



Ministry
of Justice

THE REGISTERED INTERMEDIARY PROCEDURAL GUIDANCE MANUAL (2015)

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FOREWORD

Since the introduction of the Witness Intermediary Scheme (WIS) as a pilot project in 2004, a source reference document for the role and use of a Registered Intermediary has been available to practitioners. This version of the Registered Intermediary Procedural Guidance Manual (PGM) continues this and expands on previous versions. Key to the development of this latest version of the PGM, and central to the development of its predecessors, has been the work of researchers and Registered Intermediary trainers Penny Cooper and David Wurtzel. They have collated, reviewed and drafted the available information into a form of text that is accessible, clear and cogent to its intended audience, Registered Intermediaries (RI's). Their diligence and professional knowledge has resulted in guidance that reflects the significant developments in the WIS since 2004 and brings it to the fore in meeting the requirements of RIs working within the Criminal Justice System (CJS). For that, their efforts and achievement in doing so continue to be recognised.

In addition to the work of Penny and David, the role of members of the WIS's Intermediaries Registration and Quality Assurance Boards, and that of members of the Registered Intermediary Reference Team, as reviewers of the latest draft must also be recognised. Without the contribution of these groups the PGM would lack appropriate credibility, substance and relevance, and their patience and insight is duly appreciated and acknowledged. The PGM reflects their work as practitioners and is a credit to them in their respective roles within the CJS.

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TERMS AND ABBREVIATIONS

This section is intended to provide definitions for legal terms and abbreviations used in this document.

ABE	'Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures' published in March 2011 by the Ministry of Justice
BAILII	British and Irish Legal Information Institute, provides free access to court judgments and other legal material – www.bailii.org
CJS	Criminal Justice System
CPD	Continuing Professional Development
CPP	Complaints Policy and Procedure
CPR	Criminal Procedure Rules
CPS	Crown Prosecution Service
DBS	The Disclosure and Barring Service
Defendant	Person who is charged with a criminal offence – or person/organisation who is defending a civil claim
DPA	Data Protection Act
GRH	Ground Rules Hearing
IRB	Intermediaries Registration Board
ICO	Information Commissioner's Office
MoJ	Ministry of Justice
NCA	National Crime Agency
PTPH	Plea and Trial Preparation Hearing
PGM	Procedural Guidance Manual

QAB	The Quality Assurance Board, overseeing professional standards
RfS	Request for Service
RI	Registered Intermediary
RIO	Registered Intermediaries Online, a closed forum for Registered Intermediaries
RIRT	The Registered Intermediary Reference Team, a stakeholder consultation group
Section 28	Refers to the powers of the criminal courts to pre-record the cross-examination and re-examination of a vulnerable witness under section 28 of the YJCEA '99
Special measures	Adjustments made by the court to ensure that proceedings are fair for those who are vulnerable by virtue of their age or incapacity or by virtue of fear or distress
TAG	The Advocate's Gateway, provides free access to materials on vulnerable witnesses and defendants – www.theadvocatesgateway.org
VWU	The Vulnerable Witnesses Unit (MoJ)
WIS	Witness Intermediary Scheme
YJCEA '99	Youth Justice & Criminal Evidence Act 1999

INTRODUCTION

Registered Intermediaries (RI's) have been facilitating communication with vulnerable witnesses in the Criminal Justice System (CJS) in England and Wales since 2004 when the Witness Intermediary Scheme (WIS) was first introduced as a pilot project. The WIS has been available in all 43 police forces and CPS areas in England and Wales since September 2008.

Over the course of its existence, and as knowledge and usage of the scheme has increased, the WIS has developed significantly. Consequently, procedures and practices have evolved since the publication of previous versions of the Procedural Guidance Manual (PGM) in 2005, 2011, and 2012 and will continue to do so - those detailed within this version reflect the position as of June 2015.

The PGM is intended to be a source reference document for RI's and is not intended as a guide for criminal justice practitioners on the engagement of a RI. However, it may be used for cross-reference with documents such as the revised: *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Guidance on Using Special Measures* which was published in March 2011, and *Registered Intermediaries in action - Messages for the CJS from the Witness Intermediary Scheme SmartSite*, the research report on archive material from the now defunct site, which was published on its successor, the Registered Intermediaries On-line (RIO) forum on 08 December 2011. Similarly, there are information sources such as the website of The Advocate's Gateway ('TAG'), RI regional support groups and presentations, training and development seminars and events which enable the exchange of information, ideas and best practice amongst RI's and it is recommended that these are regularly accessed.

The working life of the PGM is therefore iterative and updates to it will be made to reflect developments in procedures and best practice, relevant developments in the CJS and in legislation that relates to the WIS. As such, it will only be available electronically and amendments/updates to its contents will be circulated accordingly.

To date, the WIS and RI's operating within it have supported many thousands of people, thereby helping to make the justice process accessible to some of the most vulnerable people in our society. In some cases an RI will have been the difference between a vulnerable victim or witness being able to testify or not. Therefore, using this PGM will assist you as an RI in making that difference and it is commended to you on that basis.

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PART 1: THE REGISTERED INTERMEDIARIES CODE OF PRACTICE AND THE CODE OF ETHICS

The Code of Practice for Registered Intermediaries

Definition: in this code, intermediary means any person who is registered on the national database, the Intermediary Register, as a Registered Intermediary (RI) in the CJS as specified in Section 29 of the Youth Justice & Criminal Evidence Act 1999 (YJCEA '99).

1. The primary responsibility of the intermediary is to enable complete, coherent and accurate communication to take place between a witness who requires special measures and the court.
2. Intermediaries must have a clear and comprehensive understanding of the responsibilities and duties of their role within the CJS, including their primary responsibility to the court.
3. They must conduct themselves in a professional and courteous manner at all times.
4. They must be familiar with and observe the terms and conditions and procedures that govern their assignment.
5. They should identify the sources of advice, information and materials required in order to ensure a clear understanding of the special needs of the witness.
6. They must carry out a functional assessment of the communication needs of the witness and make an informed professional judgement of the time required to enable them to carry out the assessment satisfactorily.
7. They will use the background information provided and will meet with the witness, his or her relatives, supporter, carer or relevant professionals to acquaint themselves fully with the knowledge and understanding required to carry out the assignment successfully.
8. They must not enter discussions, give advice or express opinions concerning the evidence the witness is to present or any aspect of the case that could contaminate the evidence or lead to an allegation of rehearsing or coaching the witness.

9. They must keep the co-ordinator and other appropriate parties informed of any difficulties that may arise in the course of the assignment that may affect the prospects of best evidence being given.
10. They must hold meetings with witnesses within a time-scale agreed with the co-ordinator and in appropriate venues.
11. They must make clear the purpose of the meetings and structure meetings in a way that allows sufficient time to assess the needs of the witness and to gain the confidence and trust of the witness.
12. They must record and communicate to the co-ordinator any dissatisfaction expressed by the witness with either the intermediary or the procedure being followed.
13. They must ensure the witness is satisfied with the outcome of the assessment and understands the role of the intermediary, particularly in the context of the court appearance.
14. They must conduct themselves in court in a manner that facilitates complete, coherent and accurate communication between the witness and the court.
15. They must not change the content of what is being said or attempt to improve or elaborate what has been said. Any actions that may improve understanding without changing meaning or the sense of what is being said, such as conveying the meaning of gestures the witness may make, must be taken only with the explicit understanding and consent of the court.
16. They must disclose to the court any difficulties encountered, such as limitations in their professional experience and training, and seek the court's guidance about action that may be taken that is consistent with best evidence.
17. They must intervene only to seek clarification from the court or to draw the court's attention to any difficulty the witness may be experiencing in understanding what is being said or that may be distressing the witness.
18. They must respect at all times the authority and judgement of the court.
19. They must complete, at the conclusion of each assignment a monitoring and evaluation form that will contribute to efforts to improve the quality of the service.
20. They must recognise that an intermediary's duty to the court remains paramount. They must understand the different obligations regarding disclosure of information between the prosecution and the defence legal teams and must maintain their professional integrity in relation to these different obligations.

21. They must notify the Intermediaries Registration Board (IRB) immediately of any criminal investigation or proceedings against them or any other complaint or investigation into their conduct or competence.
22. They must notify the IRB of the result of any adverse criminal records disclosure check carried out on them. (i.e. any result where a conviction is recorded other than already disclosed to the IRB).

The Code of Ethics for Registered Intermediaries

Definition: in this code, intermediary means any person who is registered on the national database, the Intermediary Register, as a Registered Intermediary (RI) in the CJS as specified in Section 29 of the Youth Justice & Criminal Evidence Act 1999 (YJCEA '99).

1. Intermediaries will consider at all times the potential for conflict of interest and the need to act in the public interest and will conduct themselves responsibly and professionally using reasonable skill and care in the performance of their duties.
2. This includes:
 - (a) Seeking to increase their professional communication skills and knowledge and their skills as an intermediary e.g. court skills, through training and research.
 - (b) Ensuring they have adequate and sustained professional support for their own role.
 - (c) Safeguarding professional standards in every practicable way.
 - (d) Offering other intermediaries reasonable and appropriate assistance.
 - (e) Respecting the ethics and professional practice of other professions.
 - (f) Endeavouring to the best of their ability to enable communication to be complete, coherent and accurate.
 - (g) Only accepting work for which they are appropriately qualified and they judge to be within their professional competence.
 - (h) Accepting only in exceptional circumstances, an assignment for which no entirely suitable intermediary is available, with such acceptance being subject to the informed consent of all parties.
 - (i) Acknowledging and seeking to overcome in a professional manner, such as through professional advice and guidance or support networks, any unforeseen difficulties or limitations in knowledge or practice that may become apparent in the course of an assignment.
 - (j) Promptly notifying the co-ordinator of any matter, including conflict of interest or lack of suitable qualifications and experience that may disqualify or make it undesirable for them to have continued involvement in the assignment.
 - (k) Treating as confidential any information that may come to them in the course of their work including the fact of their having undertaken a particular assignment, although assignments may be used as evidence for continued registration but not in other (to be defined) circumstances. However, this does not preclude disclosure when legally required to do so or when failure to disclose information could render the intermediary liable to prosecution.

- (l) Disclosing before commencing an assignment or as soon as practicable any vested or material interest that the intermediary may have in the assignment.
- (m) Not using any information or knowledge gained during the course of their work to benefit themselves or anyone else improperly.
- (n) Not giving advice or offering personal opinions in relation to the evidence presented by the witness nor concerning people present during an assignment.
- (o) Making appropriate efforts to facilitate communication between people who have differing communication and cultural characteristics.
- (p) Making all reasonable effort to be available for all meetings, hearings, trials and other appointments for which adequate notice has been given.
- (q) Not cancelling or postponing meetings that are part of the assignment without good reason and where possible, the consent of the people concerned.
- (r) Respecting the decisions taken by other professionals, particularly criminal justice decisions.

PART 2

PROFESSIONAL INFORMATION AND REQUIREMENTS FOR REGISTERED INTERMEDIARIES

Governance of the Witness Intermediary Scheme (WIS)

- 2.1 Governance of the WIS is undertaken through the Intermediaries Registration Board (IRB) which focuses on its strategic direction, policy management and operation. It is the body that brings together the key stakeholders from across the CJS and through which the WIS policy decisions are made. Its members are responsible for representing their respective organisation on the Board and representing the Board within their organisation to ensure that the WIS continues to meet the needs of those it serves in the CJS.
- 2.2 Terms of reference for the IRB are published on the Registered Intermediary On-line forum (RIO).

Quality Assurance of Registered Intermediaries

- 2.3 Quality assurance and regulation and monitoring of the professional standards of Registered Intermediaries (RI's) is undertaken by the WIS's Quality Assurance Board (QAB). Membership of the QAB comprises of representatives of professional and vocational organisations and subject matter experts from the CPS and the National Crime Agency (NCA). Each of these individuals brings substantial and significant personal and professional experience to the QAB specifically in the field of professional regulatory issues and maintenance and monitoring of associated standards of practice.
- 2.4 Terms of reference for the QAB are published on RIO.

