



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: Nagalro Guidance on Recording Meetings between a Practitioner and Client with Template Letters.

Appendix 3: 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).

Appendix 4: Summary Guidance for Litigants in family proceedings.

Foreword

PRESIDENT OF THE FAMILY DIVISION AND CHAIR OF THE FAMILY JUSTICE COUNCIL
SIR ANDREW MCFARLANE:

I would like to thank the Family Justice Council Working Group for producing this important and informative guidance on covert recordings in family proceedings. Many thanks are also due to the Information Commissioner's Office, the Family Justice Young People's Board and all those that responded to the earlier consultation.

This has been a growing area for the courts to consider with little guidance available to judges or other professionals. This guidance from the Family Justice Council (FJC) explores the issues and examines the consequences arising from the use of covert recordings by private individuals and sets out guidance that we hope will lead to greater consistency in approach.

Whilst some covert recordings have been found to have evidential value, the secret nature of covert recordings can intrude on the privacy of parents, children, and professionals, causing harm and often leading to concerns about the accuracy of the recording.

It is hoped that this guidance will encourage professional bodies and organisations in the Family Justice System to consider developing their own guidance on the use of covert and overt recordings.

I recommend professionals in the Family Justice System, who encounter the use of covert recordings, to read this informative guidance. For unrepresented litigants, appendix 4 provides an overview to help navigate this document.

1. Introduction and scope

- 1.1. The family courts and the professionals that serve them are grappling with the consequences of a new reality, succinctly described by Mr Justice Peter Jackson (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. In recent years, the court is increasingly being asked to consider such recordings as evidence within family proceedings.
- 1.3. In the case of *Re B (A Child)* [2017] EWCA Civ 1579, 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. In this case, the Court of Appeal identified that 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) 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 covert recording of children rarely promotes a child’s welfare whatever the intention.

¹ Peter Jackson J [at para 1] in: [M v F \(Covert Recording of Children\) \[2016\] EWFC 29](#)

² Sir James Munby [at para 16] in: [Re B \(A Child\) \[2017\] EWCA Civ 1579](#)

Consultation with the Information Commissioner's Office (ICO), in the development of this guidance, has indicated that covert recording of children is likely to be viewed as a breach of their privacy. The costs consequences of the satellite litigation 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 recordings can now take place, and the increase in the frequency with which it has been seen as a legitimate method 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 hoped that this guidance will not only provide an understanding of good practice but will encourage the development of such guidance by professional bodies and organisations.
- 1.7. Whilst this guidance has been developed with a professional audience in mind, it is recognised that many litigants represent themselves in family proceedings. Therefore, a short summary of the key points in the guidance in Plain English can be found at Appendix 4 of this guidance.

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 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').³ 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. Covert methods can only be used if considered legal, necessary, and proportionate.
- 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 2018') depending on the

³ Available at [Regulation of Investigatory Powers Act 2000](#)

circumstances of the recording.⁴ This legislation applies to both professionals and individual citizens. There are rules in relation to the storing, retention, and sharing of data. The ICO regulates data protection in the UK.

- 2.5. Data protection law applies to processing personal data. “Personal data” under Article 4(1) of the 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 itself means the recording is not subject to the data protection legislative framework.
- 2.6. Data processed in the course of a purely personal or household activity, with no connection to a professional or commercial activity, is outside the scope of the UK GDPR. This means that if you only use personal data for such things as writing to friends and family or taking pictures for your own enjoyment, you are not subject to the UK GDPR. However, in the development of this guidance the ICO’s office has confirmed that if this data processed by family members is then used in a professional setting, such as in the home with a social worker present, then it would qualify under the scope of the UK GDPR. The ICO has guidance on detrimental use of data.⁵ In short, this guidance says that you must not use children’s personal data in ways that have been shown to be detrimental to their wellbeing, or go against industry codes of practice, other regulatory provisions, or Government advice.
- 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 (as he then was) in *M v F (Covert Recording of Children)* [2016] (supra):

‘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

⁴ Available at [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016](#); and [Data Protection Act 2018](#).

⁵ Information Commissioner’s Office (ICO), ‘Guidance on the Detrimental use of data’. Available at [‘5. Detrimental use of data | ICO’](#)

*benefit from the domestic purposes exemption. Uneducated, I would assume that the exemption is intended to protect normal domestic use, which this is not.*⁶

- 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.⁷ Failure to process this without a lawful basis would be a breach of the DPA 2018 and the UK GDPR.
- 2.9. Given the confusion as to the lawfulness of these types of recordings, and yet the prevalence with which they are made and increasingly utilised in litigation, further clarity, or guidance from the ICO, with reference to examples, would be welcome.
- 2.10. 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.
- 2.11. 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 give rise to unexpected and undesired outcomes for the litigant, as explored further below.

Court hearings

- 2.12. 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 1981.⁸ Unauthorised filming, recording or live streaming proceedings from court premises, 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.⁹
- 2.13. 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 in Section 7 below.

⁶ Peter Jackson J [at para 26] in Op. Cit.

⁷ 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. More information available at '[A guide to lawful basis | ICO](#)'

⁸ Advice for advocates on "Recordings of Court Hearings & Conferences" has been produced by the Bar Standards Ethics Committee. Available at '[Recordings-of-Court-Hearings-Conferences-June-2022.pdf](#)'

⁹ In 2021, the BBC were fined £28,000 for recording and then airing a six-second recording of an ongoing court hearing.

