

# WESTGATE CHAMBERS



The importance of compliance with ABE Guidance and the potential pitfalls along the way when allegations are made by children.

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## INTRODUCTION

1. Professionals working with children are only too familiar with scenarios whereby children make allegations against others. These of course, are not limited to sexual allegations and although much of the case law relates to this, it must be remembered that the guidance applies to all types of abuse.
2. The 1987 Cleveland child abuse scandal saw 121 children removed from their families and over the course of 2 months, two paediatricians diagnosed sexual abuse in those children from 57 families in the area, with most being removed from their homes.
3. Within the Cleveland Report of 1989 by Judge Butler-Sloss, she gave clear guidance:

*In Chapter 12 Listening to the child, she poses the question: What should an adult do when a child speaks of abuse? and quotes from Child abuse – working together (Department of Health and Security, 1986):*

*A child's statement that he or she is being abused should be accepted as true until proved otherwise. Children seldom lie about sexual abuse.*

*But she points out that not every detail of a child's story should be taken literally.*

*She highlights the confusion over the purpose of interviews before describing various techniques and the problems caused by recording interpretations; people need to record both innocent and sinister interpretations. She also highlights the problem when people assume there is something to disclose and that lack of disclosure is 'denial' and the inherent difficulty in any attempt to help a child to tell because the child may speak of genuine abuse, may refuse to speak of genuine abuse or may have no abuse to speak of.*

*She sets out first the disagreements by professionals over facilitation work and then the areas of agreement:*

- *Do not call an interview 'disclosure' because you assume abuse has happened.*
- *Use only trained interviewers.*
- *Approach the interview with an open mind and use open ended questions.*
- *Have no more than two interviews, taken at the pace of the child in a sympathetic environment.*
- *Accept the possibility you may have nothing to show at the end of it.*
- *Record carefully.*

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- *Recognise the problems created by facilitation techniques in court proceedings and only allow them to be used by specially trained interviewers.*
4. Since that time, there has been a plethora of jurisprudence and guidance to assist with how to deal with allegations.
  5. It is axiomatic that, when considering cases of suspected child abuse, the court must take into account all the evidence, and furthermore consider each piece of evidence in the context of all the other evidence. The burden of proof remains on the local authority with the standard is the simple balance of probabilities. Any findings of fact must be based on evidence or inferences properly drawn from the evidence and not on merely suspicion. The Judge must of course be aware of lies and will give themselves the Lucas direction if necessary.
  6. Re B (Allegation of Sexual Abuse: Child's Evidence) [2006] 2 FLR 1071 held that great care needs to be taken if the risks of obtaining unreliable evidence from a child is to be minimised. Children are often poor historians and many are suggestible
  7. Therefore, the importance of applying and putting in place proper procedures and following the recommended guidance at the earliest of stages cannot be underestimated.

## ABE GUIDANCE

8. Achieving Best Evidence in Criminal Proceedings 2011 – this is an extensive document of some 257. This document describes good practice in interviewing victims and witnesses, and in preparing them to give their best evidence in court. It considers preparing and planning for interviews with witnesses, decisions about whether or not to conduct an interview and decisions about whether the interview should be video recorded. §1.26 and 1.27 set out the importance of recording interviews by video; that they are likely to increase the amount of quality information gained from the witness and increase the amount of information reported by the witnesses being recorded and they safeguard the integrity of the interviewer and process.
9. Re P (Sexual Abuse: Findings of Fact Hearing) [2019] EWFC 27 held at §856 ‘the ABE guidance is advisory rather than legally enforceable code. However significant departures from the good practice advocated in it will likely result in reduced (or in extreme cases no) weight being attached to the interview by the court ‘
10. The ABE Guidelines are relevant to all investigations which include interviews of alleged victims of abuse, whether the exchanges purport to have been conducted under the guidance. §2.1 stresses the importance of planning, stating ‘a well-conducted interview will only occur if appropriate planning has taken place. The importance of planning cannot be overstated’.
11. It is vital that those dealing with children are familiar with this guidance and apply the principles at the earliest of stages. The ABE Guidance re-emphasises the statement of good practice contained in the Cleveland Report under the heading 'Initial Contact with Victims and Witnesses’.