Registered Intermediary representation

- 2.5 The Registered Intermediary Reference Team (RIRT) is the stakeholder consultation group that represents the RI community to the MoJ in the development, management and governance of the WIS. A nominated individual will represent the RIRT on the IRB and represent the IRB to the RIRT to ensure the WIS continues to meet the needs of those it serves in the CJS.
- 2.6 Terms of reference for the RIRT are published on RIO.

Time commitment expected as a Registered Intermediary

- 2.7 RIs are expected to commit to a minimum of 24 days a year in the role, i.e. in direct face-to-face contact with witnesses. Delivering or attending relevant training courses is an option that may be used to evidence RI specific Continuing Professional Development (CPD) activity but is not a substitute for undertaking the role itself.
- 2.8 Where RI's anticipate that they will be unavailable to be offered work in this role for known or extended periods of time – in effect, they are inactive – they should inform the NCA so the national database may be updated accordingly.

Continuing Professional Development (CPD)

- 2.9 CPD is the means by which RI's maintain, improve and broaden their knowledge and skills and develop the professional qualities and competencies required in the discharge of their duties in this role. It is an important means by which the QAB can monitor and regulate the professional standards expected of RI's in the WIS and, in doing so, provide a guarantee to the IRB and WIS stakeholders of the quality of service to be expected from an RI. Additionally, it will help inform decisions around future training and development opportunities for new and existing RI's.
- 2.10 It is a requirement of continued registration as an RI that an annual CPD log is submitted for review, i.e. for the period from 01 April of one year to 31 March of the following year. Failure to submit a CPD log can result in suspension from the register.
- 2.11 Guidance on the completion of a CPD log, a template CPD log and a selection of anonymised examples of very good CPD logs are available on RIO. Additionally, reminders and calling notices regarding annual submission of CPD logs will be posted regularly on RIO as well as sent directly via secure email.
- 2.12 Newly registered RIs are expected to have a mentor to assist them in the early stages of their work. A list of mentors is available on the RIO site. RI's will usually be professionals in their own right, but support with the very different RI role is strongly advised. RI's are also expected to join a local peer support group to ensure that they are aware of new issues arising around the RI role and to participate regularly in these discussions.

Rates of remuneration for Registered Intermediaries

- 2.13 Rates of remuneration for RI's are reviewed and agreed upon by the Remunerations Sub-Group of the IRB. This sub-group consists of End-User representatives who commission and pay for the services of RI's. The current rates of remuneration are published on RIO.

Invoicing and taxation

- 2.14 Payment for the services of an RI is made through an End-User direct payment process whereby the RI directly invoices the End-User for their services and is paid directly by them accordingly. The MoJ does not fund the costs of RI's for End-Users.
- 2.15 RIs are classed as self-employed individuals (although they may be in gainful employment elsewhere and make arrangements (i.e. take annual leave) with their employer to act in this role). They are not employees of the MoJ, the NCA or of the End-User who engages them to conduct work. RI's are therefore under no compulsion to accept work offered to them.
- 2.16 RIs are personally responsible for fulfilling any obligations in terms of submitting an annual self-assessment tax return to HM Revenue & Customs for any income received in this role.

Data protection regulations

- 2.17 Due to the nature of RI work, RI's are required to register, and maintain their registration, with the Information Commissioner's Office (ICO) as Data Controllers (Tier 1 user) as they will receive information on cases that will often include personal information and details on an individual. Guidance on how to register with the ICO, and further information on its role, is provided at the following link <https://ico.org.uk/for-organisations/register/>
- 2.18 RI's must also ensure that they adhere to the Data Protection Act (DPA) 1998, an Act that makes provision for the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information.
- 2.19 In order to adhere to the provisions of the DPA 1998 and to facilitate the safe transfer and exchange of personal information and details relating to a case, a secure email address, i.e. one that includes within its suffix .gsi, .cjsm or .pnn, must be used. RI's must therefore use the secure email address provided to them for this purpose. Should they have any doubts about the security of an email address to which they are requested to send information, they should confirm with the requester that it is a secure email address. Failing that, an alternative secure method of transferring and exchanging the information must be arranged.
- 2.20 Details of how to register for a secure email address, and any questions related to doing so, should be sought from the NCA.

Insurance to practice in the role of a Registered Intermediary

- 2.21 Due to the nature of RI work, RIs are required to have, and maintain, adequate and appropriate personal indemnity insurance to practice in the role. The IRB does not specify the level of cover required although many RIs may already have appropriate cover through their current employer or through membership of a professional organisation. However, RIs are advised to check that this extends to their role as an RI. Alternatively, appropriate insurance can be arranged on an individual/personal basis through an independent insurance provider.
- 2.22 RIs should note that as self-employed, independent practitioners it is their individual responsibility to ensure that they have, and maintain, adequate and appropriate insurance to act in this role.
- 2.23 Information on this subject is available on RIO.

Criminal Records Check

- 2.24 Due to the nature of RI work, RIs are required to have undergone a satisfactory criminal records check via The Disclosure and Barring Service (DBS), see <https://www.gov.uk/government/organisations/disclosure-and-barring-service/about>

Complaints Policy and Procedure

- 2.25 The WIS is overseen by the IRB with review and regulation of professional standards conducted by the QAB. The IRB welcomes feedback on the service that RIs provide but should anyone be unhappy with any aspect of this service, it is important that the IRB is made aware of this.
- 2.26 The QAB can take action in response to complaints. As such, a Complaints Policy and Procedure (CPP) is in place to deal with such complaints. Complaints concerning the professional conduct of an RI, or anyone associated with the RI profession, are likely to be resolved through the formal complaint procedure. Other complaints, not relating to matters of professional conduct, can be handled through informal means. The QAB reserves the right to determine the appropriate route for each complaint.
- 2.27 The CPP sets out how all complaints about the professional conduct of an RI, or anyone associated with the RI profession, are to be handled.
- 2.28 A complaint may be brought for a number of reasons, including professional misconduct or deficient performance.
- 2.30 The CPP is published on RIO.

PART 3

THE INTERMEDIARY'S ROLE: LAW, PROCEDURE AND PRACTICE

THE LAW

- 3.1. Intermediaries are a creature of statute. The Youth Justice & Criminal Evidence Act 1999 (YJCEA '99) provided for a range of 'special measures' for cases involving vulnerable and intimidated witnesses. The intention of Parliament was to allow them to give their best evidence in court. The use of intermediaries is one of those special measures. The MoJ has the statutory responsibility for victims and vulnerable witnesses and the Witness Intermediary Scheme ('WIS') falls within that remit. The WIS maintains the register of Registered Intermediaries (RIs) who have been recruited, selected, trained and accredited to assist vulnerable prosecution and defence witnesses. The scheme is available throughout England and Wales.
- 3.2. The YJCEA '99 specifically excluded 'the accused' from special measures. However, section 47 of the Police and Justice Act 2006 allows vulnerable defendants to give evidence by live link. Section 104 of the Coroners and Justice Act 2009 allows for certain vulnerable defendants to give oral evidence at trial with the assistance of an intermediary. This section has not yet been implemented, and RI's are therefore not available for defendants. In trials in which a defendant has communication or other difficulties, the judge has a duty under his inherent powers to ensure that there is a fair trial by making such adaptations to the trial process as seem reasonable in the circumstances in order to ensure the defendant's meaningful participation. Where a judge has made such adjustments, it is likely that the trial will be deemed to have been fair: *R v Anthony Cox [2012] EWCA Crim 549*.
- 3.3. The guidance in this document is complementary to the guidance on conducting video-recorded interviews *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses and Using Special Measures (March 2011)*, *Equal Treatment Bench Book (November 2013)* and the *Criminal Procedure Rules and Directions 2015*.

The test of competence

- 3.4 It does not fall within the RI's role to comment, advise or give evidence on the competence of a witness to give evidence. The question of competence is decided in accordance with a legal test which is found in sections 53 and 54 of the YJCEA '99. 'At every stage in criminal proceedings, all persons are (whatever their age) competent to give evidence'. However a person is not competent to give evidence if it appears to the court that he is not able to understand questions put to him as a witness and give answers to them which can be understood. It is for the party who wishes to call the witness to satisfy the court on a 'balance of probabilities' that the witness is competent. When deciding this, the court shall treat the witness as having the benefit of any special measures direction.
- 3.5 The Lord Chief Justice stated in *R v Barker* [2010] EWCA Crim 4 'The question [of competence] is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give a readily understood answer to every question. Whenever the competency question is addressed, what is required is not the exercise of a discretion but the making of a judgment, that is whether the witness fulfils the statutory criteria'. The Court Of Appeal said in *R v F* [2013] EWCA Crim 424 'The competency test is not failed because the forensic techniques of the advocate or the processes of the court have to be adapted to enable the witness to give their best evidence of which he or she is capable'. The Court of Appeal said in *R v Lubemba* [2014] EWCA Crim 2064, 'It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round.'

The eligibility criteria

- 3.6 Sections 16 and 17 of the YJCEA '99 set out the criteria for eligibility for special measures. The crown or defence can only apply for a special measures direction for the use of an intermediary for a witness if the witness falls within section 16 [section 18(1)(a)] that is:
- i. A witness who is under the age of 18 or:
 - ii. Someone the quality of whose evidence is likely to be diminished by reason of any of the following circumstances.
 - The witness suffers from a mental disorder within the meaning of the Mental Health Act 1983.
 - The witness otherwise has a significant impairment of intelligence and social functioning.
 - The witness has a physical disability or is suffering from a physical disorder.

- 'Quality of evidence' means quality in terms of completeness, coherence (that is the ability when giving evidence to give answers which address the questions asked and which can be understood both individually and collectively) and accuracy (although whether or not it is accurate is a matter for the jury or magistrates to decide). The court must consider the views of the witness in making any order for special measures.

3.7 If a witness falls within the section 16 category then they are eligible for the special measure in section 29 which provides:

'Any examination by a witness (however and wherever conducted) to be conducted through an interpreter or other persons approved by the court for the purposes of the section (an intermediary).'

3.8 The function of the intermediary in section 29 is to communicate:

- To the witness, any questions put to the witness; and
- To any persons asking such questions, the answers given by the witness in reply to them; and
- To explain such questions or answers so far as necessary to enable them to be understood by the witness or the questioner.

3.9 In practical terms, the central part of the intermediary's role is to assist in communication in its widest sense; in other words, to assist the court, both prior to and during the giving of evidence by the witness by facilitating two-way communication in order to allow the witness to give their best evidence. A witness does not have to manifest a disability in order to qualify for an intermediary or for any other special measure. The communication difficulty can be related to age (e.g., very young albeit normally developing children), learning difficulties, personality disorders and mental health issues. In the majority of cases in which an intermediary is used at trial, the witness's evidence-in-chief will have been recorded (section 27) and the witness wishes to give evidence at court from the live link room (section 24). However neither is a pre-condition for the use of section 29.

3.10 If the court decides that it is appropriate for a witness to take advantage of one or more special measures, then it makes a 'special measures' direction. This is an order of the court, made on the application of the party who is calling the witness (or on the court's own initiative, cf. section 19). It is not a matter which is merely agreed between the parties. The court is obliged first to decide whether any available special measure or combination of them would be likely to improve the quality of the evidence given by the witness. If it decides that quality would be improved, it identifies the special measure(s) and then makes an appropriate direction.

3.11 The special measure direction can be retrospective in the sense that it allows a witness who has already made an ABE interview to use that interview as their evidence-in-chief and for them to have had the assistance of an intermediary during the making of the ABE, if such was the case. It is prospective in the sense that it allows the witness to give evidence at a trial which has not yet happened with the assistance of an intermediary.

IN SUMMARY: A DEFINITION OF THE ROLE OF INTERMEDIARY AND PRINCIPLES OF PRACTICE

3.12 An intermediary may be defined as a person who facilitates two-way communication between the witness and any other participants in the criminal justice process to ensure that communication with the witness is as complete, coherent and accurate as possible. This includes communication at meetings between the witness and the police and/or the Crown Prosecution Service, in the ABE interview, during any identification procedures and during the trial process. It may also include communication at meetings between the defence solicitor and a defence witness.