3. Why individuals undertake covert recordings

Recordings by parents of professionals

- 3.1. The recording of professionals, either covertly or overtly by request, is a growing phenomenon that does not appear to be reflected in the policies of many professional agencies which serve the family court.
- 3.2. Organisations involved in this field have previously identified reasons why parents wish to engage in the 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 received notes that they do not agree with. The parents 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 the 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 and 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 that 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 professional malpractice which is otherwise not believed, as expressed by the then President, Sir James Munby in *Re B (A Child)* (supra) [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.*¹⁰

- 3.5. Whilst 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)* [2016] EWHC 2149, 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:

*'[T]he 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.'*¹¹

- 3.6. In *Medway Council v A & Ors (Learning Disability; Foster Placement)* [2015] EWFC B66 (2 June 2015), a mother with a learning disability was inappropriately placed in a mother and baby foster placement which was a poor match on several fronts.¹² 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 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

¹⁰ Sir James Munby [at para 12] in Op. Cit.

¹¹ Mr Justice Hayden [at para 26] in *Re F (Care Proceedings: Failures of Expert)* [2016] EWHC 2149.

¹² Available at [Medway Council v A & Ors \(Learning Disability; Foster Placement\)](#) [2015] EWFC B66 (2 June 2015).

*requirement that the foster carer attend to give evidence...it would have been impossible to gain a just and proper understanding of this case.*¹³

- 3.7. However, there are circumstances when covert or overt recordings would undermine the validity of expert assessments, for example, in neuropsychological assessments, as it has been demonstrated to influence the quality of interaction and the performance and behaviour of persons under assessment. 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.'*¹⁴
- 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 9 below.

Recordings by parents of each other

- 3.9. Parents may perceive a covert recording as the only way to illustrate their experience of the behaviour of which they complain. However, in some cases the recording is a form of surveillance that in itself can be an example of distorted and obsessive thinking that 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.¹⁵
- 3.10. Further considerations relating to the recording of private individuals can be found in Section 5 and Section 6 below.

Covert recordings of children

- 3.11. Peter Jackson J (as he then was) notes that *'[i]t 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.'*¹⁶
- 3.12. 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 case. The number of cases where this has proved to be the case is few, if any. Against any

¹³ HHJ Lazarus [at para 114H] in *Ibid*.

¹⁴ British Psychological Society, *Guidance on the recording of neuropsychological testing in medicolegal settings*, published in May 2021. Available at ['Guidance on the recording of neuropsychological testing in medicolegal settings | BPS'](#)

¹⁵ Recorder Kainth [at para 26] in [HKS v HSM \[2021\] EWHC 3423 \(Fam\)](#).

¹⁶ Peter Jackson J [at para 1] in *Op Cit*.

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.

- 3.13. The profound consequences for the welfare of children were identified in the above case.¹⁷ Peter Jackson J (as he then was) 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; and (iv) affect the family's standing in the community.
- 3.14. 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 that arise and are to be considered where parents seek to rely on covert recordings in evidence.

The response of professionals when offered covert recordings

- 3.15. 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.
- 3.16. 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.
- 3.17. 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 that 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 device on a child, then the material should be not be listened to, or viewed, until the

¹⁷ Ibid.

court has determined whether the material can be admitted into evidence, and this approach is recommended for all professionals offered covert recordings.

- 3.18. Particular guidance relating to the proper approach to the offering of intimate images as potential evidence is further referred to below and addressed in Appendix 3.

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 detail below.
- 4.3. In summary, the court will need to provide directions which cover:
 - The method 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 if having been the subject of covert recordings.
 - Consideration of costs arising from the application.
 - Any further hearing to determine the issue of admissibility.
- 4.4. The need to consider the emotional and psychological harm that 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).¹⁸ An extract of the judgment containing suggested guidance in relation to case management concerning intimate images is at Appendix 3.
- 4.5. 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 2010')

¹⁸ For full judgment, see [M \(A Child: Private Law Children Proceedings: Case Management: Intimate Images\) \[2022\] EWHC 986 \(Fam\) \(29 April 2022\)](#)

of enabling the court to deal with cases justly and proportionately having regard to any welfare issues involved.

Application of Family Procedure Rules

- 4.6. It is safe to say that almost all covert recordings will be hearsay evidence, given the definition of hearsay,¹⁹ and that recordings must be considered as ‘documents’ to which the relevant evidential rules apply.²⁰ 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 that might fall outside that definition of hearsay.²¹
- 4.7. For that hearsay to fall within the parameters of the Children (Admissibility of Hearsay Evidence) Order 1993 (SI 1993/621) (‘the 1993 Order’), and thus to 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*’.²² That determination will be fact and case specific and should be determined by the court.
- 4.8. 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 long as it falls within the parameters of the 1993 Order, which in most cases of covert recording will be likely.
- 4.9. However, the courts will have to assess that, and the weight that may attach to such evidence. In *Re W (Minors) (Wardship: Evidence)* [1990] 1 FCR 286, Lord Justice Neill noted:

‘[H]earsay 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,

¹⁹ CPR 33.1 and section 1(2) of the CEA 1995 describe hearsay as: ‘a statement made, otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated’.

²⁰ In [Rall v Hume \[2001\] EWCA Civ 146](#), Potter LJ [at para 12] 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 also, *Garcin v Amerindo Investment Advisers Ltd* [1991] 4 All ER 655.

²¹ 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.

²² Section 2 of [The Children \(Admissibility of Hearsay Evidence\) Order 1993](#). See also [Civil Evidence Act 1995](#).

*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.*²³

- 4.10. In *R v B County Council ex parte P* [1991] 1 FLR 470 (CA), Lady Justice Butler-Sloss (in relation to the previous Children Hearsay Admissibility Order 1990) 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.’²⁴
- 4.11. Even in cases where the 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.²⁵ 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.
- 4.12. Additionally, under FPR 2010 rule 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.²⁶ FPR 2010 rule 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 2010 rule 22.1(3), the court may permit a party to adduce evidence, or to seek to rely on a document, in respect of which that party has failed to comply with the procedural requirements.
- 4.13. 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, recording in which the child is being asked about specific allegations in contemplation

²³ Neill LJ [at para 227G-H] in [Re W \(Wardship: Evidence\)](#) [1990] 1 FCR 286.

