

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

Details

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1. Introduction

- 1.1 This Guide relates to ground rules hearings and the use of intermediaries, the scheme for which is set out in Part 8.2A of the *Criminal Procedure Act 2009* ('the Act') and commenced on 28 February 2018. This Guide must be read in conjunction with Part 8.2A as amended.
- 1.2 The Intermediary Program began operation on 1 July 2018 and is available to witnesses within the scope of the program (see [3.] – 'The Intermediary Program').
- 1.3 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*.
- 1.4 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.
- 1.5 The expansion of ground rules hearings to all complainants in relation to a charge for a sexual offence was recommended (recommendation 84) in the 2021 VLRC Report *Improving the Justice System Response to Sex Offences* ('2021 VLRC Report'). In line with this recommendation, the *Criminal Procedure Act 2009* ('Act') was amended in 2022. As a result, from **30 July 2023**, a ground rules hearing must be held for ALL complainants in relation to a charge for a sexual offence.¹

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 including 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 (but not limited to) 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 witnesses are asked questions can affect their evidence.²
- 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 Court³ who, under the Intermediary Program, assist the vulnerable witness and the Court so that the witness can give their best evidence during:
 - (a) Any visual and audio recording of evidence ('VARE') by police (see [3.6] – 'The Intermediary Program'), and

¹ *Criminal Procedure Act 2009* s 389A(3)(b) as amended by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*.

² Recognised in [R v Ward \[2017\] VSCA 37](#) Part 2, especially [115].

³ *Criminal Procedure Act 2009* s 389I(2).

- (b) in their evidence in Court namely in examination in chief, cross-examination and re-examination.
- 2.4 A ground rules hearing is a hearing at which the Court considers the communication, support and other needs of witnesses and decides how the proceeding is to be conducted to fairly and effectively meet those needs.⁴ The Court sets ground rules for the questioning of the witness. The ground rules take the form of Court directions.⁵ (See [4.] – ‘Ground rules hearings – an introduction’ and [5.] – ‘Ground rules hearings – the process’.)
- 2.5 While the 2021 VLRC Report acknowledged there has been a shift towards a respectful courtroom culture, it noted that trials are still often traumatic for complainants, and that the parameters of cross-examination and respectful treatment of complainants should be considered carefully and be part of every sexual offence hearing.
- 2.6 Following the government’s acceptance of the recommendation in the 2021 VLRC Report, amendments to Division 1 of Part 8.2A – Ground Rules Hearings of the Act were enacted and came into operation after 30 July 2023. Thereafter, Division 1 applies to all witnesses who are complainants in relation to a charge for a sexual offence, as well as to witnesses aged under 18 or who have a cognitive impairment and who are witnesses in a proceeding to which section 389A(1) applies. As a result, from 30 July 2023, new section 389B(3) is in force and provides that ground rules hearings must be held not only if an intermediary is appointed, but also if the witness is a complainant in relation to a charge for a sexual offence.

3. The Intermediary Program

- 3.1 The Intermediary 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 Division 2 of Part 8.2A of the Act applies to relevant criminal proceedings at a participating venue of a Court that involve a witness (including the complainant), other than the accused, who is under the age of 18 years or a person with a cognitive impairment (‘vulnerable witness’).
- 3.3 The criminal proceedings to which the scheme applies are set out in section 389A(1) of the Act (but see [3.4] below). The scheme applies at any stage of the relevant criminal proceeding including an appeal or rehearing. 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.⁶
- 3.4 However, the Intermediary Program operates more narrowly than as set out in the Act, and is not currently available for all witnesses who would otherwise be eligible. The scope of the program is:
- (a) complainants in sexual offences court proceedings who are vulnerable witnesses;
 - (b) vulnerable witnesses, apart from the accused, in homicide court proceedings; and

⁴ *Criminal Procedure Act 2009* s 389AB as introduced by *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*.

⁵ A video of best practice examples of how to conduct and appear in a ground rules hearing with and without an intermediary is available at www.judicialcollege.vic.edu.au/resources/how-conduct-ground-rules-hearing.

⁶ *Criminal Procedure Act 2009* s 451.

