



# Supreme Court of Victoria

## Multi-Jurisdictional Court Guide for the Intermediary Program: Intermediaries and Ground Rules Hearing

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## 1. Introduction

- 1.1 This Guide relates to the use of intermediaries and ground rules hearings. The scheme relating to intermediaries and ground rules hearings is set out in Part [8.2A](#) of the *Criminal Procedure Act 2009* ('the Act') which commenced on 28 February 2018. This Guide must be read in conjunction with Part 8.2A.
- 1.2 The introduction of an intermediary scheme, based on the English model, was recommended (recommendation 30) in the 2016 VLRC Report *The Role of Victims of Crime in the Criminal Trial Process*.
- 1.3 An intermediary scheme and the use of ground rules hearings in Victoria was endorsed in *R v Ward (a pseudonym)* [2017] VSCA 37, a decision of the Court of Appeal on the subject of questioning of children, and obligations of counsel and judicial officers. The principles apply equally to other vulnerable witnesses.
- 1.4 This Guide was developed by the Intermediary Pilot Program Multi-Jurisdictional Committee comprising Judge M. Sexton of the County Court, Magistrates Bowles and Wallington of the Children's and Magistrates' Courts respectively and Judicial Registrar Pedley of the Supreme Court. In 2020, Magistrate Metcalf and Judicial Registrar Freeman of the Magistrates' and Supreme Court respectively joined the committee, while Magistrate Wallington and Judicial Registrar Pedley retired from the committee.

## 2. Vulnerable witnesses

- 2.1 The most vulnerable witnesses are those under 18 years and those with a cognitive impairment ('vulnerable witnesses'). One of the principles of the criminal justice system is to ensure fairness and this includes facilitating the participation of vulnerable witnesses and providing a capacity for them to give their best evidence. This participation includes the Court giving directions for the appropriate management and questioning of a vulnerable witness including where the Court appoints an intermediary. The Court should take every reasonable step to facilitate the participation of a vulnerable witness.
- 2.2 Intermediary schemes aim to facilitate vulnerable witnesses to give their best evidence in light of the research and the experience, particularly in England and Wales since 2008, which shows that the way in which questions are asked of witnesses can affect their evidence.<sup>1</sup>
- 2.3 Intermediaries are trained professionals with specialist skills in communication. They are not expert witnesses called by a party. They are officers of the Court<sup>2</sup> who, under the Intermediary Program, assist the vulnerable witness and the Court so that the witness can give their best evidence during the visual and audio recording of evidence ('VARE') by police and in their evidence in Court namely in examination in chief, cross-examination and re-examination.
- 2.4 A ground rules hearing is a pre-hearing process used to discuss and establish how vulnerable witnesses will be enabled to give their best evidence, by the Court setting

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<sup>1</sup> Recognised in [Ward\[2017\]VSCA37](#) Part 2, especially [115].

<sup>2</sup> Section 389I(2) of the *Criminal Procedure Act 2009* ('the Act').

ground rules for the questioning of the witness. The ground rules take the form of Court directions.<sup>3</sup> See also '4. Ground rules hearings – an introduction' and '5. Ground rules hearings – the process'.

### 3. The Pilot Program

- 3.1 The Intermediary Pilot Program came into effect from 1 July 2018 after the participating venues of the Courts were gazetted, pursuant to section 389F(1)(b) of the Act, and the panel of intermediaries established, pursuant to section 389H of the Act.
- 3.2 The scheme in Part 8.2A of the Act applies to relevant criminal proceedings at a participating venue of a Court that involve a witness, other than the accused, if the witness is a person under the age of 18 years or a person with a cognitive impairment ('vulnerable witness').
  - (a) The criminal proceedings to which the scheme applies are set out in section 389A(1) of the Act (but see 3.3).
  - (b) The scheme applies at any stage of the relevant criminal proceeding including an appeal or rehearing.
  - (c) The scheme applies to a criminal proceeding commenced on or after 28 February 2018 or a criminal proceeding following the committal of an accused on or after that date irrespective of when the offence is alleged to have been committed.<sup>4</sup>
- 3.3 The Intermediary Pilot Program for the use of intermediaries has operated more narrowly than the scheme set out in the Act, applying to:
  - (a) complainants in sexual offences matters who are vulnerable witnesses;
  - (b) vulnerable witnesses, apart from the accused, in homicide matters;
  - (c) all Court jurisdictions i.e. Children's Court, Magistrates' Court, County Court and Supreme Court in the Melbourne legal precinct, and in Bendigo, Geelong and Warrnambool or participating venues as gazetted from time to time; and
  - (d) police sexual offence and child abuse investigative team ('SOCIT') sites in Bendigo, Box Hill, Fawkner, Frankston, Geelong, Knox, Melbourne and Warrnambool or as nominated by the Intermediary Pilot Program from time to time.<sup>5</sup>

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<sup>3</sup> A video of best practice examples of how to conduct and appear in a ground rules hearing with and without an intermediary is available online on the [Working with Vulnerable Witnesses](#) public page.

