Ministry of JUSTICE

NSPCC
Cruelty to children must stop. FULL STOP.

‘Registered Intermediaries in action’

Messages for the CJS from the Witness Intermediary Scheme SmartSite

Joyce Plotnikoff and Richard Woolfson
Lexicon Limited

Funded by the NSPCC and Ministry of Justice

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1 INTRODUCTION

The intermediary special measure was introduced by the Youth Justice and Criminal Evidence Act, 1999. Section 29(2) states that the function of an intermediary is to communicate –

(a) to the witness, questions put to the witness, and

(b) to any person asking such questions, the answers given by the witness in reply to them.

The Act envisaged that an intermediary may be appointed to facilitate communication with an eligible witness at police interview and at trial. In 2005, during the piloting of the intermediary special measure in six criminal justice areas, the Home Office established a confidential and secure on-line forum (known as the 'SmartSite') allowing Registered Intermediaries (RIs)[1] to raise queries about policy and practice and exchange information by email.[2] In February 2011, the SmartSite was replaced by Registered Intermediaries Online (RIO)[3], managed by the National Policing Improvement Agency (NPIA).[4]

When national rollout of the Witness Intermediary Scheme (WIS) was completed in 2008, RI messages on the SmartSite immediately revealed significant differences in the way intermediary matters were addressed by criminal justice practitioners and members of the judiciary around the country. One reason was the lack of awareness about the WIS or about how similar issues were being dealt with elsewhere. By the time of the transition to RIO in 2011, RIs were still reporting some local differences in the approach to their appointment and use. The impetus for this project came from Barbara Esam of the NSPCC who approached the Ministry of Justice with a proposal to summarise the lessons learned from SmartSite messages and to make them available to a wider audience. This report was funded by both organisations. In addition to disseminating good practice among RIs, the report should inform all those working with a Registered Intermediary. It highlights findings for others in the criminal justice process including the judiciary, police, lawyers, Crown Prosecution Service (CPS) and Witness Service.

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1 Almost all members of the forum are RIs: some others provide advice on relevant policy and practice matters.

2 By 2006, the forum had been used by 88 per cent of intermediaries surveyed. Page 18, J. Plotnikoff and R. Woolfson (2007) *The 'Go-Between': evaluation of intermediary pathfinder projects*. Ministry of Justice. As of 29 June 2011, 112 active RIs were registered on the NPIA database, with 98 (87%) of them registered on RIO. The Ministry of Justice is encouraging all RIs to register.

3 RIO provides RIs with updated information about the Witness Intermediary Scheme, access to relevant documents, publications and articles and enables them to contribute to and share in best practice.

4 Since August 2009, the NPIA have operated and managed the Witness Intermediary Scheme's matching service on behalf of the Ministry of Justice.

Sources

The report draws on:

- SmartSite messages collected between 2007 and January 2011 by the evaluators of the intermediary pathfinder project, Joyce Plotnikoff and Richard Woolfson, Lexicon Limited. (A few postings on RIO have been included where this was necessary to provide updated information but otherwise RIO messages have not been analysed);
- the SmartSite archive retained by David Wurtzel, barrister (co-trainer with Professor Penny Cooper at City Law School, City University, London, of all RIs since the scheme began). This archive was particularly valuable as David and Penny respond to almost all RI emails with a legal perspective. Some of their responses drawn on for this report had not been posted on the SmartSite but were sent directly to the RIs involved;
- SmartSite responses from Kevin Smith, NPIA; Michael Wrigglesworth, CPS; Joyce Plotnikoff, Lexicon Limited; and Jason Connolly, Ministry of Justice;
- advice from Professor Michael Lamb, Head, Department of Social and Developmental Psychology, University of Cambridge concerning sections 5.2 and 5.3 (young witnesses).

All messages have been anonymised. RIs were contacted for permission to refer to messages they posted. We are very grateful for their comments and all the assistance they provided in bringing this report together.

The report has been reviewed by the Ministry of Justice and NSPCC, the NPIA, the CPS and the Association of Chief Police Officers.

Note from the Ministry of Justice

The Witness Intermediary Scheme (WIS) was created to implement the intermediary special measure introduced by the Youth Justice and Criminal Evidence Act 1999. Through the WIS, Registered Intermediaries (RIs) are made available to categories of vulnerable witness specified by the Act. An intermediary – note the lower case spelling – is a generic term used to describe someone who facilitates communication while an RI – note the use of upper case letters – is a specific term describing a professional communication specialist who has been recruited, selected and accredited by the Ministry of Justice, and whose details are recorded on the *Intermediary Register*, the WIS national database. Readers should note that use of the generic and specific terms in this document is deliberate and not presume that the terms are interchangeable.

Report structure

Questions posed and discussed by RIs in SmartSite messages have been organised into four sections:

- Tasks within the Registered Intermediary role
- Responsibilities falling outside the Registered Intermediary role
- Case management
- Facilitating communication.

Each question is followed by a summary of policy (if any) and a discussion of good practice drawing on other SmartSite responses. There is considerable overlap between issues and the reader is referred to other parts of the report where appropriate. Whenever possible, hyperlinks are provided to policies, case law, research and other parts of the report. A search facility enables the reader to check the report for specific matters of interest.

Annex A lists some resources mentioned by RIs in assessing and working with witnesses. Annex B contains an excerpt from the *Live Links Protocol*. Annex C sets out a table on alternatives to leading questions developed at the 2011 RI Continuing Professional Development seminar. Checklists of intermediary issues are provided as follows:

- Annex D focuses on the police and CPS at the interview stage;
- Annex E addresses the judiciary, advocates and CPS at the trial stage; and
- Annex F is aimed at the Witness Service.

Key messages

Messages emerging from the analysis include:

- RI tasks have extended beyond investigative interview and trial to assist other parts of the criminal justice process (e.g. at identification procedures). The potential of their contribution has also been recognised beyond their statutory remit, in family cases and for vulnerable defendants;
- a range of problems emerging at the trial stage (e.g. witnesses' inability to read their written statement) are consequences of a police failure to involve an RI at the investigative interview;
- confusion about the scope of the RI role persists among some members of the judiciary and justice system practitioners. The RI is an independent officer of the court, not an expert witness;
- RIs are sometimes excluded from a contested intermediary application. They should always be present;

- ground rules hearings establishing how the witness is to be questioned are still not held routinely, although the Criminal Procedure Rules application form requires that they take place at trial for every witness for whom an intermediary is appointed; and
- even where RI recommendations are accepted at the ground rules hearing, some advocates find it difficult or seem unwilling to adapt their questioning to ensure it is appropriate to the communication needs of the witness.

2 TASKS WITHIN THE REGISTERED INTERMEDIARY ROLE

2.1 RI advice about eligibility for the intermediary special measure

RI discussions about witness eligibility for the intermediary special measure revealed some differences in interpretation of statutory definitions and the extent to which it is appropriate for the RI to advise on eligibility. For example, did dyslexia amount to a 'significant impairment of intelligence and social functioning' and hence render the witness 'vulnerable' according to criteria in the Act?

The 'quality of evidence' test also prompted discussion about eligibility. For example, a schizophrenic witness had angry outbursts when she thought someone suggested she was lying. However, she was described by the RI as 'essentially a fairly competent communicator'. The RI was concerned that: 'Aside from a very few recommendations around questioning styles, there is not a huge role for an intermediary'.

Policy

When an intermediary special measure application is made to the court, two conditions must be satisfied (section 16, Youth Justice and Criminal Evidence Act 1999). The prosecution or defence witness must be:

- 'vulnerable': i.e. under 18[5] at the time of the hearing (section 16(1)(a)); or suffering from a mental disorder within the meaning of the Mental Health Act 1983 or otherwise has a significant impairment of intelligence and social functioning; or has a physical disability or physical disorder (section 16(2)); and
- someone falling within section 16(2) whose evidence is likely to be diminished in quality (section 16(1)(b)) in terms of completeness, coherence (ability to give answers which address the questions put to the witness and can be understood both individually and collectively) and accuracy (section 16(5)).

Intermediary assessments cover the second of these two conditions, but not the first. It is a decision for the court, not the intermediary, to decide whether the witness is 'vulnerable' within the definition of the Act. In determining whether a witness falls within section 16(1)(b), the court must consider any views expressed by the witness (section 16(4)).

The *RI Procedural Guidance Manual* (2011) explains that:

1.41 The purpose of the assessment is for the Registered Intermediary to ascertain the witness's communication abilities and needs, so that they may:

i. Indicate whether or not the witness has the ability to communicate their evidence and, if so,

[5] Amended by section 98, Coroners and Justice Act 2009, implemented on 27 June 2011.

ii. *Indicate whether the use of an Registered Intermediary is likely to improve the quality (completeness, consistency[6] and accuracy) of the witness's evidence and*

iii. *Make recommendations as to special measures to enable the best communication with the witness.*

Good practice discussion

In relation to the example above of a witness with dyslexia, RIs agreed that recommendations about use of the intermediary special measure should be based on an RI's needs-led assessment of the individual witness. Dyslexia is a specific learning disability that is neurological in origin and is often inherited. It is characterised by difficulties with accurate and / or fluent word recognition, and by poor spelling and decoding abilities. Varying in severity, it is manifested by difficulties in receptive and expressive language including phonological processing (detection or discrimination tasks involving speech sounds in words), reading, writing, spelling, handwriting and sometimes in arithmetic. Based on this example, RI observations included the following:

- the criminal justice process may understand 'dyslexia' as only affecting literacy;
- a diagnosis of dyslexia can be significant even if there are no other identified problems. However, RI assessments should be alert to the range of subtle but significant problems which often accompany dyslexia (e.g. organisational and sequencing difficulties, word storage and retrieval difficulties and issues with time);
- those with more hidden or specific learning difficulties are often missed, and may not at first glance appear as vulnerable as someone with generalised learning difficulties;
- younger people with considerable dyslexic difficulties may have a Statement of Special Education Needs; and
- the RI report should explain the impact of dyslexia on the witness's ability to understand and respond to questioning. It should also address the implications for the way the statement is taken, memory refreshing, taking the oath and referring to documents at trial.

In relation to the witness with schizophrenia (also discussed above), RIs saw the need to avoid the witness having outbursts of temper as a legitimate intermediary role, because ability to communicate and 'social functioning' can fluctuate according to mental state and the environment in which the witness finds herself. Such a witness would have difficulty processing questions and expressing herself adequately if she became irate. The RI role includes helping the witness to remain calm, so as to be able to communicate effectively and give best evidence.

[6] Section 16(1)(b) uses the term 'coherence' – see page 8 above.

2.2 Advice about whether the witness should be interviewed or questioned at court

An RI described an assessment of a young man with Fragile X Syndrome[7] and autism whom he concluded would have been unable to be cross-examined at court, even with an RI's assistance. An attempted police interview failed. This led to a discussion about the extent to which RIs should advise against a police interview or proceeding to trial. RIs also queried whether they should write a report if it seemed unlikely that the case would go to court.

Good practice discussion

Based on the assessment, the RI must advise on the witness's ability to provide complete, coherent and accurate communication (section 16(5) Youth Justice and Criminal Evidence Act, 1999), facilitated if necessary by an intermediary. The RI's views feed into decisions made by the police and CPS about whether to proceed to interview and trial. RIs reported that police officers often 'give the interview a try' even following an unpromising RI assessment, and sometimes the interview goes better than anticipated. Attempted interviews could be worthwhile even if ultimately the witness could not give evidence at court because information may be obtained which assisted in identifying other leads or protecting the witness in question.

Even if the interviewing officer indicates that the case is unlikely to go to court, RIs generally concluded that it was useful to submit a report while information was fresh, even if it was only an interim report which could be expanded later if necessary. It was felt that a report would inform CPS decision-making, along side all other factors to be taken into consideration.

2.3 Advice about the presence of a third party in the investigative interview

An RI assessed a 12 year-old with learning difficulties but the girl was too anxious and unsettled to go ahead at interview. The RI felt that the presence of her mother in the interview suite had affected her behaviour and anxiety level. The RI queried whether it was appropriate to raise the question of the mother's presence before the second interview.

Good practice discussion

Provided the recommendation relates to the witness's communication needs, RIs may advise the police about who should be in the interview suite, for example whether someone is needed to provide emotional support for the witness or simply whether there would be too many people in the room. A social worker, for example, could observe the interview from the monitor room.

Some RIs routinely assess a young child's ability to separate from a parent or carer as part of the initial assessment, and make recommendations about enabling separation for interview or trial.

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[7] Fragile X Syndrome is the most common known cause of inherited learning disabilities. It can cause a wide range of difficulties with learning, as well as social, language, attentional, emotional, and behavioural problems.

Table 1: New tasks for Registered Intermediaries

In addition to assessing witnesses and assisting their communication at interview and trial, Registered Intermediaries have facilitated communication: • at suspect identification procedures • during experts' assessment of a witness on behalf of both prosecution and defence • while the witness and police officer were filmed taking the route from the witness's home to the scene of the crime • during familiarisation/ preparation of the witness for court by a supporter • when the witness's memory was refreshed • with defendants at trial and when a defendant was interviewed by a probation officer • when the witness is informed about the trial outcome.

