



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

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<b>Authored By</b>	Intermediary Pilot Program Multi-Jurisdictional Committee		
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## Introduction

- 1 This Guide relates to the use of intermediaries and ground rules hearings during the Intermediary Pilot Program which will operate between 1 July 2018 and 30 June 2020. The scheme relating to intermediaries and ground rules hearings is set out in Part [8.2A](#) of the *Criminal Procedure Act 2009* which commenced on 28 February 2018. This Guide must be read in conjunction with Part 8.2A.
- 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”.
- 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.

- 4 This Guide was developed by the Intermediary Pilot Program Multi-Jurisdictional Committee comprising Judge 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.

### **Vulnerable witnesses**

- 5 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 treatment and questioning of a vulnerable witness especially where the Court appoints an intermediary. The Court should take every reasonable step to facilitate the participation of a vulnerable witness.
- 6 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>.
- 7 Intermediaries are trained professionals with specialist skills in communication. They are officers of the Court who, under the Intermediary Pilot 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.
- 8 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 ground rules for the questioning of the witness. The ground rules take the form of Court directions.

### **The Pilot Program**

- 9 The Intermediary Pilot Program will come into effect from 1 July 2018 after the participating venues of the Court are gazetted, pursuant to section 389F(1)(b) of the Act, and the panel of intermediaries is established, pursuant to section 389H of the Act.
- 10 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").
  - 10.1 The criminal proceedings to which the scheme applies are set out in section 389A(1) of the Act (but see paragraph 11).
  - 10.2 The scheme applies at any stage of the relevant criminal proceeding including an appeal or rehearing.

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<sup>1</sup> Recognised in *Ward* [2017] VSCA 37 Part 2, especially [115].

- 10.3 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>2</sup>.
- 11 The Intermediary Pilot Program for the use of intermediaries and ground rules hearings will initially operate more narrowly than the scheme set out in the Act and will apply to:
- 11.1 complainants in sexual offences matters who are vulnerable witnesses
  - 11.2 vulnerable witnesses, apart from the accused, in homicide matters
  - 11.3 all Court jurisdictions in the Melbourne legal precinct e.g. Children's Court, Magistrates' Court, County Court and Supreme Court
  - 11.4 four police sexual offence and child abuse investigative team (SOCIT) sites in Frankston, Fawkner, Box Hill and Geelong<sup>3</sup>.
- 12 Given the more limited operation of the Intermediary Pilot Program, as set out in paragraph 11, it is anticipated that
- 12.1 either the accused will be legally represented in the matters to which the Intermediary Pilot Program applies, or
  - 12.2 an order will have been made by the Court under section 357 of the Act<sup>4</sup> for legal representation of the accused for cross-examination of a protected witness.
- Accordingly, at this time, the Guide does not provide guidance where an accused is self-represented<sup>5</sup>.

### Ground rules hearings – an introduction

- 13 The Court is responsible for ensuring questioning of witnesses is appropriate. Improper cross-examination of a vulnerable witness **must** be disallowed by the Court, unless satisfied in all the relevant circumstances of the case the question is necessary to be put<sup>6</sup>.
- 14 Ground rules hearings are important in bringing to the attention of counsel<sup>7</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.
- 14.1 At a ground rules hearing, a discussion is held between the judicial officer, counsel<sup>8</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>2</sup> Section 451 of the *Criminal Procedure Act*.

<sup>3</sup> Although not in the legislative scheme, Victoria Police are included in the Pilot program which is managed by the Department of Justice and Regulation. As the Court Guide deals with the Court process, there is only incidental reference to the police engagement of an intermediary for a VARE.

<sup>4</sup> Section 356 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>5</sup> Note section 389D of the Act provides that if an accused **is** self-represented, the accused **must** attend any ground rules hearing.

<sup>6</sup> Section 41(2) *Evidence Act 2008*. Section 41(3) provides the meaning of improper questioning; section 41(4) provides the definition of a vulnerable witness for the purpose of section 41(2).