²⁴ Butler-Sloss LJ [at para 72] in *R v B County Council, ex parte P* [1991] 1 FLR 470 (CA)

²⁵ [Section 4 of the Civil Evidence Act 1995](#).

²⁶ [FPR 2010 rule 22.1](#).

of the proceedings, and then the questions put to the child or the recording itself is subsequently analysed by an expert within the proceedings. Under section 13(3) of the Children and Families Act 2014, it states: '*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.*'²⁷

- 4.14. By definition, covert recordings of a child will not have been conducted with the permission of the court. If section 13(3) of the Children and Families Act 2014 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 section 13(3), section 13(4) of the same Act provides that '*evidence resulting from the examination or other assessment is inadmissible in children proceedings unless the court rules that it is admissible.*'²⁸
- 4.15. Irrespective of whether section 13(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 2010 rule 22.1. Equally, under section 2(4) of the CEA, the court has discretion to admit evidence where notice has not been given.²⁹ 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.

Process

- 4.16. 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.
- 4.17. If the court considers that a particular covert recording falls outside the provisions of the 1993 Order, section 2 of the CEA states that a party relying on hearsay evidence should give notice and, if asked, particulars. FPR 2010 rule 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.³⁰

²⁷ Section 13 of the [Children and Families Act 2014](#).

²⁸ Ibid.

²⁹ [Section 2 of the Civil Evidence Act 1995](#).

³⁰ [FPR 2010 rule 23](#).

- 4.18. 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 method of the recording and why it was obtained covertly.
 - (c) The relevance of the contents to the issues in the proceedings.
- 4.19. 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 FPR 2010 rule 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 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.
- 4.20. 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 by the court, particularly where the recordings have been in the possession of a party for some time.
- 4.21. 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.

Relevance

- 4.22. 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 a 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.
- 4.23. The test for deciding ‘relevance’ was succinctly expressed in the House of Lords decision by Lord Simon of Glaisdale in *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440, [at paragraph 460J] 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.’

- 4.24. 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.³¹
- 4.25. 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.

Probative value

- 4.26. 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?
- 4.27. 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* [2016] EWHC 1432(Ch):

‘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.’³²

- 4.28. As demonstrated in *Medway Council v A & Ors (Learning Disability; Foster Placement)* (supra), there will undoubtedly be some fact-specific occasions where the

³¹ In *Re M & F (Covert Recording of Children)* (supra), the court found the content of the recording to have no relevance but the fact of covert recording to have relevance.

³² [Singh v Singh & Ors \[2016\] EWHC 1432\(Ch\)](#) [at para 11].

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

The authenticity and completeness of the recording

- 4.29. The court will need to consider the scope and authenticity of the recording. This will be made easier if it is clear that the recording is of good quality, is reliable and 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.
- 4.30. 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.
- 4.31. 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.
- 4.32. An expert instruction will require compliance with Practice Direction 25, 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.
- 4.33. If the authenticity of the recording cannot be established, it should 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.³³

Scope

- 4.34. 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.
- 4.35. 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.

Admissibility as it relates to the manner in which the recording was obtained

- 4.36. If the authenticity can be established, the court still needs to consider whether there are other considerations that would weigh against admissibility or value. This will include whether the recording was lawfully obtained.
- 4.37. 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.
- 4.38. 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 & Others* [2013] UKEAT/0533/12/SM.³⁴ 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*.'
- 4.39. 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

³³ In *Re M & F (Covert Recording of Children)* (supra), 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*" [Peter Jackson J at para 5].

³⁴ Mr Justice Underhill [at para 12] in [Vaughan v London Borough of Lewisham & Others \[2013\] UKEAT/0533/12/SM](#).

illegally obtained. In the context of family law, this was illustrated in the Court of Appeal decision in *Imerman v Tchenguiz* [2011] 1 All ER 555, where [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.’³⁵

- 4.40. The extent to which there was ever a lawful basis for the making or sharing of the recording requires the recorder to consider the necessity and proportionality, in relation to the rights of the person who is being recorded. Of note, the ICO specifically highlights the need for the protection of children when evaluating whether there is a legitimate interest which provides a lawful basis:

‘Note: Article 6(1)(f) gives you legitimate interest as lawful basis for processing where: “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”

This can be broken down into a three-part test:

- 1. **Purpose test:** are you pursuing a legitimate interest?*
- 2. **Necessity test:** is the processing necessary for that purpose?*
- 3. **Balancing test:** do the individual’s interests override the legitimate interest?’³⁶*

- 4.41. 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

³⁵ Lord Neuberger MR [at para 117] in *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.

³⁶ Available at [‘Step 4: Assess necessity and proportionality | ICO’](#)

implications under any relevant laws.³⁷ Private individuals can expect a similar level of risk. As indicated in Section 6 below, there may be a number of related legal actions that arise from the recording even if the recording is admitted into evidence.

³⁷ 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 within statutory provisions.

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 rights of the child.
 - The potential need for representation of the child.
 - Whether and how the child should be informed they have been recorded.
 - Whether the child is required to give evidence to evaluate the content of the recording.

Relevance to welfare of the child and family

- 5.2. 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 4 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, as in the case of *Re C (A Child)* [2015] EWCA Civ 1096:

*'[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].'*³⁸

- 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 and welfare issues about what, if anything, they should be told.