2.4 Whether the RI should attend a second attempted interview

An RI assessed an adult witness with very limited communication. She concluded that he would be able to give a basic statement, restricted significantly by limited comprehension and only being able to point in response to a maximum of two pictures. She and the police officer planned a short list of questions to ask the witness that fitted the RI's recommendations for the interview. On the day of the interview his condition was significantly worse and he was unable to point at all. The interview was cancelled. The RI thought that the witness's abilities fluctuated with no apparent pattern. She was located a long way from the witness and queried whether (for practical reasons) her presence was necessary at any further attempt at an interview, as the list of questions had already been planned.

Good practice discussion

The RI needed to attend any further attempt to interview the witness.

RI suggestions about further advice in this situation included:

- exploring fully, if this had not been done already, any possible causes underlying the fluctuation in the witness's abilities and if not yet done, to defer the second interview attempt until this was completed; and
- a discussion between the police, RI and CPS (possibly at an early special measures meeting) about the implications of such fluctuations on the ability of the witness to give evidence at court.

2.5 RI access to the witness's written or DVD statement

An RI was asked to assess a 14 year-old witness with learning difficulties who had previously made a written statement without RI involvement. The RI wanted to see the statement to add depth to her assessment of the witness and assist the witness in memory refreshing (see section 2.10). She was told by the CPS that access to the statement was against national policy.

Policy

There is no police or CPS guidance preventing an RI from having access to the witness's statement. However, RIs must be confident that they are able to facilitate communication based on their own direct involvement with the witness, therefore they should not see the witness's DVD or statement until after their assessment. Seeing the statement may enable the RI to make additional observations about how the witness coped with complex questions, with a long interview, or with particular vocabulary that might be useful for questioners at court to know about in advance.

2.6 Advice about modifying eyewitness identification procedures

In the standard identification process governed by Code D of the Police and Criminal Evidence Act 1984, the witness looks at a line-up in which 12 images[8], including that of the suspect, are shown individually in sequence. They are asked not to make any decision as to whether the person they saw is on the set of images until they have seen the whole set at least twice. RIs queried whether it is possible to modify these procedures in order to accommodate the needs of a vulnerable witness.

Policy

Any departure from standard identification procedures must be justified on a case-by-case basis. The RI must explain:

- what it is about the witness's vulnerability that makes the standard procedures inappropriate; and
- what steps can be taken to ensure that modified procedures remained fair to the accused (this should be discussed with the CPS).

Achieving Best Evidence (Annex J, Identification Parades involving Vulnerable and/ or Intimidated Witnesses, 2011) permits some flexibility to accommodate the needs of the witness:

J.1 … Officers responsible for identification procedures should consider measures to accommodate the needs of the witness but must take care to ensure that the procedure remains fair to the accused.

[8] Computer systems are used to compile moving video images from a standardised database of clips; in certain circumstances still images can be used.

J.2 The assessment of the witness's ability is relevant. Explanations to the witness about the purpose of the identification procedure and the wording of instructions during the procedure itself should be considered ahead of time and tailored to the witness's level of understanding.

J.3 If the witness has particular communication difficulties, or requires an interpreter, someone who can communicate with the witness must attend. If the witness does not recognise numbers, consideration should be given to the use of symbols to distinguish participants. The symbols must not have any special meaning for the witness. The best evidence is a verbal identification, but if the witness is unable or is likely to be unable to speak, they should be advised that it is acceptable to point. If the witness wears spectacles or contact lenses or uses a hearing aid, these must be worn or used at the identification procedure.

Good practice discussion

An RI appointed for a witness with brain damage suggested familiarising the witness with the identification task by looking at a screen to select from a series of non-evidential pictures. In this instance, the police thought a change to the standard process was not possible. However, in other cases some RIs were able to suggest alternative approaches to accommodate witness needs. Good practice included reading PACE procedures beforehand and making the intermediary declaration at the start of the process. Suggestions for a modified approach included:

- checking that the witness could count, to enable them to identify/ label the appropriate image;
- asking if the witness could write the identification rather than say it aloud;
- explaining the witness's communication needs to the identification officer, who is not involved in the investigation and is unfamiliar with the witness;
- the RI and officer agreeing how the officer's instructions (which must be made in a standard way) could be simplified, broken down into shorter chunks, slowed in pace and that the RI could intervene and re-phrase if needed;
- using cue cards prepared by the RI ('I recognise this person' and 'I do not recognise this person'); and
- prior to the start, the RI and officer spending time explaining the process to the witness informally and checking understanding.

Other cases involving identification issues included the following:

- photos which were in black and white (and which should have been in colour) caused problems for the witness;
- the witness could read numbers but he had trouble waiting until he had seen all the images before speaking. Everything he said was noted down. He also wrote words down (his speech was very unclear) and these were shown to the camera, read out and kept for the record.

There were three different suspects, requiring three different image sets. It was very lengthy and tiring for the witness and breaks were necessary after each set; and

- at the end of the police interview, while the interpreter and RI were still present and available to assist, a disabled witness was offered the possibility of identifying his attackers through photo IDs on a laptop. (This can only be done if the witness confirms during the interview that he believes he would be able to recognise the assailant again.) This saved the witness attending a separate identification procedure[9].

Research suggests a way to improve children's accuracy in identification exercises[10]. A comparison of children's involvement in simultaneous line-ups (where photographs are all shown at the same time) and sequential line-ups (where they are shown one at a time) found that:

- children's performance is better with simultaneous compared to sequential line-ups—a pattern inverse to what is found with adults;
- children of all ages are more likely to make a false identification when the target is absent; and
- with children's 'choosing bias' in mind, researchers modified the standard simultaneous line-up so that children could 'choose' if the target was absent by selecting a photograph with a question mark superimposed over a silhouetted figure (a 'wild card'). The addition of the wild card significantly increased children's accuracy in line-ups where the target was not present, without affecting their performance in line-ups where the target was present.

2.7 Attending an early special measures meeting or other case conference

RIs were sometimes asked to attend meetings with the police and CPS, for example where prosecution counsel wanted to meet a five year-old witness and to explain to the family what would happen during the trial. RIs asked whether they were permitted to attend such meetings and, if they did, whether this might be seen as partisan and meant they could later find themselves being called as a witness.

Policy

RIs may attend meetings with the police and CPS to help plan how vulnerable witnesses can give their best evidence (see *Early special measures discussions with the police* (2010)). RIs should

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[9] See presentation at RI Conference, NPIA, 4.9.2009 'Working with a communication disorder and foreign language issues (Teamwork between RI, Police Officer and Interpreter)'.

[10] J. Dickinson (2010) Children's eyewitness identification accuracy. *The Advocate. Special Issue: Child Witnesses in the 21st century*, *33*, 6-8, American Psychological Association: quoting R. Zajac and A. Karageorge (2009) *The wildcard: A simple technique for improving children's target-absent line-up performance.* Applied Cognitive Psychology, 23, 358-368).

keep their own note of what happens. They must make clear that they are not expert witnesses[11] or be drawn into discussions, for example, about whether the witness is telling the truth or whether the prosecution should go ahead. The RI is not part of the 'team' in that sense. The meeting is disclosable to the defence. RIs may also be asked to support communication when prosecutors and defence advocates speak directly to witnesses before the trial (see *Special measures meetings between the Crown Prosecution Service and witnesses: practice guidance* (2009) and *Pre-trial witness interviews: code of practice* (2008)).

2.8 Requests to disclose a report provided by another professional source

With written consent from the mother of a teenage witness, an RI requested information from the family GP, who provided a recent speech and language therapy report. The CPS asked for this report in response to a defence request. The RI asked for guidance about disclosure as she had been unable to contact the author of the report.

Good practice discussion

In this case, the RI had to hand over the speech and language therapist's report because the judge ordered it to be disclosed. In these circumstances, the CPS should take reasonable steps to notify the author, offering an opportunity to comment. Failing this, the RI should first consider seeking consent from the person to whom the report relates or in the case of a child, the person with parental responsibility for the child. It is also good practice to inform the author of the report. RIs should follow the government guidance *Information Sharing: Guidance for practitioners and managers* (2009).

2.9 Presence in the courtroom at a contested intermediary application

On occasion, RIs were told they were not allowed into the courtroom or were asked to wait outside during a contested intermediary special measures application, despite asking if they could attend and answer any queries or concerns.[12]

Policy

RIs are expected to attend a contested hearing and their exclusion may be due to the mistaken assumption that the RI is a witness or to a lack of awareness of the RI's role as an independent officer of the court. The *RI Procedural Guidance Manual* (2011) states as follows:

1.73 ... If there is an indication that the application will be opposed then the Registered Intermediary should be asked to attend the application hearing which may be the PCMH in order to assist the court in reaching its decision. The Registered Intermediary should not be excluded from the hearing but should instead be involved and where appropriate asked to

[11] Part 33, Criminal Procedure Rules 2010 covers expert evidence including the expert's duty to the court.

[12] See also *2010 City Law School RI Survey*.

explain further their findings and recommendations. There is no need for a Registered Intermediary to attend an unopposed application. Guidance for the judiciary on the JSB Intranet states: 'If the application is contested then the Registered Intermediary should be asked to attend court in order to assist the court with any queries. As such, the Registered Intermediary must be in the hearing. The contested oral application should not take place in their absence'.

Special Measures Guidance from the Professional Practice Committee of the Bar Council includes the following advice to advocates, which RIs may find helpful to quote:

It should be recognised that the Intermediary is exercising an expertise when assessing the witness's needs. Counsel does not normally possess any such expertise and should not take it upon themselves to decide what the communication needs are of any of their potentially vulnerable witnesses, and in particular, children.

Good practice discussion

Excluding the RI from a contested application jeopardised the ability of the court to make an informed decision; aspects of the RI's report and recommendations often required clarification depending on the nature of the challenge to the application. The *2010 City Law School RI Survey* suggested that if RIs suspect that they have been excluded from the courtroom due to a misunderstanding of their role, they should 'speak to the court usher and get a message to the judge that they are there, they are not a witness but an adviser to the court and wish to be in court to assist in the hearing of the application to use the RI'.

2.10 Assisting the witness in memory refreshing (what if witnesses cannot read their written statement?)

RIs identified problems relating to memory-refreshing. It was not routine practice in some parts of the country. Another common difficulty arose where police officers missed indications at interview that a witness was an unsuitable candidate to make a written statement. Subsequent RI assessments often revealed that the witness did not have the understanding or vocabulary to have made written statements as worded (e.g. where the statement described 'digital penetration'). It was impossible to refresh witness memory by asking these witnesses to simply read their statements. In a number of examples, once the problem was brought to the attention of the prosecution, the case did not proceed.[13] RIs discussed what their responsibilities were in these circumstances.

[13] For example, the responses of an elderly man whose only clear words were 'yes' and 'no' were interpreted at interview by his carer who said the witness had no receptive language difficulties. The RI's assessment revealed significant receptive difficulties.

Policy

All witnesses are entitled to refresh their memory before giving evidence. *Achieving Best Evidence* (2011) sets out procedures to be followed:

4.48 Witnesses are entitled to see a copy of their statement before giving evidence (this is included in the Witness Charter). Where the investigative interview of the witness has been video-recorded, the recording is often used to refresh the witness's memory before the trial – the equivalent of reading the statement beforehand. Viewing the video ahead of time in more informal surroundings helps some witnesses familiarise themselves with seeing their own image on the screen and makes it more likely that they will concentrate on the task of giving evidence. The arranging of memory refreshment for child witnesses is one of the items on the PCMH questionnaire. For further information from case law relevant to memory refreshment see R v B [2011] Crim.L.R. 233 and R v R [2010] EWCA Crim 2469.

4.49 It is CPS policy that a video-recorded interview may be shown to the witness before the trial for the purpose of refreshing memory unless the video has been ruled inadmissible. If such a ruling is made, the court will need to give guidance at the PCMH or pre-trial hearing on an acceptable alternative method of refreshing the witness's memory. Decisions about admissibility should be made in sufficient time to allow other steps to be taken. If the witness is to give live evidence-in-chief, the prosecutor should consider seeking a ruling on whether it is appropriate to allow the witness to see the video before evidence is given. Supporters should be informed promptly about any decisions on video admissibility and editing.

4.50 The issues involved in planning for refreshment of a witness's memory will be raised at the PCMH by the legal representatives. If memory refreshment is to proceed, the hearing will allow a decision to be made as to how the vulnerable witness should be supported during the process, and the implications for the supporter's role in any subsequent trial. A decision can be reached about the person who is best placed to support the witness while their memory is refreshed. Consideration will need to be given to any competing requirements for the witness supporter during the remainder of the criminal justice process.

4.51 It is the responsibility of the police to arrange for prosecution witnesses to read their statements or view video-recorded interviews. They should consult the prosecution about where this should take place and who should be present, and keep a record of anything said at the viewing. In exceptional cases, such as those involving very young children or children with learning disabilities, the prosecutor should consider whether a video-recording should be made when the witness refreshes their memory from the video-recorded interview.

4.52 Witnesses need to receive appropriate explanations about the purpose of watching the video before the trial, and their views about this must be taken into account. Sometimes videos will be edited for legal reasons, for example if the video contains irrelevant material or

inadmissible matters of fact or law. Witnesses need to be alerted to any editing so that they will not be surprised, suspicious or confused when the recording does not match precisely their recollection of the interview.