<sup>7</sup> The reference to 'counsel' for this purpose includes police prosecutors in jurisdictions in which they appear.

<sup>8</sup> See footnote 7.

- 14.2 If an intermediary is appointed by the Court (see paragraphs 25-29), the witness's communication needs will be assessed and a written assessment report<sup>9</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.
  - 14.3 This helps the parties in planning questions to ensure they are not improper as well as planning communication and the running of the case.
  - 14.4 Counsel<sup>10</sup> are encouraged to have a private consultation with an intermediary when formulating questions, although control of questioning remains the responsibility of the Court (see paragraphs 18.7 and 22.7).
  - 14.5 Ground rules for the questioning of the witness are established by directions of the Court or given in a ruling.
  - 14.6 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.
  - 14.7 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 paragraphs 16.3, 16.4, 23 and 24 respectively.
- 15 Where directions for appropriate treatment and questioning are required, the Court should
    - 15.1 invite submissions by the parties and recommendations by the intermediary (if appointed) at a ground rules hearing
    - 15.2 set ground rules (directions) for the conduct of the questioning (see paragraph 16.6).

### Ground rules hearings – the process

- 16 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 paragraphs 10 and 11) involving a vulnerable witness, if directed by the Court on the application of a party, or on its own motion.
  - 16.1 An application for a Court to direct that a ground rules hearing be held **may** be made orally or in writing<sup>11</sup>, but where possible **should** be made in writing well in advance<sup>12</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.
  - 16.2 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>13</sup> of the day on which

<sup>9</sup> This is a process managed by the Department of Justice and Regulation.

<sup>10</sup> See Footnote 7.

<sup>11</sup> Note no application is required if an intermediary is appointed: a ground rules hearing **must** be held – section 389B(3) of the Act.

<sup>12</sup> Because of the difference in listing cases in each jurisdiction, the time for applications to be made will be different. Applications should be drafted using the General Application Form available on the County Court website.

<sup>13</sup> See Footnote 12.

the witness will be questioned in evidence, and may be made at the same time as an application under paragraph 16.1.

- 16.3 Discussion of ground rules for the questioning of vulnerable witnesses who have particular communication needs is good practice, even if no intermediary is appointed by the Court.
  - 16.4 If a Court on its own motion directs a ground rules hearing be held, and there is no intermediary, (and thus no written assessment report), 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 paragraph 18.5.
  - 16.5 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>14</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 appointed). 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.
  - 16.6 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 evidence of the witness. Judicial officers should ensure compliance with any ground rules. (See paragraph 20).
  - 16.7 Counsel briefed to appear at the hearing **must** attend the ground rules hearing<sup>15</sup>. While in-Court attendance is most preferable, the Court will take all reasonable steps to facilitate attendance, including by video link where appropriate.
- 17 At a ground rules hearing the Court **may** make or vary any direction<sup>16</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:
- 17.1 the manner of questioning of a witness
  - 17.2 the duration of questioning of a witness
  - 17.3 the questions that may or may not be put to a witness
  - 17.4 if there is more than one accused, the allocation amongst the co-accused of the topics about which a witness may be asked
  - 17.5 the use of models, plans, body maps or similar aids to help communicate a question or an answer
  - 17.6 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.

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<sup>14</sup> See Footnote 7.

<sup>15</sup> Section 389D(1) 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>16</sup> See also paragraphs 19 and 20.

