the privacy of the person subjected to covert recording, are notable.

2.2. Article 8 of the European Convention on Human Rights provides a right to respect for private and family life, home and correspondence. Unlike professionals working for public agencies, family members do not owe a duty to one another under the Human Rights Act 1998. In contrast any such recordings by public bodies are

governed by the need to justify the infringement of the Article 8 right to privacy, be it within the applicable statutory guidelines, or justified as in the public interest, and the necessity of the covert activity must be evidenced and proportionate.

2.3. The statutory framework that regulates the investigatory powers of public bodies are in the main found in The Regulation of Investigatory Powers Act 2000 ('RIPA'). RIPA does not prevent parents recording meetings and conferences. It only applies to the actions of the State (such as the local authority), in relation to surveillance type activity.

2.4. There is usually a distinction between the implications of the covert recording of professionals on the one hand, and the covert recordings of private individuals including children on the other. All recordings made after 25 May 2018 are subject to the provisions of the General Data Protection Regulation (now known as the UK GDPR) tailored by the Data Protection Act 2018 (DPA) depending on the circumstances of the recording. The Information Commissioners Office (ICO) regulates data protection in the UK

2.5. Data protection law applies to 'processing' personal data. "Personal data" under Article 4(1) UK GDPR means any information relating to an identified or identifiable living individual. The making, retention and distribution of a recording constitutes processing. Personal data processed in the course of a purely personal or household activity, with no connection to a professional or commercial activity, is usually considered to be outside the scope of the UK GDPR. Understanding the motivation for resorting to covert recording is likely to assist in understanding the extent to which the making of the recording is in effect exempt from the UK GDPR. It is however a misapprehension to consider that recording in a domestic setting of itself means the recording is not subject to the data protection legislative framework .

2.7. A warning that the use of covert recordings made for the purpose of court proceedings may not attract an exemption previously described as a domestic purposes exemption was referred to by Peter Jackson J in M v F³:

"I have not heard further argument about this, and it is unnecessary to determine whether the father's actions were illegal. That said, I believe that there may be good arguments for saying that the covert recording of individuals, and particularly children, for the purpose of evidence-gathering in family proceedings would not benefit from the

³ M v F (Covert Recording of Children) [2016] EWFC 29 (16 May 2016) [Paragraph 26]
URL: <http://www.bailii.org/ew/cases/EWFC/H CJ/2016/29.html>

domestic purposes exemption. Uneducated, I would assume that the exemption is intended to protect normal domestic use, which this is not.”

2.8. If a covert recording is shared with another person or professional body this will amount to a further processing of the data and will require a lawful basis under the UK GDPR ⁴.

2.9 It is essential to understand that irrespective of whether there are direct legal restrictions on the recording of face-to-face conversations between private individuals, or further processing of the data arising from the recording, the making of the recordings may still involve unlawful activity of a different kind, and may constitute a form of harassment.

2.10 This guidance, taken as a whole, illustrates that the issue of legality should not be the sole consideration of anyone contemplating the making of a recording without the express consent of the participants. The means of otherwise permissible recordings are not always justified in search of a particular end: the means may promote unexpected and undesired outcomes for the litigant, as explored further below.

2.11 **Court hearings** - There is an absolute prohibition on the covert recording of court hearings. Recording a court hearing without permission constitutes a contempt of court under section 9 of the Contempt of Court Act 1981. Unauthorised filming, recording or live streaming proceedings from a court room, including remote court hearings, even when those hearings are being live streamed to the press and public, can result in contempt of court proceedings, criminal sanction and very large fines. ⁵

2.12 Further legal considerations arise beyond the legality of the obtaining of the recording if the recordings are distributed or published. This is considered in more detail at Section 6.

⁴ The lawful bases for processing are set out in Article 6 of the UK GDPR. At least one of these must apply whenever you process personal data:
<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/>

⁵ In 2021 the BBC were fined £28,000 for recording and then airing as background a six second recording of an ongoing court hearing.

3. Why individuals undertake covert recordings

3.1. Recordings by parents of professionals - The recording of professionals, either covertly, or overtly by request is a growing phenomenon which does not appear to be reflected in the policies of many professional agencies which serve the family court.

3.2. The Transparency Project⁶ identifies some reasons why parents wish to engage in recording of social workers:

- They do not trust or do not want to rely on the notes of the meeting and / or they may not want to wait for the notes of the meeting to be sent to them. It may be that they have previous experiences of not having received any notes when others have, or received notes that they do not agree with. They may have found it hard to challenge inaccuracies or omissions in the past;
- They want to gather evidence for later use in court proceedings;
- They want to use recording for other reasons such as to circulate information as part of a campaign, for example on social media. This might not be their original intention when making the recording.

3.3 Professionals should be able to defend whatever they say because they should be working to a professional standard on behalf of a child. The advice from Cafcass to its practitioners is that they should always be transparent in their work, that there is no legal reason why a parent or carer should not record their own interview, subject to any direction from the court. If a recording is made Family Court Advisors (FCAs) are advised to inform the parent or carer that they will include in their report that the interview was recorded. The other party would then be aware that a recording exists and could make an application to the court to have a copy disclosed to them, or to listen to it in evidence. There is no guarantee that the court would order disclosure. If the FCA is concerned that the recording will be shared with people who are not entitled to have access to it, they may wish to seek directions from the court.

3.4 The scandals involving care homes which came to light through covert recording resulted in the Care Quality Commission issuing specific guidance relating to covert recordings. It is the case that recordings can be used as a way to evidence

⁶ 'Parents recording social workers – A guidance note for parents and professionals', The Transparency Project, December 2015

professional malpractice which is otherwise not believed, as expressed by the then President, Sir James Munby in Re B (A Child) [2017] EWCA Civ 1579 at paragraph 12:

“..it needs to be accepted, with honesty and candour, that there have been in recent years in the family courts shocking examples of professional malpractice which have been established only because of the covert recording of the relevant individual.”