4.53 The time interval between showing the video for the purpose of refreshment and actually giving evidence should take account of the witness's needs and concentration span. Minimising delay should be balanced against the difficulty experienced by some witnesses in concentrating through two viewings on the same day. Many child witnesses may prefer to watch the video at least a day before the trial to help prepare them and reduce the stress of giving evidence on the day. The CPS recommends that the first viewing of the video-recording should not be on the morning of the trial, in order to avoid the child having to view the recording twice in one day. If the witness loses concentration or becomes distressed during the viewing, a break will be necessary.

Good practice discussion

Even if their presence is not required at memory refreshing, RIs should consider what arrangements are needed to ensure that the witness's communication needs, concentration span etc. are addressed. RI suggestions to help the witness cope with watching a DVD statement included:

- allowing the witness pause and stop the DVD;
- planning breaks, and if the whole interview (or sequence of interviews) was particularly lengthy, showing it in segments over more than one day;
- not showing the rapport phase of the interview;
- showing only the version edited for court; and
- conducting refreshing at a place where the witness is comfortable (if necessary using a police portable DVD player).

When asking a witness to make a written statement, police officers should be alert to the fact that people may not volunteer that they have literacy difficulties. Where assessments reveal difficulties with written statements, RIs should bring this to the attention of the police / CPS, even if it results in doubt being cast on the credibility of the statement. The RI should also address the implications of the witness's difficulty in reading the statement for memory-refreshing:

- a man with moderate learning difficulties had attended a special school. On assessment, the RI found that he had been too proud to admit he could not read the written statement he had signed. The RI recommended that he be re-interviewed on DVD and the CPS agreed. The case went to trial with use of an RI;
- the RI's assessment revealed that a woman could read only single, short, printed words and a few hand-written ones. The CPS and police accepted the RI's recommendations that the

witness's written statement be reprinted double-spaced in larger font; that a supplementary statement, hand-written by the police officer, be typed; and that the RI read through these statements with the witness for memory refreshing in the presence of the officer; and

- two witnesses were too anxious to retain information if their statements had been read to them on the day of trial. The RI saw them a week before trial to read through their statements. A police officer was present and noted words that were explained or simplified by the RI and any additional comments made by the witnesses. The RI thought this process helped witness confidence in giving evidence but observed that in both cases the statements were 'obviously not their own words'.

In a case where the police proposed making a statement to condense a lengthy DVD interview, the RI and police officer agreed that the RI would review the statement for vocabulary, grammar and phrasing and suggest any amendments. Then the officer, witness and RI would read through the statement together so that the victim could confirm that what she read was what she meant to say. In the event this was not needed as an edited DVD was then prepared in addition to the statement.

2.11 Filming the memory-refreshing process

An RI noted that, following practice with a four year-old described in *R v Barker* [2010], one police area apparently decided to film all children under the age of seven when viewing the DVD of their investigative interview for memory refreshing purposes. The RI had been involved with two separate trials, each with a four-year old witness, where this was directed. She was worried about the impact of this on young children and observed that it was 'quite a challenge to help explain the rationale'. This practice has continued in a number of areas, specifically with very young children and children with learning disabilities.

Policy

Achieving Best Evidence (2011) explains that witnesses are entitled to an explanation about memory refreshing:

4.52 *Witnesses need to receive appropriate explanations about the purpose of watching the video before the trial, and their views about this must be taken into account…*

The guidance also explains that visually recording the memory-refreshing process should take place only in exceptional circumstances:

4.51 *It is the responsibility of the police to arrange for prosecution witnesses to read their statements or view video-recorded interviews. They should consult the prosecution about where this should take place and who should be present, and keep a record of anything said at the viewing. In exceptional cases, such as those involving very young children or children with learning*

disabilities, the prosecutor should consider whether a video-recording should be made when the witness refreshes their memory from the video-recorded interview.

This guidance is not meant to be prescriptive, and does not include situations in which the child is likely to be distressed or consent to film the process is not forthcoming. Where it appears that prosecutors are making decisions about filming a child without considering whether it is necessary or desirable to do so, RIs are requested to contact Kevin Smith, NPIA at Kev.Smith@npia.pnn.police.uk.

2.12 Memory refreshing for a re-trial

A trial concerned two offences committed a few hours apart by the defendant. At the interview (without an RI) the interviewer's questions jumped back and forward between the two events. The defendant was acquitted on the first count, but there was a hung jury on the second count. A retrial was ordered. The young witness, who had developmental and behavioural problems, had little sense of time. The RI was concerned that the witness would be confused by cross-examination if she watched her DVD evidence about both alleged offences and was then only asked about one. The RI asked for advice about how to assist the witness focus on the offence in question at the re-trial. In the end, because it was impossible to edit out the offence not being proceeded with, the decision was taken not to go forward with the re-trial.

Good practice discussion

It was open to the prosecution to discard the DVD as evidence in chief, with the witness giving live evidence-in-chief, assisted by an RI if approved, just in relation to the second incident (subject of course to the victim's views).

2.13 Sharing information with the Witness Service

The Witness Service role in supporting witnesses includes providing information about the court process, facilitating familiarisation visits, arranging alternative access to the building and separate waiting facilities, escorting witnesses and, in many courts, accompanying witnesses in the live link room and in court. RIs routinely worked alongside Witness Service managers and volunteers and saw the benefits of being able to share certain witness information with them: However, this needed to be done in a controlled way. One RI reported that the supporter allocated to the witness had read through the recommendations (it was unclear whether the whole report had been disclosed). In contrast, in the case of a young witness with Asperger's Syndrome, the RI prepared a short summary outlining ways in which supporters from social services and the Witness Service could maximise the witness's understanding and avoid confusions at the court familiarisation visit. RIs asked for confirmation that there was approval for passing on information and asked for confirmation that the witness's consent is required for passing it on.

RIs also wanted mechanisms for exchange of local feedback between RIs and the Witness Service and vice versa, and were keen to raise awareness of the intermediary special measure through contributing to Witness Service training.

Policy

The *RI Procedural Guidance Manual* (2011) states that:

1.81 The Registered Intermediary is not a witness supporter; however, they may learn things about the witness (e. g., personal care issues) which impact on their experience at court and the Registered Intermediary should convey these things to the Witness Service, and CPS or defence solicitors, so that they can make suitable arrangements. It would also be appropriate to explain the witness's difficulties to the Witness Service, and the witness or their guardian should be told of this occurring.

Good practice discussion

RI reports are addressed to those who will question the witness. However, RIs are advised in training that if they become aware of anything which would impact on the witness's welfare at court (timetabling, food, personal care and hygiene, etc.) they must notify the Witness Service. They have done this by:

- giving a bullet-point summary of information relevant to support of the witness to the Witness Service manager before the trial, to help supporters prepare for the witness's particular needs (e.g. role play, see section 2.14) having first obtained permission from the witness or person with parental responsibility;
- helping plan the content of the witness's familiarisation visit to the court, tailoring this to the needs of the witness and alerting the Witness Service to anything that the witness may find distressing;
- letting the Witness Service manager know about the purpose and timing of the ground rules hearing (it may be useful for the manager to attend);
- discussing arrangements for supporting the witness in the waiting room (RI practice varies as to whether they wait with the witness, see section 2.15); or
- adapting written material provided by the Witness Service to make the information accessible by individual witnesses (see Annex A, Resources).

RIs often commented on the quality of assistance provided by court-based Witness Service supporters (e.g. 'All the volunteers took great pride in their job. All were willing to learn and interested in what our role was. The manager led a positive, skilled, superb team' and 'It was a vital part of the team work that led to the witness successfully giving his evidence that that the supporter was made aware of his needs') but they also reported several negative experiences, arising principally through supporters' lack of knowledge of the RI role (e.g. saying, in front of the witness,

that the RI could not go into the live link room as this 'was the supporter's job').[14] The Witness Service issued new Service Delivery Operating Instructions for all staff effective July 2011. These explain about the intermediary role; the importance of '*working in partnership to best meet the needs of the witness*'; and distinguish the responsibilities of the supporter and the intermediary.

RIs suggested that Registered Intermediary Reference Team (RIRT) members[15] should collect Witness Service case studies at Regional Support Groups, to illustrate what works well and what problems have arisen. The Witness Service welcomed this opportunity to exchange information. It has circulated a presentation about the RI scheme to Witness Service volunteers; requested routine feedback from staff around the country about their experiences with RIs; and will include this feedback as a standing agenda item at its national meetings with regional representatives, which the Ministry of Justice is invited to attend.[16]

2.14 Familiarising the witness with the 'rules' about questioning

RIs asked for advice in respect of:

- cross-examination role play on non-evidential subjects;
- who has responsibility for this aspect of witness preparation; and
- documenting role play activities for the party calling the witness.

Policy

Role play cross-examination on non-evidential subjects All witnesses in criminal trials are entitled to understand the 'rules' of cross-examination (e.g. that it is okay to say 'I don't understand' or 'That isn't true'). This must be distinguished from witness training or coaching which is not permitted: see the Court of Appeal decision in *R v Momodou* (2005) paras. 61 – 64. The Court of Appeal emphasised that:

> *Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques.*

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[14] In the *2010 City Law School RI Survey*, the vast majority of RIs described their experience of the Witness Service as either excellent or good. The survey provides examples of good and bad experiences.

[15] The RIRT is the stakeholder consultation group that represents the RI community to the Ministry of Justice in the development, management and governance of the Witness Intermediary Service. It provides the MoJ with feedback, acts as a review and consultative body for the MoJ or end-users and assists in recruitment campaigns, sitting as members of sift and interview panels.

[16] Professor Penny Cooper, author of the *2010 City Law School RI Survey*, called for a feedback mechanism to be established between RIs and the Witness Service.

The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process.

National Standards for Child Witness Preparation (*Achieving Best Evidence* Annex K, 2011) encourages the use of non-evidential role play:

K.3 … Helping the child witness to understand the court process and their role in it. This will include discussion of the roles of the participants in the case, the importance of telling their truth and the nature of cross-examination. Question and answer role play on non-evidential subjects is likely to help the young witness understand the rules for answering questions at court.

Guidance on acceptable preparation for cross-examination is provided in *Preparing Young Witnesses for Court: a handbook for young witness supporters* (NSPCC, 1998).[17] The handbook provides authority for the use of question and answer role play exercises tailored to the child's needs to prepare them for cross-examination. Pages 23-24 include a section on *'Dealing with leading questions: the child should feel able to contradict a questioner who suggests something that is not true'* and goes on to suggest ways in which this might be practised which do not relate in any way to the child's evidence. Page 24 describes teaching techniques to help children improve their recall by asking about a non-evidential real event and being prompted to provide more information by 'who', 'where', and 'what' prompt cards.

The study *Evaluation of young witness support* (2007) gives examples of role play used by an NSPCC young witness support scheme which had developed written question and answer scripts for the purpose of transparency.[18] These included questions for children which *'tested their ability to respond to ambiguous or confusing propositions but did not touch on the evidence, for instance:*

"Can I suggest that when you last visited McDonalds you ate three chocolate muffins?"
"Last week, did you help your mother/ father/ carer wash the dishes on Monday and on Wednesday?"
"Do you wash the dishes with chocolate sauce or do you use furniture polish?"
The supporter used topic cards as a follow-up to the questioning exercises. Examples include Last birthday; Your favourite TV programme; and A place you have been. The young witness picks a card and then chooses a topic to talk about. Once the young witness has told the supporter about it, and then expanded on the details using who, what, where, talking and feeling prompt cards, the supporter asks the witness questions about what was said. She records the topic the young person talked about in her case files.'

[17] J. Plotnikoff and R. Woolfson. Part of the *Young Witness Pack* series and approved by the senior judiciary, relevant government departments, Criminal Bar Association and Law Society.

[18] J. Plotnikoff and R. Woolfson, page 43.

Whose responsibility? The Witness Service (or other designated supporter) has responsibility for witness preparation for court. RIs have become involved in this process to facilitate communication between the witness and supporter and advise the supporter about how best to deliver the familiarisation programme, at the witness's pace and taking account of the witness's communication needs. The RI's involvement is likely to inform the RI's advice to the court (for example, about choice of the live link).

While preparation is the supporter's role, *Evaluation of young witness support* (page 43, 2007 op. cit.) showed that supporters may not be trained to use role play as part of preparation, so RIs may have to advise and work with supporters when role play is appropriate.

RIs reported different types of involvement in witness preparation for cross-examination:

- using a pre-prepared sequence of non-evidential questions during live link practice sessions with children, with a court official (someone who was comfortable with the link and in speaking to vulnerable witnesses) at the other end of the live link. This person was briefed not to help the witness when asking questions. Practising was also important for witnesses relying heavily on non-verbal communication, for whom role play questions should prompt gesture or facial expression;
- challenging an adult witness with mental health problems who had difficulty in controlling her temper when contradicted (e.g. 'What did you have for breakfast?' 'Toast.' 'I put it to you that you had eggs for breakfast.'); and
- suggesting ways in which non-evidential questioning could be practised with a supporter (or, in the case of a defendant, with the defence solicitor), but not getting directly involved.

Documenting preparation activities Where preparation involves role play about the rules of questioning at court (such as it is alright to say 'I don't understand'), it is good practice for those involved to observe the following principles:

- put the programme in writing (for the CPS, or defence if this involves a defence witness or a defendant) and keeping a record of all those present;
- ensure that the material bears no similarity to issues in the trial; and
- advise the witness that there must be no discussion of the evidence. If the witness begins to do so, stop, make a note of what is said, and notify the party calling the witness.

2.15 Waiting with the witness at court

RIs discussed whether it was appropriate for them to be in the waiting room with the witness at court before the witness gives evidence.