- 18 In order to facilitate the making of the directions referred to in paragraph 17, the Court **may** direct counsel<sup>17</sup>, at a directions hearing held before the ground rules hearing, to:
- 18.1 identify the needs of the witness
  - 18.2 advise whether a referral has been made for an intermediary to assess the witness (see paragraphs 25 and 26)
  - 18.3 advise whether an application will be made for the Court to appoint an intermediary to assist the witness in giving evidence
  - 18.4 identify arrangements needed to facilitate the giving of evidence including under section 360 of the Act and the use of communication aids
  - 18.5 consult and follow the guidance in *Ward* [2017] VSCA 37 especially at [112]-[114], [117]-[128], [134]-[135] and in the *Bench book for Children giving Evidence in Australian Courts* (published by the Australasian Institute of Judicial Administration, updated 2015) and the *Practical Guide to Questioning Child Witnesses* (published in 2016 by the Judicial College of Victoria in the Uniform Evidence Manual).
  - 18.6 prepare their proposed questions to be asked of the witness and provide them in writing to the Court before the ground rules hearing and/or prepare and provide in writing to the Court a list of the topics about which the witness may be asked by counsel<sup>18</sup> so the appropriate form of questioning can be discussed at the ground rules hearing<sup>19</sup>
  - 18.7 where an intermediary has been appointed by the Court, share their proposed questions confidentially<sup>20</sup> with the intermediary ahead of the ground rules hearing to receive suggestions to assist with reducing the linguistic complexity of the questioning, including the matters in section 389E of the Act<sup>21</sup>, (but the process of questioning remains the responsibility of the Court).
- 19 In relation to the directions the Court may give under section 389E of the Act at the ground rules hearing, the Court **may**
- 19.1 as to manner of questioning<sup>22</sup>:
    - 19.1.1 direct that everyday vocabulary and the witness's own vocabulary (where known) be used
    - 19.1.2 allow leading questions by counsel<sup>23</sup> calling the witness<sup>24</sup>

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<sup>17</sup> See Footnote 7.

<sup>18</sup> See Footnote 7.

<sup>19</sup> A similar process has been engaged in for many years where application is made to cross examine a complainant about their sexual history (s346 *Criminal Procedure Act*). While that is a mandatory process, this is discretionary. It may be that counsel are not required to provide their questions to the court if the court is satisfied that they have undertaken the private consultation with the intermediary (paragraph 18.7), and the intermediary states at the Ground Rules Hearing that the proposed questions meet their recommendations. However, the court has a mandatory obligation to disallow improper questions which can only be met when the court hears the question and rules it improper, either at the ground rules hearing if questions are provided to the Court, or during the questioning of the witness, when intervention by the court will be necessary.

<sup>20</sup> See paragraph 22.7.

<sup>21</sup> See paragraph 19.

<sup>22</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>23</sup> See Footnote 7.

<sup>24</sup> Section 37 *Evidence Act*.

- 19.1.3 disallow leading questions by the cross-examiner<sup>25</sup>
- 19.1.4 disallow “do you remember”, negative, complex, “why” or “how” and tag questions<sup>26</sup> and the use of statements instead of questions
- 19.1.5 direct that questions be asked that require a ‘fact’ as an answer rather than yes/no
- 19.1.6 permit evidence to be given wholly or partly in narrative form<sup>27</sup>
- 19.1.7 determine the length of the pause to be allowed between asking a question and expecting an answer
- 19.1.8 direct use of short, simple sentences with the question word at the beginning<sup>28</sup>
- 19.1.9 direct that one question at a time be asked
- 19.1.10 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 after discussion with counsel<sup>29</sup> and then used with the witness in questioning
- 19.2 as to duration of questioning:
  - 19.2.1 determine the length of time that the witness is permitted to be questioned overall
  - 19.2.2 determine the timing of breaks for the witness, including whether the Court will adjourn or simply turn off the video link for a few moments for the witness to regain their concentration
  - 19.2.3 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)
- 19.3 as to the questions which may or may not be put to the witness:
  - 19.3.1 determine the way in which differences in accounts or statements made to others may be presented instead of counsel commenting on inconsistencies during cross-examination (for example, by counsel being permitted to raise the differences before the trier of fact after the witness’s evidence, or through another witness)
  - 19.3.2 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
  - 19.3.3 disallow complex questions around time, sequence or duration
- 19.4 as to allocation among co-accused of the topics about which a witness may be asked:
  - 19.4.1 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

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<sup>25</sup> Section 42 *Evidence Act*.

<sup>26</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>27</sup> Section 29(2) *Evidence Act*.