3.5. While it is to be hoped that the recording of an interaction with professionals should not be necessary, there are occasions where these kinds of recordings have been demonstrated to have probative evidential value. For example, in Re F (Care Proceedings: Failures of Expert)⁷ the discrepancy between the content of a recording of a meeting with a consultant clinical psychologist and the psychologist's report, led Mr Justice Hayden to be satisfied that the mother had been significantly misquoted and adversely misrepresented:

“the overall impression is of an expert who is overreaching his material, in the sense that whilst much of it is rooted in genuine reliable secure evidence, it is represented in such a way that it is designed to give it its maximum forensic impact. That involves a manipulation of material which is wholly unacceptable.”

3.6. In Medway Council v A & Ors (Learning Disability; Foster Placement)⁸ a mother with a learning disability was inappropriately placed in a mother and baby foster placement which was a poor match on several fronts. The local authority sought to rely on the allegations of the foster carer of inappropriate behaviour by the mother towards the foster carer and the baby. The mother had covertly recorded the foster carer being racially abusive and hostile towards her. These recordings were only transcribed and brought to the court's attention at the final hearing, but proved pivotal in dismissing the credibility of the foster carer's allegations and establishing the concerns of the parents:

“It is salutary and sobering to consider that there are many children in foster care, and many parents in parent and baby foster placements, and there will be occasions when parents complain about their treatment in those placements, but that it is the frequent practice in care proceedings not to require the foster carer to attend court, but to rely upon their notes and the social worker's evidence. In the light of Re A 2015 and Re J 2015, and an example such as this case, it will be all the more important to consider

⁷ Re F (Care Proceedings: Failures of Expert) [2016] EWHC 2149

⁸ Medway Council v A & Ors (Learning Disability; Foster Placement) [2015] EWFC B66 (2 June 2015)
URL: <http://www.bailii.org/ew/cases/EWFC/OJ/2015/B66.html>

with a sharp focus the nature of the evidence that the court needs to consider, and best evidence in particular. In this case, the parents' allegations were frankly treated dismissively from the outset. But for this court's willingness to permit the consideration and transcription of the recordings, despite the extreme lateness that they were provided, in combination with the requirement that the foster carer attend to give evidence ..., it would have been impossible to gain a just and proper understanding of this case."

3.7. However, there are circumstances when covert or overt recordings would undermine the validity of expert assessments, e.g., neuropsychological assessments, as it has been demonstrated to influence the quality of interaction, performance and behaviour. The British Psychological Society guidance notes: "*Deliberate covert recording is inappropriate and any form of recording should be considered in light of potential threats to the validity of an assessment. Undertaking such recordings is likely to undermine the validity of information collected*".⁹

3.8. Consideration is given to the need for professional bodies to have policies on overt recording by consent as well as covert recordings in Section 8 below.

3.9. Recordings by parents of each other - Parents may perceive a covert recording as the only way to illustrate their experience of behaviour of which they complain. However, in some cases the recording is a form of surveillance which in itself can be an example of distorted and obsessive thinking which can constitute a form of harassment or be controlling or abusive. The implications of the substantial invasion of privacy involved in repeated covert recording of one parent by another has been held by the court to be "highly relevant to the welfare determination" when assessing and determining arrangements for the child.¹⁰ Further considerations relating to the recording of private individuals can be found at Sections 4 and 5 below.

3.10. Covert recordings of children - "*It is almost always likely to be wrong for a recording device to be placed on a child for the purpose of gathering evidence in family proceedings, whether or not the child is aware of its presence.*"

Peter Jackson, J – Re M and F (Covert Recording of Children) (supra)

3.11. Parents who covertly record their children usually do so in the belief that the recording will provide some significant evidence relating to a disputed issue in their

⁹ British Psychological Society Guidance on the recording of neuropsychological testing in medicolegal settings. May 2021.

¹⁰ HKS v HSM [2021] EWHC 3423 (Fam) <https://www.bailii.org/ew/cases/EWHC/Fam/2021/3423.html>

case. The number of cases where this has proved to be the case is few, if any. Against any perceived potential value of the secret recording are the profound consequences for the welfare of any child subjected by a parent to such a degree of invasion of privacy and breach of trust. In that respect the evidential value is less likely to relate to the content of the recordings. The fact of the surveillance or 'bugging' of the child may have more evidential value in indicating the capability of the parent to understand and promote their child's emotional needs, and protect them from harm.

3.12. The profound consequences for the welfare of children were identified in the above case¹¹. Peter Jackson J found that the contents of the recordings did not assist the court. Instead, he found the consequences of the father and his partner's actions were to (i) damage further the relationship between the relevant adults, (ii) demonstrate the father's inability to trust professionals, (iii) create a secret that may well affect the child's relationship with her father and step-mother when she comes to understand what has happened, (iv) affect the family's standing in the community.

3.13. As illustrated above, the manner in which the recordings are made may not have evidential value other than to be directly relevant to an assessment of the parenting offered by the person who subjected the child to covert recording. Section 4 below considers further the significant issues which arise to be considered where parents seek to rely on covert recordings in evidence.

3.14 The response of professionals when offered covert recordings - It is suggested that whilst it may ultimately be appropriate to read/listen to the recordings enormous care should be taken to consider the correct approach before any recording is either viewed or listened to, and before it is assumed to be genuine.

3.15 If a recording is offered outside of proceedings legal advice should be taken and the implications of the recordings considered before a professional participates in listening to the recording. The basis upon which the recording is being shared or used, and what the professional may do with the information contained therein needs to be clarified with the parent before it is considered.

3.16 If a recording is offered within proceedings the correct approach should be seen as a key issue for case management. Cafcass expectations are that if parents or carers ask FCAs to listen to or watch recordings of others that they have made covertly which may include a recording of a contact session with a child; a recording of a conversation with the other parent or carer; or a recording made by concealing a

¹¹ M v F (Covert Recording of Children) [2016] EWFC 29 (16 May 2016)
URL: <http://www.bailii.org/ew/cases/EWFC/HCJ/2016/29.html>

device on a child, the material should not be listed to or viewed until the court has determined whether the material can be admitted into evidence, and this approach is recommended for all professionals offered cover recordings.

