

## **'Every reasonable step': a more flexible approach to vulnerable witnesses and defendants**

### **Consolidated list of intermediary examples**

**October 2017**

*CPR 3.9(3)(b) Courts must take 'every reasonable step' to facilitate participation, including:*

- *setting ground rules, whether or not an intermediary is involved (CPR 3.9(7), CPD 3E.2,3E.3)*
- *limiting the scope and duration of questioning (CPR 3.9(7)(iii), 3.10(d), CPD 3E.4)*
- *not requiring the witness to watch the VRI at the same time as the jury (CPD 18C.3)*
- *giving weight to the witness's choice of supporter in the live link room (CPR 18.10(f), CPD 18B.1, 18B.2)*
- *shielding the live link screen from the defendant and public (CPD 18A.2)*
- *using photos to help familiarise witnesses with the court (CPD 3F.29).*

### **Introduction**

Since January 2014, Lexicon has provided a periodic handout to Judicial College Serious Sex Offences Seminars, illustrating how the 'every reasonable step' rule is being interpreted through innovative intermediary recommendations accepted by courts. The course director describes the handout as *'an important feature of the training given ... it empowers judges to think outside the box'*. It is periodically updated: version 9 was sent to the College in October 2017 and is available on the Lexicon website.

Because the handout consists of one double-sided sheet, each update requires some items to be dropped. This document provides a consolidated list of examples received since 2014, and includes more information about some.

*Please bear in mind that modifications need to be tailored to the individual's needs i.e. one size does not 'fit all':*

### **Memory refreshing**

Modifying the expectation (it is not a legal requirement) that the witness will watch the whole VRI in advance of trial. Agreed modifications have included:

- Using symbols for 'good listening' and 'good looking' to direct a child non-verbally to pay attention to the evidence
- Setting up an activity for a child in front of the lap top, with the intermediary and officer facilitating play during less important parts, then directing the child's attention to the screen at key evidential points
- The witness listening to the VRI i) letting the witness cover the screen with a scarf ii) letting a six-year-old listen while in a play tent
- The witness watching the disclosure elements only
- The officer reading out a summary of disclosed events

- Reading the transcript to the witness i) for witnesses who can hear but cannot understand their own speech due to speech production difficulties ii) for a witness who could not lip read from the DVD. Sections of the DVD where she used gestures were played to her and she was reminded of what she pointed to when using communication aids

### ***Pre-trial familiarisation visit to court***

- Conducting the witness's visit and the ground rules hearing on the same day. During the visit, the advocates and judge asked the witness non-evidential questions developed by the intermediary. This was followed by – and helped inform – decisions about the form of questions at the ground rules hearing which followed
- Identifying a waiting room close to the link room to be used for the trial, so that an anxious witness could see how quickly and easily they could access a carer, if necessary, during cross-examination

### ***Introductions to the judge and advocates; names***

- Showing Internet photos of the judge and advocates to the witness in advance
- Arranging introductions to take place before the day of the witness's evidence
- Arranging seated introductions to the advocates and the judge who were dressed informally
- Agreeing in advance the names to be used for the judge, advocates, intermediary, witness (own preferred name) and the defendant (e.g. for a woman stressed by hearing his name, the ground rules hearing agreed that questioning would refer to her 'ex-husband')
- Having the names of the judge and counsel written on differently coloured Post-It notes, to help the witness distinguish them
- Advising the judge and counsel of a subject to engage the witness; setting up a play session in the waiting room, with judge and counsel then joining in
- Introducing the judge and counsel one at a time e.g. for a boy at high risk of 'melting down' when meeting new people
- For an adult witness with significant social anxiety, agreeing at the ground rules hearing a controlled, staged process of introductions that took a few minutes (e.g. standing in the doorway; speaking first to the intermediary; asking the intermediary whether the witness was willing for the person to enter etc.) This strategy made the witness feel more comfortable

### ***Witnesses not wishing to be seen or to encounter the defendant (where a remote link is not a possibility)***

- Combining special measures (Criminal Practice Direction 18A.2) to prevent the defendant from viewing the witness on courtroom screens by i) turning off the live link screen seen by the defendant ii) blocking his view or iii) moving him (including seating him in a lower chair or in the press benches). Judges prefer to do this in a way that the jury is unaware. If the defendant is moved, check that he cannot be seen on the live link screen

- Where a witness in the live link room did not wish to be seen by the public gallery, and the judge did not wish to exclude the public using s 25 YJCEA 1999, large courtroom screens were switched off. The advocates and jurors could view a screen not seen by the jury. Members of the public could hear but not see the witness
- Seating the witness behind a screen in court before the defendant was brought in; keeping the defendant in the dock until the witness has left the court building