3.13 An intermediary appointed through the Witness Intermediary Scheme (WIS) will be an RI, a professional who has passed the MoJ's recruitment and training process and whose details are recorded on the Intermediary Register. This manual is therefore written on the basis of the role of the RI operating within the WIS.

PRINCIPLES OF REGISTERED INTERMEDIARY (RI) PRACTICE

3.14 The following principles apply to RI practice:

- The RI is impartial and neutral. Their paramount duty is to the court.
- They must adhere to the RI's Code of Practice and Code of Ethics (see Parts 1 and 2).
- For each proposed step in the process there should be consent from the witness or, in the case of a child who is not competent to consent, from the person with Parental Responsibility. In the case of an adult who does not have capacity to consent, there should be a decision taken as to whether or not the proposed step is in their best interests.
- There must be an effective 'matching' of the RI to ensure that he/she has the necessary skills to establish rapport and facilitate communication with the witness.
- To enable the effective matching of an RI to a case, RI's must regularly inform the National Crime Agency (NCA) who maintain the matching service of any additions to and/or changes to their stated professional skills and qualifications and to their stated areas of expertise/specialisation. RI's must exercise their professional discretion and judgement in accepting any case and should not accept cases which are outside their stated level(s) of skills and expertise.

- The RI must keep full records of their involvement throughout the process including notes of assessments. These are disclosable by the prosecution to the defence. The notes must be kept safe and comply with MoJ guidance on data protection as well as the law on data protection and confidentiality (cf. the Data Protection Act 1998).
- The RI must inform the officer-in-charge of the case of anything to which they become aware which could potentially undermine the case for the prosecution against the accused or which might assist the case for the accused, e.g., anything said by the witness in respect of the allegation. In respect of a defence witness, however, the RI must not disclose anything said by a defence witness or defendant to anyone other than the defendant's legal representatives without the express consent of the defendant.
- At no stage must the RI express an opinion on the truth or reliability of what the witness has said.
- At no stage must the RI express or offer any opinion as to whether the accused is guilty or not.
- At no stage prior to the making of the special measures direction must the RI assure the witness that the RI will in fact be assisting them at the trial or that any other special measure order will be made. The witness must instead be advised that these orders are a matter for the judge to decide.
- The RI must not be left alone with the witness at any point and the RI must take steps to ensure that when they meet the witness there is also a responsible third party. They must not contact the witness directly by telephone or email but must instead follow guidance on the correct method of contact.
- The RI is not a witness supporter, counsellor or legal advisor.
- The RI is not an appropriate adult.
- The RI is not an expert witness.
- The RI is not an interpreter.
- The RI's role must be transparent throughout.
- The RI should not take on a workload larger than they can reasonably deal with.
- Where an RI acts either as a non-registered intermediary or as an expert witness on the basis of their professional specialism then they must make clear to the court the distinction between their role as an RI and the role they have taken in this trial, and that they are not coterminous.

AN OVERVIEW OF THE RI'S INVOLVEMENT IN A CRIMINAL CASE

3.15 The steps described below give an overview of a RI's involvement in a criminal case when assisting communication with a prosecution witness, for whom the RI's work is primarily conducted.

- a. The police officer in the case recognises that the witness may fall within the eligibility set out in the YJCEA '99 and may need an RI in order to assist with their communication. The officer ought then to contact the Crown Prosecution Service (CPS) to discuss the effect this might have on the case. This is called an 'early special measures meeting' which is most likely to be a telephone call. However, it is recognised that in practice this rarely happens.
- b. The police obtain consent from the witness to obtain copies of relevant reports (for example medical or school reports) and for the RI to speak to those who may be able to assist the police and an RI (e.g., doctor, teacher, psychologist, etc.).
- c. The police officer contacts the WIS matching service which is run by the National Crime Agency ((NCA), see 'Part 5 Further Resources: contact details and websites'). The officer completes and submits the Request-for-Service (RfS) form. The NCA 'matches' the case, that is they identify and contact an RI with the necessary skills and experience which appear to match the witness's needs, and who operates in the geographical area of the witness, and is available to conduct the work on the dates required. This process is undertaken in an auditable manner that ensures a fair rotation of RI's being offered work for which they are suitable and available to conduct. The NCA forwards the RfS to the RI.
- d. The RI makes contact with the police officer, by phone or email within 24 hours. The officer and the RI discuss the details about the witness and the officer will provide an outline of the alleged offence. The RI is not told the details of the allegation but needs to know its nature, for example, whether the alleged perpetrator is a stranger or a family member. The officer and the RI discuss when and how the RI's assessment will take place. This includes ascertaining the identity of the responsible third party who ought to be the interviewing police officer. The RI then fills in part 8 (Letter of Engagement) of the RfS and forwards this to the requesting officer. This process forms the contractual agreement between the RI and the police.
- e. Depending on the time scale, the RI should as far as is practicable obtain copies of any relevant reports from professionals on the witness's communication abilities and needs and speak to people who can assist. If consent has not yet been obtained, then it must be obtained.

- f. The RI conducts the assessment. There is no set procedure or template for this. The form and content of the assessment will depend on the witness's communication needs and on the RI's professional specialism. In practice RIs have developed their own methods based on the fact that the purpose of the exercise is to ascertain how the witness can answer questions from those who need to question them about the alleged offence. At the time of the meeting with the witness, the witness (or those who can give consent for him or her) must give consent for the intermediary to assist during the evidence-giving.
- g. Once the RI has established rapport with the witness then they will have a planning meeting with the interviewing officer for the ABE interview. The RI will prepare a preliminary report, either oral if the ABE takes place the same day, or in writing if it takes place subsequently. The planning includes a discussion of communication needs, the layout of the room, the use of props, vocabulary, and how to ensure that the witness stays calm and engaged.
- h. The ABE interview takes place. The RI is not a second interviewing officer. It is not their task to analyse a previous ABE if there was one or to give an opinion on its quality. They are present in order to assist with communication as required.
- i. If the police have already conducted an ABE interview or taken a statement from the witness before the referral, then the RI conducts the assessment before they watch the ABE or read the statement. Their eventual report should mention this and explain how if at all their assessment has been altered as a result of watching the ABE or reading the statement.
- j. The CPS may at any time make the request for an RI but in practice this usually takes place after the interview and at some later stage of the proceedings. The RI would still need to liaise with the officer in charge of the case in order to arrange to meet the witness and to make the other arrangements which it is the responsibility of the police to facilitate.
- k. After the stages set out above, the RI writes a report for court based on their assessment as well as other information such as other reports about the witness. The report writing template (see 'Part 4 Report Writing: guidance, template and checklist') should be used but the RI should note that it is designed to be used as a guide and not as a restrictive template.
- l. The RI sends the report to the End User as per the details set out in the RfS but in any event to the CPS and to the officer in charge of the case. The CPS will attach the report to the application for special measures which will be served on the defence and the court.
- m. If the application for special measures is opposed, then the RI should be in court for the contested application in order to assist the court in its decision-making and, if necessary, to respond to the judge's questions about the RI court report.

- n. If the special measures application for use of the RI is granted by the court, the RI will be at the trial when the witness is due to give evidence.
- o. Prior to the witness giving evidence, the RI will attend when the witness has their court familiarisation visit and, subject to necessary consent, will inform the Witness Service of any relevant matters regarding the witness's care and well-being that might impact on the quality of the witness's evidence. If questioning is practiced with the witness, for example to give the witness the opportunity to become familiar with the process of being questioned over the live link, the proposed questions should be sent to the CPS in advance and their approval obtained. There must be no 'dress-rehearsal' of the evidence.
- p. In addition the RI will attend when the witness refreshes their memory by watching their ABE interview. This ought to take place in advance of the trial at a suitable time and place. It is one of the RI's tasks to advise on the best way of doing this, e.g. whether breaks will be needed and how often they should occur. There must be a third party there such as a OIC who is tasked with noting anything which the witness says while watching the DVD. The RI must not be the person who does this.
- q. As per Criminal Practice Rules Part 3 paragraph 3.9(7) and Criminal Practice Directions 3D.7, discussion of ground rules is required in all intermediary trials, where they must be discussed between the judge or magistrates, advocates and intermediary before the witness give evidence. The intermediary must be present but is not required to make the declaration. Matters to be discussed include the way in which the RI will intervene during the evidence.
- r. If the judge so orders, the RI may be asked to look at the proposed questions of the advocates and to advise on their suitability in terms of the witness's communication needs.
- s. RI's also assist during the giving of evidence. In order to monitor the witness's needs, they sit next to the witness in the live link room or stand/sit next to them in the witness box. They intervene when a communication issue arises. How often and to what extent they do so depends on what has been directed at the ground rules hearing (GRH) and the questioning that ensues. Issues may arise even though they were not anticipated. The witness may give evidence at trial or in advance of the trial in accordance with the section 28 YJCEA '99, the pre-recording cross-examination and re-examination. At the time of writing 'section 28' is operating as a pilot project only in three Crown Courts – Kingston Upon Thames, Leeds and Liverpool.
- t. In practice the RI may assist in other matters, e.g., helping a witness who is giving a Victim Impact Statement or taking part in an identification procedure, and also to help in the explanation to the witness of the outcome of the case.

STEP BY STEP NOTES ON PROCEDURE

This section deals with the procedure when a RI assists with a prosecution witness.

'Think trial'

- 3.16 As soon as the RI becomes involved in the case, they should 'think trial'. The purpose of the special measures legislation is to enable vulnerable witnesses to be able to give evidence at court, although many investigations will not get that far and even cases taken to court do not necessarily result in a trial. The various steps along the way all lead in the direction of court and the issues that arise at trial. RI's should bear in mind the likely accumulating workload when cases come to trial and should ensure that they have sufficient capacity to follow cases through to trial.
- 3.17 As well as assisting during the trial, the RI may assist in other ways: most significantly the making of the ABE interview which will stand as the evidence-in-chief, but also in identification procedures, in the familiarisation visit, and the memory refreshing. Although not a witness supporter, their knowledge of the witness and his or her needs can greatly assist those who do have responsibility for the witness's welfare.

The communication process

- 3.18 It has sometimes been submitted that if a witness is not assisted by a RI during the investigative period then the RI is not required at trial. There is however no necessary link here. It may be that the communication needs were not realised until a later stage. It must be remembered that a police interview and a cross-examination are very different, quite apart from the difference in venue and atmosphere. In a police interview the witness is next to the officer; at court the witness is either speaking to a television screen or to an advocate across the court room. There is a difference in the language between the open questions of an interview and the closed/leading questions of cross-examination. There is most importantly a difference between the 'narrative flow' of an ABE interview in which the witness is encouraged to tell as much of the story as possible in their own words and at their own pace and the restricted and more controlled nature of cross-examination.
- 3.19 The work of the RI is not a science. In practice, the witness may be more 'able' to deal with some questions than anticipated, or less 'able', having regard to the stresses of the forensic process and the ability of the advocate to ask appropriate questions. RI's have to respond to the immediate situation.

- 3.20 Identification of the witness's needs may be more straightforward but others may be more difficult to identify, e.g. a child with a wide spoken vocabulary but in fact low levels of comprehension.
- 3.21 Communication may be affected by a broad range of factors including the ability to understand and make sense of words and images, the level of ability to use speech and language to express needs or ideas, age and level of development and physical disabilities. Communication may also be affected by anxiety which may be linked to a number of issues including mental health issues or the trial process or a condition such as autism spectrum disorder.
- 3.22 There is a need for all to recognise the complexities involved in the communication process. The following are examples of instances where communication problems may arise:
- A child responding to the adult world but having a different understanding to an adult's due to their stage of intellectual and emotional development.
 - A witness trying to make sense of and giving meaning to speech, signs or symbols.
 - A witness finding it difficult to deal with abstract concepts relating to the past, present and future.
 - A witness experiencing difficulty in understanding questions where the content or form is complex or abstract.
 - A witness associating words and symbols with objects, people and activities.
 - A witness with sensory difficulty or hypersensitivity that impacts on their ability to concentrate on communication.
 - A witness with a mental illness that impacts on their ability to communicate.