4. Case management: establishing the status and admissibility of covert recordings in court proceedings

4.1. The court will be required to engage in focussed case management before the admissibility of a covert recording and its probative value can be established. It will always be important to identify any issue relating to covert recording at the earliest possible stage in order to manage its impact on the case effectively and avoid costly satellite litigation.

4.2. The elements required for effective case management and determination of admissibility factors are considered in some detail below.

In summary, the court will need to provide directions which cover:

- The methodology of disclosure of the recordings to the other parties, including whether transcripts are required
- Establishing the full scope of the recordings, how they came about, and which recordings fall to be considered
- Establishing authenticity if in dispute, including any issues relating to editing
- Establishing the probative value of the recordings to relevant issues in dispute
- Consideration of implications for the welfare of the parties and in particular the child of having been the subject of covert recordings
- Consideration of costs arising from the application
- Any further hearing to determine the issue of admissibility.

4.3. The need to consider the emotional and psychological harm which may be caused to the parties, and particularly to an alleged victim of abuse, by the indiscriminate use of covert material involving intimate images and the importance of robust case management was recently highlighted by Mrs Justice Knowles in *Re M (Case Management: Intimate Images [2022] EWHC 986 (Fam)*¹². An extract of the judgment containing suggested guidance in relation to case management concerning intimate images is at **Appendix 4**.

¹² *M (A Child: Private Law Children Proceedings: Case Management: Intimate Images) [2022] EWHC 986 (Fam) (29 April 2022)*

4.4 The necessity of satellite litigation to determine the admissibility of covert recordings adds time and costs, with no guarantee that the substance of the recordings will be probative to issues in the case. In managing these issues the court must apply the overriding objective set out in Part 1 of the Family Procedure Rules 2010 ('FPR') of enabling the court to deal with cases justly and proportionately having regard to any welfare issues involved.

4.5. **Application of Family Procedure Rules** - It is safe to say that almost all covert recordings will be hearsay evidence, given the definition of hearsay¹³, and that recordings must be considered as 'documents' to which the relevant evidential rules apply¹⁴. It will likely only be in cases where none of the content of the recording is relied upon, and where, for example, it is only the very act of covert recording that is asserted by the existence of the covert recording which might fall outside that definition of hearsay¹⁵.

4.6. For that hearsay to fall within the parameters of the Children (Admissibility of Hearsay Evidence) Order 1993 (SI 1993/621) ('1993 Order'), and thus fall outside any other rule of law relating to hearsay such as the Civil Evidence Act 1995 (CEA), it must be '*evidence given in connection with the upbringing, maintenance or welfare of a child*'. That determination will be fact and case specific and should be determined by the court.

4.7. The effect of the 1993 Order in family proceedings relating to children is that the rule against hearsay does not apply, either in the public or private law fields. A party to proceedings relating to a child no longer has a right to challenge the admissibility of evidence connected with a child on the ground that it is hearsay so

¹³ CPR 33.1 and Civil Evidence Act 1995 s1(2) – hearsay: 'a statement made, otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated'.

¹⁴ In *Rall v Hume* [2001] EWCA Civ 146 at paragraph 12, Potter LJ clearly set out the legal position in respect of this sort of evidence: "For the purposes of disclosure, a video film or recording is a document within the extended meaning contained in CPR 31.4. A defendant who proposes to use such a film to attack a claimant's case is therefore subject to all the rules as to disclosure and inspection of documents contained in CPR 31"; and see *Garcin v Amerindo Investment Advisers Ltd* [1991] 4 All ER 655.

¹⁵ It could be argued that this rare and limited reliance on a covert recording might be analogous to the use of photographs. Even so there are requirements applicable to photographs under CPR 33.6. That rule only applies to evidence to which CPR 33.2 does not apply, and in terms of recordings they would seem to be covered by CPR 33.2(3), particularly where recordings are 'documents' under CPR 31 and not 'photos/plans/models' as cited in the heading of CPR 33.6. In either case notice needs to be given; the point of the rule being to enable a party to inspect said photograph and agree its admission without the need for further proof.

long as it falls within the parameters of the 1993 Order, which in most cases of covert recording will be likely.

4.8. However, the courts will have to assess that, and the weight which may attach to such evidence. In Re W (Minors) (Wardship: Evidence), Neill LJ noted: '*hearsay evidence is admissible as a matter of law, but... this evidence and the use to which it is put has to be handled with the greatest care and in such a way that, unless the interests of the child make it necessary, the rules of natural justice and the rights of the parents are fully and properly observed.*'¹⁶ And in R v B County Council ex parte P, Butler-Sloss LJ (in relation to the previous 1990 Children Hearsay Admissibility Order) held that '*A court presented with hearsay evidence has to look at it anxiously and consider carefully the extent to which it can properly be relied upon.*'¹⁷

4.9. Even in cases where the Civil Evidence Act 1995 ('CEA') does not strictly apply, when assessing the weight to be attached to hearsay evidence, section 4 of the CEA provides a useful framework to apply when considering hearsay evidence. Section 4 sets out the factors which should be carefully applied when considering tendentious material such as covert recordings, both in relation to potential admissibility issues and what weight should be given to that material:

- whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
- whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
- whether the evidence involves multiple hearsay;
- whether any person involved had any motive to conceal or misrepresent matters; whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
- whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

4.10. Additionally, under FPR r.22.1:(1) The court may control the evidence by giving directions as to (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court. FPR r.22.1(2) provides that the court may use its power under this rule to exclude evidence that would otherwise be admissible. Alternatively, under FPR r.22.1(3) the court may permit a party to adduce evidence, or

¹⁶ [1990] 1 FCR 286

¹⁷ [1991] 1 FLR 470 (CA)

to seek to rely on a document, in respect of which that party has failed to comply with the procedural requirements.

4.11. In the event the recordings are of a child, it may be necessary to consider whether the substance of the recording can be said to amount to an examination or assessment of the child, per section 13(3) of the Children and Families Act 2014. For example, where the child is being asked about specific allegations in contemplation of the proceedings and the questions are put or the recording subsequently analysed by an expert (or purported expert) within the proceedings. Under s13(3) “A person may not without the permission of the court cause a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in children proceedings.”