<sup>4</sup> Section 451 the Act.

<sup>5</sup> Although not in the legislative scheme, Victoria Police are included in the Pilot program which is managed by the Department of Justice and Community Safety. As the Court Guide deals with the Court process, there is only incidental reference to the police engagement of an intermediary for a police interview (VARE).

- 3.4 Given the more limited operation of the Intermediary Pilot Program, as set out in 3.3, it is anticipated that either
- (a) the accused will be legally represented in the matters to which the Intermediary Pilot Program applies, or
  - (b) an order will have been made by the Court under section 357 of the Act<sup>6</sup> for legal representation of the accused for cross-examination of a protected witness.
- 3.5 Accordingly, at this time, the Guide does not provide guidance where an accused is self-represented.<sup>7</sup>

#### 4. Ground rules hearings – an introduction

- 4.1 The Court is responsible for ensuring that the questioning of witnesses is appropriate. Improper cross-examination of any witness, including a vulnerable witness, *must* be disallowed by the Court.<sup>8</sup>
- 4.2 Ground rules hearings are important in bringing to the attention of counsel<sup>9</sup> and judicial officers the comprehension capacity and communication needs of the vulnerable witness, which are relevant circumstances to be considered for disallowing improper questioning.
- (a) At a ground rules hearing, a discussion is held between the judicial officer, counsel<sup>10</sup> and the intermediary (if any) about the questioning of the witness, taking into account the witness’s communication needs, and any other arrangements to be made.<sup>11</sup>
  - (b) The intermediary is not a witness. They are neutral and an officer of the Court<sup>12</sup>, and accordingly would only become a witness in rare circumstances. The discussion of their assessment of the witness’s needs may take place with the intermediary seated in the witness box for ease of communication with the Court and to ensure the oral information they give is recorded, but not for the purpose of the intermediary being sworn or affirmed, giving evidence and being cross-examined.

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<sup>6</sup> Section 356 of the Act provides that a protected witness must not be cross-examined by an accused in person. Section 357 sets out the process where an accused is not legally represented and the witness is a protected witness (as defined or as declared by the Court – see section 354).

<sup>7</sup> Note section 389D of the Act provides that if an accused is self-represented, the accused **must** attend any ground rules hearing.

<sup>8</sup> From 28 October 2018, section 41(1) *Evidence Act 2008* provides that the Court **must** disallow an improper question put to [any] witness. Section 41(2), which made it mandatory to do so only for vulnerable witnesses, has been repealed. Sections 41(3) and (5) provide the meaning of improper questioning; section 41(4) providing the definition of a vulnerable witness for the purpose of section 41(2) has been repealed.

<sup>9</sup> The reference to ‘counsel’ for this purpose includes prosecution and defence legal practitioners and, in jurisdictions in which they appear, police prosecutors.

<sup>10</sup> See footnote 10.

<sup>11</sup> See Footnote 4.

<sup>12</sup> Section 389I(2) the Act.

- (c) If a referral is made to the Intermediary Matching Service<sup>13</sup> by a party or on the Court's own motion, or an intermediary is appointed by the Court after referral (see '7. Intermediaries – the process'), the witness's communication needs will be assessed and a written assessment report<sup>14</sup> provided to the Court and the parties containing practical strategies and recommendations on how to best communicate with the witness. This assessment report will be provided at least 7 days before and will be discussed at the ground rules hearing, at which the Court may make or vary any direction for the fair and efficient conduct of the proceeding (see 5.1–5.5).
  - (d) The assessment report and discussion of it at the ground rules hearing help the parties in planning questions to ensure they are not improper as well as helping the Court in planning communication and the management of the case.
  - (e) Counsel<sup>15</sup> will be directed to have a private consultation with the intermediary (if any) to assist in formulating questions, although control of questioning remains the responsibility of the Court (see 5.2(b), 5.2(c) and 6.1(h)).
  - (f) Ground rules for the questioning of the witness are established by directions of the Court or given in a ruling (see 5.1(f)).
  - (g) If a ground rules hearing is effective, there should be less need for an intermediary or the judicial officer to intervene in the questioning of the witness to ensure the questioning is fair and not improper.<sup>16</sup>
  - (h) For cases where a Court on its own motion directs a ground rules hearing be held, or on its own motion appoints an intermediary, or in any case where the lateness of the direction or appointment does not allow time for a written assessment report, see 5.1(c), 5.1(d), 5.2, 6.2 and 7.1 respectively.
- 4.3 Where directions for appropriate management and questioning are required, the Court should:
- (a) invite submissions by the parties and recommendations by the intermediary (if any) at a ground rules hearing;
  - (b) set ground rules (directions) for the conduct of the questioning (see 5.1(f)).