The police officer's initial contact with the RI

- 3.23 In a criminal investigation the police are usually the first agency to come into contact with the witness. Whether or not the witness is also an alleged victim, police officers have a responsibility to identify that there is a difficulty in communication. Where children are involved, there must be an automatic initial assessment of the nature of their vulnerability due to their age and consideration must be given to appropriate special measures.
- 3.24 CPD 3F.5 states that an intermediary assessment 'should be considered if a child or young person under 18 seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority . For children under 11 years and under in particular, there should be a presumption that an intermediary assessment is appropriate'.

- 3.25 If the officer feels that an intermediary assessment might be appropriate, then it should be discussed with the CPS in 'an early special measures meeting' since the use of an RI will affect the conduct of the case.
- 3.26 After identifying that the witness may have communication needs, the officer should attempt to obtain as much information about the witness as possible from those who have been involved with him or her—teachers, doctors, family, carers, social workers, etc. The officer needs to obtain consent from the witness (or from those with parental responsibility for a child witness who is not capable of consenting) for access to the reports and for consent to speak to others about the witness's communication needs.
- 3.27 The RI should have access to the reports as well. In due course what the reports say, in so far as it is relevant to the RI assessment and recommendations (though not the report itself), will be included in the RI's report. The report itself should be returned to the original provider or to the officer in the case or destroyed as appropriate, with the RI making a note of what has happened.
- 3.28 If the officer feels the witness may need a RI then the officer should make a referral to the WIS (see Part 5 Further Resources: contact details and websites). The officer will be sent a RfS form which, when completed, should include as much information as possible about the witness's needs. This will enable the Matching Service to match the witness with a RI with the requisite skills and having regard to where the witness lives in relation to the RI's availability. Not every RI is qualified to assist every witness and their preparedness to work in different geographic areas throughout England and Wales varies. They are advised not to take on cases beyond their professional experience. Any preference by the witness (e.g., by gender) needs to be identified and considered.

The first involvement of the RI

- 3.29 Once the RI accepts the referral, this is the beginning of information-gathering in the case and therefore the moment when the RI begins to make notes. The RI notes are potentially disclosable to the defence. The RI should contact the police officer. This will normally be by telephone in the first instance. Matters which should be dealt with in the initial contact between the RI and the police officer include:
- Clarification of a shared understanding of the role of the RI.
 - Contact details of the officer including the most effective way to get through to them or to someone responsible for the case when they are off-duty, and of the CPS lawyer and caseworker. These should be updated if the need arises.
 - Details of the witness—name, gender, address, date of birth, main carer, involvement with other agencies, first language, family members, etc.
 - Nature of the witness's vulnerability.

- Arrangements for the RI assessment—where, when, who else will be present, etc.
 - Consents obtained for the RI for the assessment itself and to obtain personal information from other sources.
 - Any risks to the RI, the witness or anyone else present.
 - Agreement as to who will be the responsible third party present at the assessment.
- 3.30 The officer needs to disclose sufficient information about the offence to assist the RI in the task ahead, e.g., if the alleged perpetrator is a family member, the RI will wish to avoid asking the witness about them. The details of the allegation and the evidence surrounding it should not be discussed before and during the assessment.
- 3.31 It is useful for both the RI and the officer to discuss their knowledge of the WIS and any experience in using RI's, so that each is clear of the role of the other. The officer should already have obtained the necessary consents for the RI to speak to those who have had involvement with the witness (teachers, doctors, carers, etc.) and to see any reports they have written about the witness and the witness's needs. If the officer has not yet done it then the RI will need to obtain those consents. It is necessary to explain to the witness and/or their parent or guardian that these reports may be referred to in the report which will be sent to the prosecution and to the defence lawyers. One issue may be the extent to which the report sets out information which will identify the witness's personal details. Sample consent forms are available for RI's to download from RIO.

The assessment of the witness

- 3.32 The purpose of the assessment is for the RI to ascertain the witness's communication abilities and needs, so that the RI may:
- i. Indicate whether or not the witness has demonstrated the ability to communicate their evidence and if so how.
 - ii. Indicate whether the use of an RI is likely to improve the quality (completeness, coherence and accuracy) of the witness's evidence.
 - iii. Advise the police officer and advocates on the most effective way of communicating questions to the witness.
 - iv. Make recommendations as to special measures and other adjustments to enable the most effective communication with the witness.
- 3.33 Note that the RI is not assessing a witness as they might in another professional role, for example in order to diagnose or treat, but purely to advise on communication with the witness at police interview or at court. The method of assessment and any tools used would therefore be different.

- 3.34 If the RI concludes that they do not have the appropriate specialism for the witness's particular communication needs, they must contact the Matching Service as soon as possible so that another RI can be sought.
- 3.35 The method of carrying out the assessment, the length of time required to do so, the venue for the assessment and the number of occasions which are necessary to complete the assessment are all dependent on the requirements (communication abilities and needs) of the particular witness. The essential task is to establish how best to communicate with the witness; the RI does not have to assess the witness's ability to understand truth and lies nor is it the RI's role to assess whether the witness's recollection of events is truthful or accurate. However, if requested, they can advise the interviewing officer on how best the officer can deal with the 'truth and lies' requirement in the ABE guidance.
- 3.36 The assessment must take place in the presence of a responsible third party, who must not be another lay witness in the case. This is because there must be another witness who is able if needed to give an independent account of what happened. Whenever possible the responsible third party ought to be the interviewing officer. This enables the officer to gain significant first-hand experience of the witness's communication needs prior to conducting the ABE interview, by watching the interaction of the RI and the witness.
- 3.37 A witness supporter may also be present. The supporter, who must not themselves be a lay witness in the case, may be a parent, sibling, carer, care worker, social worker, or other volunteer advocate. The primary role of a witness supporter is to provide emotional support to the witness. The RI and the officer should discuss in advance exactly who should be present at the assessment and the role of staff when assessments are conducted in care homes and hospitals.
- 3.38 Although the RI must keep a note of what happened in the assessment, it is not necessary to audio record the meeting or to make a verbatim note, although it may be recorded if the witness consents to this. The RI should not be left alone with the witness during the assessment.
- 3.39 The RI should explain to the officer in advance that it may not be possible to conduct the ABE interview on the same day as the assessment. The witness may be too tired and/or a further assessment session may be required. If an officer needs to interview a witness as a matter of urgency and before a RI is available, then they are obliged to record the reasons for this and to notify the CPS.
- 3.40 Following the assessment the RI must pass on their findings to the officer including any conclusion that the witness does not require the assistance of a RI or that the witness has not demonstrated an ability to give evidence even with the assistance of an RI (the latter is not an opinion on competence; that is a matter for expert evidence). If the interview takes place the same day then the report can be done orally. If the interview takes place on a subsequent day then the RI should write their findings in a preliminary report.

Assessment of a defence witness

3.41 The assessment of a defence witness follows the same principles. The responsible third party will probably be the solicitor. The preliminary report is addressed to the defence solicitor, who interviews the defence witness.

The RI assisting the police interview of the prosecution witness

3.42 The purpose of the preliminary report is to assist in the planning of the ABE interview. The RI's input into the planning of the interview is one of their most important functions. Planning discussions with the interviewing officer may include:

- How to check the witness understands what is going to happen/is happening in the interview.
- Language: vocabulary, complexity of sentences, style of questioning, what forms of questions to avoid.
- Setting up the room in the most appropriate way – the position and nature of seating.
- How best to explain the cameras and the recording equipment.
- How to use any communication aids, visual aids, or props if necessary, e.g., drawing tools.
- The frequency and duration of breaks.
- How it is best for the RI to intervene if necessary.
- Any other circumstances relating to the communication abilities and needs of the witness.

3.43 It is important that the officer realises that the RI is not a second interviewing officer; the RI in turn must realise that the officer has conduct of and manages the interview. There should be an understanding between them about roles and how the RI will indicate a wish to intervene, for example to check the witness understands, to assist the police officer to rephrase a question or to ask for a break on behalf of the witness.

3.44 There may be other people involved in the interview such as a social worker. The RI may need to advise on how many people should be in the room with the witness, if this is likely to affect the witness's communication.

3.45 The role of the RI in interview must be transparent, that is anyone watching the recording must be able to see and hear the whole communication exchange between the RI and the witness. It should be agreed in advance what the RI will do if the officer needs to leave the room since there must be a responsible third person in the room with the RI and the witness.

- 3.46 Section 29(5) of the YJCEA '99 (and Criminal Practice Rules 18.7) requires that the RI makes the RI declaration before the interview commences. This should be explained to the witness beforehand. It may be felt to be more appropriate for the RI to make the declaration on tape before the witness comes into the room.

The declaration is: *"I solemnly, sincerely and truly declare [or I swear by Almighty God] that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding."*

RI and the interviewing officer during the interview

- 3.47 During the interview it may be necessary for the RI to intervene if the question for example is too long or the words too complex or if the RI feels that the witness would be helped at this point by a visual aid, e.g., drawing or using post-it notes. The RI may also help to settle and to focus the witness. During breaks the interviewing officer and the RI may discuss any communication issues that have arisen and anticipate what might be a problem in the next section.
- 3.48 Interventions by the RI about communication arise spontaneously during the course of the interview, as the need occurs. Although the RI should not feel inhibited from intervening, they may scarcely need to do so if after the planning meeting the officer manages to ask appropriate questions and no fresh issues manifest themselves.
- 3.49 The RI may assist the witness in other aspects of the investigation such as procedures for identification of a suspect or if the police need to explain to the witness what is going to happen next or why the case will not be proceeding. They must not however take part in clinical decision-making which needs to be done by other professionals in order to care for the witness. The RI must be conscious throughout that their role in facilitating communication is entirely different from the clinical role they may have in their day-to-day job.

Defence witnesses

- 3.50 In the case of defence witness, the above sequence is similar. However it is the defence solicitor who would need to identify the fact that the witness may need assistance from a RI and who would need to obtain the necessary consents, to obtain the referral and to act as a responsible third party in the assessment. While officers will have been trained in conducting an ABE interview, the solicitor will not, and they may be dealing with a vulnerable witness for the first time. The RI's involvement in the interview must be transparent to anyone viewing the recording of the proposed evidence in chief.

After the ABE interview

- 3.51 Following the ABE interview the RI writes a report for the court (see Part 4 Reporting Writing: guidance, template and checklist) to set out the witness's background, what was ascertained during the assessment and the interview, and details about the witness's communication needs and abilities, with practical suggestions on how the witness can best be questioned at court. It also needs to demonstrate how the RI has the necessary skills to meet the particular communication needs of the witness. In respect of defence witnesses, the RI would produce a similar report. The recommendations in a well written RI report will serve as the agenda for the GRH. The recommendations will be demonstrably based on the RI's assessment of the witness's communication needs and abilities.
- 3.52 The RI who assisted the witness at interview should, whenever possible, continue to assist the witness up to and including the trial. If this is not possible for any reason, there must be a 'hand over' process between the RI who wrote the report and the RI who will be acting at the trial. The new RI must themselves meet with and assess the witness and establish rapport with the witness. They must also write their own report even if they agree with most or all of the previous RI's recommendations and conclusions. The reason is that the trial RI must be able to justify their interventions on the basis of what they personally have learned about the witness through the assessment and what they have recommended. The GRH will be based on the trial RI's report. If there has already been a GRH and a new RI takes over, there should be a further GRH involving the trial judge, advocates and the new RI to ensure that there is a shared understanding of and agreement to comply with the ground rules already set.
- 3.53 It is important that the RI keeps checking on the status of the case and their involvement in it. Although the End-User should keep the RI informed, it may not always happen that they receive the necessary information regarding trial dates, etc. in good time. It is recommended that the RI also makes regular contact with the CPS to ensure that trial dates have not been re-arranged. In turn, the RI must inform the End-User immediately if for any reason they are unable to assist on the fixed trial date.
- 3.54 It should be noted that the RI's assessment report for court is attached to the application for special measures. The report is not shown to the jury.
- 3.55 The report is a 'free standing' document. It is not an exhibit and the RI is not a witness. RI's do not make a witness statement exhibiting their report. The RI assists with the witness's communication needs but they do not give evidence to the court about it.