The potential need for representation, including consideration as to the appointment of a Guardian

- 5.5. 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,

³⁸ Lady Justice King citing judgment of the first instance court [at para 23] in [Re C \(A Child\) \[2015\] EWCA Civ 1096](#)

wishes and feelings, the court will need to consider appointing a Children's Guardian who will obtain legal representation for the child. The court should consider the extent to which the recording of the child engages the child's Article 6 and Article 8 European Convention Human Rights.

Consideration of whether and how the child is to be told they have been the subject of a covert recording

- 5.6. The court will need to consider whether a child's welfare requires them to be informed they have been the subject of recordings. The advice of a court appointed Guardian is likely to be essential to achieving this. The issue was considered [at paragraph 5(iii)] in *M v F (Covert Recording of Children)* (supra): *'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...'*³⁹

The child may be required to give evidence to evaluate the weight to be attached to the content of the recording

- 5.7. Any involvement of the child or children must be approached sensitively, with the child's wellbeing at 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 guidelines 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.

³⁹ Peter Jackson J [at para 5(iii)] in *M v F (Covert Recording of Children)* [2016] WLR(D) 275.

- 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.⁴⁰

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)* (supra) 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]*'.⁴¹

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 in Section 6 below.

⁴⁰ Family Justice Council, '[Guidelines in relation to children giving evidence in family proceedings](#)', December 2011. See also [Re W \(Children\) \[2010\] 1 FLR 1485 SC](#).

⁴¹ Lady Justice King [at para 60] in *Op. Cit.*

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.

Costs consequences

- 6.2. 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 evidence in costs in order to deter improper conduct. In *Jones v University of Warwick* [2003] EWCA Civ 151 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.'*⁴²

- 6.4. The family courts may also wish to consider costs sanctions. In *M v F (Covert Recording of Children)* (supra) the father was ordered to pay £1,500 transcription charges and £9,240 towards the mother's costs.

Derivative civil actions

- 6.5. 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

⁴² Lord Chief Justice [at para 30] in [Jones v University of Warwick \[2003\] EWCA Civ 151](#)

recorder may have engaged in unlawful activity under the DPA 2018, unless it can be demonstrated one of the statutory defences applies.⁴³ Specifically, under section 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.

The risk of injunctive proceedings and criminal exposure relating to harassment

- 6.7. 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)* (supra) [at paragraph 59] 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.

Risk of compromising the prospects of any potential prosecution or judgment in the family court

- 6.10. There may be cases where parents are attempting to record the child referring to matters that 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.

⁴³ Any personal data unlawfully obtained prior to 25 May 2018 (that is, pre-UK GDPR) would be investigated as a [section 55 Data Protection Act 1998](#) offence.

- 6.11. There are strict rules and guidance regarding the achieving of best evidence when children are interviewed.⁴⁴ Police officers and social workers are specially trained to avoid the way in which children are questioned producing misleading answers, or answers that 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. Therefore, 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.

⁴⁴ Available at '[Achieving best evidence in criminal proceedings - GOV.UK](#)'

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 in law. There would need to be a lawful basis for justifying publishing covert filming that outweighs the privacy and welfare of a child. The ICO provides guidance in determining decisions relating to children which highlights Recital 38 to the UK GDPR that says: '*Children merit specific protection with regard to their personal data.*'⁴⁵ Publication of a recording even if within the law can have major implications for the privacy and welfare of the people subjected to covert filming, especially where the recording involves children.
- 7.2. Documents or evidence produced for the purpose of court proceedings are covered by court rules and there are restrictions about their distribution. 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 2010. 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 public social media site, they should consider whether, if at all, this would be lawful under the provisions of 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.*'⁴⁶ The 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.⁴⁷
- 7.4. When an organisation or individual runs an online forum, they may also have responsibilities as data controllers under the DPA 2018. 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 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

⁴⁵ Available at '[1. Best interests of the child | ICO](#)'.

⁴⁶ Available at [Article 5 of the Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016](#).

⁴⁷ Article 2(2)(a) of the UK GDPR and Recital 1 outlines rules for posts that apply under the UK GDPR.

investigate or take enforcement action against them if the processing falls outside the law.

- 7.5. Recordings 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. 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 them being identified, for example, as a child involved with social services, 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 be 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 and 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 significant 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. In some cases, where there is a breakdown of trust between individuals and professional agencies, policies on overt recording may be of assistance.
- 9.3 Guidance developed by the professional association for Children's Guardians, Family Court Advisers, and Independent Social Workers, Nagalro, 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 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.⁴⁸

- 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 or 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. For example, some local authorities already engage in the recording of case conferences.
- 9.6 In addition to the issue of consent, the overt recording of meetings requires both means and process that should be clearly set out in accessible 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 that 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 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

⁴⁸ Nagalro, 'Guidance on Recording Meetings between a Practitioner and Client', 2016. Available at Appendix 2 of this guidance.

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.'*⁴⁹
- 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 2.
- 9.10 Agencies wishing to record meetings must have regard to Article 6 of the UK GDPR.⁵⁰ This requires the agency to actively justify legality by demonstrating that the recording fulfils one of six lawful bases:
- (a) **Consent:** the individual has given clear consent for you to process their personal data for a specific purpose.
 - (b) **Contract:** the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract.
 - (c) **Legal obligation:** the processing is necessary for you to comply with the law (not including contractual obligations).
 - (d) **Vital interests:** the processing is necessary to protect someone's life.
 - (e) **Public task:** the processing is necessary for you to perform a task in the public interest or for your official functions, and the task or function has a clear basis in law.

⁴⁹ Nagalro Guidance on Recording Meetings between a Practitioner and Client

⁵⁰Article 6 of the UK GDPR is available at <https://www.legislation.gov.uk/eur/2016/679/article/6> . For more information, see also '[A guide to lawful basis | ICO](#)'

- (f) **Legitimate interests:** the processing is necessary for your legitimate interests or the legitimate interests of a third party, unless there is a good reason to protect the individual's personal data which overrides those legitimate interests.⁵¹ (This cannot apply if you are a public authority processing data to perform your official tasks.)