## 5. Ground rules hearings – the process

- 5.1 Ground rules hearings *must* be held in all cases where an intermediary is appointed by the Court. A ground rules hearing *may* be held in a relevant criminal proceeding (see 3.2–3.3) involving a vulnerable witness, if directed by the Court on the application of a party, or on its own motion.
- (a) An application for a Court to direct that a ground rules hearing be held *may* be made

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<sup>13</sup> This is managed by the Department of Justice and Community Safety. See also 6.1(e).

<sup>14</sup> This is managed by the Department of Justice and Community Safety.

<sup>15</sup> See Footnote 10.

<sup>16</sup> See Footnote 9.

orally or in writing<sup>17</sup>, but where possible *should* be made in writing well in advance<sup>18</sup> of the day on which the witness will be questioned in evidence, particularly if the witness has complex communication needs and there are special arrangements to be made.

- (b) An application for a Court to give certain directions (set ground rules) at the ground rules hearing *should* also be made in writing well in advance<sup>19</sup> of the day on which the witness will be questioned in evidence, and may be made at the same time as an application under 5.1(a).
- (c) Discussion between counsel<sup>20</sup> and the judicial officer of ground rules for the questioning of vulnerable witnesses who have particular communication needs is good practice in relevant criminal proceedings, even if no intermediary is appointed by the Court.
- (d) If a Court on its own motion directs that a ground rules hearing be held, and there is no intermediary, or where there is no written assessment report for any reason, the discussion of ground rules will be based on the material available to the Court and the parties, including the depositions, and the guidance from the resources referred to in 5.2(v) and 8. The Court may make enquiries of the parties about matters that appear in the Ground Rules Hearing Questionnaire<sup>21</sup> (see 5.2(a)(iii)).
- (e) If a ground rules hearing is to be held, it *must* be held before the commencement of any hearing at which the witness is to give evidence under section 389C(1) of the Act. The Court *may* direct that the ground rules hearing is to be held on a day earlier than the day the witness will be questioned. This is to give counsel<sup>22</sup> time to adapt their questions to the witness's needs and to allow for other arrangements to be put in place, including those recommended by the intermediary (if any). The time for holding a ground rules hearing can be extended and more than one extension *may* be granted under section 389C(2) of the Act.
- (f) At the end of the ground rules hearing, a clear statement of ground rules from the judicial officer, by way of direction or ruling, is needed. These should be recorded in writing for ease of reference during the questioning of the witness and provided to the parties and the intermediary (if any). Judicial officers should ensure compliance with any ground rules (see 5.6).

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<sup>17</sup> Note no application for a ground rules hearing is required if an intermediary is appointed: a ground rules hearing *must* be held – section 389B(3) of the Act.

<sup>18</sup> Because of the difference in listing cases in each jurisdiction, the time for applications to be made will be different. Please consult the websites for the respective jurisdictions as to any Practice Directions and Forms to be used in making written applications, and time requirements.

<sup>19</sup> See Footnote 19.

<sup>20</sup> See Footnote 10.

<sup>21</sup> <https://www.mcv.vic.gov.au/for-lawyers/practice-directions/ground-rules-hearings-no-intermediary-practice-direction-no-23-2020>.

<sup>22</sup> See Footnote 10.



(g) Counsel briefed to appear at the hearing *must* attend the ground rules hearing.<sup>23</sup> While in-Court attendance is most preferable, subject to health requirements, the Court will take all reasonable steps to facilitate attendance, including by audio-visual link where appropriate.

5.2 At a directions hearing held before the ground rules hearing, in order to facilitate the making of the directions pursuant to section 389E of the Act referred to in 5.3,

(a) the Court *may* direct counsel<sup>24</sup>:

- (i) to advise whether a referral has been made to the Intermediary Matching Service for an intermediary to assess the witness (see 7.1)
- (ii) to advise whether an application will be made for the Court to appoint an intermediary to assist the witness in giving evidence (see 7.2-7.6)
- (iii) to identify the needs of the witness, including where there will be no referral to the Intermediary Matching Service, by directing the informant (or the prescribed person, being the police member who conducted the Video Recording of Evidence or VARE) to complete and file the Ground Rules Questionnaire<sup>25</sup> by a set date
- (iv) to identify arrangements needed to facilitate the giving of evidence including under section 360 of the Act, and the use of communication and visual aids<sup>26</sup>
- (v) to consult and follow the guidance in *Ward* [2017] VSCA 37 especially at [112]-[114], [117]-[128], [134]-[135] and in the *Benchbook for Children giving Evidence in Australian Courts* (published by the Australasian Institute of Judicial Administration, updated 2020), and other resources referred to by the Court or published by the Judicial College of Victoria from time to time, including Fact Sheets about communicating with people with particular vulnerabilities, prepared by the Intermediary Pilot Program<sup>27</sup>
- (vi) *where there is no referral to the Intermediary Matching Service, or no intermediary is appointed*, in order that the appropriate form of questioning can be discussed at the ground rules hearing:
  - (A) to provide their proposed questions to be asked of the witness in writing to the Court<sup>28</sup> by 9am on the day before the ground rules hearing; and/or