Late or post-ABE interview referrals

- 3.56 If the referral is sought after the ABE has taken place, or after a written statement has been taken from the witness, the RI should not watch the recording or read the statement prior to carrying out the assessment. This protects the integrity and credibility of the RI by ensuring that the initial assessment conclusions are based on what the RI has discovered from the witness assessment and the other usual enquiries from teachers, carers, etc., which may be made. In addition, the RI must be confident that they are able to facilitate communication with the witness based solely on their initial direct involvement with the witness.
- 3.57 Following their assessment and subject to the consent of the witness, the RI may watch the recording to further assist with their understanding of the witness's communication needs. This should be clearly noted and documented in their report. The RI should refer expressly to any additional observations as a result of watching the recording. It may be helpful to add this as an addendum or cross-refer in the report to the addendum under subject headings. It is a matter for the police and the CPS to decide whether or not to conduct a second ABE interview with the witness being assisted by a RI. If there is such a second interview then the RI needs to have a planning meeting with the officer in the same way as they would have done in the case of a first ABE interview. They should not however engage in an analysis of 'what went wrong' the first time.
- 3.58 There may be various reasons for the referral being 'late', e.g., the communication needs of the witness were not yet recognised or those dealing with the matter may not have been aware of the availability of the WIS. Although each witness must be assessed in their own right, it is important to recognise that the experience of giving evidence at trial and of being cross-examined at court is very different from open, narrative questioning at an ABE interview, and the fact that the witness was not assisted by an RI in the ABE does not in itself prove that one is not required for the trial.
- 3.59 In practice the NCA may decline to accept a referral if it is too close to the trial date and the RI would not have sufficient time to assess the witness and to write their report.
- 3.60 If there is a hand-over between the RI who assessed the witness and the RI who assists at the trial, then the 'new' RI must themselves meet with and assess the witness and establish rapport with the witness. They must also write their own report even if they agree with most or all of the previous RI's recommendations and conclusions. The GRH will be based on the trial RI's report.

The application for special measures

3.61 The rules relating to special measures are contained in Part 18 of the Criminal Procedure Rules 2015. This should be read in conjunction with the Plea and Trial Preparation Hearing Form which must be completed by both parties for all cases sent to the crown court. The PTPH is part of judicial case management and may be only one of the hearings which take place before the trial itself. The prosecution are obliged to indicate whether they are seeking special measures and whether the application has been served. Under 'Part 2—Plea and Trial Preparation Hearing Orders' the court should indicate the following:

- The date of any Ground Rules Hearing (paragraph 8).
- Any special measures orders that can be made 'without further formality' (paragraph 9). The form has tick boxes for ABE evidence, Live Link and Screens.
- An order that a young or vulnerable witness to which an Advocates' Gateway toolkit applies are to be examined and cross-examined in accordance with that toolkit unless that is superseded by specific ground rules.
- A date for the prosecution to serve a special measures application if they have not already done so (paragraph 25).
- Require the defence to serve any special measures application for a defendant or defence witnesses (the prosecution to reply, within 14 days) (paragraph 33).
- Require the defence to serve any response to a prosecution special measures application (paragraph 38).
- Order the prosecution to serve an intermediary report with draft specific Ground Rules if required (paragraph 50) and the defence to serve a response to the report (paragraph 58).
- Order the defence to serve an intermediary report for a defendant or defence witness with draft Ground Rules (prosecution to reply within 14 days) (paragraph 59).

3.62 Special measures are an order of the court which is binding on all parties until the order is varied or discharged because there has been a change in circumstances. They are not merely 'agreed'.

3.63 The procedure in Criminal Practice Directions 2015 Part 18 can be summarised as follows:

- A party who wants the court to make a special measures direction must apply in writing as soon as reasonably practicable and in any event not more than 28 days after a defendant in the magistrates' court pleads not guilty or 14 days after the defendant has pleaded not guilty in the crown court and to serve the application on the court officer and each other party.

- A party that applies for an order must inform the witness of the court's decision as soon as reasonably practicable and explain to the witness the arrangements that as a result will be made for him or her to give evidence.
- The court may of its own initiative make a special measures direction for a child to whom the primary rule applies.
- The application must explain (i) how the witness is eligible; (ii) why special measures are likely to improve the quality of the witness's evidence; (iii) propose the measure that would be likely to maximise the quality of that evidence; (iv) report the witness's views on their eligibility, the likelihood that the special measures would improve the quality of their evidence and the measure proposed by the applicant; (v) identify someone to accompany the witness when giving evidence by live link; and (vi) 'attach any other material on which the applicant relies. If the applicant wants a hearing, ask for one, and explain why it is needed'.

3.64 If the application for the use of an intermediary is opposed then the RI must attend the application hearing. The Equal Treatment Bench Book (2013) chapter on 'Children and Vulnerable Adults' (para.47) states that: 'The intermediary should always attend the hearing to explain their recommendations and in what way their presence will facilitate "complete, coherent and accurate" communication'. The RI should always remember that they are making recommendations only and it is the judge who decides whether to put in place the special measures. This guidance to the judiciary sets out the factors if it is suggested that the intermediary is not needed at trial. In particular:

- Communication with a witness during the trial process is more challenging than the investigative interview, leading to greater stress and potentially more opportunities for miscommunication.
- The intermediary may have taken no active part in the ABE interview because they had already provided advice to the interviewer about how to adapt his or her questions and therefore did not need to intervene.
- In practice, many advocates find it more difficult to adapt key questions than they anticipate. It can be difficult to keep in mind all aspects of questioning that may be problematic for the individual witness. An intermediary who has already assessed the witness's communication is able to alert the court to any problems or loss of concentration.

3.65 The RI must never promise the witness that they will be at the trial prior to a judge making the special measures direction. If asked if they will be there, they should explain that it is a matter for the judge to decide.

Pre-trial

- 3.66 The RI should accompany the witness to the court familiarisation visit. The Equal Treatment Bench Book chapter cited above (para 36) recommends that intermediaries should be provided by the court with photos of live link rooms and screens, or allow intermediaries to take photos for the purpose of preparing the witness. See also CPD 3F.7
- 3.67 Witnesses are entitled to practice speaking and listening on the live link. The RI can assist here by providing the court officials with questions unrelated to the case which the witness can be asked as a means of practising. Such questions should be submitted first to the CPS for approval to ensure that they do not in fact trespass into aspects of the evidence which may come up in the trial.
- 3.68 The witness is entitled to refresh their memory by watching their DVD before the trial and the RI must be there for that. 'Decisions about how, when and where refreshing should take place should be made on a case-by-case basis. There is a risk that a viewing combined with the court familiarisation visit will result in "information overload"' (Equal Treatment Bench Book, para 39). Someone should be designated to take a note and report to the judge if anything is said during the viewing, but that person must not be the RI in case there is any conflict of evidence between the witness and the person who made the note.
- 3.69 In their report, the RI should advise on the best time for the witness to give evidence, e.g., first thing in the morning, so that the CPS can take steps to have the trial timetabled accordingly.
- 3.70 Although the RI is not a witness supporter, they may learn things about the witness (e.g. personal care issues) which impact on their experience in court. The RI should convey these things to the Witness Service and CPS (or defence solicitors) so that they can make suitable arrangements. The witness or their guardian should be told of this occurring.
- 3.71 The RI may be asked to assist at any pre-trial meeting with counsel, the CPS (or defence solicitors if a defence witness) when consideration is given to the steps that need to be taken in order to assist the witness to give their best evidence.
- 3.72 Any further insights in respect of the witness's communication needs and which are gained through attending the court familiarisation visit and the memory refreshing should be conveyed immediately to the CPS and officer in charge of the case (or defence solicitors), particularly if these lead to a further recommendation or supplementary report about steps that may need to be taken to adapt things in order to assist in the witness's communication. Example: an intermediary noted during the live link practice that the child witness communication through small gestures which would not clearly come over on the live link; she therefore recommended that examination of the witness should take place with counsel and the intermediary in the live link room with the witness.

Ground Rules Hearing ('GRH')

3.73 Under CPR Part 3 (paragraph 3.9(6)) part of the case preparation powers of the court is facilitating the participation of any person, including giving directions for the appropriate treatment and questioning of a witness, 'especially where the court directs that such questioning is to be conducted through an intermediary'.

3.74 Part 3 (paragraph 3.9(7)) mandates the court ('where directions for appropriate treatment and questioning are required, the court must') must invite representations by the parties and by and intermediary, and set ground rules for the conduct of questioning which may include:

- A direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety.
- Directions about the manner of questioning.
- Directions about the duration of questioning.
- If necessary, directions about the questions that may or may not be asked.
- Where there is more than one defendant, the allocation among them of the topics about which a witness may be asked.
- Directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.

3.75 In *R v Lubemba, R v JP* [2014] EWCA Crim 2064 the Court of Appeal said:

"The court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process. To that end, judges are taught, in accordance with the Criminal Practice Directions, that it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness.

We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert." [42] And in *R v Sandor Jonas* [2015] EWCA Crim 562 the Court of Appeal also noted that modern best practice is to hold a GRH before a vulnerable witness gives evidence and to include specific directions about cross-examination when there are multiple defendants separately represented:

“Advocates must accept that the courts will no longer allow them the freedom to conduct their own cross-examination where it involves simply repeating what others have asked before, or exploring precisely the same territory. For these purposes defence advocates will now be treated as a group and, if necessary, issues divided amongst them, provided, of course, there is no unfairness in so doing.” [34]

3.76 *The Equal Treatment Bench Book* chapter on *Children and Vulnerable adults* sets out guidance for the judiciary on the conduct of a GRH:

- Discussions can take place in court, in chambers or over a remote live link where the intermediary is at a different location with the witness.
- The hearing is an opportunity for the judge and advocates to plan any adaptations to questioning that may be necessary to facilitate the evidence of a vulnerable person.
- Judges and magistrates still have a paramount duty to control questioning as required by the overriding objective. Witness testimony must be adduced as effectively and fairly as possible.
- Witnesses must be able to understand the questions and enabled to give answers they believe to be correct. If the witness has not understood the question the answer will not further the overriding objective.
- The manner, tenor, tone, language and duration of questioning should be appropriate to the witness’s developmental age and communication abilities.
- The GRH should take place in the presence of the trial judge or magistrates, advocates and intermediary.
- The GRH should consider:
 - (a) Whether a departure may be necessary from normal cross-examination in which leading questions are asked “putting the case”.
 - (b) Whether a departure may be necessary from normal cross-examination relevant to their client’s case without repeating the questioning that has already taken place on behalf of the other defendants.
 - (c) Whether the judge should impose reasonable time limits on cross-examination. The judge should keep duration under review at trial.
 - (d) Questions which are likely to cause difficulty for the individual witness such as tag questions and assertions.
 - (e) What information should be given to the jury in respect of any restrictions on questioning and the role of the intermediary.