- (c) where (a) or (b) applies, in all court jurisdictions in the Melbourne legal precinct (i.e. the Children’s Court, Magistrates’ Court, County Court and Supreme Court), and in Bendigo, Geelong and Warrnambool and other participating venues as gazetted from time to time.
- 3.5 The Intermediary Program has very limited capacity to provide assistance where requests for referral are out of the scope of the program as set out in [3.4] above.
- 3.6 Although the use of intermediaries at the recording of a VARE by a prescribed person (police member) is not in the legislation, a similar scheme has operated since 1 July 2018 at Victoria Police sexual offence and child abuse investigative team (‘SOCIT’) sites in Bendigo, Box Hill, Fawkner, Frankston, Geelong, Knox, Melbourne and Warrnambool, and other locations as nominated by the Intermediary Program from time to time.⁷
- 3.7 As it is anticipated that either:
- (a) the accused will be legally represented in the matters to which the Intermediary Program applies, or
 - (b) an order will have been made by the Court under section 357 of the Act⁸ for legal representation of the accused for cross-examination of a protected witness,
- this Guide does not provide guidance where an accused is self-represented.⁹

4. Ground rules hearings – an introduction

- 4.1 As stated above,¹⁰ from 30 July 2023, a ground rules hearing must be held for all complainants in relation to a charge for a sexual offence.
- 4.2 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.¹¹ This is reinforced by Note 2 at the foot of section 389E of the Act (as amended).
- 4.3 Ground rules hearings are important in bringing to the attention of counsel¹² and judicial officers the comprehension capacity and communication needs of the vulnerable witness, which are relevant circumstances to be considered for disallowing improper questioning. Key aspects of a

⁷ Although not in the legislative scheme, Victoria Police are included in the program which is managed by the Department of Justice and Community Safety and governed by a manual of procedures developed by the Department. As this Guide deals with the Court process, there is only incidental reference to the police engagement of an intermediary for a police interview (VARE).

⁸ *Criminal Procedure Act 2009* s 356 provides that a protected witness must not be cross-examined by an accused in person. *Criminal Procedure Act 2009* s 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 *Criminal Procedure Act 2009* s 354).

⁹ Note *Criminal Procedure Act 2009* s 389D provides that if an accused **is** self-represented, the accused **must** attend any ground rules hearing.

¹⁰ See [1.5] - ‘Introduction’ and 2.6 – ‘Vulnerable witnesses’.

¹¹ From 28 October 2018, *Evidence Act 2008* s 41(1) provides that the Court **must** disallow an improper question put to [any] witness. *Evidence Act 2008* s 41(2), which made it mandatory to do so only for vulnerable witnesses, has been repealed. *Evidence Act 2008* ss 41(3) and (5) provide the meaning of improper questioning; *Evidence Act 2008* s 41(4) which provided the definition of a vulnerable witness for the purpose of *Evidence Act 2008* s 41(2) has been repealed.

¹² The reference to ‘counsel’ throughout this Guide includes prosecution and defence legal practitioners and, in jurisdictions in which they appear, police prosecutors.

ground rules hearing are as follows:

- (a) At a ground rules hearing, a discussion is held between the judicial officer, counsel¹³ 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.¹⁴
- (b) The intermediary is not a witness. They are neutral and an officer of the Court¹⁵, 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 not for the purpose of the intermediary being sworn or affirmed, giving evidence and being cross-examined but for ease of communication with the Court and to ensure the oral information they give is recorded.
- (c) If a referral is made to the Intermediary Matching Service¹⁶ 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 by an intermediary and a written assessment report provided to the Court and the parties¹⁷ 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] – 'Ground rules hearings – the process').
- (d) The assessment report and discussion of it at the ground rules hearing helps 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) Counsel¹⁸ 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)] – 'Ground rules hearings – the process' and [6.1(h)] – 'Intermediaries – an introduction').
- (f) Whether or not there is an intermediary appointed, ground rules for the questioning of the witness are established by directions of the Court or given in a ruling (see [5.1(f)] – 'Ground rules hearings – the process').
- (g) If a ground rules hearing is effective, there should be less need for intervention by an intermediary (if any) or the judicial officer in the questioning of the witness to ensure the questioning is fair and not improper.¹⁹
- (h) For cases where a Court on its own motion²⁰ 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] –

¹³ See Footnote 12.

¹⁴ See Footnote 4.

¹⁵ *Criminal Procedure Act 2009* s 389I(2).

¹⁶ This is managed by the Department of Justice and Community Safety. See also [6.1(e)] – 'Intermediaries – an introduction'.

¹⁷ This is managed by the Department of Justice and Community Safety.

¹⁸ See Footnote 12.

¹⁹ See Footnote 11.