9.11 The UK GDPR sets out seven key principles in managing data.⁵² 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 accessing 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 UK 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 BWC and the retention of the footage.⁵³ 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

⁵¹ The ICO guidance is available at '[Legitimate interests](#)'.

⁵² Available at '[A guide to the data protection principles | ICO](#)'.

⁵³ Available at '[Body Worn Video \(BWV\) | Metropolitan Police](#)'.

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

- 9.14 It is of note that the ICO's guidance is required to have regard to the United Kingdom's obligations under the United Nations Convention on the Rights of the Child (UNCRC), and specifically Article 3:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

10. Acknowledgements

This guidance is produced by the Family Justice Council at the invitation of the President of the Family Division. The Family Justice Council were assisted by a working party who considered broad terms of reference to involve consideration of covert recordings by and of professionals, parents, and children. The responses to the consultation were helpful and considered, and the guidance was amended as a result. The helpful advice of the ICO has assisted in the development of this guidance.

Particular thanks to the Family Justice Young People's Board who engaged in insightful and thought-provoking discussions about the impact of covert recording on young people and their families.

Appendix 1

Covert Recordings: Summary of General Principles

Legality of a covert recording made by a member of the public

The extent to which some covert recordings by private individuals can really be said to genuinely fall within the lawful bases of data protection legislation will be fact specific, and a recording may be unlawful if personal data is being processed outside of the framework.

Irrespective of whether there are direct legal restrictions on the recording of face-to-face conversations between private individuals, recordings may still involve unlawful activity and may constitute a form of harassment or be controlling or abusive.

There is an absolute prohibition on the covert recording of court hearings.

Recordings of professionals

The desire of some parents to record their interactions with professionals should be addressed by the development of published policies and procedures of professional agencies which serve the family court, so that overt recordings are the subject of a clear understanding as to when they are acceptable, and how the data will be managed. This approach may avoid the need for covert recordings.

Transparency about the conduct of professionals may guard against malpractice.

There are circumstances when covert or overt recordings would undermine the validity of expert assessments.

Covert recordings of children

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.

Consultation with children in the development of this guidance emphasised the extent to which young people consider covert recordings of them to be harmful and of dubious evidential value.

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.

Case Management of Covert Recordings: Summary

Admissibility

Under the Family Procedure Rules (FPR), covert recordings may be regarded as admissible hearsay evidence, but the courts will have to assess the weight which may attach to such evidence and what is said to be the probative value of the evidence. FPR rule 22.1(2) provides that the court may use its power to exclude evidence that would otherwise be admissible.⁵⁴

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 2014.⁵⁵

Issues to be determined and directions

With reference to the overriding objective the court will need to consider:

- The need for an on notice C2 application to determine admissibility.
- 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 and need for expert evidence as to authenticity.
- 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.

Probative value and relevance

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.

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 (particularly in relation to the recording of children).

Irrespective of the undisputed authenticity of the recording, if admitted into evidence, it may

⁵⁴ [Family Procedure Rules rule 22.1 \(2\)](#)

⁵⁵ [Children and Families Act 2014 \(legislation.gov.uk\)](#)

still be necessary for the subjects of the recording to give evidence regarding its proper interpretation and weight.

Additional considerations in relation to covert recordings of children

The court will need to consider:

- 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.

Further implications and issues

The cost of the satellite litigation to consider the relevance and admissibility of covert recordings can be significant. Family courts may wish to consider costs sanctions. 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.

There are strict rules and guidance regarding the achieving of best evidence when children are interviewed. 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, may compromise a criminal or civil investigation.

The publication or distribution of a covert recording on the internet (through social media or other means) can have harmful consequences and may not be lawful. It may be necessary for the Court to consider whether an injunction is required in some circumstances.

Appendix 2

Nagalro Guidance on Recording Meetings between a Practitioner and Client with Template Letters



Nagalro Guidance on Recording Meetings between a Practitioner and Client

Nagalro is the Professional Association for Children's Guardian, Family Court Advisors and Independent Social Workers.

1. Status of this Guidance

Nagalro is neither the employer nor the professional regulatory body for its members. It cannot lay down mandatory provisions which members are required to follow. It does, however, represent a substantial, accrued body of knowledge and experience from senior members of the profession, aided by subscribing children's lawyers.

What Nagalro can do is to offer a statement of what it would regard as best practice in various circumstances. This guidance represents Nagalro's current view as to the best professional practice to be followed by a Social Work Practitioner ("Practitioner") following either:

- (a) a request to record meetings with a Client made by the Practitioner.
- (b) a request to record meetings with a Practitioner made by the Client.
- (c) discovering that covert recordings have been made of such meetings.

There is no obligation on practitioners to initiate discussions about recordings or to suggest that sessions should be recorded. These guidelines are primarily intended to deal with the situation where the Client positively requires a recording to be made.

2. The Transparency Project

In December 2015 the Transparency Project published the results of its research into whether, and if so what, policies local authorities had in place about parents wishing to record meetings with their social workers. The results ranged from clear and accurate, to none at all, to plainly wrong. The Cafcass policy on parents making covert recordings was also reviewed favourably by the Project.

In addition to examining current materials and legislation, the authors of the Transparency Project report prepared and published their own suggested guidance entitled '*Parents*

Recording Social Workers - A Guidance Note for Parents and Professionals'. **[Nb. guidance withdrawn by the Transparency Project]**. It is Nagalro's view that the guidance prepared by the Transparency Project provides a clear and rational basis for making decisions about recording interviews. This guidance should be the starting point (and in most cases the finishing point) for any decisions about recording meetings between the practitioner and his/her client.