- 3.77 The RI must think of all the practical aspects of the witness's evidence: seating, how to signal an intervention, what to do if breaks are needed, vocabulary, style of questioning, type of questions, etc. These should be brought to the court's attention at the GRH even if they already appear in the report and even if they do not appear.
- 3.78 A GRH is also required in respect of defence witnesses. These are more likely to take place only after the defence have decided whether or not to call the evidence.
- 3.79 The GRH should ideally take place at least a day before the witness is due to give evidence, but since it must involve the trial judge, the trial advocates, and the intermediary, it is not always practicable. Where a GRH has already taken place but there has been a change in judge, advocate or intermediary, then there should be a further GRH, however brief. The reason is that the trial participants must themselves agree to the rules. The ground rules should be embodied in a Practice Note which is issued by the judge, with copies for all counsel and the RI.
- 3.80 See also *R v RL [2015] EWCA Crim 1215*. The Court of Appeal refused permission to appeal in a section 28 pilot case where the judge placed restrictions on the questioning of two children. Counsel beforehand submitted a list of questions which were vetted by a Registered Intermediary. Relying on the advice in The Advocates' Gateway Toolkit Number 1, the questions were further pruned by the judge where they were thought to be unnecessary and repetitious. It should be noted that the appellant conceded that (i) advice contained in The Advocates' Gateway 'is commonly followed'; (ii) the trial judge has a discretion to prevent cross-examination which he regards as unnecessary, improper or oppressive; and (iii) the trial judge gave an entirely sufficient and proper direction to the jury about the limitations put on the questioning of the children.

Reviewing counsel's questions

- 3.81 The RI may be asked to look at counsel's proposed questions prior to the actual cross-examination. In *R v Lubemba, R v JP [2014] EWCA Crim 2064* the Court of Appeal (paragraph 43) stated that 'So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the GRH to invite defence advocates to reduce their questions in writing in advance'. Where this occurs the RI should review the submitted questions and advise on those which are likely to cause communication difficulties for the witness. The judge has the final decision about which questions are asked. The decision further states, 'Advocates must adapt to the witness, not the other way round'.

- 3.82 Another example: In *R v FA [2015] EWCA Crim 209* the Court of Appeal heard evidence from a complainant with the assistance of a RI. In the judgment (para. 13) it was noted that the RI and both counsel 'have worked as a team, the better to promote the interests of justice in the conduct of this case. It is clear they have had in mind not only the course of the hearing and the welfare of KK but also the interests of the applicant himself. Questions to be put by [counsel for the appellant] to KK in cross-examination were reviewed by the RI, whose sensible expert suggestions were unhesitatingly adopted'.
- 3.83 When reviewing counsel's questions, RIs must keep in mind the function of cross-examination, that is, to challenge the witness. The defence are required to set out in their Defence Case Statement where they take issue with the prosecution but they do not normally disclose in advance each matter on which they take issue with a particular witness. There may also be disagreement between defendants in a multi-handed trial as to what took place and/or who was responsible. The RI's task here is to help the advocate in phrasing questions in a way that the witness can fairly deal with them but not to 'protect' the witness from being challenged on their evidence. They therefore need to examine the questions from the stand point of the witness's communication needs. They must not disclose the content of the questions to the prosecution or to any other defence counsel. In that sense there is a duty of confidentiality between each counsel and the RI.

At trial

- 3.84 The prosecution (or defence solicitors) bear the responsibility of telling the RI of the case listing and the likely or fixed date of the case, to ensure that they remain available. The RI however needs to be pro-active when it comes to keeping in touch with the person who is commissioning their services—the police, the CPS or the defence solicitor. It is important to check that the special measures application has in fact been successfully made and to ensure accurate information about this.
- 3.85 When the RI arrives at court they should make themselves known to the court usher, the Witness Service, to the officer in charge of the case and to the trial advocate. They should bring spare, clean copies of their court report. They should also bring copies of the relevant Rules and cases cited in this guidance manual.
- 3.86 The judge should explain the RI's role to the jury. The RI must make the declaration as set out in paragraph 3.46 above. This again is required by statute. Many RIs have found it helpful to carry a small, laminated copy of the declaration in case the court does not have one available. The declaration can be made either in court or in the live link room.
- 3.87 The RI may need to explain their qualifications, training and role for the jury and magistrates.

- 3.88 The RI's role during cross-examination must be transparent. Throughout the evidence the RI should be in view of the jury or magistrates and not out of the camera angle. The reason is that the RI must be able to monitor the witness' reactions and the jury or magistrates must see that the answer is coming from the witness.
- 3.89 The RI should not be alone with the witness at any time. There should always be a responsible third party present.
- 3.90 The court may not always hear every word that the witness says. It is the RI's duty to bring to the court's attention anything that it said or done particularly in the live link room which the court may not clearly have heard regardless of what impact they think this may have on the witness's evidence.
- 3.91 The RI should intervene as soon as possible when they feel that an intervention is required, e.g. if the question is too complicated for the witness. This is a matter of judgment and balance; it is not a science. It needs to be resolved on the spot on the basis of the knowledge the intermediary has gained about the witness. The questioning should flow if possible and the witness should not feel disempowered. If counsel is able to adapt their questions appropriately it is no criticism of the RI if they do not in fact have to intervene. The lack of intervention may well reflect the quality of the work carried out before the trial, and that counsel have observed the ground rules. It is important to remember that proper preparation for cross-examination is likely to reduce the need for intervention.
- 3.92 The RI's interventions should be based on the GRH which in turn should be based on the report which in turn is based on the assessment. However matters may arise spontaneously at trial; difficulties which have been flagged up may not manifest themselves but other matters which were not anticipated may occur. The RI should not be inhibited from intervening simply because the issue which has arisen is a fresh one.
- 3.93 The advocate should be given an opportunity to rephrase the question before the RI is asked to phrase it differently. The intervention is not akin to an objection in law by an advocate. It should be resolved by the judge there and then without the jury being asked to retire.

- 3.94 All parties should understand that when a witness is asked an inappropriate question they can become distressed because they realise that they cannot answer it and therefore they are not assisting the court. Other witnesses may give answers such as 'don't know' or 'yeah' as a way of bringing the questioning to an end even though they are not genuinely agreeing with what they have been asked. The RI needs to be alert to this and to the issues which arise if the advocate persistently asks inappropriate questions. If there is such a fundamental problem during the trial and if no one else takes the initiative then the RI should say to the judge, "there is a matter which would best be dealt with in the absence of the jury" which is 'code language' for asking the judge to send the jury out so that the judge, advocate's and RI can discuss the issue between themselves.
- 3.95 It is the decision of the judge whether or not to uphold the RI's intervention. Ordinarily interventions should be addressed directly to the judge ('Your honour . . .') who will decide whether counsel should change the question or whether the witness should be asked to deal with it as asked. The RI can address counsel directly if the ground rules permit it.

RI'S DUTIES WHILST AT COURT

3.96 Below is a checklist of RI duties whilst at court:

- A RI owes their primary responsibility to the court and to upholding the overriding objective that criminal cases are dealt with justly.
- They should confirm their understanding of their duties and make their declaration at the start of the ABE interview and again at trial.
- They will not discuss any aspect of the case or of the witness's testimony with the witness.
- They will communicate questions put to the witness by the court or legal representatives as accurately as possible, in a way that facilitates the witness's understanding.
- They will communicate the witness's answers to questions to the court as accurately as possible.
- They will communicate the witness's reply as given, however irrelevant or illogical it might seem. It is for the court to seek clarification if necessary.
- They will seek clarification from the court of any questions that they have not understood before putting the question to the witness in the form the court wishes. Such clarification should relate to matters of understanding and comprehension and not any legal issues.
- They will not interrupt the advocates question unless there is an urgent need to seek clarification or to indicate that the witness has not understood something.

- They will not hypothesise as to the intentions or motives of the witness.
- They will not anticipate the intention of the questioner.
- They will not alter the question put or answer given in the first instance but may if required offer an alternative form of the question to facilitate understanding.
- They will not alter the precise nature or thrust of the questions put to the witness or the witness's answer in order to shield or protect the witness.
- They will not unnecessarily impede or obstruct the pace and flow of court proceedings.
- They will follow the directions of the court as instructed by the judge or magistrate and will respond to the directions and requests when required to do so.
- They will not engage in private conversation with the witness during the giving of evidence or in any way distract the witness from attending to the court process.
- They will address the court through the judge or magistrate unless invited to respond to others by the judge or magistrate.
- They will conduct themselves in a manner which is consistent with their role as a RI and in accordance with the RI Codes of Practice and Ethics (see Part 1).
- They will make use of appropriate pauses and breaks in the court process to raise any matters of concern affecting the quality of the witness's evidence or when necessary bring matters of immediate concern to the attention of the court at the time they occur.
- They must not discuss any evidential aspect of the case with the witness on any future occasion.

OTHER SOURCES OF INFORMATION AND SUPPORT FOR THE WITNESSES

3.97 Interpreters. Interpreters may be used where the witness does not have a sufficient command of English to communicate with those who question them. Interpreters are tasked to provide an accurate transfer of meaning from one language to another without adding to the question or answer. They must not explain the questions to the witness nor explain the witness's answers. They are however allowed to intervene to ask for clarification and to alert parties to possible misunderstandings and missed cultural references. A RI may have to deal with an interpreter if the witness's first language is not English.

- 3.98 **British Sign Language (BSL).** The role of the BSL interpreter is similar except that they are using signing as the language of interpretation particularly for those for whom BSL is their first language. There are deaf Registered Intermediaries who use deaf relay interpretation with the witness but who also need a BSL interpreter to convey the words to the court.
- 3.99 **Expert witnesses.** An expert witness is someone who has specialist knowledge or experience which is outside that of the court and who is entitled to give opinion evidence rather than just evidence of fact, e.g., for example whether a witness is competent to give evidence in accordance with the statutory requirement. A RI cannot be an expert witness in the same case in which they appear as a RI even though they possess professional training and experience in fields which qualify them to give expert evidence in other circumstances.
- 3.100 **The Witness Service.** The Witness Service offers information, including pre-trial visits and support, to all witnesses before and during hearings. This is available both to prosecution and to defence witnesses. The RI will in practice have to liaise with the Witness Service to arrange the pre-trial familiarisation visit and to assist them with any information about the witness's needs of which the RI is aware. The Witness Service is run by Citizens Advice.
- 3.101 **Victim Support.** Victim Support is a national charity which provides help and support for victims, witnesses and familiarise whether or not there is a court process.
- 3.102 **The National Society for the Prevention of Cruelty to Children (NSPCC) Young Witness Service.** Witnesses under the age of 18 can receive support before and during their appearance as a witness which includes familiarisation with the court process and physical and emotional support of young witnesses at all stages of the legal process. Young witness support schemes are also operated by Local Criminal Justice Boards and the Witness Service. Support is provided through the use of guided activities and materials in the Young Witness Pack as well as dealing with questions and concerns and being present at court to support the young witness. This role is distinct from the role which certain NSPCC workers may take part in, as part of the joint investigative teams which work alongside the social services and the police.

Safeguarding

- 3.103 There may be occasions when an RI is required to share concerns about a vulnerable witness because s/he thinks that the vulnerable witness may be at risk of significant harm and not being safeguarded.
- 3.104 In relation to children, significant harm is defined as 'the threshold that justifies compulsory intervention in family life in the best interests of the child. Children Act 1989'.

3.105. In relation to adults at risk, safeguarding is defined as 'protecting an adult's rights to live in safety, free from abuse and neglect. It is about people and organisations working together to prevent and stop both the risks and experience of abuse or neglect, while at the same time making sure that the adult's wellbeing is promoted, including, where appropriate, having regard to their views, wishes, feelings and beliefs, in deciding on any action.' Care and Support, (2014).

3.106 RIs must act in line with the relevant statutes and guidance that inform decision making regarding safeguarding. This includes:

Children's Safeguarding:

- Children Act 1989
- Children Act 2004
- Adoption and Children Act 2002
- Data Protection Act 1998
- Working Together to Safeguard Children: a guide to inter-agency working to safeguard and promote the welfare of children, Department for Education, March 2015
- Information Sharing: Advice for practitioners providing safeguarding services to children, young people, parents and carers (2015)

Adults at risk safeguarding:

- Care Act 2014
- Mental Health Act 2005
- Data Protection Act 1998

3.107 If the RI assesses that a child or vulnerable adult, is at risk of significant harm they should make the relevant agency/ies aware of the safeguarding concerns verbally, as soon as possible, and follow this up in writing within 24 hours. Relevant agencies include the police, local children's services and adult safeguarding services. If advice regarding a policing matter is needed a RI can call the NCA.