4.12. By definition, covert recordings of a child will not have been conducted with the permission of the court. If s13(3) is applicable the evidence would be deemed inadmissible until such time as the court rules it admissible. Where the court considers the recordings to amount to a contravention of s13(3), S.13(4) provides that “evidence resulting from the examination or other assessment is inadmissible in children proceedings unless the court rules that it is admissible.”

4.13. Irrespective of whether s13(3) of the Children and Families Act 2014 applies, the key issue for the court to determine, where a child has been involved in a covert recording, is the extent to which this hearsay evidence should be admitted or excluded under FPR r.22.1. Equally, under CEA s.2(4) the court has discretion to admit evidence where notice has not been given. The court’s determination of the issue of admission of such evidence will involve a highly fact-specific examination and balancing of the factors set out above in the CEA and, additionally, described below.

4.14. **Process** - It is essential that the court is provided with the details necessary to carry out a proper determination of the factors relevant to the consideration of whether covert recordings should be admitted into evidence, and the weight to be given to covert recordings as hearsay evidence.

4.15. If the court considers that a particular covert recording falls outside the provisions of the 1993 Order, s2 CEA states that a party relying on hearsay evidence should give notice and, if asked, particulars. FPR 2010 r.23 provides, in those circumstances, that those seeking to rely on a covert recording at a final hearing should make an application for the recordings to be determined as admissible evidence as soon as is practicable.

4.16. The application should be made on notice to the other parties, by way of an application using Form C2. As a minimum the application should provide a summary of the following:

(a) the nature of the recording – its context, whether it is edited, and the date(s) and time(s)

(b) the methodology of the recording and why it was obtained covertly

(c) the relevance of the contents to the issues in the proceedings.

4.17. Upon either being made aware of the existence of and/or intention to rely on a covert recording under the 1993 Order, or by receipt of an application pursuant to r.23, the court will need to consider directions necessary to determine whether the recording should be admitted and issues relevant to any weight to be given to it, and ensure that this is a proportionate exercise. This will likely be considered at the next listed case management hearing ('CMH'), or may require a specific listing. Further consideration may well be required at a later hearing to determine the issues with the benefit of the information resulting from the earlier directions.

4.18. It is essential that where parties seek to admit covert recordings into evidence that the issue is raised at an early opportunity. This should not be trial by ambush. The court will require time to determine the nature and admissibility of the recordings and establish their integrity. Late production risks derailing the timetable of the case, extending an existing trial listing, risking a last-minute adjournment, or taking the court and other parties by surprise, and is unlikely to be looked on favourably, particularly where the recordings have been in the possession of a party for some time.

4.19. In considering the proportionality of the directions required to determine whether covert recordings should be admitted, the relevance and probative value of the recordings, even assuming their authenticity, will be key.

4.20. **Relevance** - Satellite litigation to consider the admissibility and nature of covert recordings is costly in terms of time and money, and in terms of the intrusion into the privacy of the individuals the subject of the recording, particularly where the recording is of children. Before the court engages in full consideration of the recording itself the court should be satisfied that taken at its highest the content of the recording is relevant to the issues that require to be determined.

4.21. The test for deciding "relevance" was succinctly expressed in the House of Lords decision by Lord Simon of Glaisdale in Director of Public Prosecution v Kilbourne [1973] 1 All ER 440, at 460 J in the following terms:

"Your Lordships have been concerned with four concepts in the law of evidence: (i) relevance; (ii) admissibility; (iii) corroboration; (iv) weight. The first two terms are frequently, and in many circumstances legitimately, used interchangeably; but I think it makes for clarity if they are kept separate, since some relevant evidence is

inadmissible and some admissible evidence is irrelevant... Evidence is relevant if it is logically probative or disprobative of some matter which requires proof."

4.22. In the context of proceedings involving children, the recordings may be relevant to issues relating to a child's welfare and/or be helpful to a Judge when considering the wider context of a matter. If the key content of the recording is not probative of an issue in the case, then the fact of the making of the recording may still be relevant in so far as it relates to the conduct of the person who engaged in covert recording, and implications for the welfare and relationships of those recorded.¹⁸

4.23. Where it can be demonstrated that the content of the recording is likely to be relevant, the court should continue to consider the factors below.

4.24. **Probative value** - The suggested probative value of the covert recording should be identified: Is it required to show what was said/done, or is it suggested that it is evidence that what was said is true?

4.25. Courts considering commercial litigation, employment, and personal injury cases are regularly obligated to consider the probative value of covert recordings. The balance of the caution required when relying on recordings, against the potential value in establishing the truth has been considered in a commercial context in Singh v Singh & Ors:

"In this case however I have the direct evidence of the recordings made by the claimant. It is true to say that these must be approached with some caution, as there is always a risk that where one party knows a conversation is being recorded but the other does not the content may be manipulated with a view to drawing the party who is unaware into some statement that can be taken out of context. But there can be great value in what is said in such circumstances, where the parties plainly know the truth of the matters they are discussing and are talking (at least on one side) freely about them."¹⁹

4.26. As demonstrated in Medway Council v A & Ors (Learning Disability; Foster Placement) (supra) there will undoubtedly be some fact-specific occasions where the recordings have probative value as to issues in dispute. Irrespective of the undisputed authenticity of the recording, if admitted into evidence, it may still be necessary for the subjects of the recording to give evidence regarding its proper interpretation and

¹⁸ In Re M & F (Covert Recording of Children) [2016] EWFC 29; the court found the content of the recording to have no relevance but the fact of covert recording to have relevance.

¹⁹ [2016] EWHC 1432(Ch)

weight. This has particular implications where the subject of the recording is a child, which is considered in more detail below.

4.27. **The authenticity and completeness of the recording** - The court will need to consider the scope and authenticity of the recording.

4.28. This will be made easier if it is clear that the recording is of good quality, is reliable and is demonstrably a record of the entire discussion or event, rather than an edited selection. In this digital era there is a risk that material may be skewed and manipulated by the careful editing by one party. The court will need to consider the degree to which the material has been edited selectively.

4.29. In order to prevent this, original recordings should be preserved in their entirety and be made available to all participants to hear and view. Additionally, the court should actively consider whether it may be necessary for a transcript of the audio recording to be prepared, possibly by an independent party.