### ***Live link***

- Having the advocate, young child and intermediary sit on the floor of the live link room for questioning
- Questioning a six-year-old over the live link while sitting on the intermediary's lap. The child's head was turned away from the live link screen, with the microphone held close to her mouth as her answers were whispered
- Letting a small child give evidence in the live link room while sitting on a rocking horse
- Moving advocates into the live link room for face-to-face questioning
- Letting young children set the pace of face to face questioning i) a four-year-old would answer, put in the piece of a puzzle, hand a piece to the advocate who would place it and then ask the next question ii) the young child and advocate took turns with Play Doh Pizza
- Allowing children who became scared or distressed by seeing the advocate's face over the live link screen to continue being questioned using live link sound only
- Letting an adult with physical difficulties sit on a chair in the live link room, take her shoes off and plant her feet firmly into a large beanbag, to help 'ground' her

### ***Section 28 pre-trial cross-examination (pilot courts)***

- Moving the judge as well as the advocates into the live link room for face to face questioning
- Holding a s 28 hearing when a trial could not proceed but all parties were present. The witness died before the adjourned trial took place but her VRI and filmed cross-examination were played to the jury
- Enabling a s 28 hearing to be conducted remotely, by filming the witness's cross-examination in her care home using police mobile equipment

### ***Court environment***

- Instructing the intermediary to read the oath to the witness, rather than the usher
- Removing items from the live link room that may be distracting (e.g. a ticking clock for a witness with autism) or potentially thrown
- Arranging for a fan to be placed in the live link room, to help regulate the witness's body temperature
- Putting up signs along the corridor approaching the live link room, requesting silence, to assist a hypervigilant witness

- Seating the witness close to the door of the live link room
- Setting aside a 'quiet' or 'safe' room for breaks, for witnesses on the autism spectrum, with challenging behaviour or with mental health difficulties
- Agreeing that those in court would avoid perfume and aftershave in the presence of a witness with poor respiratory health and scent sensitivity who wished to give evidence in court

### ***The person accompanying the witness in the live link room***

- Where a witness in the live link room would benefit from a specific supporter but this person should not hear the evidence, asking the supporter to wear headphones playing music
- Allowing a 4 year-old to give evidence while sit on a relative's knee
- Requesting assignment of a female usher who agreed to interact with the witness only if interaction was initiated by the witness for whom social interactions were uncomfortable
- Deciding that, in specific circumstances, the presence of a young witness's father was more important than that of the intermediary. The ten-year-old was on the autism spectrum, had attention deficit hyperactivity disorder and oppositional defiant disorder. He found the live link room oppressive during the pre-trial visit because of the number of adults in a confined space. The intermediary felt she could not help him reduce his anxiety. He gave evidence over a remote link accompanied by his father, with the door left open; he could go out if feeling overwhelmed but did not need to. The intermediary monitored questions from the courtroom while sitting next to the judge. Questions had been simplified significantly at the ground rules hearing (no visual aids were needed)

### ***Non-verbal communication and repetition of questions and answers by the intermediary***

- Where the witness had difficulty listening carefully, allowing the intermediary to repeat the advocate's question verbatim, if the witness may not have understood
- Where the witness relied on lip-reading and therefore required face to face communication (and the live link room was too small to include the advocate), asking the intermediary to repeat questions asked over the live link
- Allowing a teenager, cognitively able but unwilling to speak about what happened, to type responses to typed questions, as was done at the VRI. A typist transcribed counsel's questions. Video screens allowed the jury and defendant to follow Q and A exchanges. (This process worked well but would have gone more smoothly if questions had been agreed in advance)
- Letting witnesses write, text or type their answers (including typing by eye movement<sup>1</sup>), which were then read out by the intermediary
- Using software to 'speak' the witness's typed answers<sup>2</sup>

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<sup>1</sup> E.g. Tobii Dynavox.

- Where witnesses had severe difficulty with naming objects, allowing them to answer by choosing from a balanced selection of pictures or words produced by the intermediary, with an option for 'none of these' / 'something else'
- Asking the intermediary to repeat the answers of witnesses i) who whispered ii) who were seated facing away from the live link room camera iii) where the witness's speech was difficult to follow
- Asking the intermediary to state what witnesses are pointing to when shown photographs