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12. In *Re W, Re F*, (at paragraph 79):

*"I have sympathy for officers and social workers entrusted with the difficult task of speaking to children about allegations of this sort. The ABE Guidance is detailed and complex. But those details and complexities are there for a reason. Experience has demonstrated that very great care is required when interviewing children about allegations of abuse. The Guidance has been formulated and refined over the years by those with expertise in the field, including specialists with a deep understanding of how children perceive, recall and articulate their experiences. It would be unrealistic to expect perfection in any investigation. But unless the courts require a high standard, miscarriages of justice will occur, and the courts will reach unfair and wrong decisions with profound consequences for children and families."*

13. Recent case of *JB (a child) Re (sexual abuse allegations) [2021] EWCA Civ 46* considered the importance of compliance with ABE guidelines

## BASIC PRINCIPLES

14. Adopting and considering the following will assist with any investigation and potential trial, whether this be in the criminal court or the family court. This applies to all those who might be subject to questioning children or at the receiving end of allegations, firsthand. There is Government advice from March 2015 as to what to do if you're worried that a child is being abused. At §25 it states 'it will be the role of social workers and the police to investigate cases and make a judgment on whether there should be a statutory intervention and /or a criminal investigation.

15. The guidance recommends joint interviews between the police and social workers. The issue of whether an intermediary is necessary remains an important one that links with the need to conduct better and proper assessments of the child prior to the interview and should always be considered, particularly with the vulnerable and young children.

## ALLEGATIONS V DISCLOSURE

16. As Mrs Butler-Sloss pointed out, the use of the term 'disclosure' creates the assumption that the abuse has happened.

17. By adopting a good working practice of using the term 'allegation', this will assist in creating a positive working relationship with the parents.

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18. AS v TH (False Allegations of Abuse) [2016] EWHC 532 (Fam) It is easy to adopt the position that use of the term ‘disclosure’ is wrong – there is plenty of evidence from the forensic context of why it is rightly deprecated, as MacDonald J recently reminded us

‘Despite the fact that the use of the term “disclosure” to describe a statement or allegation of abuse made by a child has been deprecated since the Cleveland Report due to it precluding the notion that the abuse might not have occurred (see para 12.34(1)), every professional who gave evidence in this case (except the children’s guardian) used the term “disclosure” to describe what the children had said to them.’

19. In *AS v TS* MacDonald J sets out the key passages from that report in particular:

*‘Throughout the phase of the initial assessment and preliminary decision making, social workers should be conscious of the fact that the presumption that abuse has taken place can have damaging repercussions for the child and the family. Equally, an abnormally low level of alertness to the possibility of child sexual abuse may deter children from subsequently trusting adults sufficiently to reveal the fact of abuse to them (para 13.22).’*

## NEED TO KEEP AN OPEN MIND

20. TW v A City Council [2011] EWCA Civ 17, Sir Nicholas Wall P said:

*‘The Guidance makes it clear that the interviewer must keep an open mind and that the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else. We regret to say that we were left with a clear impression from the interview that the officer was using it purely for what she perceived to be an evidence-gathering exercise and in particular to make [the child] repeat on camera what she had said to her mother. That, emphatically, is not what ABE interviews are about and we have come to the view that we can place no evidential weight on it. It is not sufficient for a judge to rely primarily on the fact that the child is able, when being interviewed, in a thoroughly unsatisfactory manner and contrary to the Guidance, to make a number of inculpatory statements. A clear analysis of all the evidence is required and the child’s interview must be assessed in that context.’*

21. In that case, the judge’s acceptance of the validity of the interview, coupled with other factors, vitiated her finding that the child had been abused and the finding was set aside.

## MEMORY DELAY

22. Re P (Sexual Abuse – Finding of Fact Hearing) [2019] EWFC 27 reminds us that *“Memory is prone to error and easily influenced by the environment in which recall is invited .... Delay between an event recounted and the allegation made with respect to that event may influence the accuracy of the account given.”*

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23. The need to act expeditiously is paramount. Both at the time the allegations are made but also in the follow up investigation. The courts and process can be greatly assisted by social workers/professionals involved being proactive and pushing for matters to take place in a timely manner.