²⁰ *Criminal Procedure Act 2009* ss 337(1) and 389B.

‘Ground rules hearings – the process’, and [6.2] – ‘Intermediaries – an introduction’ respectively.

4.4 At a ground rules hearing, the court should:

- (a) invite submissions by the parties and recommendations by the intermediary (if any);
- (b) set ground rules (directions) for the conduct of the questioning (see [5.1(f)] – ‘Ground rules hearings – the process’).

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, and in all cases where the witness is a complainant in relation to a charge for a sexual offence²¹. A ground rules hearing *may* be held in a relevant criminal proceeding²² involving a vulnerable witness, if directed by the Court on the application of a party, or on its own motion²³.

- (a) An application for a Court to direct that a ground rules hearing be held *may* be made orally or in writing²⁴, but where possible *should* be made in writing well in advance²⁵ 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 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)] for a ground rules hearing to be held.
- (c) Discussion between counsel²⁶ 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) Where 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] – ‘Resources’. The Court may make enquiries of the parties about matters that appear in the Ground Rules Hearing Questionnaire²⁷ (see [5.2(a)(iii)]).

²¹ *Criminal Procedure Act 2009* s 389B(3) as amended.

²² *Criminal Procedure Act 2009* ss 389A and 389B.

²³ *Criminal Procedure Act 2009* ss 337(1) and 389B.

²⁴ No application for a ground rules hearing is required if an intermediary is appointed or the witness is a complainant relating to a sexual offence: a ground rules hearing *must* be held – *Criminal Procedure Act 2009* s 389B(3) as amended.

²⁵ 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, Practice Notes and Forms to be used in making written applications, and time requirements.

²⁶ See Footnote 12.

²⁷ [Magistrates' Court Practice Direction No. 5 of 2023](#); [Magistrates' Court Practice Direction No. 4 of 2023](#); [County Court Criminal Division Practice Note 2023](#).

- (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 counsel²⁸ 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]).
- (g) Counsel briefed to appear at the hearing *must* attend the ground rules hearing.²⁹ While in-Court attendance is most preferable, 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 at the ground rules hearing pursuant to section 389E of the Act referred to in [5.3],

- (a) the Court *may* direct counsel:³⁰
 - (i) to advise whether a referral has been made to the Intermediary Matching Service for an intermediary to assess the witness (see [7.1] – ‘Intermediaries – the process’);
 - (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] – ‘Intermediaries – the process’);
 - (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 applicable Ground Rules Questionnaire³¹ 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;³²
 - (v) to consult and follow the guidance in *R v 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 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 Program;³³

²⁸ See Footnote 12.

²⁹ *Criminal Procedure Act 2009* s 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.

³⁰ See Footnote 12.

³¹ See Footnote 27.

³² See [5.4(e)] – ‘Ground rules hearings – an introduction’.

³³ See [8.] – ‘Resources’.

- (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:
- (I) to provide their proposed questions to be asked of the witness in writing to the Court³⁴ by 9am on the day before the ground rules hearing; and/or
 - (II) 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.³⁵
- (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 counsel³⁶ 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 counsel³⁷ 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 counsel³⁸ 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.³⁹
- (c) The directions under [5.2(b)] are to enable both prosecution and defence counsel⁴⁰ 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 Act⁴¹ (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 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)])

³⁴ 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 (*Criminal Procedure Act 2009* s 346).

³⁵ See Footnote 12.

³⁶ See Footnote 12.

³⁷ See Footnote 12.

³⁸ See Footnote 12.

³⁹ The intermediary has no role in deciding if questions are irrelevant or otherwise legally improper, and the Court's mandatory obligation under *Evidence Act 2008* s 41 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 considered 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.

⁴⁰ See Footnote 12.

⁴¹ See [5.4] – 'Ground rules hearings – the process'.

- (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)])
- (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 the manner of questioning:⁴²
 - (i) direct that everyday vocabulary and the witness's own vocabulary (where known) be used
 - (ii) allow leading questions by counsel⁴³ calling the witness⁴⁴
 - (iii) disallow leading questions by the cross-examiner⁴⁵
 - (iv) disallow⁴⁶ 'do you remember', negative, complex, 'why' or 'how', and tag questions⁴⁷ and the use of statements instead of questions
 - (v) direct that questions be asked that require a 'fact' as an answer rather than yes/no⁴⁸
 - (vi) permit evidence to be given wholly or partly in narrative form⁴⁹
 - (vii) determine the length of the pause to be allowed between asking a question and expecting an answer⁵⁰

⁴² See *R v Ward* [2017] VSCA 37 especially at [112]–[114]; also at [11]–[12], [15]–[18], [52]–[59]; and *Evidence Act 2008* s 29(1).