4.30. The extent to which the accuracy of the recording is accepted by the participants needs to be established. Where the authenticity of the recording is challenged, the reasons for that challenge may lead the court to consider whether the instruction of a forensic expert is necessary and proportionate.

4.31. An expert instruction will require compliance with PD25, specifically a letter of instruction approved by the court. The burden and costs associated with a forensic exercise will need to be determined, and where parties are publicly funded will need to be within the range of publicly funded legal aid certificates. A full expert forensic exercise should therefore only be undertaken where it is necessary, and the scope identified. Instruction may need to consider factors such as:

- context,
- interrogation of device(s)
- metadata analysis
- default recording and file formats
- timestamps
- glitches, flaws, splices, chops
- background noise, voice texture, vocal content.

4.32. If the authenticity of the recording cannot be established, it should be not be admitted as evidence in terms of being probative of the content of the recording. However, the fact of the recording may still be admissible as it relates to the other

relevant considerations of the court concerning the child's welfare or the conduct of the parties.²⁰

4.33. **Scope** - Assuming authenticity is established, the court should consider the scope of the recordings to be admitted into evidence. There may be more than one recording, and not all will be relevant.

4.34. Any proposal for the editing of the tape or the transcript for admission into evidence should be dealt with initially between the legal representatives (where instructed) and thereafter (or otherwise) determined by the court.

4.35. **Admissibility as it relates to the manner in which the recording was obtained** - If the authenticity can be established, the court still needs to consider whether there are other considerations which would weigh against admissibility or value. This will include whether the recording was lawfully obtained.

4.36. In civil proceedings, the court does not have a specific power to exclude evidence on the ground that it was improperly or unlawfully obtained. However, the court has discretion to exclude evidence in order to achieve the overriding objective of ensuring cases are dealt with justly and at proportionate cost.

4.37. Beyond the family courts a number of different tribunals routinely consider the issue of admissibility when confronted with potentially unlawful or unethical covert recordings. The issue of admissibility was re-visited by the Employment Appeal Tribunal (EAT) in Vaughan v London Borough of Lewisham & Others²¹. Here, the claimant (who had presented a claim of discrimination) applied for permission to rely on 39 hours' worth of covert recordings that she had made, using a dictaphone, of communications between herself and her managers and colleagues. On appeal, the EAT stated that the practice of covert recordings is "*very distasteful*". However, it went on to confirm that such recordings are "*not inadmissible simply because the way in which they were taken may be regarded as discreditable*".

4.38. Questions of compliance and legality are relevant to the question of admissibility, but there is no automatic bar to admissibility of evidence that has been improperly or illegally obtained. In the context of family law, this was illustrated in the

²⁰ In *Re M & F* the covert recordings were admitted into the proceedings but did not have probative value as to content: "*In the end, the issue increased the length and cost of the hearing, yet it did not produce a single piece of useful information.*" (ibid) (para 5)

²¹ *Vaughan v London Borough of Lewisham & Others* [2013] UKEAT/0533/12/SM

Court of Appeal decision in Imerman v Tchenguiz²², at paragraph 177 Lord Neuberger MR concluded that:

"Accordingly, we consider that, in ancillary relief proceedings, while the court can admit such evidence, it has power to exclude it if unlawfully obtained, including power to exclude documents whose existence has only been established by unlawful means. In exercising that power, the court will be guided by what is "necessary for disposing fairly of the application for ancillary relief or for saving costs", and will take into account the importance of the evidence, "the conduct of the parties", and any other relevant factors, including the normal case management aspects. Ultimately, this requires the court to carry out a balancing exercise, something which, we are well aware, is easy to say in general terms but is often very difficult to effect in individual cases in practice."

4.39. In cases involving circumstances in which a public authority or public body has acted in breach of statutory provisions in the making of covert recordings, but the evidence as a consequence of those actions is treated as admissible, the family court has taken the approach that this will not absolve the public authority or body from the implications under any relevant laws.²³ Private individuals can expect a similar level of risk. As indicated at Section 6, there may be a number of related legal actions which arise from the recording even if the recording is admitted into evidence.

5. Particular considerations relating to the covert recording of children

5.1. Covert recordings of children give rise to considerations relating to:

- The implications for the ability of the parties to promote and protect the welfare of the family
- The potential need for representation of the child
- Whether and how the child should be informed they have been recorded
- Whether child is required to give evidence to evaluate the content of the recording

²² *Imerman v Tchenguiz & others* [2011] 1 All ER 555. See also *Re DH (A Minor) (Child Abuse)* [1994] 1 FLR 679 where covert hospital video footage was admitted.

²³ See for example *Re E & N (No 2)*, [2017] EWFC B27 which considered the admission of surveillance conducted by the local authority notwithstanding that no determination was made as to its lawful compliance with statutory provisions.

5.2. Relevance to welfare of the child and family - Irrespective of whether the recordings can be relied on as evidence of fact, the court must consider the degree to which the nature of the recordings is pertinent to the welfare analysis of the child. The potentially harmful implications for the emotional welfare of a child are considered in Section 3 above.

5.3. In addition to the direct impact of making a child the subject of covert recording or surveillance, the willingness to sacrifice the emotional welfare of the child by the use of covert surveillance as a means to attack the other parent has also been noted by the court:

*"[The father] is quite unable to understand that his frequent recording and photographing of [the child] is emotionally abusive of her. As [the child] grows up, what is she to make of it? She will know, if she does not already, that [the father] is looking all the time for the means to criticise [the mother]."*²⁴

5.4. In addition to considering the implications for the child's welfare, the court will also be faced with a number of dilemmas regarding the involvement of the child in the proceedings going forward including the issue of representation.

5.5. The potential need for representation, including consideration as to the appointment of a Guardian - Given the importance of the issues before the court and the extent to which the court will need to be guided by evaluation in this context of the child's welfare, needs, wishes and feelings, the court will need to consider appointing a Children's Guardian who will obtain legal representation for the child.