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<sup>23</sup> Section 389D(1) of the Act refers to 'a person acting for the prosecution' and 'the legal practitioner representing the accused'. This Guide makes it clear that counsel briefed for the hearing at which the witness is to be questioned are required to attend, which for this purpose, includes police prosecutors.

<sup>24</sup> See Footnote 10.

<sup>25</sup> See Footnote 22.

<sup>26</sup> See Footnote 4 and 5.4(e).

<sup>27</sup> See 8.

<sup>28</sup> A similar process of providing questions in writing has been engaged in for many years where application is made to cross examine a complainant about their sexual history (section 346 of the Act).

- (B) to provide in writing to the Court by 9am on the day before the ground rules hearing a list of the topics about which the witness may be asked by counsel.<sup>29</sup>
- (b) *where a referral is made or an intermediary is appointed*, in order that the appropriate form of questioning can be discussed at the ground rules hearing the Court:
- (i) *will* direct counsel<sup>30</sup> for the parties to consult confidentially with the intermediary before the ground rules hearing about the form of proposed questions to be asked of the witness;
  - (ii) *may* direct counsel<sup>31</sup> for the parties to provide in writing to the intermediary by 9am on the day before the ground rules hearing is to be held, proposed questions to be asked of the witness; and
  - (iii) *may* direct counsel<sup>32</sup> for the parties to provide questions in writing to the Court, where a direction referred to in 5.2(b)(i) and/or 5.2(b)(ii) is not complied with, or where an issue arises that the Court cannot rule on without reference to the proposed questions or topics.<sup>33</sup>
- (c) The directions under 5.2(b) are to enable both prosecution and defence counsel<sup>34</sup> to receive suggestions from the intermediary to assist with the formulation of their questions adapted to the communication needs of the vulnerable witness, including the matters in section 389E of the Act<sup>35</sup> (noting that the relevance and legality of questioning remains the responsibility of the Court), and to avoid delays in commencing the ground rules hearing and the questioning of the witness at the listed time.
- 5.3 At a ground rules hearing the Court *may* make or vary any direction<sup>36</sup> for the fair and efficient conduct of the proceeding, in accordance with section 389E of the Act, including but not limited to a direction about:
- (a) the manner of questioning of a witness (see 5.4(a))
  - (b) the duration of questioning of a witness (see 5.4(b))
  - (c) the questions that may or may not be put to a witness (see 5.4(c))

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<sup>29</sup> See Footnote 10.

<sup>30</sup> See Footnote 10.

<sup>31</sup> See Footnote 10.

<sup>32</sup> See Footnote 10.

<sup>33</sup> The intermediary has no role in deciding if questions are irrelevant or otherwise legally improper, and the Court's mandatory obligation under section 41 *Evidence Act* to disallow an improper question can only be met when the Court is aware of the question and rules it improper. This is best dealt with at the ground rules hearing, but can only be if the questions are provided to the Court. Otherwise, improper questions not dealt with in advance will involve intervention by the Court during the questioning of the witness.

<sup>34</sup> See Footnote 10.

<sup>35</sup> See 5.4.

<sup>36</sup> See also 5.4–5.5.



- (d) if there is more than one accused, the allocation amongst the co-accused of the topics about which a witness may be asked (see 5.4(d))
- (e) the use of models, plans, body maps or similar aids to help communicate a question or an answer (see 5.4(e))
- (f) whether the party is not obliged to put the evidence in its entirety in cross-examination where it is intended that evidence be led that contradicts or challenges the evidence of a witness or that otherwise discredits a witness (see 5.4(f)).