## NOTE TAKING/RECORDING KEEPING

24. The importance of good record keeping cannot be underestimated. This applies as much to professionals as it does to the non-professionals. It is equally vital that these notes are retained. And included within this, is the need to retain any notes/pictures the child may make. At the original trial in JB (a child) re (sexual abuse allegations) [2021] EWCA Civ 46, it was noted by the Judge that ‘the failure to retain the note [written by E] was a ‘significant failing on behalf of the Local Authority and the police’.
25. The Cleveland Report makes clear at paragraph 13.11 that: "*We would emphasise the importance of listening carefully to the initial presentation of information and taking careful notes*". Within this context, the requirement that all professionals responsible for child protection make a clear and comprehensive record of what the child says as soon as possible after it has been said, and in the terms used by the child has been well established good practice for many years.
26. Re P [§595]. Where the person to whom the initial account is given is not a professional, there remain obvious advantages if the account is recorded having regard to this principle.
27. §596. The need for those working with children to record, as contemporaneously as possible, what the child has said has been recognised and endorsed by the courts as vital in circumstances where, in determining allegations of sexual abuse, it is necessary for the court to examine in detail and with particular care what the child has said (sometimes on a number of different occasions) and the circumstances in which they said it (*D v B and Others (Flawed Sexual Abuse Enquiry)* [2007] 1 FLR 1295). Within this context, it will also be important that, when recording an allegation, the child's own words are used and that those speaking with the child should avoid summarising the account in the interests of neatness or comprehensibility or recording their interpretation of the account.
28. §597. In particular, the courts have emphasised the need for records of conversations with the alleged victim of sexual abuse to include a full note of the *questions* as well as the answers

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29. In *Re B (Allegation of Sexual Abuse: Child's evidence)* at [37] Hughes LJ (as he then was) observed as follows when commenting on an interview undertaken of a child by a police officer and social worker who were not properly prepared notwithstanding the likelihood of allegations, which allegations should have been anticipated and during which only what the child was said was noted down:

*"None of this should have happened. In the case of S, unlike her siblings, there was clear reason to think that she might well have something to say and certainly there might be questions which needed to be asked of her. It would have been much more sensible to record all conversations with her. To proceed without recording was to court the risk that what would happen was what did; that is to say that S would produce information, that it would be undesirable to stop her, but that the professionals were not ready to deal with it. If there was to be any possibility of such an unrecorded discussion ensuing, the absolute irreducible minimum was that a full note be taken of questions as well as answers. There were also other lesser, but important, respects in which this discussion failed to comply with the ABE guidelines. There was, for example, no truth and lies discussion."*

30. The need for effective record keeping in the context of allegations of child sexual abuse extends to schools. The departmental advice entitled *What to do if you're worried a child is being abused* (HM Government, March 2015) makes clear at [26] that professionals should record in writing all concerns and discussions about a child's welfare, the decisions made and the reasons for those decisions". The statutory *Guidance Keeping Children Safe in Education* (HM Government, July 2015) makes clear at [19] that poor practice in relation to safeguarding children includes poor record keeping.

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## Q and A SESSION

31. Once a child has made an allegation, there will be a need to explore this with some initial questioning intended only, to elicit a brief account of what is alleged to have taken place; a more detailed account should NOT be pursued at this stage but should be left until the formal interview takes place.
  
32. This is often referred to as a Q and A session, sometimes a social worker, or often, with a social worker and police officer. In these circumstances, any early discussions should, as far as possible, adhere to the following guidance:
  - (a) Listen to the witness.
  
  - (b) Do not stop a witness who is freely recalling significant events.
  
  - (c) Where it is necessary to ask questions, they should, as far as possible in the circumstances, be open-ended or specific-closed rather than forced-choice, leading or multiple.
  
  - (d) Ask no more questions than are necessary in the circumstances to take immediate action.
  