5.6. Consideration of whether and how the child is to be told they have been the subject of a covert recording - The court will need to consider whether a child's welfare requires them to be informed they have been the subject of recordings, and the advice of a court appointed Guardian is likely to be essential to achieve this. The issue was considered in M v F: *"She is also at risk of harm arising from the recordings. I accept the Guardian's compelling assessment that it would be extremely damaging for Tara if the information comes to her in future in some uncontrolled way, something that is likely to cause her confusion or distress and seriously affect her ability to trust people..."*²⁵

5.7. The child may be required to give evidence to evaluate the weight to be attached to the content of the recording - Any involvement of the child or children

²⁴ Re C (A Child) [2015] EWCA Civ 1096

²⁵ Re M & F (ibid) (para 5 iii)

must be approached sensitively, with the child's wellbeing in the forefront of the court's and the parties' minds. Giving evidence could cause substantial stress and psychological harm to a child. However, there is no presumption that children cannot give oral evidence.

5.8. If a party wants a child to give evidence, they must make an application to the court on Form C2. The court will seek to find a balance between the advantage of hearing the child's evidence in the proceedings and any possible damage to the child's welfare in giving evidence. Any suggestion that the child will be required to give evidence about the content of a recording will require urgent review of the need for legal representation and an appointment of a Guardian to assist the court and represent the interests of the child. Under the relevant guidelines²⁶ the court is required to consider:

- the child's wishes and feelings about giving evidence;
- the child's particular needs and abilities;
- the age, maturity, vulnerability, understanding, capacity and competence of the child;
- the support or lack of support the child has;
- the quality and importance of the child's evidence;
- the views of the guardian who should have discussed the issue with the child and those with parental responsibility;
- the impact that may be had on later care arrangements.

5.9. The court will need to consider the weight to attach to the recording with reference to the fact-specific context relating to that child, and the extent to which the views expressed in the recording appear to be freely given. For example, in Re C (A Child)²⁷ the court noted that the recordings included repeat questioning of the child which was leading and suggestive, leading to "*well founded concerns that the child has learned that F likes to hear bad things about [her Mother]*".

²⁶ FJC Dec 2011: Guidelines in relation to children giving evidence in family proceedings; Re W (Children) [2010] 1 FLR 1485 SC.

²⁷ Unreported? But referred to in the unsuccessful appeal: [2015] EWCA Civ 1096

5.10. The risks of the recording of children responding to direct questioning by people who are not adhering to the strict framework under which children should be interviewed are considered further at Section 6.

6. Intended and unintended consequences: Further implications and issues arising from covert recordings

6.1. Beyond the issue of the admission of evidence, the revelation that one party has been recording the other can result in a domino effect of additional litigation:

6.2. Costs consequences - The costs arising from the management of recordings can be huge, including the significant costs of transcribing any recording, notwithstanding that the content of the recordings may not ultimately change the outcome of the case.

6.3. In civil litigation and family cases, as indicated above, although there is precedent for the courts to admit into evidence covert video recordings obtained by way of conduct which may give rise to a separate action, there is also legal precedent for penalising the party producing the recording in costs, in order to deter improper conduct. In Jones v University of Warwick²⁸ in admitting into evidence video surveillance which had been obtained by the insurers involving trespass the court noted that excluding the evidence is not the only weapon in the court's armoury:

“The court has other steps it can take to discourage conduct of the type of which complaint is made. In particular it can reflect its disapproval in the orders for costs which it makes. In this appeal, we therefore propose, because the conduct of the insurers gave rise to the litigation over admissibility of the evidence which has followed upon their conduct, to order the defendants to pay the costs of these proceedings to resolve this issue... even though we otherwise dismiss the appeal.”

6.4. The family courts may also wish to consider costs sanctions. In M v F²⁹ the father was ordered to pay £1,500 transcription charges and £9,240 towards the mother's costs.

²⁸ Jones v University of Warwick [2003] EWCA Civ 151

²⁹ M v F (Covert Recording of Children) [2016] EWFC 29

6.5. Derivative civil actions - The individual, who has been recorded, may separately sue the recorder for the wrong committed in the course of obtaining evidence.

6.6. If it can be demonstrated that the recordings of personal data have not been processed in the course of a purely personal or household activity, it is possible the recorder may have engaged in unlawful activity under the Data Protection Act 2018, unless it can be demonstrated one of the statutory defences applies. Specifically, under S.170 of the DPA 2018:

(1) It is an offence for a person knowingly or recklessly—

(a) to obtain or disclose personal data without the consent of the controller,

(b) to procure the disclosure of personal data to another person without the consent of the controller, or

(c) after obtaining personal data, to retain it without the consent of the person who was the controller in relation to the personal data when it was obtained.

6.7. The risk of injunctive proceedings and criminal exposure relating to harassment - The secret recording of conversations of a parent may provide evidence of controlling or coercive behaviour, demonstrating possessive and obsessive tendencies. The welfare of both parents is relevant to the welfare of the child.

6.8. A fact-specific examination of the case may find that covert recordings are a form of intimidation, enabling the granting of injunctive relief against the person persistently recording. In Re C (A Child)³⁰ the court concluded that courts are “*entitled to conclude that the use of recording equipment in the context of the case overall amounts to a form of intimidation and is abusive and is therefore being capable of being the subject of an injunction.*”

6.9. Whilst, there is no specific criminal offence that covers the use of covert recording devices, in rare circumstances, covert recording could amount to a course of conduct which would engage the offences of harassment, stalking or coercive and controlling behaviour.

6.10. Risk of compromising the prospects of any potential prosecution or judgment in the family court - There may be cases where parents are attempting to

³⁰ Re C (A Child) [2015] EWCA Civ 1096 [paragraph 59]

record the child referring to matters which they believe to be evidence of criminal behaviour or abuse. It is essential for the credibility of the interview both in civil and criminal proceedings that interviews of this nature are conducted in a controlled environment under the supervision of appropriately qualified professionals.