### ***Aids to communication***

- Requiring advocates to 'signpost' their questions as referring to a specific event/ location (e.g. alleged offence(s); the disclosure; police interview etc.) and allowing the intermediary to refer the witness to a visual aid to help the witness understand the context of the question. In one such instance, the witness coloured in the visual aid while waiting at court
- Agreeing the use of a 'visual timeline' to facilitate questioning about alleged offences over a period of time, e.g. (i) a witness with Down syndrome giving evidence about assaults in different houses (ii) a witness with a moderate learning disability described hotels where she had been assaulted. She identified hotel receipts as accurate, but mixed up locations and dates in interview. The intermediary helped her create a timeline marked with years and significant non-evidential events. The witness then added dates and locations from the hotel receipts. Referring to the timeline enabled her to provide correct information (iii) a witness with a progressive neurological illness was questioned about three different incidents by referring her to three Post-It notes identifying each incident by words spoken by the witness at interview. The wording was agreed at the GRH. (A number for each topic can be added to the time line as a reference point)
- Agreeing methods of indicating intimate touching without asking the witness to show on their own body. For witnesses with selective mutism or who may be acutely embarrassed, letting them write down a word or point to pre-agreed words or to a 'word body map'
- Where topics/ questions were agreed in advance, agreeing a visual aid allowing the witness to monitor progress i) the witness put a counter in a box for each question/ topic completed and could see how many remained ii) providing a booklet with topic headings, with pages to be torn out or boxes ticked off as topics were completed

### ***Alleviating stress***

- Permitting witnesses to monitor/ indicate their stress levels (or, for a witness with speech production problems, the extent to which their speech was deteriorating) by tapping a card

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<sup>2</sup> See the App Store e.g. 'Speak and Read to Me' (suitable for assessing the witness's ability to communicate this way); 'Lightwriter'; and 'Predictable' (more expensive but preferable for use at interview or trial as it stores typed text). Intermediaries assess the witness and identify an appropriate method.

with a 'thermometer', 'traffic lights' or a numerical scale. Witnesses have created their own personalised stress scale. These aids help indicate when breaks are needed

- Permitting the use of a comfort object (e.g. letting an adult witness with autism wear a lion's tail, his 'comfort object' in daily life) or a stress toy of the witness's choice
- Letting anxious adult and young witnesses bring a calm dog/ a hamster in its ball into the live link room
- Using a 10-minute sand-timer to allow a child to monitor the length of cross-examination conducted in 10-minute 'blocks'
- Agreeing that the usher would knit quietly during cross-examination because it was calming for the child and meant the usher was not obviously observing
- Agreeing to a child's request that a male usher would cover his face with a cushion when the child said 'naughty' words
- For witnesses constantly seeking reassurance, agreeing at the ground rules hearing neutral words that the intermediary may use if necessary (e.g. 'You're doing some good listening...', 'X more topics to go' etc.)
- Letting a 13-year-old give evidence with her legs wrapped in a blanket
- Letting an adult witness's social worker sit outside the door of the live link room
- Letting a child with urinary urgency go to the toilet without seeking permission first
- Arranging access to a shower at court for a child at risk of soiling
- Allowing witnesses to take short breaks in the live link room during questioning, measured by a sand timer. The sound is turned off between the court and live link room but the jury is not sent out. In-room break activities for children have included i) playing the recorder to regulate breathing ii) going under a table, behind a curtain or into a 'tent', created by placing a blanket over two chairs back to back and with mats and cushions on the floor
- During breaks, engaging anxious adult witnesses with i) blowing bubbles ii) using a yoga stretch band and many other activities<sup>3</sup>
- Allowing children to reduce heightened anxiety and 'settle' with physical activity during breaks. Activities have included dancing, vacuuming, riding a tricycle, bouncing on a mini trampoline and rocking in a small rocking chair
- Agreeing that a 15-year-old with psychological problems could pull up her 'hoodie' if stressed. With this reassurance, she gave her evidence without covering her head (as is often the case if 'just in case' recommendations are accepted)

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<sup>3</sup> Intermediaries should alert the court to methods employed to enable witnesses to continue. These 'behind the scenes' activities form an important part of the intermediary's function of which the court may be completely unaware.

### ***Physical contact between intermediary and witness<sup>4</sup>***

- Allowing an intermediary to touch a witness's arm to direct them to look at or listen to the live link screen, to help them focus
- Allowing an intermediary to stroke a four-year-old's hair, when this was requested by the child during a break taken because the child was crying
- Allowing the intermediary to hold and rock a witness with learning difficulties and mental health problems when she showed signs of psychological disturbance. The judge warned the jury against sympathising with the witness. The intermediary's actions were upheld by the Court of Appeal (*R v Christian* [2015] EWCA Crim 1582, <http://www.bailii.org/ew/cases/EWCA/Crim/2015/1582.html>). The Court of Appeal concluded: 'We do not consider that the fact she received physical support in the form described will have been particularly surprising or impactful upon the jury. The experienced judge appears to have taken the view that the support given enabled [the witness] to proceed at a time when she was very distressed' (para 39).