Good practice discussion

There is no rule about whether RIs should wait with a witness or not. They may do so provided they are escorted at all times.[19] This is at the RI's discretion and depends on the needs of the witness and the circumstances, for example whether the RI needs to establish or re-establish rapport, facilitate communication or 'tune into' the witness's communication needs or to assist others to keep a witness calm. RIs were cautious about doing anything that might be thought to jeopardise their own impartiality. They stressed the importance of making advocates and police aware they should not be left alone with a witness.

Practice among individual RIs differed as to whether they routinely stayed in the waiting room with the witness:

- some 'touched base' with the Witness Service on arrival at court to ensure that they knew of the individual's particular needs and difficulties; greeted the witness and introduced them to the advocates; but explained that the RI would not wait with them; and
- others waited with the witness provided a Witness Service or other supporter stayed with them. These RIs saw this as particularly important if the supporter would have difficulty communicating with the witness without the RI's help. They often took activities with them to occupy the witness.

Case study 1: Making the most of delay at trial

The first trial was abandoned because a young boy became so distressed he could not give evidence. He was described as 'almost phobic' about court. At the second trial the child, his father, the Witness Service volunteer and the RI waited in the live link room for almost three hours. They played games, read comics and talked about anything but the trial. The RI said: 'This turned out to be a great way for him to relax in the room and gain confidence, almost as if it was his territory. It also meant I could get to know him better and get more practice with his communication needs.'

2.16 Assisting the witness to make a victim personal statement

Following a guilty verdict, an RI was asked to help a seven year-old witness 'be meaningfully involved' in producing a victim personal statement. The RI queried whether this was part of the role and if so, how best to go about it – whether it should be written or visually recorded.

[19] 1.22 The Registered Intermediary must not be left alone with the witness at any point… *RI Procedural Guidance Manual* (2011).

Policy

A victim personal statement[20] may be taken following the investigative interview or after conviction but before sentencing. Facilitating the taking of such a statement (either written or visually recorded) is part of the RI role and they are entitled to payment if this is requested. There is no rule about making the intermediary oath or affirmation in these circumstances but it is advisable to do so.

Good practice discussion

Some RIs reported experience with victim personal statements:

- questions to be addressed in the statement include how the victim felt at the time of the offence; how he or she feels now; and any changes to the victim's life arising from the offence;
- the task requires advance planning. Some victims have difficulty responding to abstract questions around feelings, changes over time and effects on them of the offence; and
- it may be necessary first to establish the victim's understanding of emotions by using communication aids to ask 'How would you feel if…', to demonstrate appropriate indication of feelings and understanding of what the communication aids represent.

2.17 Avoiding report references that could lead to tracing the witness

A police officer wanted to see the RI's report before it was sent to the CPS so that the officer could 'amend it' in case the RI had included anything which might locate the witness.

Policy

No-one else is entitled to edit the RI's report, which should generally identify sources of information. However, in the case of a prosecution witness the RI should consider whether any details could be used to locate the witness thus increasing the potential for intimidation. The *RI Procedural Guidance Manual* (2011) states that:

2.28 *… [The RI's report] should also make reference to other information that the Registered Intermediary has relied on for their assessment.... If information in the report comes from other sources, the report should make it clear what the information is and who it comes from.*

2.29 *… the Registered Intermediary's court report is attached to the application for special measures and that these are served on the defence. The Registered Intermediary 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, 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.*

[20] Section 2.215, *Achieving Best Evidence* (2011).

Good practice discussion

Some RIs avoid naming schools or nurseries, foster carers or individual professional sources. Questions about what should be omitted from an RI report in a specific case should be directed to the police officer in charge of the case or the CPS. Some RIs always submit the electronic version of their report in PDF format, which preserves layout as well as preventing changes.

2.18 Passing on concerns about safeguarding the witness

Following advice from the NPIA, an RI passed on concerns to social services about the welfare of a young witness where the defendant was returning home to live next door to her after the trial resulted in an acquittal.

Policy

In response to such cases, the *RI Procedural Guidance Manual* (2011) now states as follows:

1.105 There may be occasions when a Registered Intermediary wishes to share concerns about a vulnerable witness because s/he thinks that the vulnerable witness may be at risk of significant harm, for instance if they were to return to their home environment or if they did not get access to necessary support services.

1.106 The Registered Intermediary who is considering sharing 'safeguarding' concerns with a relevant agency/ agencies, such as social services or the police, should consult the guidance 'Information Sharing - Guidance for Practitioners and Managers' (Oct 2008), the link to which is as follows:

http://www.dcsf.gov.uk/everychildmatters/strategy/deliveringservices1/informationsharing/informationsharing/.

1.107 If the Registered Intermediary decides to share 'safeguarding' concerns they should make the relevant agency/ies aware of their concerns verbally and follow this up in writing. If the Registered Intermediary requires advice regarding a policing matter they can call the NPIA Specialist Operations Centre.

1.108 The Registered Intermediary should keep a clear record of what they have done (including if s/he decides not to share information) and the reasons why.

1.109 For more general information about the safeguarding of children see:

http://www.education.gov.uk and for general information about the safeguarding of vulnerable adults see: http://www.dh.gov.uk.

2.19 Passing on information disclosed by the witness

During a break in testimony, an adult witness with epilepsy and learning difficulties who was giving evidence about a sexual offence, suddenly said to the supporter and the RI, 'I've been raped before you know, I never told my mum'. At that point, cross-examination was about to resume. The

RI told the witness not to say any more at that point, to finish cross-examination and then deal with it. The RI was unsure if she had a duty to tell the police officer or prosecution advocate or whether to encourage the witness to tell the police officer herself as she was an adult.

Good practice

Before the jury returns, an RI in this position should ask the judge for a short adjournment to inform the prosecution advocate that the witness has said something during the break. The prosecutor has responsibility to pass this information to the defence advocate.

2.20 Assisting a witness at a civil trial

An RI was asked to assess a man with a brain injury, who planned to give evidence at a civil trial to determine the extent to which he was liable for his injury.

Policy

The intermediary special measure was created through the Youth Justice and Criminal Evidence Act 1999. There is no equivalent covering the civil courts: a Request-for-Service for an RI would therefore be rejected by the National Policing Improvement Agency. It is up to the discretion of the judge to allow an intermediary to be used in a civil trial. Intermediaries approached directly are not able to class themselves as RIs accredited through the Witness Intermediary Scheme. Intermediaries are responsible for making their own arrangements for payment of such work.

2.21 Assisting a witness in a family case

RIs asked for advice about appointment for a child or a vulnerable parent in family proceedings and the content of their report when so appointed.

Policy

The Ministry of Justice will provide an RI only where there is a direct link to a criminal case in which the witness is involved and where one has already been provided through the Witness Intermediary Scheme. This is justified on the basis of continuity of care for the witness who already has rapport with the RI. Even in these circumstances, assistance will only be provided where the RI used in the criminal case is available and where doing so does not impact upon the availability of intermediaries for others covered by the legislative provisions.

Good practice discussion

Unless the family court requests or orders that the report must address specific topics, then intermediaries should adopt the same structure and similar content (including the confidentiality declaration) as for a criminal court. Most family advocates and judges do not work in the criminal jurisdiction and are unfamiliar with intermediaries. It is therefore important to describe the role, the responsibility to facilitate complete, coherent and accurate communication (section 16(5) Youth Justice and Criminal Evidence Act, 1999) and the duty to the court. Intermediaries may refer to their statutory role in the criminal courts and the professional code of conduct but must make clear

that they have no statutory role in family proceedings, where they are appointed by a judge using his or her inherent jurisdiction.

A few RIs have had their report for the criminal trial disclosed to family proceedings. There is no law or procedure specifically covering 'ownership' or sharing of the RI report. As witnesses are the owner of information about them, they (or the person with parental responsibility) should be asked for consent to disclosure of the report beyond the purpose for which it was prepared. The RI should as author should be consulted as a matter of good practice. Even where the report may be disclosed (by court order or because it is deemed in the public interest) without the witness's consent, the witness should be informed. See government guidance: *Information Sharing: Guidance for practitioners and managers* (2009).

2.22 Suggesting coordination of concurrent family and criminal proceedings

An RI assisted at the investigative interview of a three-year-old who was also the subject of family proceedings. The RI asked how these criminal and care proceedings could best be managed.

Policy

Where there are concurrent linked criminal and care cases, the RI may suggest a joint directions hearing. CPS policy states that:

> *joint case management direction hearings may be considered useful where there are concurrent criminal and family proceedings and issues arise as to disclosure of information or mutually convenient timetabling* (Introduction, *Safeguarding Children as Victims and Witnesses*, 2009).[21]

2.23 Intermediaries for vulnerable defendants

RIs have sought clarification about the circumstances and process by which an intermediary can be appointed for a vulnerable defendant, as this is not covered by current legislation. A number of judges have exercised their inherent discretion to appoint an intermediary, not only to facilitate the defendant's evidence but also to explain proceedings throughout the trial.

Policy

C v Sevenoaks Youth Court[22] held that, since the special measures legislation did not cover defendants, the court could use its inherent jurisdiction to ensure a fair trial to make a direction for the defendant's communication to be assisted by an intermediary. In *R v Walls* [2009], Lord Justice Thomas noted that 'There are available to those with learning disabilities in this age, facilities that can assist. Consideration can now be given to the use of an intermediary under the court's inherent powers as described in the *Sevenoaks* case, pending the bringing into force of s.33BA (3) and (4)

[21] For an example, see the *Manchester Joint Directions Hearings Protocol*.

[22] [2009] EWHC 3088 (Admin), [2010] 1 All ER 73.

of the Youth and Criminal Evidence Act 1999 (added by section 104, Coroners and Justice Act 2009).' This amendment when implemented will enable the court to appoint an intermediary to assist certain vulnerable defendants but only when giving their oral evidence at trial.

HM Courts and Tribunals Service court managers and relevant staff have been provided with guidance on the provision of intermediaries. The guidance in respect of vulnerable defendants sets out the legislative position and explains that:

- where the judiciary uses its inherent powers to grant an application for an intermediary on behalf of a defendant, arrangements are to be made for the appointment of an intermediary;
- the court cannot order the appointment of a Registered Intermediary;
- the Witness Intermediary Scheme (WIS) matching service (managed by the National Policing Improvement Agency on behalf of the Ministry of Justice) is only resourced to provide RIs in accordance with section 29, Youth Justice and Criminal Evidence Act 1999 i.e. on behalf of vulnerable witnesses; and
- the WIS does not have resources to support requests for an RI for the duration of a defendant's trial, i.e. in excess of the defendant's oral evidence. In these circumstances the Ministry of Justice and the NPIA recommend use of a non-registered intermediary.

The Ministry of Justice has advised that[23]:

- if RIs are approached to act as an independent professional (i.e. as a non-registered) intermediary, the court remains responsible for the costs of that intermediary for the trial stage;
- the solicitor is responsible for sourcing the non-registered intermediary and the guidance also includes details of the various professional organisations from which non-registered intermediaries may be sought, based on the professions from which the majority of RIs are drawn; and
- if RIs receive requests from defence solicitors on this subject, they should be redirected to the local court involved for it to deal with in accordance with the guidance provided to its staff.

[23] For more information, see *Registered Intermediaries and non-registered intermediaries for vulnerable defendants and vulnerable defence and prosecution witnesses* RIO message posted by Jason Connolly, Ministry of Justice (6.7.11).

3 RESPONSIBILITIES FALLING OUTSIDE OF THE REGISTERED INTERMEDIARY ROLE

3.1 The intermediary is not a witness

Several RIs reported being asked to give evidence or otherwise being treated as a witness. Examples included:

- being asked to attend a hearing to determine the competency of a five year-old witness. The RI explained that she was not an expert witness and could not comment on competency but could suggest strategies associated with language that could be used to fix time;
- Witness Care Units attempting to summons as a witness RIs carrying out their statutory responsibilities;
- being asked to sign an MG11 witness statement form to accompany their report; and
- being asked to sign a witness statement when the witness retracted her statement in the RI's presence.

Policy

An intermediary is an independent officer of the court, not a witness, therefore no witness statement is required to accompany the report. The *RI Procedural Guidance Manual* (2011) explains that:

1.65 *The report is a 'free-standing document'. It is not an exhibit and the Registered Intermediary is not a witness: this may need to be explained when officers ask the Registered Intermediary to make a witness statement on an MG11 in which they exhibit the report. The answer to that is that it is not necessary.*

The Manual requires standard language to be included in the RI's full court report (page 34): *My role as a Registered Intermediary 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.*

Good practice discussion

In limited circumstances, an RI may have no option but to give a witness statement, but first it is worth informing the NPIA about the request and explaining to the police officer or CPS that an RI statement should be avoided if possible:

- is a statement from the RI essential?
- were there others present who can equally give an account of what happened?
- does the prosecution need to adduce the RI's evidence (e.g. of the retraction) or is it likely to be an agreed fact that it happened?

An RI called as a witness of fact would have two distinctly different and conflicting roles. This could lead to a challenge to the RI role and a request for another RI, causing delay or derailing the proceedings. If an RI is, in the end, required to give a witness statement or to give evidence (e.g. at a *voir dire*[24] before trial), consideration must be given to appointment of another RI.
RIs are required to 'keep full records of their involvement throughout the process' (section 1.22, *RI Procedural Guidance Manual* (2011)) and should therefore keep a note of what happened if the witness retracts the statement (as in the circumstances described above, where the RI was present when the witness retracted her statement).