5.4 In relation to the directions the Court may give under section 389E of the Act at the ground rules hearing, the Court *may*

- (a) as to manner of questioning<sup>37</sup>:
  - (i) direct that everyday vocabulary and the witness's own vocabulary (where known) be used
  - (ii) allow leading questions by counsel<sup>38</sup> calling the witness<sup>39</sup>
  - (iii) disallow leading questions by the cross-examiner<sup>40</sup>
  - (iv) disallow<sup>41</sup> 'do you remember', negative, complex, 'why' or 'how', and tag questions<sup>42</sup> and the use of statements instead of questions
  - (v) direct that questions be asked that require a 'fact' as an answer rather than yes/no<sup>43</sup>
  - (vi) permit evidence to be given wholly or partly in narrative form<sup>44</sup>
  - (vii) determine the length of the pause to be allowed between asking a question and expecting an answer<sup>45</sup>

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<sup>37</sup> See *Ward* [2017] VSCA 37 especially at [112]-[114]; also at [11]-[12], [15]-[18], [52]-[59]; and section 29(1) *Evidence Act 2008*.

<sup>38</sup> See Footnote 10.

<sup>39</sup> Section 37 *Evidence Act*.

<sup>40</sup> Section 42 *Evidence Act*.

<sup>41</sup> Section 41(3) *Evidence Act*.

<sup>42</sup> A tag question (also known as a tail question) is a sentence structure in which a declarative or interpretative statement is turned into a question (the tag). For example, in the sentence 'You're John, aren't you?', the statement 'You're John' is turned into a question by the tag 'aren't you?'

<sup>43</sup> An example of a question that requires a fact is 'Where was mum?'; an example of a question that requires a yes/no answer is 'Was mum at the shops?'

<sup>44</sup> Section 29(2) *Evidence Act*.

<sup>45</sup> This is to accommodate a slower processing speed for certain vulnerable witnesses. This would be addressed in the intermediary report if relevant. See also the IPP Fact Sheets and other resources in 8.

- (viii) direct use of short, simple sentences with the question word at the beginning<sup>46</sup>
  - (ix) direct that one question at a time be asked
  - (x) permit a visual schedule for topic outlines (a small booklet using photos or other images) as recommended by the intermediary, to be produced by the intermediary in consultation with counsel<sup>47</sup> and then used with the witness in questioning
- (b) as to duration of questioning<sup>48</sup>:
- (i) determine the length of time that the witness is permitted to be questioned overall
  - (ii) determine the timing of breaks for the witness, including whether the Court will adjourn or simply turn off the audio-visual link for a few moments for the witness to regain their concentration
  - (iii) determine the start and end times of the witness's questioning to avoid delays or unnecessary waiting and to optimise improved attention (for example, in accordance with a school day schedule starting early in the morning for young children, taking the lunch break earlier than 1pm, finishing for the day at 3pm; or starting at a time when prescribed medication is effective for a vulnerable witness)<sup>49</sup>
- (c) as to the questions which may or may not be put to the witness:
- (i) determine the way in which differences in accounts<sup>50</sup> or statements made to others may be presented instead of counsel commenting on inconsistencies during cross-examination (for example, an alternative is counsel being permitted to raise the differences before the trier of fact after the witness's evidence, or through another witness)
  - (ii) determine whether questions may be asked on other areas or topics upon which counsel would wish to cross-examine if the witness was an adult or non-vulnerable witness
  - (iii) disallow complex questions around time, sequence or duration
- (d) as to allocation among co-accused of the topics about which a witness may be asked:
- (i) direct counsel to divide the topics between them in advance of the hearing, with counsel for the first accused leading the questioning, and counsel for the other

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<sup>46</sup> Examples of question words: 'What', 'Where', 'When' and 'Did'. Note that 'Why' or 'How' are question words that may be problematic for a vulnerable witness and the intermediary may address this in their assessment report, or at the ground rules hearing.

<sup>47</sup> See Footnote 10.

<sup>48</sup> This would be addressed in the intermediary report if relevant. See also the IPP Fact Sheets and other resources in 8.

<sup>49</sup> An example of such a direction or ground rule is found in the JCV Ground Rules Hearing video online on the [Working with Vulnerable Witnesses](#) public page.

<sup>50</sup> See Part 5, Division 3 *Jury Directions Act 2015*.

accused asking only ancillary questions relevant to their client's case without repeating the questioning that has already taken place on behalf of the other accused

- (e) as to the use of models, plans, body maps or similar aids:
  - (i) if the witness needs to indicate a part of the body, direct counsel<sup>51</sup> to ask the witness to point to the relevant part on a body map<sup>52</sup> and disallow questions by counsel<sup>53</sup> requiring the witness to point to a part of the witness's own body
  - (ii) allow the use of symbols to reinforce comprehension<sup>54</sup> (for example, pictorial representation of 'I don't know/I've forgotten')
  - (iii) allow the use of pictures and dolls to help with location and position
  - (iv) allow the use of a timeline (for example, using post-it notes on a page containing only a horizontal line) so that the witness can place events in order
  - (v) provide an opportunity at the ground rules hearing for the intermediary to discuss recommendations for use of any communication aids and to demonstrate how visual resources and props can be used
- (f) as to a direction that the party intending to lead evidence to contradict or challenge or otherwise discredit the witness is not obliged to put that evidence to the witness:
  - (i) this should be a direction of last resort. The first step is to pose the questions contradicting or challenging the witness in a form that the witness will understand, with the assistance of an intermediary where there is one, and/or by direction of the Court
  - (ii) if the Court considers, on the recommendation of the intermediary or on its own motion, that there is a risk of a vulnerable witness being unable to understand, becoming distressed or acquiescing to leading questions that contradict or challenge them, the Court may dispense with normal practice and impose restrictions on counsel 'putting the case' (see also 5.6).