6.11. There are strict rules and guidance regarding the achieving of best evidence³¹ when children are interviewed. Police officers and social workers are specially trained to avoid the way in which children are questioned producing misleading answers, or answers which cannot be relied upon because of the way or circumstances in which they were asked. If interviews are not conducted to this standard the credibility of what the child says may be seriously undermined to the extent that the court can attach no weight to it. Thus a parent may seriously compromise any investigation by an attempt to lead the child in their evidence or ask questions in such a way that the court finds that the answers cannot be considered reliable.

7. Publication of covert recordings

7.1. Whilst the recording itself may well be lawful it is essential to consider the extent to which there may be restrictions on its use. Documents or evidence produced for the purpose of court proceedings are covered by court rules and there are restrictions about their distribution.

7.2. The extent to which any recording has been created for the purposes of litigation and so the extent to which the rules governing the confidentiality of court documents thereby apply will need to be considered. Where there are court proceedings concerning a child the documents or evidence produced for the purposes of the court case must not be distributed except in certain circumstances prescribed by the FPR. The distribution of a recording that identifies the child as subject of court proceedings or gives details of what has happened in the proceedings is likely to be a contempt of court, and the court may consider an injunction to prevent or remove publication.

7.3 If a parent or other individual posts recordings of a meeting on a social media site they should consider whether, if at all, this would be lawful under the provisions of

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https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf

the UK GDPR. Article 5(1) of the UK GDPR provides that “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”. Processing of personal data must always be fair as well as lawful. If any aspect of processing is unfair (for example edited so as to be misleading) the principle will be breached even if it can be shown that there is a lawful basis for the processing.

7.4 When an organisation, or individual runs an online forum they may also have responsibilities as data controllers under the DPA. This would include a duty to take reasonable steps to check the accuracy of any personal data that is posted on their site by third parties. The Information Commissioner’s Office (ICO) is clear that when an organisation, or individual posts personal data on a social networking site, message board or blog, they will need to ensure that they have complied with the data protection regime. The ICO may investigate or take enforcement action against them if the processing falls outside the law.

7.5. Recordings which are published to demonstrate the truth of a particular allegation may be defamatory if that allegation is unproven.

7.6. If a recording is distributed or published by another family member or other third party, it may be a breach of family members’ confidentiality and privacy and may amount to harassment.

7.7. Irrespective of the legality, the publication of covert recordings either to other individuals or on social media can have profound consequences for the individuals involved, which go beyond a simple desire for transparency. The risks of doing so and the possible impact on the child or others should be considered prior to publication, and those seeking to publish should be aware that their conduct in doing so may be considered as part of any evaluation of their conduct in proceedings and may be a contempt of court.

7.8. The distribution of a covert recording on the internet (through social media or other means) can have harmful consequences to the child, either because it would lead to their being identified as a child involved with social services (for example) or simply by virtue of the emotional impact of details of their private lives being made public without their consent or control. The risks associated with longevity of published material on the internet are only beginning to be understood.

7.9. Where the publication of a recording or the threat of publication is or may be harmful the court may be asked to consider the making of an injunction to prevent publication or to attempt removal from the public domain.

7.10. If a party to proceedings requires a record of what was said and done during a hearing a typed transcript of the hearing can be obtained with the permission of the court.

8. Views of young people

8.1. In preparing this Guidance the Family Justice Young People's Board were consulted. They were asked to provide their views in relation to:

- Being the subject of a covert recording
- Being asked to be the subject of an overt recording by a parent or a professional
- Their response to those recordings being heard and or seen by third parties involved in court proceedings
- Circumstances in which covert recordings might be justified
- Wider publication of recordings involving their family

8.2. This consultation underscored the negative and harmful impact of covert recordings on young people in the family justice system. They noted that young people themselves may view covert recording as a way to feel heard or protect themselves but were clear about the pitfalls. They described likely feelings of betrayal and discomfort, raised concerns about the clear potential for manipulation and coercion, seeing such recordings as a breach of trust and violation. They reported that their use, regardless of intent, inevitably risked emotional / psychological harm and a serious threat to relationships.

8.3. They stressed the illusion of veracity in covert recordings of what children say and do. Editing can take things out of context; a young person's words may have been attempting to placate a parent or in response to an artificial script or staged scenario. A young person may be knowingly recorded or enlisted to capture covert recordings and this would not just place them in an impossible situation but also likely influence what is recorded. They encouraged a focus instead on professionally gathered views and raising any welfare concerns with professionals.

8.4. In contrast, they were rather more positive about the utility of overt recordings with consent, although they raised the need for clear guidance and provision to ensure that these were held by professionals not parents to avoid selective editing and public sharing on social media. However, they also raised the potential for this to have an impact on them and their interactions/ presentation.

9. Reducing the perceived need for covert recordings of professionals- developing policies on overt recording

9.1. As previously explored, there are a variety of motivations for individuals engaging in the covert recording of professionals, some entirely legitimate, but some representing a breakdown in trust between those conducting the recording and the subject of the recording. Whether a lack of trust is merited or not, the promotion of trust is the foundation of the successful working relationships to which any professional agency should aspire. The primary statutory guidance relating to statutory services working with families, 'Working together to safeguard children' is silent as to overt or covert recordings of interaction with families by parents. The lack of clarity about the obligations of private individuals in terms of the control of the data once recorded also presents risks of publication and editing of the recording, which as described in this Guidance are unattractive to professional agencies charged with the protection of children, clients, and their own employees.

9.2. One way to address this, particularly when faced with a direct request for audio recording, or repeated challenges to the legitimacy of records of meetings or discussions, is to have policies and procedures in place whereby professionals regard overt recording as a legitimate methodology and option.

9.3. Guidance developed by the professional association for Children's Guardians, Family Court Advisers and Independent Social Workers, Nagalro,³² identifies constructive reasons to adhere to a request to record meetings, thereby avoiding some of the risks and problems associated with covert recordings:

- A client who is suspicious of the local authority may be able to work more constructively where the request is met with immediate acquiescence.
- The practitioner should not say anything he/she would not be happy for the court, the client's legal team or any other legal party to hear whether there is a recording made or not.
- It may be better that the client is free to concentrate on the work in hand, rather than become distracted by making notes.
- A full, clear and accurate recording is an excellent way of rebutting allegations that anything inaccurate or improper was said by the practitioner.
- In some cases, where the client makes his/her own recordings, the equipment used is inadequate and the quality of the recording poor and therefore

³² Nagalro Guidance on Recording Meetings between a Practitioner and Client (2016)

unreliable. It may be better that the practitioner makes the recording with an identical copy for client and practitioner against which to check any future transcript.