Where an RI was required to provide a witness statement describing what she did in the course of the trial for the purpose of an appeal, she was entitled to payment at RI rates in the usual way.

3.2 The intermediary is not a supporter (or an alternative for a supporter)

An RI reported that the CPS made a late special measures application just before trial for an RI and a named supporter for the witness.[25] The prosecution advocate declined the RI's offer to attend the application hearing. The judge deferred the final decision until the day of trial, saying that the application would be granted either for the RI or a named supporter.

Policy

The RI and supporter have distinct and separate roles and one cannot be a replacement for the other. The *RI Procedural Guidance Manual* (2011) emphasises that:

1.81 The Registered Intermediary is not a witness supporter…

Achieving Best Evidence (2011) explains the role of the court witness supporter as follows:

5.34 The presence of a court witness supporter is designed to provide emotional support and helps reduce the witness's anxiety and stress and contributes to the witness's ability to give their best evidence. A court witness supporter can be anyone known to the witness who is not a party to the proceedings and has no detailed knowledge of the evidence in the case. If evidence is to be given by live link an application for a supporter should be made to the court at the same time as the live link application. If it is proposed that a supporter sit near the witness in court, it is a matter for the judge to determine who should accompany the witness. The Consolidated Criminal Practice Direction, Part III.29 makes it clear that this person does

[24] A 'trial within a trial'. This happens when the defence challenges the admissibility of some prosecution evidence, either because it was obtained improperly or because it would adversely affect the fairness of the trial. The *voir dire* takes place in front of the judge without a jury.

[25] Section 102, Coroners and Justice Act 2009 (amending section 24, Youth Justice and Criminal Evidence Act 1999) came into force on 27.6.11.This allows the court to direct that a specified person accompany a witness giving evidence by live link. In determining who may accompany the witness, the court must have regard to the wishes of the witness: http://www.legislation.gov.uk/ukpga/2009/25/section/102.

not need to be an usher or other court official. The identity of this person should be discussed and agreed if possible in advance of the Special Measures application and certainly as part of the preparation for trial. See Chapter 4 and Annex L for further information about the court witness supporter.

3.3 Capacity to consent: the need for an expert witness

RIs were occasionally asked to take on the role of an expert witness, for example being asked to comment on the witness's capacity to consent to a police interview or to sexual activity. In one referral, the police officer asked for the appointment of an RI with the skill to assess the witness's capacity to consent.

Policy

The RI cannot act as an expert witness on behalf of either the prosecution or defence and also be an independent non-partisan intermediary with sole responsibility to the court. RIs advise only on whether they can facilitate complete, coherent and accurate communication (section 16(5) Youth Justice and Criminal Evidence Act, 1999).

Matters of capacity to consent, competence and credibility are all beyond the RI remit.

Capacity to consent to a police interview RIs who conclude that the witness does not have capacity to consent to a police interview may suggest that an expert assessment be conducted in accordance with the Mental Capacity Act (2005) to determine whether decisions ought to be taken in the best interests of the witness.[26] Commenting on capacity in this way is not in conflict with the RI role because:

- the RI's view relates to investigative procedure, not evidence of the alleged offence; and
- the RI is not stating an opinion about capacity, merely that (as a professional with experience in communicating with people in a similar condition) the witness might not fully understand the nature of the decision and that an expert assessment should therefore be conducted in accordance with the Mental Capacity Act to determine the issue.

The Mental Capacity Act does not apply to those under 18: an expert opinion may be obtained as to whether a child can consent and if not, whether it is in their best interests to be interviewed if someone consents on their behalf.

Capacity to consent to sexual activity If the question concerns witness capacity to consent to sexual activity (e.g. so that the prosecution can proceed with a charge of rape) this is also beyond the RI's remit, even if the RI is qualified to do so. An expert witness must assess capacity to consent to sexual activity.

[26] Police officers seeking guidance on what to do in these circumstances should contact Kev.Smith@npia.pnn.police.uk.

Good practice discussion

In respect of the witness's capacity to consent to assessment or interview, RIs occasionally reported feeling under considerable police pressure to proceed with assessment and / or interview of a child or vulnerable adult where it was apparent to the RI that the witness did not wish to participate (e.g. 'She was literally being pushed into the office to see me. She was making it clear that she did not want to answer questions and was becoming increasingly distressed'). One RI responded: 'There has to be some trust built between the police, witness and RI in order to achieve "best evidence". However, it is not our job to sort this out for the police'. Another RI noted in respect of children that they should be offered a genuine choice about whether to be interviewed; they should be able to leave the interview room easily; and where the child is anxious, the interviewer and RI should sit to the child's side and not directly in front.

3.4 Competence: the need for an expert witness (distinguishing the need for another RI with different skills)

(See section 2.1) After an RI's involvement at interview, she informed the CPS that, due to the complex mental health needs of the witness, a psychiatrist as an expert witness was needed to advise whether the witness would manage the pressure of going to court. (The witness had been diagnosed with Stockholm Syndrome[27] and therefore did not want to give evidence against the defendant.) The RI did not feel able to facilitate best evidence in these circumstances and in any case as the communication skills of the witness were 'OK'.

Policy

The general rule is that all people, whatever their age, are competent to act as witnesses. A lack of competence is an inability to understand questions or to give answers which can be understood with, if necessary, the assistance of special measures (sections 53–55, Youth Justice and Criminal Evidence Act, 1999).[28] However, the witness need not understand every question or give a readily understood answer to every question. If competence is in question, it must be addressed by an expert witness, not the RI.

If the question of competence to give evidence arises *before* the investigative interview, the RI may proceed with assessment and the interview before an assessment of competence by an expert witness because delay[29] might have an impact on the witness's memory and, in some cases, emotional condition, and because the witness may not actually disclose anything amounting to an offence. In these circumstances, an assessment of competence before the interview might be said to amount to a waste of public money. However, if the question arises *after* the witness has already

[27] Where hostages express empathy for their captors, sometimes to the point of defending them.

[28] The burden of proof lies with the party seeking to call the witness to give evidence and is on the balance of probabilities.

[29] RI experience suggests that these expert assessments often take months.

given a statement, the expert's assessment of witness competence should take place before the RI's pre-trial assessment.

Good practice discussion

The situation of the witness with Stockholm Syndrome was so complex that it justified appointment of an expert witness. However, RIs observed that there may be some circumstances where it is appropriate to seek appointment of another RI with a mental health specialism, rather than an expert witness, as RIs are expected to advise on the witness's ability to communicate their evidence and whether this would be improved by the assistance of an intermediary. The *RI Procedural Guidance Manual* (2011) states that:

1.43 If the Registered Intermediary 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 Registered Intermediary may be sought.

1.42 Note that the Registered Intermediary is not assessing a witness as they would in their professional roles but purely to see if the witness would be able to give evidence at a police interview and at court.

3.5 The intermediary cannot advise about legal decisions

Cases in which this arose include the following:

- the CPS asked for the RI's view about whether a witness with mental health problems would be able to give evidence-in-chief over the link or whether the prosecution should rely on the DVD interview; whether the questioning at interview had been appropriate; and whether there were any concerns about the witness's credibility[30]; and
- the witness interview, made without an RI, resulted in a six-hour DVD. Following the RI's assessment, the police asked the RI's opinion about condensing the DVD into a composite written statement. Following advice, the RI declined to express a view about the form in which evidence should be presented at trial. However, bearing in mind the witness's attention, medical and learning issues, the RI recommended that the witness watch, rather than read, her evidence to refresh her memory.

Policy

Whether or not the DVD interview is used as evidence-in-chief, or whether it should be edited, is for the prosecution team to decide. The RI should not comment on these matters, witness credibility or the appropriateness of the interviewing officer's questions.

[30] The question of pre-judging the reliability of the evidence of a witness with mental health issues was dealt with in R_(B)_v_DPP_(2009).

Good practice discussion

The decision about how the witness's evidence is presented to the court is for the party calling the witness. However, *before* the witness statement is taken, RIs have advised about the circumstances and surroundings in which the witness will be able to give their best evidence (including the possibility of using portable DVD equipment to take the statement in a location more suitable for the witness). Where possible, the consequences of making a visually recorded or written statement should be explained to the witness, who has a choice about how to proceed. In a case where an adult witness opted to make a written statement following an explanation of the pros and cons, an RI commented: 'I've been involved with other adults with acute anxiety and have seen how the stress of giving evidence has been increased by the need to go to the police station or video suite. In addition, when they have realised subsequently that the defendant would see the video in court this has further increased their anxiety. In contrast, the giving of a statement at the witness's home was striking'.

4 CASE MANAGEMENT

4.1 Arranging the intermediary's assessment of the witness

Difficulties encountered by RIs in relation to witness assessments included:

- incorrect advice about who was an appropriate third party to accompany the RI and witness. (In one instance, the proposed escort was someone who was a witness; in another, the CPS told the police that the interviewing officer could not attend the assessment);
- lack of assistance to set up the assessment where the request for RI appointment came from the CPS; and
- identifying what constituted a suitable location for the assessment.

Policy

The *RI Procedural Guidance Manual* (2011) emphasises that:

1.22 The Registered Intermediary must not be left alone with the witness at any point…

Where the assessment takes place *before* the investigative interview, the responsible third party accompanying the RI and witness should be the interviewing officer. If the third party accompanying the RI is not a police officer, the identity of the escort should be discussed with the officer in charge of the case. The person must not be a potential witness. The *RI Procedural Guidance Manual* (2011) states that:

1.45 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 person who is able to observe the meeting and if needed 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. The interaction of the Registered Intermediary and the witness can be extremely valuable for the interviewing officer to observe.

1.46 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, citizen advocate or other volunteer advocate. The primary role of a witness supporter is to provide emotional support to the witness. The Registered Intermediary 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.

Good practice discussion

Even when the CPS or Witness Care Unit[31] request the appointment of an intermediary, it remains the responsibility of the police officer in charge of the case to arrange for the RI's assessment of the witness and for the responsible third party to be present. The RI may need to ask the CPS for the name and contact details of the officer.

RIs conducted assessments in a wide range of locations, not just in the witness's home or on police premises. In at least one instance it took place at a Witness Care Unit. However, it was preferable to find somewhere familiar where the witness felt safe and as much at ease as possible. RIs identified some advantages to assessing a child in school, as it could be a useful opportunity to talk to staff members to build up a picture of the child's communication strengths and challenges (e.g. behaviour, attention, literacy, best times of day, social interaction, etc.). Further, one RI warned that a witness may present very differently in an unfamiliar or stressful environment: a child seen by this RI was able to sit and attend to an assessment at school, but at the police station his attention levels were very poor, his communication skills were reduced and he was unable to participate in the interview. Potential advantages and disadvantages of the choice of location must take into account the needs of the individual witness.

Even where the assessment has to take place on the same day as the interview, there should be enough time between them for the witness to have a proper break and for the RI and interviewing officer to discuss ways to obtain 'best evidence' and agree ground rules for the RI's role (e.g. how does the officer want the RI to indicate a potential communication difficulty and when this should be done).

Case study 2: Failing to take account of the RI's limited availability

The only witness (other than the complainant) to a serious sexual offence was an adult with Down's Syndrome and epilepsy. The intermediary application was granted before a trial which was then adjourned for six months. The re-scheduled trial was listed for Monday to Wednesday and the RI was told that the witness's evidence would be taken on the Tuesday. The RI gave an early indication that she would not be available on the Thursday and Friday. Due to extended legal arguments, the witness's testimony was deferred to Thursday. The RI reminded the Witness Care Unit that she had already indicated she was not available. The judge then ruled, after discussion with the prosecution, that they would proceed without an intermediary but that he would follow her recommendations closely. There was no time to appoint another RI as the complainant's mental health was delicate and time was of the essence. Ultimately, the defendant was found not guilty at the judge's direction.

[31] A Witness Care Unit (WCU) may fill in the form applying for an RI appointment but the request has to be formally made by the CPS which pays for it. The WCU may act as the contact point for the RI.

4.2 Consent for the intermediary to access third party information

RIs sometimes experienced difficulty in obtaining consent from the witness or carer to access third party information about the witness, for example where the assessment and interview had to be held at short notice or the person with parental responsibility for a child was the suspect.

Policy

Consent must be obtained to include information from third party sources in RI reports. Primary responsibility for doing so lies with the police.

The *RI Procedural Guidance Manual* (2011) confirms that the police should assist RIs on matters of consent to obtain third party information:

1.23a …The police are used to obtaining consent from witnesses to obtain copies of reports, and it would be good practice for the police to obtain consent from the witness which would allow the Registered Intermediary in due course to have sight of any relevant reports about the witness and also to speak, for example, to teachers and doctors who know the witness.

The *RI Procedural Guidance Manual* continues:

1.40 The officer should have already obtained consent from the witness and / or their parent or guardian for the Registered Intermediary to make any necessary enquiries (e.g., teachers, doctors, specialists) and for relevant reports to be provided. If this has not been done then the Registered Intermediary will need to obtain that consent as he/ she should inform the witness and / or their parent or guardian that these third party reports may be referred to in their court report which will subsequently be seen by the prosecution and disclosed to the defence. Sample consent forms are available for Registered Intermediaries to download from the Registered Intermediary On-line forum.