3.108 The RI should keep a clear record of what they have done (including if s/he decides not to share information) and the reasons why. Any information subsequently provided by the safeguarding agency on action taken should also be recorded. This record should be submitted to the Quality Assurance Board (QAB), who will refer matters to the Intermediaries Registration Board (IRB) as appropriate.

NCA who will anonymise this data and provide a report to the IRB on numbers of safeguarding referrals, trends and issues in order that this can be addressed through training and governance of WIS.

Disclosure, Barring and Vetting

3.109 All RIs must have a current enhanced DBS certificate.

3.110 RIs must inform QAB if they are subject to any safeguarding allegations, police investigation, cautions or criminal offences immediately. QAB will then decide on appropriate action in relation to any undertakings for further RI work, referring matters to IRB as appropriate.

Safeguarding concerns about professionals involved in the case

3.111 Any allegation made against someone 'working with children or adults at risk', must be referred to the same point of contact (local children's services or adult safeguarding team) as a concern about a child's or adult at risk's welfare. This ensures that cases are dealt with in a coordinated manner with allegations against those who work with children and vulnerable adults being addressed alongside corresponding welfare concerns in relation to the child or adult involved.

3.112 An allegation may relate to a person who works with children or vulnerable adults who has:

- behaved in a way that has harmed a child or adult at risk;
- possibly committed a criminal offence against a child or adult at risk; or
- related to a child or adult at risk in a way that indicates they may pose a risk of harm to them

3.113 If there is a direct safeguarding concern about another RI, or a concern about their decision making, then this must be reported to the QAB for consideration and action – where appropriate the QAB will refer matters to IRB.

PART 4

REPORT WRITING: GUIDANCE, TEMPLATE AND CHECKLIST

- 4.1 Having completed an assessment of the witness and having gathered relevant information from all available sources, the RI will be required to write a report for the court about the communication needs of the witness.
- 4.2 The effectiveness of the RI at any contested special measures hearing, at the ground rules hearing and at the trial is dependent on the quality of the assessment and the written report for court. In order to perform their function well at court, the RI needs to be confident about the assessment, conclusions and recommendations in their report.
- 4.3 This section contains advice about a RI's full, written report for the court. This is not the same as a preliminary report which a RI may provide to the police officer after the initial RI assessment but before the ABE interview. A preliminary report may be written or oral but it is not the same as the report for court which comes at a later stage.
- 4.4 The report for the court will be used in three main ways:
 - It will be taken into consideration by the prosecution, defence and the court when the application for special measures is made.
 - It will advise the prosecution and defence (in particular the advocates) and the magistrates/judge about how best to communicate with the witness at the trial.
 - It will help shape the discussions and the directions made at the GRH.
- 4.5 The report for court should be set out in a way that assists the parties and the magistrates/judge. It should be clear and concise. Most judges and advocates have had little or no training on developmentally appropriate questioning or how to communicate with vulnerable witnesses hence the need for clear and well-explained, impartial advice from the RI in the case.
- 4.6 This section suggests a structure for the report and gives a checklist for the written style, formatting and content. However, the content of any report should be adapted as necessary to suit the particular case.

- 4.7 Once completed, the RI should send the report to the person who commissioned it, i.e. the CPS paralegal if it is about a prosecution witness or the defence solicitors if it is about a defence witness. The CPS paralegal/defence solicitor is then responsible for serving the report i.e. circulating the report to the parties and the court.
- 4.8 The suggested structure of a full court report follows.

Suggested structure of the full court report

Front page

Contents page and page numbers

Section 1: Summary of RI's qualifications and experience

Section 2: Background, instructions and chronology

Section 3: Summary of conclusions and recommendations

Section 4: Witness assessment

4.1 General observations

4.2 Attention and listening skills

4.3 Auditory comprehension/understanding of spoken language

4.4 Spoken expression (expressive language)

4.5 Speech sound intelligibility

4.6 Reading and writing ability

4.7 Non-verbal communication

4.8 View of witness on being assisted by a RI

4.9 Other relevant information, i.e. social, health, medical background, level of education and development, emotional state, etc.

Section 5: Conclusions and recommendations for special measures

5.1 Conclusions

5.2 Recommendations on communication and questioning

5.3 Other recommendations/special measures

5.4 Plea and Trial Preparation Hearing ('PTPH')

5.5 Pre-trial hearing to set the Ground Rules

RI Declaration

Appendices

- Appendix 1: CV of the RI
- Appendix 2: Description of the role of a RI
- Appendix 3: Notes on communication aids
- Appendix 4: Giving feedback about the WIS

Front page of the full court report

R v [Name of defendant/s]

Case reference number:

Registered Intermediary Report and Recommendations on Special Measures
in respect of [Name of witness]

Report prepared at the request of
[Name and address]

Author: [Registered Intermediary name]
Registered Intermediary Registration Number: [Number]

[Date]

Confidential Report

This report is confidential and is intended only for the parties and the court in this case.
It should not be disclosed outside these proceedings without the permission of the court.
This report is for advice only and is not evidence in the case.

Contents page

For any report longer than ten pages, including the front page, it is also advisable to have a contents page with page numbers to help the parties and the judge find their way around the report. All reports should be page numbered whatever their length.

Section 1: Summary of Registered Intermediary qualifications and experience

The RI should set out, usually in one or two paragraphs, their qualifications and experience relevant to the particular case. The RI can indicate that their full CV is set out in Appendix 1.

Section 2: Background, instructions and chronology

This section should succinctly explain who contacted the RI and why and the key facts and dates including the name of the witness, their date of birth and the dates of the referral, the intermediary assessment/s (which ordinarily takes place before the ABE interview), the ABE interview and the PTPH (if known).

This section should also set out clearly what questions this report seeks to address. For example the report might say

"I have been asked to:

- i. Indicate whether or not the witness has demonstrated an ability to communicate their evidence and, if so how;*
- ii. Indicate whether the use of an RI is likely to improve the quality (completeness, coherence and accuracy) of the witness's evidence;*
- iii. Advise the advocates on the most effective way of communicating questions to the witness;*
- iv. Make recommendations as to special measures and other adjustments to enable the best communication with the witness.*

My role as a RI is to assist communication with a witness and to assist a witness to communicate with others. I am not instructed as an expert witness. I cannot give an opinion on the accuracy of a witness's recall of the facts in this case nor can I give an opinion on whether a witness is telling the truth in his/her evidence.

My role is limited to providing assistance to facilitate communication before trial and during the witness' evidence and advising how this can best be achieved."

Section 3: Summary of conclusions and recommendations

Normally this section would be no more than two to three paragraphs long and should provide the reader with a quick overview of what the report says. It should include a statement advising the reader that in accordance with Criminal Procedure Rules Part 3 paragraph 3.9 (7), Criminal Practice Directions 3D.7 and the decision in *R v Lubemba* [2014] EWCA Crim 2064, there should be a ground rules hearing save in exceptional circumstances, and the RI should be part of any ground rules discussions. Further guidance on holding a ground rules hearing and a checklist is available at theadvocatesgateway.org

Section 4: Witness assessment

It is important that this section gives details of the facts upon which the RI has based their conclusions. The report sub-headings below are suggestions only and may not be suitable in all cases:

- 4.1 General observations and sources of information e.g. meeting a teacher or carer, reading a medical report etc.
- 4.2 Attention and listening skills
- 4.3 Auditory comprehension/understanding of spoken language
- 4.4 Spoken expression (expressive language)
- 4.5 Speech sound intelligibility
- 4.6 Reading and writing ability
- 4.7 Non-verbal communication
- 4.8 View of witness on being assisted by an intermediary
- 4.9 Other relevant information, i.e. social, health, medical background, level of education and development, emotional state, etc.

Each RI should approach the assessment in the way they feel is most appropriate, having regard to the purpose of the assessment. There is no rule to say how the assessment should be carried out or what it should consist of. The RI decides the best way to carry out the assessment in that particular case and the report should reflect that assessment.

It is not necessary to include full clinical test results. In some cases the RI may want to include test results or partial test results in an appendix because it will help the reader to understand the communication issues. In most cases, though, this is not required and a summary of the assessment results in the main body of the report will be sufficient.

RIs should not attempt to assess the witness's understanding of truth and lies but they should be ready to advise the police officer and/or the court how best to communicate these concepts to the witness so that the interviewing police officer/the judge may assess the witness's understanding.

This section should also make reference to other information that the RI has relied on for their assessment. Others who may be able to provide relevant information for the assessment might include family members, foster parents, nursery workers, early years service workers, school teachers and teaching assistants, special educational needs co-ordinators, key workers or assistants, social workers, psychologists, doctors, nurses, therapists, police officers etc. If information in the report comes from other sources, the report should make it clear what the information is and where it comes from e.g. school, nursery etc. All sources of information relied on, whether written or oral, should be listed with the date of the report or conversation. However, the RI should seek consent to include information from a third party's report if it has not already been gained by the police. In the ordinary course of events it should not be necessary to attach a copy of the third party's report to the RI's report.

It should be noted that the RI's court report is attached to the application for special measures and that these are served on the other party/ies and the court. The RI should therefore only include personal confidential information in so far as it is necessary for their report and must not include information which could further identify or endanger the witness, for instance details that would identify the location (place of residence, name of school, name of day care centre etc.) of a witness. The effect of this is, for example, that they should simply refer to obtaining information from a child witness's school rather than naming the school and the person from whom they obtained that information.

Information or reports about a witness should be stored securely along with the rest of the RI's notes in compliance with guidance on storage and disposal of case notes and papers, i.e. in accordance with the provisions of the Data Protection Act 1998. RIs must be registered as data controllers with the Information Commissioner.

Section 5: Conclusions and recommendations for special measures

5.1 Conclusions

This section of the report should address the issues that the RI has been asked to address as set out earlier in the written report. For example the conclusions will address whether the witness demonstrated ability to give evidence in court in this case, and if so whether the use of a RI is likely to improve the completeness/coherence/accuracy of the evidence given.

The report should then go on to make recommendations which improve the quality of evidence from the witness.

5.2 Recommendations on communication and questioning

The report should provide detailed recommendations to the advocates and the judges on what to say and do when communicating with the witness/defendant.

RIs may find the GRH checklist accompanying Toolkit 1 on theadvocatesgateway.org is a useful structure to adopt.

The recommendations should clearly tie in with the assessment findings. For example a recommendation that there should be no use of 'tag' questions would refer back to the part of the witness assessment that showed use of 'tag' questions would be detrimental to clear communication/give rise to meaningless answers.

The report should make detailed recommendations as to how questions should be put to the witness. For instance, there might be recommendations on: pace of questioning, prefacing questions with the name of the witness, allowing the witness to process the question and formulate their answer, chronology of topics, whether questions about certain times should be linked to events, length of questions, avoiding inferences and double negatives etc.

The report should give examples to illustrate in practical terms what is meant by a particular recommendation. For example, if the recommendation is to "avoid tag questions" the report should give an example of a tag question and then also give an example of how the question should be put avoiding the use of a tag.

The recommendations about questioning techniques should be as specific as possible. For example, rather than simply saying that the witness needs "frequent, short breaks", the report should explain how often the breaks should occur, whether snacks should be on hand, how long the breaks should last, whether for a short break the witness should remain in the live link room with the microphones turned off while the jury remain in the court room etc.

Where possible, the report should give the questioner practical tips and strategies. For example, if the assessment established that the witness has a language-processing delay and a recommendation is to allow the witness sufficient time to answer, the report might suggest that the questioner counts up to five in their head after the question has been asked and before saying anything else.

The report may refer to words used successfully in interview. The report should also address special vocabulary if the witness uses idiosyncratic language for certain body parts. The report should set out the special word/s so that the questioner may use them.

The report should also indicate what, if anything, will indicate that the witness is becoming confused so that the questioner can be alert to this. The report should state how the intermediary will indicate if there needs to be a break in the questioning.

The report should set out what the RI will do to draw the court's attention to a communication issue should it arise. The report may also set out how the witness will indicate if s/he has a question or concern e.g. raising a red card.