9.4. It is not suggested that audio recording of meetings should be the default position of any agency, but it is recommended that it is available to be utilised in specific circumstances. Indeed, as noted earlier there will be circumstances when it is inappropriate for example in assessments by psychologist / neuropsychologist experts as it may invalidate the assessment tools being used – leading to unreliable expert evidence being available to the court.

9.5. When appropriate, this approach is not simply for the advantage of parents. Professionals may judge that there are some meetings where the need for accuracy is so great that a recording will be to the strategic advantage of all participants. An account to a social worker of how a child came by significant injuries may be an example. Some local authorities already engage in the recording of case conferences for example. **Appendix 2** provides an extract from the Transparency Project's guidance note for parents and professionals³³ setting out a constructive approach to dialogue on the issue of recording by consent.

9.6. In addition to the issue of consent to the overt recording of meetings requires both means and process, clearly set out in published policy documents. It is recognised that for some professional agencies the means to make a recording and to have sufficient data available to store it will represent a challenge. This guidance does not attempt to provide a detailed policy framework in terms of process for overt recording by and of professionals, but given the reality of the ease with which recordings can be made with or without the consent of the professional it is recommended that professional agencies should as a matter of good practice develop clear policies which provide for the circumstances in which such recordings can be made by consent, and how the data arising will be maintained, stored and accessed in compliance with the applicable statutory framework. Any policy should provide for the retention and destruction of recordings maintained by the organisation, ensuring that recordings are created, managed, and disposed of in accordance with applicable regulatory requirements.

9.7. Before embarking on reliance on the recording of a meeting, the limitations of any recording or transcription should still be understood. The recording of a meeting

³³ 'Parents recording social workers – A guidance note for parents and professionals', The Transparency Project, December 2015

does not obviate the need for professional judgement as to the significant elements of the meeting, and for records of work with a family to be up to date and accessible without the need to listen to or watch a full recording. It will therefore still be important to capture the main elements arising in the meeting as a written record, so as to avoid the need to have to review a whole recording, unless the recording is needed to settle a dispute as to what was said. Where the recording is being made by an individual and there is later some dispute as to the editing of the recording, contemporaneous notes will provide some clue if passages in the recording have been rearranged.

9.8. It is also important to consider the extent to which an audio recording can capture every important matter. Nagalro have guidance which notes that audio recorders are non-visual and will not record important non-verbal communications, and recommends that significant but silent matters need to be flagged up as the recording develops: “This can be as simple as “You’re shaking your head Mrs Smith, you don’t agree with that?” to the (hopefully) more fanciful “For the benefit of the tape Mr Corleone is drawing his finger across his throat in a cutting action.”³⁴

9.9. It is recommended that if a practitioner is giving their consent to the client making his/her own recording, or to providing the client with a copy of one made by the practitioner, the basis and limitations of that consent need to be clearly set out and agreed in writing. This consent should be signed by both parties and will be available for future reference. Nagalro have developed suggested template letters setting out expectations and consent, albeit that the way in which these might be used in practice is potentially difficult and beyond the scope of this guidance. These can be found at **Appendix 3**.

9.10 Agencies wishing to record meetings must have regard to General Data Protection Regulations (GDPR). This requires the agency to actively justify legality, by demonstrating that the purpose of the recording fulfils any of six conditions:

- The people involved in the meeting have given consent to be audio recorded
- An audio recording is necessary for the fulfilment of the meeting
- An audio recording is necessary to fulfil a legal requirement
- An audio recording is necessary to protect the interests of one or more participants
- An audio recording is necessary for the exercise of official authority
- An audio recording is in the legitimate interests of the audio recorder, unless those interests are overridden by the interests of the participants of the meeting.

³⁴ Nagalro Guidance on Recording Meetings between a Practitioner and Client

9.11. It is specifically recommended that policies should include clear general principles relating to:

- The need for informed consent of all parties to be the subject of the recording
- Preferred approach where there is a difference of opinion about a recording taking place
- Ensuring that the interests of the child or young person are central to any discussion about recording to ensure that any action taken is not likely to cause the child or people relevant to their welfare to suffer significant harm.
- Procedures with regard to access to recordings
- Clarity about the circumstances in which the recording might be disclosed to third parties in future, including for the purposes of court proceedings
- Recordings should not be edited.
- Clarity about how the recording will be labelled so as to identify the timing of the recording, the participants, the circumstances of the recording, and any breaks in recording
- Safe storage of recordings
- A proportionate approach to the retention of recordings which is GDPR compliant.

9.12. An example illustrating a policy which has clear principles relating to when recordings are appropriate, and when and for how long they should be retained is the Body Worn Camera ('BWC') Policy Statement of the Metropolitan Police, which outlines the policy for the use of use of BWC and the retention of the footage.³⁵ Cafcass provide clear expectations to FCAs as to how to manage the issue of recordings. Other professional agencies need to develop policies in this area.

9.13. It is to be hoped that any guidance developed will consider the potential to diminish the perceived need for covert recordings of professionals, by promoting accurate and overt records of professional interaction. However, this guidance is not seeking to encourage the routine recording of all meetings by professional bodies as a solution to issues of mistrust of professionals or even evidence. Of note is that even the policy in relation to police worn cameras is explicit that these recordings should only be used to corroborate and not replace evidence from other sources, and it will not be helpful for systems to be overwhelmed with the unnecessary storage and access to recordings as a crude answer to the issues identified. Nonetheless it is hoped that this review of the complexities arising from covert recordings has illustrated

³⁵ https://www.met.police.uk/SysSiteAssets/foi-media/metropolitanpolice/policies/bwv_policy_statement_february2017.pdf

the value of published policy and guidance being developed by all professional bodies who serve the family courts.

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The draft guidance is being distributed for consultation to key stakeholders before further review and publication.

Endorsement

This guidance is published with the endorsement and approval of (tbc)