5.5 In addition to the directions the Court may give under section 389E of the Act at the ground rules hearing, the Court *may* give directions about:

- (a) timing of the witness's viewing of the VARE, which should be on a day earlier than the day evidence is to be given
- (b) the use of the first names of the witness, counsel<sup>55</sup> and the intermediary (if any) as well as how the judicial officer is to be addressed during the questioning of the witness

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<sup>51</sup> See Footnote 10.

<sup>52</sup> For an example of a body map, see the [Working with Vulnerable Witnesses](#) public page.

<sup>53</sup> See Footnote 10.

<sup>54</sup> For an example of a visual reminder of court rules, see the [Working with Vulnerable Witnesses](#) public page.

<sup>55</sup> See Footnote 10.

- (c) how the judicial officer and counsel<sup>56</sup> are to be introduced to the witness (for example over the audio-visual link from Court, or briefly in person at the remote witness facility, noting that a meeting in person must not include an accused)
  - (d) the robing and dress of judge and counsel during the introduction and/or the evidence of the witness
  - (e) the location of the judicial officer, counsel<sup>57</sup> and the accused during questioning (including when an online platform is in use, to ensure the accused can view the witness, but not be seen by the witness)
  - (f) allowing arrangements for the witness to maintain composure or concentration, especially if recommended in an intermediary assessment report (for example, a toy, a stress ball, drawing while speaking, or a support dog)
  - (g) the location of the intermediary when giving the intermediary oath or affirmation<sup>58</sup> before the Court (in the absence of the witness)
  - (h) the location of the intermediary during questioning having regard to the primary rules referred to in section 389K of the Act (see 7.6)
  - (i) the degree and extent to which the intermediary will interact with the witness and the Court during questioning
  - (j) the manner in which the intermediary will communicate with the Court during questioning
  - (k) suspending the proceedings and undertaking a further ground rules hearing if counsel<sup>59</sup> is not complying with the directions made following a ground rules hearing, or the intermediary indicates that the witness is failing to understand questions asked under the existing ground rules, or there is some persisting miscommunication
  - (l) if the prosecutor wishes to ask questions in re-examination, directing there be a break in proceedings so that there can be a discussion between the intermediary and the prosecutor where advice can be offered as to the form of questions.
- 5.6 All witnesses should be enabled to give the best evidence they can. This is an attribute of a fair hearing. For vulnerable witnesses, this may mean departing from traditional cross-examination. The form and extent of appropriate cross-examination will vary from case to case. Where limitations on questioning are necessary and appropriate, they must be clearly defined by the Court through ground rules (directions). There must be compliance with any directions.
- (a) Where there is a jury and counsel requests it, the judge should explain the limitations

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<sup>56</sup> See Footnote 10.

<sup>57</sup> See Footnote 10.

<sup>58</sup> Section 389K(4) of the Act.

<sup>59</sup> See Footnote 10.

to the jury and the reasons for them.<sup>60</sup> If counsel fails to comply with the ground rules, the judge should prevent further questioning that does not comply with the ground rules and give relevant directions to the jury (see also 5.5(k)).

- (b) Where there is no jury, and if counsel<sup>61</sup> fails to comply with the ground rules, the judicial officer should prevent further questioning that does not comply with the ground rules (see also 5.5(k)).

## 6. Intermediaries – an introduction

### 6.1 An intermediary:

- (a) has specialist skills in communication
- (b) is an officer of the Court and has a duty to act impartially when assisting communication with a witness who has communication needs<sup>62</sup>
- (c) is not an expert witness to be called by a party and cross-examined<sup>63</sup>
- (d) is a member of a panel of persons with prescribed qualifications suitable for appointment as intermediaries established and managed by the Department of Justice and Community Safety<sup>64</sup>
- (e) following referral by a party, is identified for a vulnerable witness by the Intermediary Matching Service managed by the Department of Justice and Community Safety and may be used by the police, prosecution and defence<sup>65</sup>
- (f) is appointed by the Court for questioning of a witness at a relevant hearing on application by a party after referral to the Intermediary Matching Service<sup>66</sup> or on the Court's own motion
- (g) should be considered for referral in every case involving a child witness or cognitively impaired witness covered by the Intermediary Pilot Program (see 3.2–3.3)
- (h) in their written assessment report produced before the ground rules hearing, makes a declaration which includes a statement that they will not reveal the contents or topics of proposed questions to any third party including the prosecution or defence, except as ordered by the Court
- (i) at Court before the questioning of the witness begins, takes the intermediary oath or

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<sup>60</sup> See Part 3.14, Criminal Charge Book, Judicial College of Victoria.