⁴³ See Footnote 12.

⁴⁴ *Evidence Act 2008* s 37.

⁴⁵ *Evidence Act 2008* s 42.

⁴⁶ *Evidence Act 2008* s 41(3).

⁴⁷ 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?'.

⁴⁸ 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?'.

⁴⁹ *Evidence Act 2008* s 29(2).

⁵⁰ 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 Fact Sheets and other resources in [8.] – 'Resources'.

- (viii) direct use of short, simple sentences with the question word at the beginning⁵¹
- (ix) direct that one question at a time be asked
- (x) permit a visual schedule for topic outlines (such as a small booklet using photos or other images) as recommended by the intermediary, to be produced by the intermediary in consultation with counsel⁵² and then used with the witness in questioning
- (b) as to the duration of questioning.⁵³
 - (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)⁵⁴
 - (iv) direct that counsel⁵⁵ provide the intermediary with a list of topic numbers (not topic subjects or headings) to assist the witness to follow the progress of the questioning
- (c) as to the questions which may or may not be put to the witness:
 - (i) determine the way in which differences in accounts⁵⁶ or statements made to others may be presented instead of counsel commenting on inconsistencies during cross-examination (for example, an alternative approach is to permit counsel⁵⁷ 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 counsel⁵⁸ 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:

⁵¹ 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.

⁵² See Footnote 12.

⁵³ This would be addressed in the intermediary report if relevant. See also the Fact Sheets and other resources in [8.] – ‘Resources’.

⁵⁴ An example of such a direction or ground rule is found in the JCV Ground Rules Hearing video online at www.judicialcollege.vic.edu.au/resources/how-conduct-ground-rules-hearing

⁵⁵ See Footnote 12.

⁵⁶ See *Jury Directions Act 2015* Part 5, Division 3.

⁵⁷ See Footnote 12.

⁵⁸ See Footnote 12.

- (i) direct counsel⁵⁹ 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 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 counsel⁶⁰ to ask the witness to point to the relevant part on a body map⁶¹ and disallow questions by counsel requiring the witness to point to a part of the witness's own body
 - (ii) allow the use of symbols to reinforce comprehension⁶² (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 containing events and/or reference points 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 counsel⁶³ '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, counsel⁶⁴ and the intermediary (if any) as well as how the judicial officer is to be addressed during the questioning of the witness

⁵⁹ See Footnote 12.

⁶⁰ See Footnote 12.

⁶¹ For an example of a body map, see judicialcollege.vic.edu.au/resources/victims-and-witnesses under the heading 'Ground rules hearings: Intermediary Assessment Report and recommendations'.

⁶² For examples of such symbols, see Footnote 61.

⁶³ See Footnote 12.

⁶⁴ See Footnote 12.

- (c) how the judicial officer and counsel⁶⁵ 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 counsel⁶⁶ during the introduction and/or the evidence of the witness
- (e) the location of the judicial officer, counsel⁶⁷ 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 affirmation⁶⁸ 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] – ‘Intermediaries – The process’)
- (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 counsel⁶⁹ 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 counsel⁷⁰ requests it, the judge should explain the limitations to the jury and the reasons for them.⁷¹ 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)] above).

⁶⁵ See Footnote 12.

⁶⁶ See Footnote 12.

⁶⁷ See Footnote 12.

⁶⁸ *Criminal Procedure Act 2009* s 389K(4).

⁶⁹ See Footnote 12.

⁷⁰ See Footnote 12.

⁷¹ See [Criminal Charge Book, Judicial College of Victoria](#), Part 3.14.

- (b) Where there is no jury, and if counsel⁷² fails to comply with the ground rules, the judicial officer should disallow further questioning that does not comply with the ground rules (see also [5.5(k)] above).