### ***When questioning breaks down / second ground rules hearings***

- Allowing a witness being treated for post traumatic stress disorder, who had a tendency to vomit when stressed, to write down all she wanted to say. This was shown to the jury and she was cross-examined about it
- Changing how the witness gives evidence to i) move the witness from the live link room to behind a screen, or vice-versa ii) face to face questioning in the live link room
- Permitting witnesses unable to give evidence e.g. because of distress due to a delayed start or as a result of inappropriate questioning to come back, sometimes the next court day, following a further ground rules discussion between the judge and advocates, rather than dismissing the case immediately

### ***Clothing (or not)***

- Permitting a man self conscious about disfigurement from skull surgery to wear a baseball cap in court
- Taking evidence by remote link (with a strategically placed table) from a man in a care home who refused to wear any clothes

### ***After evidence is finished***

- Asking the intermediary to help the witness make a victim personal statement, if this was not done following the police interview

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<sup>4</sup> To be avoided, but if the need for emotional containment is anticipated for a specific witness, raise this possibility with the judge in advance, and consider the presence of a supporter known and trusted by the witness. If the need for touching arises when the intermediary is with the witness at trial, explain the reasons to the judge as quickly as possible.

- Asking the intermediary to help explain the sentence to the witness
- Facilitating a further meeting with the judge. During introductions before a s 28 hearing, the judge told a 16 year-old witness (with learning, behavioural, emotional and mental health difficulties) that she could ask to see the judge or counsel again after giving evidence if she had questions. After giving evidence, she wanted to see the judge and asked: '*Why didn't he [defence counsel] ask me about [the sexual assault]?*' The judge explained that it was up to defence counsel to ask the questions he wanted to and that she had talked about 'that' in her interview
- Enabling elderly infirm complainants to use a remote link to watch a burglar being sentenced

### ***Other adjustments in respect of witnesses***

- The judge and counsel agreeing that a child with significant learning difficulties be asked questions reviewed by the intermediary at a second police interview. The child did not attend court
- The judge agreeing that the prosecutor would ask some questions of the child witness in the waiting room, prior to cross-examination, to clarify the child's understanding of a word that the intermediary feared could cause confusion in cross-examination. These questions, and the child's use of drawings to explain what she meant, were facilitated by the intermediary and documented by a clerk. (This arose out of the pre-trial review of questions when the defence wanted to use. In questioning, the idiosyncratic name for an object used by another child in their VRI – i.e. not *this* young witness's word). This approach to clarify the child's understanding was decided at the GRH)
- When a key witness whose evidence was adjourned overnight returned to court drunk, agreeing to delay resumption of his evidence until after lunch, to allow the intermediary to report back when the witness had sobered up sufficiently
- Allowing a witness serving a custodial sentence to give evidence by remote link from prison

### ***Modifications in respect of vulnerable defendants***

- Requesting that *all* witnesses be asked 'very simply phrased questions' and 'express their answers in short sentences', to make it easier for a defendant (who had complex needs but no intermediary) to follow proceedings (*R v Cox* [2012] EWCA Crim 549)
- Letting defendants with hearing/ sight problems or poor attention sit in the body of the court; letting a defendant with poor vision sit close to the jury box when he was asked if he knew any of the jurors
- Preparing the judge's opening remarks and the defence's questions in large print for a defendant with limited vision and learning difficulties
- Agreeing use of a visual timeline in the dock throughout the trial to enable the defendant to follow times and dates mentioned when others gave evidence



- In cases where there is concern about intimidation by co-defendant(s) i) moving the co-defendant to the side ii) seating the defendant and his intermediary at the end of a row iii) seating them out of the dock iv) at the magistrates' court, having them attend the trial by remote link
- Screening the dock from members of the public who made faces at a defendant with learning difficulties
- Allowing a defendant with autism to give evidence with the witness box screened
- Allowing a defendant with autism to practise walking towards the witness box while his favourite music was played, then answering questions from the box about his favourite subject. This relaxed him and enabled him to give evidence from the witness box
- Allowing a defendant with mental health issues to take brief pauses during cross-examination to manage his emotional state and remain calm enough to respond to questions
- Letting the defendant's intermediary text defence counsel when breaks were needed
- Allowing defendants to have quiet, calming objects (including an iPad with a relaxation programme and colouring books) in the dock, to help them attend or keep calm
- Allowing an elderly defendant with mental health difficulties to bring his cat into the dock
- Letting the intermediary visit the cells to check on the defendant's understanding and to report back to court about any necessary adjustments to enable effective participation.

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