While consent to release information is always preferable, it may be possible to obtain information without consent if it is considered in the public interest. RIs who negotiated access to third party information for themselves have found it helpful to quote from the Government's 'golden rules for information sharing' set out at page 11, *Information Sharing: Guidance for practitioners and managers* (2009):

- the Data Protection Act is not a barrier to sharing information but provides a framework to ensure that personal information about living persons is shared appropriately…
- share with consent where appropriate and, where possible, respect the wishes of those who do not consent to share confidential information. You may still share information without consent if, in your judgement, that lack of consent can be overridden in the public interest. You will need to base your judgement on the facts of the case.

Good practice discussion

When information is needed urgently (particularly from the NHS) RIs suggested that, once written consent has been obtained, it is helpful to call, speak to the professionals concerned, explain the short notice and fax the consent form.

When RIs seek information from a school, it was seen as advisable to explain the RI's role but to avoid going into the allegations. It is not necessary for the police officer to have told the school about the investigation first. Ultimately it is for those with parental responsibility to give information about the investigation to the school if they think it is in the child's best interests for the school to know more.

Table 2: Checklist of items for discussion at the ground rules hearing

*Required subjects (*Part 29 of the Criminal Procedure Rules 2010 Application for a Special Measures Direction)

- how questions should be put to help the witness understand them
- how the proposed intermediary will alert the court if the witness has not understood, or needs a break

Other possible subjects

- what the judge will explain to the jury about the role of the RI
- whether the judge will give the jury information about the witness's communication difficulties
- where the RI will make the intermediary declaration (in court or from live link room)
- how intermediary interventions will be managed (e.g. giving the advocate one opportunity to re-phrase the question, then asking the intermediary to do this)
- whether the prosecutor intends to ask any supplementary questions in examination-in-chief[32] requiring discussion with the RI
- the use of leading/ tag questions
- is judicial decision needed re limitations on 'putting the case' to the witness as in *Barker* [2010]
- use of communication aids. Are these to be explained to the jury (if so, by whom)
- does the RI need to identify/ create aids to support a specific line of questions
- confirmation of final arrangements for timetabling all of the witness's evidence and breaks (brief, in live link room without jury recess or for longer periods)
- monitoring any increase in witness's anxiety level and how this is to be addressed
- whether evidence (e.g. photos or papers) to be shown to the witness in the live link room, and if so, who will assist the witness with this.

[32] Restrictions on doing this have been relaxed through section 27(5)(b), Youth Justice and Criminal Evidence Act 1999 amended by section 103(2), Coroners and Justice Act 2009. The advocate will require leave of the court only where the matter had already been dealt with in interview, the criterion being that that it would be in the interests of justice to permit the additional questions.

4.3 Timing of the compulsory ground rules hearing

RIs invariably commented that their interventions at trial were minimized where report recommendations were discussed and ground rules were agreed beforehand and carried through. In some cases, the ground rules hearing (attended by the trial judge, prosecution and defence advocates and the intermediary) was held in advance of the day of the witness's testimony, allowing advocates to plan any proposed adaptations of questioning. In contrast, RIs described the frequency of problems arising where no ground rules hearing was held, or because it was only cursory or scheduled at the last minute, or because advocates had difficulty adhering to agreed ground rules. One example involved a ground rules hearing delayed until the morning of trial at which the judge declined to agree to any specific mode of intervention by the RI. Following a few RI interventions in cross-examination questions, the judge directed the RI not to speak while the defence was asking questions. In chambers later with both counsel present, the judge asked the RI only to say 'I would like to raise a point'. The judge would then decide what to do, and if necessary clear the court for it to be discussed.

Policy

Ground rules hearings (including establishing how the RI will intervene) are not yet held routinely, even though they are now compulsory in intermediary trials.[33] Part 29 of the Criminal Procedure Rules 2010 (Application for a Special Measures Direction) requires that:

F.1 …'Ground rules' for questioning must be discussed between the court, the advocates and the intermediary before the witness gives evidence, to establish (a) how questions should be put to help the witness understand them, and (b) how the proposed intermediary will alert the court if the witness has not understood, or needs a break.

Where no ground rules hearing has been scheduled, RIs often attend trial ready to quote authorities on the requirement to hold one. However, it is preferable for the ground rules meeting not to take place at the last minute, as this gives advocates little time to modify their questions in light of the discussion and adds to witness waiting time. A QC has stressed to RIs that an advocate's proper preparation for questioning cannot take place if ground rules are not discussed until just before the witness's testimony.[34] She encouraged RIs to contact advocates directly in advance of trial to discuss their recommendations.[35]

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[33] The *2010 City Law School RI survey* identified a slight increase in the number of ground rules hearings held: 61%, up from 42% in 2009.

[34] Johanna Cutts QC, speaking at the RI Continuing Professional Development Day, 9 February 2011.

[35] For barrister contact details, see: http://www.legalhub.co.uk/legalhub/app/main?rs=BOL1.0&vr=1.0&ndd=2&bctocguid=Ide6206400caa11d9b720e55d2b60bfda&ststate=S&ao=o.Id6e745f002c711db85b9d734e660a063.

A reminder about the requirement to schedule the ground rules hearing should be made as early as possible: in the RI report, through the CPS and if necessary through contact with the court (the listing office schedules all hearings). Many RIs stressed the need for persistence: in one instance, the RI reported that it took over 40 phone calls, emails and letters to ensure that the ground rules hearing was held.

Case study 3: Problems arising through poor case management and no ground rules hearing

The RI was asked to assess a witness with learning difficulties. He was a serving prisoner who had committed serious sexual offences when he was 17, and had been in custody for 18 years. The RI assisted at his interview during which the witness disclosed an account of historical sexual abuse by the person who had acted as appropriate adult at the witness's trial. The application for use of an RI was agreed only at trial 20 months after the interview. There was no ground rules hearing. The RI noted the following problems:

- the RI was unable to arrange to see the witness again at prison to see if his needs had changed since he was first assessed and to explain her role at trial
- her request for a familiarisation visit to court for the witness was refused, even though he revealed during assessment and interview that 'he had not known what was going on at his trial' 18 years previously. He was allowed to look around the courtroom for less than a minute before the start of his evidence. He was worried by the large plasma screens, thinking this was something to do with the press
- the prosecution decided to take the witness through the 42-page transcript of the interview as his evidence-in-chief, even though the RI's report explained that the witness had reading difficulties. A last-minute arrangement was made to let the RI read it to him in the cells and she took that opportunity to outline her role
- the start of witness testimony was further delayed while there was a discussion about where the RI should sit and whether the witness should be handcuffed. The RI pointed out that the witness used gesture to communicate. The judge decided the witness would not be handcuffed and that the RI could sit next to him in the witness box
- soon after starting his evidence, the witness broke down and told the RI that he was unable to give evidence with the defendant looking at him. A rushed application for a screen was made and granted
- the RI had noted in her report that the witness self-harmed. This was raised with the judge at the start of the trial. The witness found cross-examination very stressful. During a break the witness was taken to the cells. He split in half a spoon given him by security officers and self-harmed. He was taken back to prison.

The defendant (the witness's appropriate adult at his own trial) was found guilty on 19 counts and sentenced to 15 years in prison.

4.4 Information for the jury

RIs raised questions about the way jurors were told about the intermediary role, their report and the witness's vulnerabilities, as judicial practice on these matters varied widely. Those who sought guidance included the following:

- an RI asked to attend court to be questioned about her report 'to help the jury understand' the witnesses' communication difficulties, after a decision not to cross-examine them
- an RI who was told her report would be read to the jury following cross-examination of the witness
- an RI who was told by the judge in chambers not to refer to her report when intervening in cross-examination questions, because the jury was unaware of the report and therefore it should not be mentioned
- an RI who did not have to give information to the jury after the judge was advised about limitations on the RI role.

Policy

Guidance about intermediaries on the Judicial College (formerly Judicial Studies Board) Intranet says:

The jury does not see the report and the intermediary should not be asked to summarise her findings for the jury. Some of the difficulties outlined in the report in fact may not arise.

The RI's report[36] deals with matters concerning the witness which are not the jury's concern. There is a risk that the report could prompt the jury to question parts of the witness's evidence based on the RI's assessment findings and report recommendations (e.g. 'The report says that the witness might have difficulty with closed questions. The witness gave a key answer to a closed question – does it mean the answer to that question is unreliable?').

Good practice discussion

The judge and advocates, in the absence of the jury (usually at the ground rules hearing), should agree what if anything needs to be explained to jurors. It is generally the judge's responsibility to explain to the jury why the RI has been appointed and the general nature of the witness's communication difficulties. There is no set form of words; it depends entirely on the difficulties experienced by the particular witness. For example, the judge may say 'Witness X has learning difficulties and the intermediary is a neutral person here to help make sure that he understands the

[36] The front sheet of the RI's report should state (page 33, *RI Procedural Guidance Manual*, 2011): 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.

questions'.[37] The RI's input is usually limited to ensuring that what the judge says is accurate and consistent with the report. Where the witness's difficulties are extreme, jurors may need more information in order to assess the witness's evidence. In some instances RIs have been asked to explain to the jury about alternative communication strategies, for example, the use of symbols and Makaton signs.

After making the RI declaration but before the witness gives evidence, RIs may be asked to explain to the jury about their role and they should be prepared to summarise their personal qualifications and training. However, the RI must avoid becoming involved in explanations to the jury about why a witness reacts in a particular way because that would take the RI into the realm of expert evidence.

4.5 Witnesses who do not watch their DVD interview at the same time as the jury

RIs sometimes recommended that witnesses should not watch their evidence-in-chief at the same time as the jury. Reasons included letting the witness watch at their own pace and accommodating frequent breaks for a witness with a short concentration span; enabling the witness to see it away from the court, in an environment where they felt safe; and reducing time spent at court, enabling the witness to start cross-examination while as fresh as possible. When this was accepted, RIs sought advice about timetabling the oath for witnesses needing to be sworn, as practice differed among judges. In one case, the RI recommended that a young adult with serious mental health problems should not wait at court for a prolonged period of time because of the increased risk of psychotic and dissociative symptoms. The judge agreed that the witness did not have to watch her evidence-in-chief at the same time as the jury, but required her to be sworn in and wait to give evidence after the interview was played. This necessitated a wait of over three hours in which the witness's mental health became worse.

Policy

There is no requirement in legislation or case law that the witness must watch their evidence-in-chief at the same time as the jury (the four year-old witness in *R v Barker* [2010] saw her video twice before trial but did not see it at the same time as the jury, see para. 14 of the judgment). A vulnerable witness, if sworn, must be sworn prior to giving oral evidence. They can take the oath immediately before cross examination, and if necessary they can be asked if they have watched the DVD and whether the contents are true.

4.6 Helping ensure 'best evidence' over the court live link (or remote link)

Almost all witnesses for whom RIs were appointed were scheduled to give evidence by live link. Sometimes witnesses who would otherwise have benefitted from this were disadvantaged by technological (particularly poor sound quality) and other problems with equipment at court, causing

[37] See the judge's address to the jury in *Serious Sexual Offences Seminar* DVD (2009, Judicial Studies Board).

delays and disruption to witness evidence. The use of live links away from the court (e.g. from the witness's home, school, nursing home or hospital) gave greater opportunities to meet witness needs but presented additional challenges. RIs exchanged views about factors to be considered in live link arrangements.

Policy

See Annex B, 'Live links responsibilities under section 24 Youth Justice and Criminal Evidence Act 1999': excerpt from *Live Links Protocol* (Office for Criminal Justice Reform, Ministry of Justice, undated).

Good practice discussion

RIs made a range of suggestions about ways in which the quality of witness evidence could be maximised over a live link within the court building or from non-court locations:

- ensure the witness tried out the live link ahead of time. Many RIs accompany the witness. One RI routinely does part of her assessment at this stage, using a pre-prepared sequence of questions unconnected to the evidence (see section 2.14);
- witnesses should understand that they can be seen as well as heard over the live link (especially important for witnesses using any non-verbal communication, which includes almost all children). This can be achieved by having the witness come into court, if the witness wishes, to practise speaking to someone in the live link room from the judge's chair;
- if the witness uses their hands/ face for communication, make sure these are clearly visible on camera. If this requires adjustment, it is preferable to move the camera (usually by tilting the TV/ camera as a unit) than to put a small witness on cushions or a higher chair;
- check what the witness will see on screen. (The picture insert of the RI and the witness in the corner of the live link screen can be distracting to the witness. One RI was able to get this removed; another brought a teatowel to cover this part of the screen. In yet another case, the RI was told that the link would only give a long distance view of counsel with part of the dock in view as well. The RI made clear that the witness must not be able to see the defendant or even his shadow);
- find out if evidence such as photos or papers will be shown to the witness in the live link room, and discuss how this will be dealt with. (A witness was asked questions referring to a large lever arch folder of written and photographic evidence. The witness had limited movement and wore glasses for reading but had to take them off to see the live link screen. He communicated by pointing to letters on an alphabet chart, which the RI then transcribed and read aloud to the court. At first the RI tried to balance the folder on the witness's lap, find the relevant page and line, ensure that he could still reach his alphabet chart, put on and take off his glasses as needed and write down what he was saying. The Witness Service

supporter was invaluable as she took over dealing with the glasses, holding the folder and locating the pages);

- find out who will accompany the witness and RI in the live link room[38];
- if the live link room is very small, discuss how the number of people can be managed. (One RI obtained agreement that the third party would stay in the room until the live link was turned on, at which point the RI and witness could be seen by the judge, so the third party then waited just outside.) If the witness is claustrophobic, ask whether it is possible to transfer to a larger live link room at the trial court or use remote link to a different court facility;
- ensure that someone will accompany the witness during the breaks, not leaving the RI and witness alone. Where this is not planned for, supporters may leave unexpectedly. (Defence counsel suggested that someone had shown the witness the evidence bundle in the live link room and 'coached' him. After that, the RI stayed in the live link room in view of the court even when the witness went out for a break accompanied by the supporter.);
- ensure the witness is prepared for last-minute changes. (In one trial, the RI and the witness were accompanied by two ushers and three Witness Service supporters and used two live link rooms);
- clarify roles and expectations with the Witness Service (see sections 2.13 and 2.14) A supporter can answer witness questions about court proceedings in general;
- ask how the witness oath is to be administered and if necessary practise this ahead of time;
- find out when and where the RI will make the intermediary declaration;
- suggest brief breaks in the live link room on camera, if this suits the witness, rather than stopping completely and having to start again;
- arrive early so as to ensure that technical issues are sorted out and to recap witness needs with court personnel. Test the position of the cameras and picture and sound quality before the court starts and ensure that the RI can be seen on screen as well as the witness;
- remind advocates that the sound of their voices fade if they look down at their notes as they begin a question. It is often only when they look up that the words become clear;
- alert the court if there is even a slight delay between the person speaking and the person receiving the signal at the other end, as this can result in counsel asking a question then asking another question immediately afterwards; and
- be prepared for delays and disruptions. If accompanying the witness, bring quiet, calming activities for the witness to do while waiting.