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 needs⁷³
- (c) is not an expert witness to be called by a party and cross-examined⁷⁴
- (d) is a member of a panel of persons with prescribed qualifications suitable for appointment as an intermediary established and managed by the Department of Justice and Community Safety⁷⁵
- (e) following referral by a party, is identified for a vulnerable witness by the Intermediary Matching Service⁷⁶ managed by the Department of Justice and Community Safety and may be used by the police, prosecution and defence⁷⁷
- (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 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 Program (see [3.3]–[3.4] – 'The Intermediary Program')
- (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 affirmation,⁷⁸ but not in the presence of the witness
- (j) has as their primary functions improvement of the quality of evidence and aiding the

⁷² See Footnote 12.

⁷³ *Criminal Procedure Act 2009* s 389I(2). See also Fact Sheets and other materials in [8.] – 'Resources'.

⁷⁴ See [4.2(b)] – 'Ground rules hearings – an introduction'.

⁷⁵ *Criminal Procedure Act 2009* s 389H.

⁷⁶ This is managed by the Department of Justice and Community Safety. See [4.2(c)] – 'Ground rules hearings – an introduction'.

⁷⁷ Excluding the accused as a witness (sections 389A(3) and 389F(1) *Criminal Procedure Act 2009*). Note: *Evidence Act 2008* s 26(d) may provide the basis for an accused to have a support person during the questioning of witnesses, and/or during their own questioning should they choose to give evidence.

⁷⁸ See *Criminal Procedure Act 2009* s 389K(4) and *Criminal Procedure Regulations* (as amended) cl 25 – the prescribed form of oath or affirmation is the form set out in Schedule 1 or a similar form.

understanding between the Court, counsel⁷⁹ 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 counsel⁸⁰ in adapting their language and questioning style to meet those needs (see [5.5(i)], [5.5(j)] – ‘Ground rules hearings – the process’ and [6.2] – ‘Intermediaries – an introduction’).⁸¹

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 police⁸² make a referral through the Intermediary Matching Service,⁸³ an intermediary conducts an on the spot assessment of the witness’s communication needs before the police interview (VARE) and provides a short verbal assessment to the prescribed person with 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 recommendations⁸⁴ 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 that is within the scope of the Intermediary Program (see [3.3] and [3.4] – ‘The Intermediary Program’) to the Intermediary Matching Service 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 in relevant criminal proceedings on the application of a party or on its own motion.⁸⁵
- 7.3 An application for a Court to appoint an intermediary *may* be made orally or in writing, but where

⁷⁹ See Footnote 12.

⁸⁰ See Footnote 12.

⁸¹ 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.

⁸² See Footnote 7.

⁸³ See [6.1(e)] – ‘Intermediaries – an introduction’.

⁸⁴ The process of assessment and report writing takes about eight weeks and is managed by the Department of Justice and Community Safety.

⁸⁵ *Criminal Procedure Act 2009* s 389J.

possible *should* be made in writing well in advance⁸⁶ 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 intermediary⁸⁷
- (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)⁸⁸
- (b) the same or any other intermediary assessed the witness for the interview with police (VARE)⁸⁹
- (c) the same or any other intermediary was present with the witness at the interview with police (VARE).⁹⁰

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 same remote witness facility⁹¹
- (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, counsel⁹² and jury (if any)
- (c) the Court and counsel⁹³ must be able to communicate with the intermediary.

⁸⁶ 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 Notes and Forms to be used in making written applications, and time requirements.

⁸⁷ *Criminal Procedure Act 2009* s 389J(3). It is not intended that the witness give evidence in order for the court to be so satisfied.

⁸⁸ See Footnote 3. *Criminal Procedure Act 2009* s 389J(4)(b) permits a person to be appointed by the court as an intermediary if they have assisted the witness as an intermediary but not in another professional capacity.

⁸⁹ See Footnote 88.

⁹⁰ See Footnote 88.

⁹¹ 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.'

⁹² See Footnote 12.

⁹³ See Footnote 12.

8. Resources

Victorian and Australian materials

- [R v 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
- *Bench Book for Children giving Evidence in Australian courts* (updated 2020, Australasian Institute of Judicial Administration – AIJA – available online aija.org.au)
- www.judicialcollege.vic.edu.au/resources/victims-and-witnesses including:
 - “How to conduct a Ground Rules Hearing” training video
 - “Managing the Questioning of Vulnerable Witnesses” training video
 - Fact Sheets for communicating with people with vulnerabilities – Intermediary Program
 - Child Witnesses: Testing Competency and Questioning – A Practical Guide
- [Disability Access Bench Book Victoria](#) (2016, Judicial College of Victoria)

UK materials

Also located at: www.judicialcollege.vic.edu.au/resources/victims-and-witnesses

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