<sup>28</sup> Examples of question words: ‘What’, ‘Where’, ‘When’ and ‘Did’.

<sup>29</sup> See Footnote 7.

other 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

- 19.5 as to the use of models, plans, body maps or similar aids:
    - 19.5.1 if the witness needs to indicate a part of the body, direct counsel<sup>30</sup> to ask the witness to point to the relevant part on a body map and disallow questions by counsel<sup>31</sup> requiring the witness to point to a part of the witness's own body
    - 19.5.2 allow the use of symbols to reinforce comprehension (for example, pictorial representation of "I don't know / I've forgotten")
    - 19.5.3 allow the use of pictures and dolls to help with location and position
    - 19.5.4 allow the use of a time-line (for example, using post-it notes) so that the witness can place events in order
    - 19.5.5 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
  - 19.6 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:
    - 19.6.1 dispense with normal practice and impose restrictions on counsel 'putting the case' where there is a risk of a vulnerable witness being unable to understand, becoming distressed or acquiescing to leading questions. (See also paragraph 21 below.)
- 20 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:
- 20.1 timing of the witness's viewing of the VARE, which should be on a day earlier than the day evidence is to be given
  - 20.2 the use of the first names of the witness, counsel<sup>32</sup> and the intermediary (if appointed)
  - 20.3 how the judicial officer and counsel<sup>33</sup> are to be introduced to the witness (for example over the video link from Court, or briefly in person at the remote witness facility, noting that a meeting in person must not include an accused)
  - 20.4 the robing and dress of judge and counsel during the introduction and/or the evidence of the witness
  - 20.5 the location of the judicial officer, counsel<sup>34</sup> and the accused during questioning
  - 20.6 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)
  - 20.7 the location of the intermediary when giving the Intermediary oath or affirmation<sup>35</sup> before the Court (in the absence of the witness)

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<sup>30</sup> See Footnote 7.

<sup>31</sup> See Footnote 7.

<sup>32</sup> See Footnote 7.

<sup>33</sup> See Footnote 7.

<sup>34</sup> See Footnote 7.

<sup>35</sup> Section 389K(4) of the Act.



- 20.8 the location of the intermediary during questioning having regard to the primary rules referred to in section 389K of the Act (See paragraph 28 below)
  - 20.9 the degree and extent to which the intermediary will interact with the witness and the Court during questioning
  - 20.10 the manner in which the intermediary will communicate with the Court during questioning
  - 20.11 suspending the proceedings and undertaking a further ground rules hearing if counsel<sup>36</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
  - 20.12 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 formulating questions.
- 21 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.
- 21.1 Where there is a jury and counsel requests it, the judge should explain the limitations to the jury and the reasons for them. 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 paragraph 20.11.
  - 21.2 Where there is no jury, and if counsel<sup>37</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 paragraph 20.11.

### **Intermediaries – an introduction**

- 22 An intermediary:
- 22.1 has specialist skills in communication
  - 22.2 is appointed by the Court for questioning of a witness at a hearing on application by a party or on the Court's own motion
  - 22.3 is an officer of the Court and has a duty to act impartially when assisting communication with a witness who has communication needs<sup>38</sup>
  - 22.4 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 Regulation<sup>39</sup>
  - 22.5 is identified for a vulnerable witness by the Intermediary Matching Service managed by the Department of Justice and Regulation and may be used by the police, prosecution and defence

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<sup>36</sup> See Footnote 7.

<sup>37</sup> See Footnote 7.

<sup>38</sup> Section 389I(2) of the Act.

<sup>39</sup> Section 389H of the Act.