  - (e) Make a comprehensive note of the discussion, taking care to record the timing, setting and people present as well as what was said by the witness and anybody else present (particularly the actual questions asked of the witness).
  
  - (f) Make a note of the demeanour of the witness and anything else that might be relevant to any subsequent formal interview or the wider investigation.
  
  - (g) fully record any comments made by the witness or events that might be relevant to the legal process up to the time of the interview.
  
33. Once the Q and A session has taken place, it will be important to consider the next steps. Delay should be avoided at all costs. Care must be taken as to how any further allegations made between that time and any ABE, are to be dealt with. The need to make careful and contemporaneous notes of anything further said by the child is important, as it the need to resist asking the child any questions about what they have already said.



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## Conducting the ABE interview

34. Often a social worker is present during the interview and takes part of the questioning process.
35. The KEY to successful interviewing is flexibility but with the guidance firmly at the forefront of minds. The fact that the phased approach may not be appropriate for interviewing some witnesses with the most challenging communication skills (e.g., those only able to respond ‘yes’ or ‘no’ to a question) should not mean the most vulnerable of witnesses are denied access to justice. It should not be regarded ‘as a checklist to be rigidly worked through.’
36. There are four main phases
  - Establishing rapport;
  - Initiating and supporting a free narrative account;
  - Questioning; and
  - Closure

## Establishing rapport

37. This must be part of the recorded interview and must include an exercise to establish the child’s understanding of truth and lies. There is specific wording within the guidance to assist.
38. This is even if there is no suggestion that the child did not know the difference between truth and lies because ‘it is, or may be, important for the court to know everything that was said between the interviewing officer and a child in any case [McFarlane LJ in Re E §38]. It includes explaining the ground rules for the interview to the child

## Initiating and supporting a free narrative account

39. The interviewer should ‘initiate’ an uninterrupted free narrative account of the incident/events from the witness by means of an open-ended invitation. This is the most important part of the interview.
40. It is really tempting to remind the child of what they have said to others in terms of the disclosures, particularly if they do not repeat what they had previously said. §3.29 ‘some form of active listening is necessary, letting the witness know that what they have communicated has been received by the interviewer. This can be achieved by reflecting back to the witness what they have communicated.....the interviewer should be aware of the danger of subconsciously or consciously indicating approval or disapproval of the information just given’
41. Lillie & Anor v Newcastle City Council & Ors[2002] EWHC 1600 (QB) When young children are interviewed by an adult about some question of fact, by no means confined to sexual abuse, their accounts may come quickly to conform to the suggestions or beliefs of the interviewer. Moreover, when the inquiry is extended to issues going beyond matters of fact, such as interpretation or value judgments, a child’s responses will often come to conform similarly with the interviewer’s point of view... . if interviewers believe that all the children they are

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interviewing have experienced a certain event, then it is probable that many of the children will come to make such claims even if they did not.'

42. There is of course a need to fully appreciate there are various types of questions which vary in how directive they are. §3.39 'some vulnerable witnesses may be particularly complainant in that they will try to be helpful by going along with much of what they believe the interviewer 'wants' to hear, and/or is suggesting to them. This is particularly so for witnesses who believe the interviewer to be an authority figure.
43. Questions should, wherever possible, commence with open-ended questions and then proceed, if necessary, to specific-closed questions. Forced choice questions and leading questions should only be used as a last resort.
44. Drawings, pictures or other props may be used for different reasons, inter alia
  - To assess a child's language, to keep the child calm and settled,
  - To support a child's recall of events
  - To enable the child to give an account
  - It may be younger children, particularly those with communication difficulties, may give clearer accounts when props are used but any props should be preserved for the production at court
  - Interviewers need to be aware of the risks and pitfalls of using them
  - They should be used with caution
  - And NEVER combined with leading questions
45. The following are some cases that have explored the ABE process:
46. TW v A City Council [2011] EXCA 17 was a criminal case and example of where things can go very wrong if the correct approach is not followed. At the trial the jury were directed to acquit because, inter alia, there had been a gap of 12 months between the allegations and hearing, significant inconsistencies in some of the evidence, and contents of the ABE interview. In the course of the appeal, the CA held the ABE interview had no evidential value because it was unsatisfactory, it had been edited considerably prior to being put before the jury, the inadequacies of the ABE were manifest, the departure of the guidelines were self-evident and glaring; there was no free narrative of the child, an abundance of leading questions, no closure and inadequate establishment of report. The conclusion reached was that 'everything in the interview was led by the officer, and nothing was introduced into the interview by the child'
47. In Re Y & E (Children) [2019] EWCA Civ 206 the Court of Appeal (Baker LJ giving the lead judgment) was again dealing with deficiencies in the ABE process. These deficiencies were not so serious as to render the interviews of no value. This was a case involving an older allegation (by Y) of sexual abuse that was investigated but not established. Contact with the Father therefore resumed. Six years later Y repeated the allegations and then gave three interviews with police. The Father's case was that the Mother and Grandmother had coached Y. The Judge found