3. Further Discussion

It will be seen from the Transparency Project's examination of the issues that, in the vast majority of cases, there can be no real, legal objection to a request to make a recording of meetings. The more difficult issues arise around the use that is subsequently made of that recording. There are usually adequate legal mechanisms available to prevent recordings being used in a way which is contrary to the interests of the child and these are discussed in the Transparency Project's Guidance.

Where a Client or other party seeks the Practitioner's permission to record meetings the following practical points should also be considered:

- (a) 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.
- (b) It may be better that the Client is free to concentrate on the work in hand, rather than become distracted by making notes.
- (c) 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 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. Most handheld dictaphones are not adequate to this task. Professional, handheld audio recorders such as the Tascam range can be purchased for under £100.00.
- (d) It is worth noting that audio recorders are blind and will not record non-verbal communications. Significant but silent matters need to be flagged up. 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*".
- (e) If a Practitioner is giving their consent to the Client making his/her own recording or

agreeing to provide 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 can be referred to by both parties in the future. With this in mind, Annex 1, Annex 2 and Annex 3 at the end of this document each contains different forms of consent which might be used in the following cases:

- (1) where the Client wishes to make his/her own recording (Annex 1).
- (2) where the Practitioner agrees to the Client's request but on the basis that the Practitioner will make the recording and provide a copy (Annex 2).
- (3) where the Practitioner initiates the discussion of recording and needs to obtain the Client's consent to the making of a recording (Annex 3).

The Transparency Project refers with approval to the Cafcass policy on covert recordings. That policy, essentially, is that Cafcass professionals should be able to defend anything which they have said, and so have nothing to fear from a covert recording, since it can only show them acting properly and in accordance with their duties. The same philosophy should form the basis of Nagalro members' attitude to this. There can be nothing harmful, either to the child or to the Practitioner from someone making a recording of a task being carried out professionally; as long as it is a full, clear and accurate record of the proceedings.

Where, in the course of proceedings, a practitioner is confronted with a recording made without their knowledge, it is the view of Nagalro that the practitioner should explain to the court that, because the recording was made without consent, they need to listen to *the whole* of the recording (for which there should also be a transcript) in order to ensure that it is full and accurate before answering any questions about it. It may help to redirect the court's understandable irritation at any delay if it is also made clear that, if the other person had raised the issue before the meeting, both consent and cooperation would have probably been forthcoming, rendering the subterfuge unnecessary.

Digital recordings can easily be edited with freely available software and this needs to be taken into consideration whether the Client is making the recording with consent or covertly. Apart from keeping the usual detailed, contemporaneous notes of meetings, it is suggested that Practitioners should record accurate start and finish times for sessions together with 'waypoint' times during the discussions. Contemporaneous notes will show the order in which matters were dealt with and give a clue if passages in the recording have been rearranged. Differences between the duration of the recording and the times set down in the notebook are an immediate clue that the recording has been edited. If a 'waypoint' time check comes in at the wrong point of the recording then, again, there is likely to have been digital tampering with the recording. Such doubts would be a powerful reason for a Judge to refuse to admit such a recording in evidence.

The Cafcass guidance on covert recordings is that whilst *"it may be appropriate to read/listen to the recordings the practitioner should decline to accept it [as genuine] until the*

This document was provided by Nagalro in 2019 and therefore, may refer to documents which have been subsequently amended or withdrawn.

recording has been brought to the attention of the court and the court's directions have been obtained" [See Page 15, 2.31]. Nagalro would encourage Practitioners to adopt a similar approach in such circumstances.

From a legal perspective, there is no difference between video and audio recordings and the Transparency Project analysis of the steps which can be taken to prevent recordings being misused would apply equally to a video recording.

In conclusion, there is nothing objectionable about recordings being made of Practitioners carrying out their work so long as they are complete and accurate. The resulting recordings can be misused and where this takes place or is threatened the Court should be asked to intervene. There is a real risk of digital recordings being edited or otherwise manipulated. Such tampering should be readily apparent on a forensic examination of the original audio file. Simple precautions by Practitioners will, however, make such actions much easier to recognise. The Court is likely to take a very dim view of anyone seeking to present falsified evidence and prosecutions for attempting to pervert the course of justice may follow.

Nagalro
December 2019

NAGALRO ANNEX 1

[Precedent letter of consent for the recording of meetings - parent making recording]

Date

Dear

Re (Name of Child)

As you know, I have been asked to carry out some assessment work with you in relation to the future arrangements for (name of child). You have asked me if I would mind if you made an audio recording of the sessions.

For my part, I am quite happy for recordings to be made. I have a piece of work to carry out to a set of written instructions approved by the court and in accordance with recognised professional standards. Nothing which I may say or do will change whether a recording is made or not. However, because we are dealing with a child who is the subject of court proceedings, we are both subject to rules about the way in which we deal with records. These rules are based on the child being entitled to expect that their most personal and private details will be kept private and not made public until they are old enough to either give or withhold their permission. We have, of course, already discussed this in more detail.

So that we both comply with our obligations to the court and to (name of child) we have agreed the following:-

1. I will agree to you making, for your own personal use and reference, an audio record of our sessions.
2. You will:
 - a. Keep the recording in a safe and secure place;
 - b. Only use the recording for your personal use as a substitute for keeping detailed notes;
 - c. Ask the permission of the court before you play the recording to anyone other than your legal advisers or make any other use of it;
 - d. Provide me with a copy of the recording should I ask you for it.
3. You will not:
 - a. Play the recording to anyone other than your solicitors or counsel;
 - b. Post the recording on the internet or any social media website;
 - c. In any way edit or alter the recording;
 - d. Make or distribute copies of the recording.