The recommendations should address what, if any, communication aids should be used (for example symbols, charts, pictures, time lines etc) and how they should be used. Further detailed guidance may be set out in an appendix as necessary.

Mode of delivery may also be addressed in the report; for example, the recommendations might include advice to the questioner to indicate if they are about to change the topic, or advice to avoid using a particular tone of voice.

The report may make suggestions regarding witness familiarisation for example when and how witness familiarisation should take place with the Witness Service. RIs should note that witness familiarisation is the responsibility of the Witness Service and the RI's role is to support communication at the witness's familiarisation visit. Whether the witness is going to be giving evidence in the courtroom or giving evidence from a live link room they should have the opportunity to become familiar with the location and, where relevant, practice using the technology. If the witness practices answering questions, they must be wholly unrelated to the case. Coaching a witness or rehearsing a witness's evidence is strictly forbidden: *R v Momodou [2005] EWCA Crim 177*. The proposed practice questions should be submitted first to the CPS who are in a position to know if they might touch on aspects of other evidence in the case.

The report may make recommendations as to when and how the witness will watch for memory refreshing purposes the DVD of their ABE interview. There is no rule that says that the witness must watch their interview at the same time as it is played in court; for some witnesses this will not be helpful for example they might require frequent breaks or they may become anxious or upset when watching it. The important thing is that before the witness is questioned at court, the witness has had the recent opportunity to watch the recording of their interview to refresh their memory. The RI may be present to assist communication whilst the witness refreshes their memory; usually the officer in the case will organise this and be present. It is the officer's responsibility to make a note of anything the witness says before, during and after the watching of the DVD. The RI must not be the person who notes those comments which in turn may need to be disclosed to the defence. The RI must not be left alone with the witness. Similarly if the witness has made a written statement the RI may be present to assist with memory refreshing from the written statement.

In addition to the above narrative explanation of the recommendations, it may be helpful to include in the report a summary of the recommendations in a checklist or a table format. This can then be used as a quick reference guide at the special measures application (whether contested or not) and at the GRH and at the trial when the witness is giving evidence.

Ground Rules in table format (with illustrative examples)

Do (communication techniques to adopt)	Notes to assist the questioner (including examples)
Refer to the witness and the RI by their first names. Preface questions with the witness's name if their concentration appears to be lapsing.	'Kate, what happened after that?'
Don't (communication techniques to avoid)	Notes to assist the questioner
Do not ask 'tag' questions	Rather than 'It was raining, wasn't it?' ask 'Was it raining?'

5.3 Other recommendations/special measures

As well as the above recommendations on communication and questioning of the witness, the report may also include recommendations which would enable better communication with explanations as to why. The following are suggestions only and the list is not exhaustive:

- Whether the witness finds it helpful that wigs and gowns are worn/not worn.
- Whether the witness prefers to give evidence in court or over the live link or whether they will need a court familiarisation visit to help them decide that.
- Whether the RI should make their declaration in the absence of the witness, because otherwise the wording may be confusing for the witness.
- How the witness oath/affirmation should be taken; for example, how many words should be read at a time for the witness to repeat.
- The timing of the witness's evidence (for example, if there is a certain time of day when communication is likely to be easier, if it is necessary to, as far as possible, avoid keeping the witness waiting at court, etc).
- Memory refreshing procedure.

The RI must indicate that he/she should attend the hearing of a special measures application if it is opposed. The application ought to be made some weeks before the trial but this does not always happen and may even happen on the day that the trial begins. The report should indicate that the RI is willing to attend a contested hearing of an application for special measures.

The report must remind the court that there must be a GRH before the witness gives evidence in order to discuss the contents of the report and how the witness can be questioned most effectively. The hearing is in effect a meeting between the RI, advocates and the judge in the trial and it is necessary to establish the ground rules for questioning the witness.

5.4 RI Declaration

The RI declaration should be set out in full and be followed by the RI's signature and date on which the report was signed. An original, signed copy of the report should be supplied (or sent via secure post/secure email) to the person who commissioned the report.

The declaration should read:

"I solemnly, sincerely and truly declare that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding."

Signed

Dated

Appendices

Appendices should be used for relevant reference material that is too detailed for the main body or which would break up the flow of the main body of the report.

CV

A full CV of the RI's relevant qualifications and experience should be included including when they qualified as an RI. It should be no more than two pages in length.

Role of the RI

A short description of the role of the RI will be particularly helpful for those who do not have experience of working with a RI. This description should normally last no more than a half to three quarters of a page of A4.

Communication Aids

It may be useful to explain some communication aids in an appendix. If a recommendation is for the use of a 'bliss board' for example, more detailed notes in the appendix will help the parties and the judge understand exactly how this will work in practice. If a picture book is to be used, this could be described in more detail with examples given of the pictures to be used. The main body of the report might invite advocates, in advance of the trial to indicate other words or ideas which could usefully be represented in the picture book, i.e. cards to help the witness say "I don't know", "I don't understand", etc. It may also be useful to cross refer to the communication aids toolkit on theadvoactesgateway.org, which will inform advocates about the benefits of using communication aids, and also, the risks associated with inappropriate use.

Other appendices

An appendix should be used to set out reference material that will help the parties and the judge but which would be too detailed to include in the main body of the report.

An appendix may be used for details of assessment tests and results; that is, to set down what happened when particular tests were carried out. These should only be included if it will be useful for the parties and the judge to see them. Remember, the report is mainly going to be used to support an application for special measures and to guide the advocates and the judge on how to best communicate with the witness. It is therefore unlikely that the report needs to contain specific test results; in the event that a query did arise about a specific test result, the RI will have their assessment notes to refer back to.

RIs should include details about how to give feedback. The following wording should be used:

Appendix 4: Giving feedback about the Witness Intermediary Scheme.

'End-Users'* will be provided with an End-User feedback form, the completion and submission of which will enable performance management information on the Witness Intermediary Scheme to be collected and assessed to see what improvements to service provision may be made.

Should End-Users wish to provide additional, more detailed feedback on the service provided by RIs within the Witness Intermediary Scheme they should send it by email to Ministry of Justice at Registered.interme@justice.gsi.gov.uk

For others involved in a case, i.e. members of HMCTS, the judiciary, counsel, etc, feedback on the service provided by RIs within the Witness Intermediary Scheme may be provided to the Ministry of Justice at Registered.interme@justice.gsi.gov.uk

*The End-User is the individual who, on behalf of their respective organisation, submits the Request-for-Service for the engagement of a RI. For victims and witnesses this will be the police and CPS for pre-trial (investigation) and trial stages of a case respectively. The End-User will be the individual, on behalf of their respective organisation, to whom the RI will submit their assessment report(s).

RI REPORT WRITING CHECKLIST

Below is a checklist for RIs when writing reports:

- Suitable front page and contents page.
- Written in the first person.
- Suitably structured and headed/sub-headed, following the guidance above.
- One and a half line-spaced.
- Set out with wide margins.
- Printed single-sided.
- Arial font must be used.
- Font size twelve must be used.
- Written in plain English and containing no jargon.
- Written in short sentences and with short paragraphs.
- Any medical or communication abbreviations and terms used should be explained, i.e. 'X has dysphagia. This means they have difficulty swallowing and this has an impact on their ability physically to form words.'
- Page-numbered, i.e. page 1 of 5. This should be in the bottom right-hand corner of the page.
- Paragraph-numbered., i.e. 1.1, 1.2, 1.3, etc. Sub-paragraphs should be reflected in numerical order and, if required, further divisions should be reflected in alphabetical order, i.e.
 - o 1.1
 - 1.
 - a.
- Headed on each page with case name, number and the front page headed RI Report.
- Clearly summarised at the end with conclusions and recommendations (which are supported in the body of the report by assessment findings).
- Recommendations clearly set out for viewing 'at a glance' – a table may be used for this purpose.
- Signed under the declaration.
- Dated.
- Proof-read and free of grammar, spelling and typographic errors.

PART 5

FURTHER RESOURCES: CONTACT DETAILS AND WEB SITES

5.1 The table below shows an outline of the division of responsibility between the Criminal Justice Group and the NCA.

Ministry of Justice	NCA
Overall governance and management of the Witness Intermediary Scheme.	Queries about the Witness Intermediary Scheme's Matching Service in general.
Policy and strategy management and development of the Witness Intermediary Scheme.	Questions about the role and use of a RI.
Informal or formal complaints regarding a RI or the Matching Service.	Advice and support on interviewing vulnerable witnesses.
Enquiries and expressions of interest about becoming a RI.	Obtaining a Request-for-Service (RfS) for the engagement of a RI, and other operational matching issues.
Recruitment, training and registration of RIs.	Updates on the progress of RfSs.
Resolution of payment disputes between RIs and End-Users.	Provision of management information and performance statistics on the Witness Intermediary Scheme to the Ministry of Justice.
Management of enquiries and matters related to implementation of section 104 of the Coroners and Justice Act 2009.	Running of RIO
Secretariat for the Witness Intermediary Scheme's Intermediaries Registration Board and Quality Assurance Board.	

Contact details

5.2 Below are contact details for the MoJ and the NCA.

- Ministry of Justice: Registered.interme@justice.gsi.gov.uk
- NCA Specialist Operations Centre - call 0845 000 5463 or email: socwitnessint@nca.x.gsi.gov.uk

Websites

5.3 Below are details of useful websites related to the Witness Intermediary Scheme and RIs operating within it:

- **City Law School, City University London:** The providers of RI initial and refresher accreditation courses. See the web-pages for free pod-casts of interviews with RIs and the annual RI survey results. <http://www.city.ac.uk/law/courses/continuing-professional-development/in-house-courses/>
- **Crown Prosecution Service:** The Crown Prosecution Service is responsible for prosecuting criminal cases investigated by the police in England and Wales. Information on how the CPS apply for special measures can be found at the link below. http://cps.gov.uk/legal/s_to_u/special_measures/index.html
- **Ministry of Justice:** The government department with responsibility for the courts, prisons, probation services and attendance centres. <https://www.gov.uk/government/organisations/ministry-of-justice>

The website includes resources for witnesses to explain what it is like going to court. <https://www.gov.uk/going-to-court-victim-witness>

- **NCA Specialist Operations Centre:** Operates and manages the Witness Intermediary Scheme's Matching Service on behalf of the Ministry of Justice and provides vulnerable witness interview advice and support. Contact the Witness Intermediary Team, Organised Crime Command, Specialist Operational Support, Specialist Operations Centre, National Crime Agency Knowledge Centre, Wyboston Lakes, Great North Road, Wyboston, Bedfordshire MK44 3BY Tel: +44(0)1480 334728 or email wit@nca.pnn.police.uk (pnn users) or wit@nca.x.gsi.gov.uk (all other users).
- **NSPCC:** a charity working to end cruelty to children in the UK. <http://www.nspcc.org.uk>

The NSPCC and The Nuffield Foundation sponsored 'Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings', Plotnikoff and Woolfson (July 2009), available at the following link: <http://www.nuffieldfoundation.org/young-witnesses-criminal-cases>

- **The Advocate's Gateway:** This is a widely-used website endorsed by the higher judiciary which provides free advice and toolkits for advocates and judges to assist them in cases where witnesses, parties or defendants are vulnerable. theadvocatesgateway.org
- **Victim Support:** The national charity giving free and confidential help to victims of crime, witnesses, their family, friends and anyone else affected across England and Wales. <http://www.victimsupport.org.uk/>

Other useful resources

- 5.4 Intermediaries in the criminal justice system.
- 5.5 Various forms, templates, articles and other relevant documents, etc, are available for RIs to download from the RIO. As these are often subject to revision and updating for accuracy and currency they are not included in this document.
- 5.6 Further to page 58 at which RIs are advised to write their reports in plain English, in short sentences and with short paragraphs, the following sources are recommended for guidance on these requirements;
 - a. *Usage and Abusage: A Guide to Good English* by Eric Partridge.
 - b. *Plain English for Social Services: A Guide to Better Communication* by Graham Hopkins.
 - c. The Plain English Campaign's website at www.plainenglish.co.uk