[38] Question C3, special measures application form.

Remote live links are addressed in questions C1 and C2 of the special measures application form. The police should arrange for the equipment and the CPS caseworker should assist with other details. The court may arrange for a court usher to attend at the remote site. Other issues specific to the use of remote live links included the following:

- advance planning of the details is vital. It is beneficial to schedule the ground rules hearing so that the RI can attend in person (when ground rules were discussed over the live link, one RI could not follow the discussion as the sound was switched off except when she was asked a question);
- additional time needs to be set aside for practising with the equipment. (An adult witness using the remote link felt disadvantaged as he had not realised he would not see the whole courtroom, in particular the jury's response to his evidence) Time is also needed to resolve technological issues. (In one case, 10 minutes was 'hardly long enough to make sure the cameras were in the right position'.) Where the witness might be frightened or fazed by 'talking to a TV', it is helpful to install the equipment a few days before the witness's evidence, allowing for more than one practice session;
- a normal-size TV screen is preferable. (When a commercial-size screen was installed in a small room, the judge appeared as twice life-size, the camera was in the wrong place and the witness and RI could only see the close-up of an ear and eye. It was overwhelming and scared the witness);
- the witness should have a choice about visiting the court if desired. (A child who wanted to use the remote link was indignant about not being allowed to see the courtroom);
- ensure who will be there to operate the equipment. This is not the RI's responsibility, though the RI may need to advise on camera positions, sound, etc.; and
- agree a method for contacting someone at the trial court in an emergency.

5 FACILITATING COMMUNICATION

5.1 Information about the alleged offence

RIs discussed the scope of information about the offence which would inform the assessment.

Good practice discussion

RIs sometimes found it necessary to stop a police officer or CPS staff member if they went into too much detail about the facts of the case. However, RIs found it useful to receive a brief overview, because it was difficult to give detailed advice about how to phrase questions if unaware of the kind of questions likely to be asked. Helpful information included:

- concepts to be addressed (e.g. time awareness)
- areas of knowledge (e.g. names for parts of the body)
- advice about topics, words, names or situations to be avoided during the assessment. For example, it was important to know whether to avoid conversation about family matters, where the alleged incident involved a family member or where a witness was recently bereaved.

5.2 Facilitating the interview of a very young witness

An increasing number of RI appointments concerned very young children.[39] RIs asked for advice about ways to approach such interviews (sometimes these followed a first interview, with or without an RI present, which did not result in disclosure of an offence). In some instances, RIs expressed concern about police pressure on children who were reluctant to talk about alleged offences.

Good practice discussion

RIs were aware that, even where very young children have previously revealed a possible offence to a trusted adult, enormous difficulties face such children in interview, including embarrassment about saying it all again to strangers in an unfamiliar setting, or understanding why their account is wanted, assuming that adults already know what happened. Some RIs had experience with children who could not or would not tell but were able to show what had happened, the issue then being whether they were able to show clearly enough in ways which were evidentially safe. It was important to discuss the approach with the CPS. However, RIs reported differences in approach as to whether prosecutors approved the use of props, especially dolls (see section 0).

RIs suggested use of the following strategies:

- cultivating a trusting relationship between the interviewer, RI and the child, to help the child feel safe. (see case study 4). This may be difficult to achieve in only one interview, especially

[39] In a 14 month period between 2009-2010, the National Policing Improvement Agency (which operates and manages the Witness Intermediary Scheme's matching service on behalf of the Ministry of Justice) matched RIs to 114 cases where the witnesses were aged 5 or under, with the youngest of being 23 months old. This equates to 7.62% of the total number (1,495) of cases matched. It is not known how many of these were involved in a trial.

if the suspect is a family member. Bearing in mind that repeated interviews may be distressing for some children asked to "relive" and discuss painful memories and experiences, it may be appropriate to plan a sequence of short interviews of less than ten minutes rather than trying to get everything covered in one session. If multiple interviews are planned, it is best to postpone any probing of substantive issues until the child seems ready. Breaks allow the RI and interviewing officer to confer. Open-ended questions in a further session may help children overcome emotional difficulties and stresses often associated with interviews about sexual abuse[40];

- suggesting that the trusted adult to whom the child has previously disclosed should explain to the child (without crossing the line into coaching) that it was important to talk to the interviewing officer;
- completing the filmed 'set up' (date, time, location, roles, intermediary declaration) before the child enters the room, so as to avoid subjecting the child to complex language at the outset;
- encouraging the interviewer to say at the beginning of the interview that they do not know what happened, especially where the child has already 'told' one or more people;
- using drawings[41], playdough or plasticene models made by the child or pipe cleaner figures made by the RI. Once the child had identified them, some RIs attached a photo of the person or (for those who could read) the name or initial to the drawing or figure. (However, it should be noted younger children in particular have difficulty with representation so this approach should be used with caution);
- giving the child ways to manage anxiety and stress (e.g. through calming play materials, controlled breathing and use of a red 'stop' card);
- reviewing the layout and furniture[42] in the interview suite (e.g. 'I did the assessment sitting and playing on the floor with her but in the ABE she was perched in a big armchair and it was not possible to sit on the floor because it could not be picked up on camera. She was a talkative child but was moving around all the time and seemed more at ease when talking to the back of the chair i.e. facing away from me and the interviewing officer but this made it difficult to pick up on the microphone'); and
- does the technology support quiet or non-verbal communication? Cameras should capture the child's expression and gesture and microphones should be located appropriately. (One child spontaneously whispered the answers to all the 'rude' questions to the RI. The RI

[40] David la Rooy, Carmit Katz, Lindsay Malloy and Michael Lamb *Do We Need to Rethink Guidance on Repeated Interviews?* Psychology, Public Policy, and Law, 2010, Vol. 16, No. 4, 373–392.

[41] It is vital that the evidence should be seen to come directly from the witness, so RIs were cautioned about themselves drawing what the child said.

[42] The Early Learning Centre has small plastic table/ chair sets which one RI carries in her car.

repeated the words and also sat near a microphone so all that the child whispered was picked up).

Children and adults with autism, and children under the age of four generally assume that everyone experiences the world as they do, and therefore see no reason to explain events. In assessment, they may consistently fail 'theory of mind' tests, predicting wrongly that an adult would know when a hidden object was moved while the adult's eyes were closed. ('Theory of mind'[43] starts to be established around three to four years of age in typically developing children.) They are likely to require help and active teaching to understand that the questioner does not know the answers to questions put to the child. Ground rules such as 'say if you don't know' and 'no guessing' should be established at the start and practised with the child.[44], Where the child has difficulty with the words, the RI may explore the use of symbols for 'I know' and 'I don't know' (see Annex A, Resources) with the caveat that younger children are likely to have difficulty with representation.

Case study 4: Helping a young child feel safe at interview

An RI was appointed for a boy of seven but with a younger developmental age. He was unable to talk about a previously disclosed offence at his first police interview. He then told his grandma that he was terrified that 'the bad man 'would come back and "get" him and his mother if he told'. Following consultation with the CPS, a second interview was planned. He was introduced to a 'big, burly, uniformed policeman' who explained in simple terms that he and all the other policemen in the town spent a lot of time out on the streets watching out for people like him and his mum to try to keep them safe. The boy was reassured that he would not get into trouble for saying anything 'rude'. At the second interview, diagrams of his house were used which the RI had drawn as he described them at his previous interview. He was able to 'tell' what happened. The diagrams were subsequently given to the CPS as exhibits.

[43] Theory of Mind' is the ability to infer other people's mental states – thoughts, desires, intentions and the ability to use this information to interpret what they say, make sense of their behaviour and predict what they will do next.

[44] For example, in front of the child, the police officer asks the RI 'What did I have for breakfast?' to help teach the child how to use the symbol cards. The RI says aloud, 'What did X [the officer] have for breakfast? I had breakfast at my house. I was not at X's house. I didn't see her eat breakfast. I don't know what she had for breakfast.' Then the RI points to the 'I don't know' symbol. It is vital to check that the child understands what the symbol cards represent and can use them appropriately.

5.3 Clarifying what a young witness means

(See Annex A, Resources) The investigative interview of a five year-old witness was conducted without an RI. Although the girl initially stated that the defendant 'put his finger in', the interviewing officer was unable to identify whether the touch was 'inside' or 'outside'. On assessment, the RI found that the witness understood these terms when placing toys inside or outside a bag but recognised this was different from the child's understanding of her own anatomy. The RI sought guidance to inform discussion at the ground rules hearing; for example, whether an anatomically accurate doll could be used. (Eventually, both advocates decided that the precise location of touch would not be pursued at trial).

Policy

Guidance on the pitfalls and advantages of using anatomically accurate dolls and other props is found at sections 3.105-122 *Achieving Best Evidence* (2011):

3.122 … In the main, anatomically accurate dolls should only be used as an adjunct to the interview to allow the child to demonstrate the meaning of terms used by them or to clarify verbal statements. Anatomically accurate dolls can be used very effectively to clarify body parts, position of bodies and so on, as can conventional dolls. However, they should only be used following verbal disclosure of a criminal offence by the child or where there is a very high suspicion that an offence has been committed which the child is unable to put into words.

Good practice discussion

Forensic linguist Anne Graffam Walker points out that:

In cases involving sexual abuse, "touch" is a word that has special significance, so it is particularly important that questioners recognize it as one of those "higher order" words that adults understand to include many kinds of contact, but that children may understand to mean one specific kind of contact with one specific kind of instrument (as with the hand). A child as old as 6 may deny being touched, but later talk about something being "put in" his mouth… The challenge is to recognize the limitations of word meanings for children, and to craft questions that get at those limitations.[45]

RIs made the following points in discussion:

- it is helpful to clarify whether the child's understanding of inside/ outside was a receptive task only (could she place toys inside/outside a bag when asked to do so) or was also expressive (having placed the item inside a bag, could she then describe where she had put it). If a child demonstrates that an item of vocabulary is stored both receptively and expressively within

[45] *Handbook on Questioning Children: A Linguistic Perspective* (1999) American Bar Association Center on Children and the Law.

their lexicon and that they are able to select and use it appropriately when explaining and describing, this may indicate a more complete understanding of the concept;

- putting and describing the position of objects are useful assessment techniques, for example, using little toys or objects that can go in, on, under, behind or next to each other;
- do not ask children to put fingers (or anything else) in their mouths;
- children may know that something went inside them, but not know that there is more than one 'inside place'; and
- do not combine the use of any prop with a leading question. The question 'Tell me everything about that' or 'Can you show me where it went?' should be used rather than 'Did it go in here?'.

Case study 5: Strategies with a witness who did not always communicate what she meant

(See also Annex A, Resources)

Before the police interview, the RI had three assessment sessions with a teenager who had learning difficulties and selective mutism. At the first rapport-building session, the witness interacted non-verbally using Makaton, her symbol book and a sophisticated gestural system in which she acted out scenarios and nodded or shook her head according to whether the RI guessed correctly what she was communicating. It also became apparent that she liked to tease by saying the exact opposite of what she meant: 'She would then laugh behind her hand and wait for your reaction'. During the second visit, the RI worked on communication of feelings. The witness understood 'happy', 'sad', 'scared' and 'angry' and could identify things and people that made her feel these emotions. The RI and witness made their own gestures and backed these up with pictures made in the session (gestures seemed more natural for her and using the symbol book seemed to distract her). They also worked on the idea of 'silly' and 'sensible' to help the witness understand that the ABE interview was not a time to be 'teasing'. The RI showed pictures using 'What's wrong?' and verb cards, sorting the pictures into piles of 'silly' and 'sensible', again represented with a face or symbol drawn in the session. They also looked at 'Things we like and things we do not like' based on activities and foods etc.