<sup>61</sup> See Footnote 10.

<sup>62</sup> Section 389I(2) of the Act. See also IPP Fact Sheets and other resources in 8.

<sup>63</sup> See 4.2(b).

<sup>64</sup> Section 389H of the Act.

<sup>65</sup> Excluding the accused as a witness (sections 389A(3) and 389F(1) of the Act).

<sup>66</sup> See 4.2(c).

affirmation<sup>67</sup>, but not in the presence of the witness

- (j) has as their primary functions improvement of the quality of evidence and aiding the understanding between the Court, counsel<sup>68</sup> and the witness
- (k) advises on the formulation of questions so as to avoid misunderstanding, as they commonly do in other jurisdictions where intermediaries are used. When necessary and as directed by the Court, they actively assist and intervene during questioning. The extent to which they do so (if at all) depends on factors such as the communication needs of the witness, and the skill of counsel<sup>69</sup> in adapting their language and questioning style to meet those needs (see 5.5(i), 5.5(j)<sup>70</sup> and 6.2).

6.2 An intermediary's role is to assess the communication needs of a vulnerable witness and provide practical strategies and recommendations on how to best communicate with the witness so they can understand the questions and provide their best evidence.

- (a) If the police<sup>71</sup> make a referral through the Intermediary Matching Service<sup>72</sup>, an intermediary conducts an on the spot assessment of the witness's communication needs prior to the police interview (VARE) and makes verbal recommendations on communication methods that will elicit clear and coherent evidence.
- (b) If a referral is made by a party, or an intermediary is appointed by the Court on the application of a party or on the Court's own motion, the intermediary will write an assessment report for the Court and the parties containing practical strategies and recommendations<sup>73</sup> on how to best communicate with the witness so they can understand the questions and provide their best evidence. This assessment report will be discussed at the ground rules hearing at which the Court may make or vary any direction for the fair and efficient conduct of the proceeding.

## 7. Intermediaries – the process

7.1 The usual process is that a party refers a matter to the Intermediary Matching Service<sup>74</sup> before an application is made to the Court to appoint an intermediary. This enables material to be obtained for the application (see 7.4) and provided to the parties.

7.2 An intermediary *may* be appointed by the Court for the questioning of a vulnerable witness

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<sup>67</sup> See section 389K(4) of the Act; and clause 21 *Criminal Procedure Regulations* (as amended)– the prescribed form of oath or affirmation is the form set out in Schedule 1 or a similar form.

<sup>68</sup> See Footnote 10.

<sup>69</sup> See Footnote 10.

<sup>70</sup> At the ground rules hearing, it is for the Court to direct the degree, extent and manner of the intermediary's interaction with the Court.

<sup>71</sup> See Footnote 6.

<sup>72</sup> See 6.1(e).

<sup>73</sup> The process of assessment and report writing takes about four weeks and is managed by the Department of Justice and Community Safety.

<sup>74</sup> See 6.1(e).



in relevant criminal proceedings on the application of a party or on its own motion.<sup>75</sup>

- 7.3 An application for a Court to appoint an intermediary *may* be made orally or in writing, but where possible *should* be made in writing well in advance<sup>76</sup> of the day on which the witness will be questioned in evidence, particularly if the witness has complex communication needs and there are special arrangements to be made.
- 7.4 An applicant for an intermediary to be appointed by a Court *must*:
- (a) explain how the witness is eligible for such assistance
  - (b) explain why an intermediary would be likely to improve the quality of the witness's evidence
  - (c) provide any information the Court may need to be satisfied that the witness is aware that an application for an intermediary to be appointed can be made, and is able and wishes to give evidence without the assistance of an intermediary<sup>77</sup>
  - (d) provide any other material on which the applicant relies, including an intermediary assessment report.
- 7.5 An intermediary *may* be appointed by the Court whether or not:
- (a) an intermediary was engaged by the police for the interview with the witness (VARE)<sup>78</sup>
  - (b) the same or any other intermediary assessed the witness for the interview with police (VARE)<sup>79</sup>
  - (c) the same or any other intermediary was present with the witness at the interview with police (VARE).<sup>80</sup>
- 7.6 Where an intermediary is appointed, the primary rules in section 389K of the Act (subject to any direction of the Court and rules of Court) are:
- (a) the evidence of the witness must be given in the presence of the intermediary; if the witness gives evidence remotely, the intermediary will usually assist from the remote

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<sup>75</sup> Section 389J of the Act.