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that the interviews were central to the case, that the Father had raped Y on multiple occasions, had masturbated in front of her and was guilty of other incidents of sexual abuse.

48. Baker LJ found that there were significant breaches of the ABE procedure however the guidance was very challenging and often difficult for police officers and social workers to follow. It was the Judge's duty to assess the extent to which the failures undermined the reliability of the evidence. The breaches included an absence of any record of the previous conversations between Y and the police officer before the first interview, no proper "rapport" phase in any of the recorded interviews, the police officer encouraging Y to speak in ways which were inconsistent with the guidance.
49. However, there was a significant amount of free narrative from Y, with sensitive follow-up questions and no leading questions. There was considerable detail in Y's accounts which pointed to them being accounts based on experience. The account of abuse came from the child and not the officer. Ultimately, despite the deficiencies, the interviews contained significant evidence and detail on which the judge was entitled to rely.
50. In Re B (Allegation of Sexual Abuse: Child's evidence), Hughes LJ (as he then was) observed:  
*'Painful past experience has taught that the greatest care needs to be taken if the risk of obtaining unreliable evidence is to be minimised. Children are often poor historians. They are likely to view interviewers as authority figures. Many are suggestible. Many more wish to please. They do not express themselves clearly or in adult terms, so that what they say can easily be misinterpreted if the listeners are not scrupulous to avoid jumping to conclusions. They may not have understood what was said or done to them or in their presence'*
- 'For these and many other reasons it is of the first importance that the child be given the maximum possible opportunity to recall freely, uninhibited by questions, what they are able to say, and equally it is vital that a careful note is taken of what they say and also of any questions which are asked. All this and many other similar propositions, most of them of simple common sense, are set out in nationally agreed guidelines entitled Achieving Best Evidence...'*
51. Having considered the evidence in that case, Hughes LJ added:  
*'There is no question of this evidence being inadmissible for failure to comply with the ABE guidelines, and that has not been suggested in argument for either parent. In a family case, evidence of this kind falls to be assessed, however unsatisfactory its origin. To hold otherwise would be to invest the guidelines with the status of the law of evidence and it would invite the question: which failures have the consequence of inadmissibility? Clearly some failures to follow the guidelines will reduce, but by no means eliminate, the value of the evidence. Others may reduce the value almost to vanishing point.'*

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52. In that case, this court allowed a mother's appeal against the finding that she had watched the father abusing the child and failed to intervene, on the grounds that the flawed manner in which the interview had been conducted meant that it was quite unsafe to rely on it as alone justifying the finding.

53. JB (a child) Re (sexual abuse allegations) [2021] EWCA Civ 46 . Newey LJ emphasised the importance of the guidelines. An important feature was the age of the child and the delay between last living with her mother and making the allegations. (§35). Another important matter was that the ABE interview departed from the guidance to such an extent it seemed wrong to describe it as an ABE interview at all (§39). There had been no "rapport" phase establishing ground rules, and no "free narrative" phase, since it consisted largely of the officer reading E's notes and asking her about the content. The appeal was allowed. However, given the length of time, the age of the child, the concessions made by the Mother and her agreement that the child would not be returned to her care, the matter was not remitted back for a re-hearing but the sexual abuse matters were set aside.