This document was provided by Nagalro in 2019 and therefore, may refer to documents which have been subsequently amended or withdrawn.

This letter has been prepared and signed by us both in duplicate and we will each keep a copy of it.

Yours sincerely

(Signature of Practitioner)

I agree to the points listed above

(Signature of person being assessed)

Nagalro
December 2019

NAGALRO ANNEX 2

[Precedent letter of consent for the recording of meetings - Practitioner making recording]

Date

Dear

Re (Name of Child)

As you know, I have been asked to carry out some assessment work with you in relation to the future arrangements for (name of child). You have asked me if I would mind if you made an audio recording of the sessions.

For my part, I am quite happy for recordings to be made. I have a piece of work to carry out to a set of written instructions approved by the court and in accordance with recognised professional standards. Nothing which I may say or do will change whether a recording is made or not. However, because we are dealing with a child who is the subject of court proceedings, we are both subject to rules about the way in which we deal with records. These rules are based on the child being entitled to expect that their most personal and private details will be kept private and not made public until they are old enough to either give or withhold their permission. We have, of course, already discussed this in more detail.

To ensure that the recording is full and as clear as possible you have accepted my offer to make a recording using professional quality recording equipment.

So that we both comply with our obligations to the court and to (name of child) we have agreed the following things:

1. I will make a digital audio recording of our sessions for your own personal use and I will provide you with a copy of the recording.
2. You will:
 - a. Keep the recording in a safe and secure place;
 - b. Only use the recording for your personal use as a substitute for keeping detailed notes;
 - c. Ask the permission of the court before you play the recording to anyone other than your legal advisers or make any other use of it.
3. You will not:
 - a. Play the recording to anyone other than your solicitors or counsel;
 - b. Post the recording on the internet or any social media website;
 - c. In any way edit or alter the recording;

This document was provided by Nagalro in 2019 and therefore, may refer to documents which have been subsequently amended or withdrawn.

d. Make or distribute copies of the recording.

This letter has been prepared and signed by us both in duplicate and we will each keep a copy of it.

Yours sincerely

(Signature of Practitioner)

I agree to the points listed above

(Signature of person being assessed)

December 2019

NAGALRO ANNEX 3

[Precedent letter of consent for the recording of meetings – Independent Social Worker (ISW) requests]

Date

Dear

Re (Name of Child)

As you know, I have been asked to carry out some assessment work with you in relation to the future arrangements for (name of child).

So that I can concentrate on the discussions we need to have, rather than note-taking, I have asked if you would mind if I recorded our sessions and you have agreed to this.

I have a piece of work to carry out to a set of written instructions approved by the court and in accordance with recognised professional standards. Nothing which I may say or do will change whether a recording is made or not. However, because we are dealing with a child who is the subject of court proceedings, we are both subject to rules about the way in which we deal with records. These rules are based on the child being entitled to expect that their most personal and private details will be kept private and not made public until they are old enough to either give or withhold their permission. We have, of course, already discussed this in more detail.

So that we both comply with our obligations to the court and to (name of child) we have agreed the following things:

1. I will make a digital audio recording of our sessions and, if you wish, I will provide you with a copy of the recording.

2. You will:

- a. Keep any copy of the recording in a safe and secure place;
- b. Only use the recording for your personal use as a substitute for keeping detailed notes yourself;
- c. Ask the permission of the court before you play the recording to anyone other than your legal advisers or make any other use of it.

3. You will not:

- a. Play the recording to anyone other than your solicitors or counsel;
- b. Post the recording on the internet or any social media website;
- c. In any way edit or alter the recording;

This document was provided by Nagalro in 2019 and therefore, may refer to documents which have been subsequently amended or withdrawn.

d. Make or distribute copies of the recording.

This letter has been prepared and signed by us both in duplicate and we will each keep a copy of it.

Yours sincerely

(Signature of ISW)

I agree to the points listed above

(Signature of person being assessed)

This document was provided by Nagalro in 2019 and therefore, may refer to documents which have been subsequently amended or withdrawn.

Nagalro
December 2019

Appendix 3

Extract from [Re M \[2022\] EWHC 986 \(Fam\)](#), guidelines relating to case management of intimate images

The Use of Intimate Images: General Observations

76. It will be apparent to readers of this judgment that I have grave concerns about the use of intimate images in private law children proceedings where allegations of abuse, specifically domestic abuse, are made. I perceive it to be a problem which is already present in a growing number of private law children cases and one which is likely only to increase given the growing use of still and/or moving images to document intimate relationships. In this case, the volume of intimate images previously admitted without any scrutiny is itself a strong argument for guidelines to encourage the court to control this type of evidence in private law children proceedings. However, there is a further compelling reason for such guidelines, namely 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 this material.

77. During the hearing on 29-30 March 2022, I made a number of observations as to how intimate images should be managed within the context of private law children proceedings and invited counsel to collaborate to produce some agreed guidelines. I am grateful to them for doing so. What follows is drawn from their written document which incorporated the observations I made during the hearing:

- A) Sexually explicit or intimate videos and photographs should not be filed as part of evidence without a written application being made to the court in advance.
- B) Any such application will require the court's adjudication, preferably at an already listed case management hearing.
- C) It is for the party making such an application to persuade the court of the relevance and necessity of such material to the specific factual issues which the court is required to determine.
- D) The court should carefully consider the relevance of the evidence to the issues in the case together with the likely probative value of any such evidence.
- E) As part of its analysis and balancing exercise, the court will need to consider all the relevant factors including (i) any issues as to vulnerability in relation to any of the parties and the likely impact on any such parties of the admission of such evidence and the manner in which it is used in the proceedings; and (ii) if it is able to do so at a preliminary stage, whether the application/use of such images is motivated, in whole or in part, by a desire to distress or harm a party.
- F) The circumstances in which a court will permit the inclusion in evidence of

sexually explicit or intimate videos or photographs of any person are likely to be rare, in particular, in circumstances in which that person does not consent to such material being admitted.