- 22.6 should be considered in every case involving a child witness or cognitively impaired witness covered by the Intermediary Pilot Program (see paragraphs 10 and 11)
- 22.7 in their written assessment report produced before the ground rules hearing, makes a declaration which includes a statement that they will not discuss the proposed questions of any counsel<sup>40</sup> with anyone other than at the direction of the Court
- 22.8 at Court before the questioning of the witness begins, takes the Intermediary oath or affirmation<sup>41</sup>, but not in the presence of the witness
- 22.9 has as their primary functions improvement of the quality of evidence and aiding the understanding between the Court, counsel<sup>42</sup> and the witness
- 22.10 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>43</sup> in adapting their language and questioning style to meet those needs (see paragraphs 20.9 and 20.10<sup>44</sup>).
- 23 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.
- 23.1 If the police make a referral through the Intermediary Matching Service<sup>45</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<sup>46</sup>.
- 23.2 If an intermediary is appointed by the Court on the application of a party, an intermediary will write an assessment report for the Court and the parties with practical strategies and recommendations<sup>47</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.
- 24 If an intermediary is appointed by the Court close to the hearing at which the witness will be questioned
- 24.1 on a late application by a party, or
- 24.2 on its own motion, or
- 24.3 because an intermediary who was previously appointed has become unavailable, or

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<sup>40</sup> See Footnote 7.

<sup>41</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>42</sup> See Footnote 7.

<sup>43</sup> See Footnote 7.

<sup>44</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>45</sup> See Footnote 9.

<sup>46</sup> See Footnotes 3 and 9.

<sup>47</sup> See Footnote 9.

- 24.4 in any case where there is less than the time required for the intermediary's assessment and written report to be provided before questioning of the witness<sup>48</sup>,  
the Court:
- 24.5 may direct the intermediary to conduct an on the spot assessment of the witness's communication needs and make verbal recommendations to the Court in the presence of the parties including practical strategies on how best to communicate with the witness so they can understand the questions and provide their best evidence
- 24.6 must hold a ground rules hearing at which those recommendations are discussed with counsel<sup>49</sup>, and submissions are heard,
- 24.7 may set ground rules (make directions or ruling - see paragraphs 17-21) and
- 24.8 if the Court finds it is necessary to adjourn the hearing, having regard to any recommendations of the intermediary including the complexity of the witness's communication needs, and the submissions of the parties, set a new hearing date for the questioning of the witness.

### Intermediaries – the process

- 25 An intermediary **may** be appointed by the Court for the questioning of a vulnerable witness in relevant criminal proceedings on the application of a party or on its own motion<sup>50</sup>.
- 25.1 A party or the Court on its own motion may refer a matter to the Intermediary Matching Service<sup>51</sup> before an application is made to the Court to appoint an intermediary. This enables material to be obtained for the application (see paragraph 27) and provided to the parties.
- 26 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>52</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.
- 27 An applicant for an intermediary to be appointed by a Court **must**
- 27.1 explain how the witness is eligible for such assistance
- 27.2 explain why an intermediary would be likely to improve the quality of the witness's evidence
- 27.3 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>53</sup>

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<sup>48</sup> The process of assessment and report writing takes about four weeks and is managed by the Department of Justice and Regulation.

<sup>49</sup> See Footnote 7.

<sup>50</sup> Section 389J of the Act.

<sup>51</sup> See Footnote 9.

<sup>52</sup> Because of the difference in listing cases in each jurisdiction, the time for applications to be made will be different. Applications should be drafted using the General Application Form available on the County Court website.

<sup>53</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.

27.4 provide any other material on which the applicant relies, including an intermediary assessment report.

28 An intermediary **may** be appointed by the Court whether or not

28.1 an intermediary was engaged by the police for the interview with the witness (VARE)<sup>54</sup>

28.2 the same or any other intermediary assessed the witness for the interview with police (VARE)<sup>55</sup>

28.3 the same or any other intermediary was present with the witness at the interview with police (VARE)<sup>56</sup>.

29 Where an intermediary is appointed, the primary rules in section 389K (subject to any direction of the Court and rules of Court) are:

29.1 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 witness facility

29.2 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>57</sup> and jury (if any)

29.3 the Court and counsel<sup>58</sup> must be able to communicate with the intermediary.

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<sup>54</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>55</sup> See Footnote 54.

<sup>56</sup> See Footnote 54.

<sup>57</sup> See Footnote 7.

<sup>58</sup> See Footnote 7.