<sup>76</sup> Because of the difference in listing cases in each jurisdiction, the time for applications to be made will be different. Please consult the websites for the respective jurisdictions as to any Practice Directions and Forms to be used in making written applications, and time requirements.

<sup>77</sup> Section 389J(3) of the Act. It is not intended that the witness give evidence in order for the Court to be so satisfied.

<sup>78</sup> See Footnote 3. Section 389J(4)(b) of the Act permits a person to be appointed by the Court as an intermediary if they have assisted the witness as an intermediary.

<sup>79</sup> See Footnote 79.

<sup>80</sup> See Footnote 79.

witness facility<sup>81</sup>

- (b) any evidence given by the witness, including any assistance given by the intermediary, must be able to be seen and heard by the Court, counsel<sup>82</sup> and jury (if any)
- (c) the Court and counsel<sup>83</sup> must be able to communicate with the intermediary.

## 8. Resources

- *Ward* [2017] VSCA 37 – outlines case law, law reform proposals and literature on the challenges of questioning children and the need for counsel to adapt their approach to the developmental capacity of the witness
- *Benchbook for Children giving Evidence in Australian courts* (updated 2020, Australasian Institute of Judicial Administration – AIJA – available online [aija.org.au](http://aija.org.au))
- “Working with Vulnerable Witnesses” public page – [www.judicialcollege.vic.edu.au/resources/working-vulnerable-witnesses](http://www.judicialcollege.vic.edu.au/resources/working-vulnerable-witnesses) – including:
  - “How to conduct a Ground Rules Hearing” training video – [judicialcollege.vic.edu.au](http://judicialcollege.vic.edu.au)
  - “Managing the Questioning of Vulnerable Witnesses” training video – [judicialcollege.vic.edu.au](http://judicialcollege.vic.edu.au)
  - Fact Sheets for communicating with people with vulnerabilities – Intermediary Pilot Program
  - *Appendix A: Child witnesses: Uniform Evidence Manual* (2014, Judicial College of Victoria)
  - *Practical Guide to Questioning Child Witnesses* (published in 2016 by the Judicial College of Victoria in the Uniform Evidence Manual)
- Disability Access Benchbook Victoria (2016, Judicial College of Victoria)

### UK materials:

- Toolkits for Questioning Witnesses with communication needs – [theadvocatesgateway.org](http://theadvocatesgateway.org)  
(Please note Terms of Use)
- “A Question of Practice” training film – [theadvocatesgateway.org](http://theadvocatesgateway.org)
- The 20 Principles of Questioning – [icca.ac.uk](http://icca.ac.uk) – CPD – A & V resources
- Advocacy and the Vulnerable Online Training – [icca.ac.uk](http://icca.ac.uk)

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<sup>81</sup> There may be circumstances in which other arrangements are necessary, if there is a good reason for the intermediary to be giving assistance from a different location to the witness via audio-visual link. The witness will still be giving evidence ‘in the presence of the intermediary.’

<sup>82</sup> See Footnote 10.

<sup>83</sup> See Footnote 10.

## 9. Document control

### Details

<b>Document type</b>	Multi-jurisdictional Court Guide
<b>Reference</b>	Intermediary Program
<b>Division</b>	Criminal Division
<b>Reviewed by</b>	Judicial Registrar Freeman, member of Intermediary Program Advisory Committee
<b>Authorised by</b>	Chief Justice Ferguson
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### Release history

Version	Date	Author	Summary of changes
1.0	28/6/2018	Intermediary Pilot Program Multi-Jurisdictional Committee	Multi-jurisdictional Court Guide first published by the Intermediary Pilot Program Advisory Committee.
2.0	22/3/2021	Intermediary Pilot Program Multi-Jurisdictional Committee	Re-formatted numbering. Incorporates the extension of the IPP beyond the original end date of 30 June 2020. Refers to a second video produced by the Judicial College of Victoria ('JCV') and JCV Vulnerable Witnesses public page. Allows for the application of the Guide to additional venues without the need to amend the Guide. Incorporates the repeal of s 41(2) <i>Evidence Act</i> . Makes clear that an intermediary is not a witness. Incorporates additional directions the Court will, or may, give at a directions hearing before the ground rules hearing ('GRH'), including: where an intermediary is involved, the Court will direct counsel to consult with the intermediary before the GRH, the Court may direct written questions be provided to the intermediary by 9:00am on the day before the GRH and the Court may direct written questions be provided to the Court where there has been non-compliance with directions or where it is necessary for the Court to rule on an issue. Addition of a reference to a questionnaire where there is no intermediary.