G) Where the court is being asked to admit such material, the court should consider whether there may be a range of alternatives to the viewing of such material, for example but not limited to:

- i) seeking an admission/partial admission in respect of the alleged conduct.
- ii) agreed transcripts and/or descriptions of any videos.
- iii) playing only the audio track of any video recordings.
- iv) using a still image rather than a video or a short excerpt from a longer video.
- v) editing images to obscure intimate parts of the body.
- vi) extracting meta data as to the timing and location of the evidence.
- vii) focused and specific cross examination on the issues.
- viii) consideration of the use of other evidence to prove the particular fact in issue instead.

H) If the court decides to admit any sexually explicit or intimate images/videos for any purpose, care should be taken to limit the volume of such evidence to that which is necessary to fulfil the purpose for which it is admitted;

I) The court should determine who can view the material that is to be admitted and limit this where necessary, bearing in mind its private character and the humiliation and harm caused to those both depicted and involved in the proceedings;

J) If the evidence is considered relevant, a starting point should be to say that it should incorporate the lowest number of images, seen by as few people as necessary, and viewed in the least damaging way;

K) It would be helpful to consider how best to ensure that the evidential security of such material can be maintained (for example, by using only password protected files) both within the hearing itself and outside it, and how the material is deployed within the proceedings;

L) Likewise, specific consideration should be given to the protection and safeguards necessary in respect of any video evidence relied upon (for example, such evidence being made available on a single laptop and brought to court, or the distribution being limited to a core specified legal team on behalf of each party).

78. I recognise that judges dealing with private law children proceedings in which allegations of domestic abuse are made already face significant difficulties stemming both from the volume of such work within the family justice system and from the reality that many parties are unrepresented. My suggestions for the management of intimate images in such proceedings are intended to be straightforward and to discourage their use save where

strictly necessary to the issues which the court needs to resolve.

Appendix 4

Litigants guide to Covert (Secret) Recording in the Family Court

In recent years, family courts have increasingly been asked to consider covert (secret) recordings as evidence in family proceedings.

The growth in the use of technology such as mobile phones and tablets has made it easier for individuals to record themselves and others. Sometimes, parents in court proceedings feel a covert recording is the only way to demonstrate what happens behind closed doors. However, these recordings will not always be accepted into evidence.

The Family Justice Council (FJC) has produced guidance on the use of covert recordings in the family courts. This short version is intended for parents and family members, especially those without a lawyer. It addresses some of the issues the court will consider when deciding whether to accept covert recordings as evidence.

The publication of the guidance is not meant to encourage covert recordings. While such recordings can provide important evidence, they may also invade privacy or cause harm, and there are often concerns about their accuracy. The purpose of the guidance is to promote good and consistent practice across the family justice system.

For more detail, please refer to the full guidance.

What is a covert recording?

If you have made a recording without the knowledge or permission of someone, whether they are a professional, an adult, or a child, then this may be described in Court as a covert – or secret – recording. This can refer to both video and audio recordings.

Can I use secret/covert recordings as evidence?

In some situations, covert recordings will be accepted by the Court as evidence. However, this is not always the case. The court needs to consider, among other things, the welfare of any child, the right to privacy and rules of evidence.

What should I do if I want to use a secret recording in evidence?

Tell the court, explain who and what the recording is of, and what the relevance is to the case. Be ready to provide an unedited version of the recording to the Court and parties if ordered to do so.

Tell the court about the recording as early in the case as possible.

The court may ask you to make an application on Form C2 for permission to use the recording.

What will the court do to decide if I can use the recording in evidence?

- There may need to be a special hearing to decide if the recording can be used.

- In general, in deciding on what evidence to allow courts will think about what is proportionate and necessary for the case to be dealt with properly.
- The court will need to decide what the relevance is of the recording to the issues that need to be decided in the case.
- All the parties and the Judge may need to be given access to the recording.
- The court will want to know that any recording is unedited and has not been changed.
- A written version (transcript) of the recording may need to be prepared.
- If there are a lot of recordings that will make the proceedings longer and more expensive, the court will need to decide whether the recordings are going to be helpful enough to justify this.

What are the considerations about privacy?

Whether or not the recording is allowed to be used as evidence, the court may consider why you made the recording and the impact that had on the person recorded. The court may feel you invaded the privacy of the person you recorded.

Recordings by parents of each other: Unless there is a very good reason why it was necessary to record an adult (such as the other parent), these recordings might be seen by the court as an invasion of privacy of the recorded individual. The court may even decide this amounts to harassment or is wrong for another reason. Be mindful that in these circumstances, the court will take this into consideration when deciding about the welfare of the child.

Covert recordings of children: In general, courts do not approve of covert recordings of children. Young people have told us covert recordings of them are an invasion of privacy and may cause them to feel that the adult has broken their trust. The court will likely consider the impact of the recording on the child, whether the child needs to be told about the recording and whether they should give evidence about what was recorded.

The court will need to think about whether all of this is harmful to the child.

Is it okay to record professionals?

If you want to record professionals, it is better to ask their permission and ask to see any policy their organisation may have about recordings. For example, Cafcass says that its social workers should always be open and transparent in their work and there is no legal reason why a parent or carer should not record their own interview. But keep in mind that even with the permission from a social worker to record, that does not mean a court would necessarily accept the recording into evidence.

Can I record what happens in Court?

No. It is a contempt of court and/or a criminal offence to record court proceedings, including remote hearings.

For more information, please see the full guidance.