At the final session at the police interview suite, the RI and witness created a paper family and put the names of all family members written on each person to be clear who she was 'talking' about. The issue of not having vocabulary or not leading in the interview about specific body parts was resolved by the witness drawing body parts on the family members during the interview. The work on 'silly' and 'sensible' was valuable as the witness needed to be reminded a few times when, due to her embarrassment, she laughed behind her hand. Reminding her that it was time to be sensible helped her to refocus. They also used 'yes/no/don't know' cards in combination with a tick, cross or question mark when it was necessary to confirm the answer or whether she had understood. By being given these tools to communicate, the witness was able to make a clear statement. This case did not progress to trial but the girl did not return to her family.

5.4 Facilitating communication with a witness who can only answer ‘yes’ or ‘no’

An RI was asked post-interview to assess an elderly man with schizophrenia, whose only clear words were ‘yes’ and ‘no’. The RI queried whether she could introduce communication aids as he did not use them already.

Good practice discussion

There is no prohibition on RIs introducing or developing communication aids for use with witnesses who did not use them already, as long as the aids support the witness’s communication in an objective way that does not suggest one answer more than another (e.g. pictures showing a range of emotions should be balanced between happy/ sad). Suggestions for helping witnesses with very limited communication included the following:

- become as familiar as possible with the witness’s communication, which will involve spending more time than normal in assessment;
- if the witness has already indicated that a possible offence was committed, is it possible to build on the way this was communicated;
- assess understanding of the vocabulary in questions and the ability to select symbols, pictures etc. needed to disclose basic facts;
- expand questioning options by exploring ways for the witness to indicate ‘I don’t know’;
- ask the witness to listen to a question first, then repeat it, with pauses, for the witness to answer;
- ask whether the witness wants to talk about a specific person by showing a series of photos of people known to the witness and asking ‘Who do you want to talk about?’ ‘Do you want to talk about…?’;
- use gestures or pictures describing actions (e.g. punch, slap, poke, squeeze);
- develop a visual time line for a typical day in the witness’s life for questions around timing;
- offer alternative questions such as ‘Did you like that?’/ ‘Did you feel unhappy?’;
- take the evidence slowly, in chronological order and in very small steps;
- draw the questioner’s attention to body language and facial expression that is part of the witness’s communication; and
- discuss at an early stage (possibly at an early special measures meeting) with the police and CPS what steps can be put in place to assist the witness at trial and to what extent these would assist the witness to cope with the process and give best evidence.

One RI suggested that the police interviewer contact Dr Kevin Smith, NPIA (Kev.Smith@npia.pnn.police.uk) for advice on structuring interview questions for a witness who

used ‘eye pointing’ to symbols and whose answers were restricted to ‘yes’/ ‘no’ / ‘I don’t know’. The RI found this helpful in enabling her to focus on her role of facilitating communication.

5.5 Assisting a witness prone to temper outbursts

An RI sought advice about helping a witness with mental health problems who was likely to have temper outbursts if challenged or accused of lying (see section 2.1). Suggestions to facilitate her best evidence by keeping calm included:

- asking the witness and carers during the assessment about how to deal with angry outbursts;
- explaining in the RI report what type of questions might trigger an outburst and discussing this at the ground rules hearing;
- taking a break if the witness shows signs of becoming angry;
- having a known and trusted supporter in the live link room or outside the door;
- explaining to the witness about jobs at court, including the defence advocate’s responsibility to test the evidence; and
- challenging her in role play on non-evidential matters (see section 2.14).

An RI was appointed for a witness with mental health difficulties who was terrified of the trial process, including concern that people might think she was lying. A nurse was allowed to accompany her in the live link room. Although there were a few times when the RI needed to intervene to repeat or rephrase, her principal role was to monitor the witness’s mental health. The judge agreed that the RI would regularly ask the witness to rate her stress levels on a chart; alert the judge if concerns arose; and ask for a break when necessary to avoid the witness self-harming.

5.6 Assisting an inaudible witness

Several RIs reported audibility problems with adult witnesses but these concerns were most common in relation to children who whisper. This may relate only to specific words (hearing ‘rude words’ repeated by a grown up may be enough to make them okay to say), or the location (e.g. a child who whispers in the live link room at trial even though able to speak out in the police interview suite). Where key passages of the interview transcript were marked as inaudible or inaccurately transcribed, RIs have assisted with production of an amended transcript.

Good practice discussion

Audibility should be addressed before the interview/ trial to consider whether repetition or other steps may be necessary. Strategies employed by RIs included:

- explaining that the RI will repeat otherwise inaudible witness answers provided the RI is confident about what was said. The RI will say nothing if unsure and will not change pronunciation, grammar or intonation;

- telling the witness: ‘You can whisper to me and I will tell X what you whisper. And this microphone will listen to you too, and then your whispering will be heard on the film/ in the courtroom’;
- encouraging the witness to correct the RI if the RI makes an error in repeating back what the witness says e.g. through pointing to a prompt card ‘That’s wrong’;
- practising with live link equipment at the pre-trial familiarisation visit, to assess whether audibility may be a problem. (A child spoke over the live link to an usher pretending to be a judge, while another member of the court staff unobtrusively played with the sound level and position of the microphone to pick up her voice, which became louder as she got used to talking to ‘Judge Jim’);
- sitting close to a wall microphone, re-locating the live link microphone closer to the witness (this may require placing padding, like a small piece of foam or a mouse mat, under the microphone to reduce vibration noise if the witness fidgets) or using a radio/ lapel microphone;
- providing safe ways to show rather than just tell[46];
- asking the judge to speak briefly to the child about a non-evidential matter to help the child feel more confident; and
- recommending that whispering is ‘played down’ to remove pressure from the child and requesting parents, police etc. not to talk about it.

When RIs are asked to review the transcript of an investigative interview, they found it helpful to receive this electronically and to use the ‘track changes’ function when editing. Transcribers may not refer to non-verbal communication, so it is important for the RI to describe (without interpretation) any gesture from the witness (e.g. ‘child puts finger in mouth’).

Case study 6: RI interventions and judicial decisions

This example comes from the cross-examination of a seven year-old who had given an account of the rape of her five year-old sister on the bottom bunk bed while she was on the top bunk:

Q: ‘When you say you saw this happening, it was night-time, wasn’t it?’ (tagged question; rephrase requested by the RI; judge agreed)

Q: ‘Was it daytime or night time?’

A: ‘A little bit day a little bit night’

Q: ‘Well was it light or dark outside?’

[46] See *Achieving Best Evidence* (2011) E.3.3 … *age-appropriate play materials should be provided to settle the child and possibly to assist communication (see section 3, paragraphs 3.103 to 3.122 for more on using props, figures, dolls or drawings)*.

A: ‘Dark’

Q: ‘Was there a light on in the room?’

A: ‘No’

Q: ‘I put it to you that because of the absence of light in the room, it was not possible for you to have seen what you say you saw, was it?’ (long and complex question; rephrase requested; judge agreed)

Q: ‘I put it to you that you did not see X doing any of those things, did you?’ (negative and tagged question; rephrase requested; judge agreed)

Q: ‘Did you see X doing those things?’

A: ‘X was doing those things. I did know’

Q: ‘But if as you say it was dark outside, and if as you say there was no light on in the room, it would not have been possible for you to see what was happening on the bottom bunk, would it?’ (judge tells the advocate to ask one question at a time)

Q: ‘If it was dark, you could not see what X was doing, could you?’ (negative tagged question, rephrase requested, judge agreed)

Q: ‘How did you know what x was doing?’

A: ‘Well, X was doing the willy in the private thing to her, so the bunk beds were going like this’ (child shows with hands, up and down and side to side). Jigging’

Q: ‘Jiggling?’

A: ‘Jigging. Her bed was jigging so my bed was jigging’.

The trial resulted in a conviction.

5.7 Recommending avoidance of leading questions, including ‘tag’ questions

RIs reported that some judges and advocates adopted their report recommendations about the avoidance of leading and tag questions following discussion at the ground rules hearing, with cross-examination running smoothly and the RI making few or no interventions. Others reported their recommendations being accepted in principle but advocates finding it difficult to implement them.[47] A few reported being told by the judge that the cross-examiner is ‘entitled’ to ask leading questions, involving in one example a five year-old witness. Where a judge gave permission for ‘simple’ tag questions to be asked, the RI suggested that the tag should not combine both a positive and negative statement and should remain positive in both parts, as negatives cause

[47] The *2010 City Law School RI survey* found that avoiding leading questions was recommended in around 3/4 of RI trials. Half of the RIs surveyed said that this recommendation had always been agreed by the judge. However, only two out of 25 RIs reported that everyone abided by the ground rule. When it was contravened, RIs usually had to point this out before the judge corrected the advocate. A few said the judge sometimes allowed the leading question even after the RI had pointed it out. The survey report concluded: ‘A “Ground Rules are made to be broken” attitude may be prevalent amongst cross-examining counsel and if so it undermines the purpose of the Ground Rules hearing. The survey suggests that generally judges could be more proactive in enforcing the Ground Rules that they have put in place’.

comprehension problems. The judge then stated that if he or the RI was concerned that the witness had not understood the tag question, then it must be put again without the tag.

RIs sought guidance on how to frame recommendations to the court about the need to avoid leading questions where their assessment indicates that such questions may produce unreliable responses from the witness.

Policy

The criminal trial is an adversarial process in which advocates aim to put their case to the other side's witness and to undermine his or her evidence. This is done through asking leading questions in cross-examination which suggest (to a prosecution witness) the defendant's version of events. However, there is no absolute right to ask leading questions. The judiciary and advocates have responsibilities to enable the best evidence of which the witness is capable[48] and it is the intermediary's duty to draw the court's attention to questions likely to lead to misunderstanding. *Achieving Best Evidence* (2011) states that:

5.11 *The responsibilities of judges and magistrates also extend to the prevention of improper or inappropriate questioning… An advocate may be asked to rephrase a question if it is in a form or manner likely to lead to misunderstanding on the part of the witness… Judges and magistrates should be alert to the possibility that a witness might be experiencing difficulty in understanding a question which, if not corrected, might lead to the giving of evidence that is not of the best quality that the witness could provide. Where an intermediary is used, their report will contain recommendations about what types of questions are likely to lead to misunderstanding on the part of the witness.*

5.17 *…The manner in which the legal representative cross-examines a witness must not be improper or inappropriate… This may involve taking account of information about a witness's special needs. Both the legal representative calling the witness to give evidence-in-chief and the legal representative cross-examining the witness should strive to avoid being the cause of a misunderstanding as a result of which the witness gives evidence that is not of the best quality that they could provide… The strategies necessary to avoid… a misunderstanding may include, for example, avoiding the use of a tone of voice which is intended only to sound firm but which might be intimidating to a vulnerable witness, and following a systematic and logical sequence of questioning.*

[48] In *R v Barker* para 42, the Court of Appeal said that young witness evidence should be placed on the same level as that of all other witnesses but the advocate's forensic techniques, in particular relating to cross-examination, have to be adapted *'to enable the child to give the best evidence of which he or she is capable'* while ensuring the defendant's right to a fair trial. When the issue is whether the child is lying or mistaken, the advocate should ask *'short, simple'* questions which put the essential elements of the defendant's case, and *'fully to ventilate before the jury'* evidence bearing on the child's credibility.

B.9.32 *…The use of an intermediary does not reduce the responsibility of the judge or magistrates, or of the legal representative, to ensure that the questions put to a witness are proper and appropriate to the level of understanding of the witness.*

The 'quality of evidence' test (section 16(5) Youth Justice and Criminal Evidence Act, 1999 used in deciding whether special measures, including an intermediary, should be granted) encompasses 'completeness, coherence and accuracy'.

In recommending ways to maximise accuracy, it is unhelpful for RIs to simply recommend that leading questions be avoided. Drawing on their assessment, RIs should provide examples of the types of questions that seemed problematic for the individual witness. Examples are essential because some types of problematic question are not recognised as such by questioners.[49] Where possible, RIs should suggest appropriate alternatives (see section 5.8) and should also alert the court to the possibility that the witness may go along with suggestive questions and provide unreliable answers through a wish to please.[50]

Tag questions Policy restricting use of tag questions (combining a negative and a positive, such as 'He didn't do it, did he?') focuses on young witnesses, though principles may also apply to certain vulnerable adults where assessment indicates difficulties with this question form. The Judicial College discourages putting tag questions to children and suggests questions be put more directly (*Fairness in Courts and Tribunals,* 2010, Chapter 5, Children and young people):

> *'Tag' questions e.g. "He didn't touch you (with his willy) did he?" take at least seven stages of reasoning to answer[51] and should be avoided with children. Children need more time to process questions (for younger children, almost twice as much). A more direct question should therefore be put to the child e.g. 'Did he touch you?' 'How did he touch you?' However, rather than use the term "he", it is better that the name of the alleged perpetrator is*

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[49] In a small study, tag questions, questions beginning 'I suggest to you that…' and statements as questions (which may not be recognised as questions by a vulnerable witness) were not seen as leading: S. Krahenbuhl (S.Krahenbuhl@staffs.ac.uk) *Effective and appropriate communication with children in legal proceedings according to lawyers and intermediaries*. Child Abuse Review, forthcoming. The *Serious Sexual Offences Seminar* DVD (2009, Judicial Studies Board) included a series of statements as questions, in a demonstration of cross-examination good practice when an intermediary is used.

[50] See page 4-25, *Equal Treatment Bench Book* (2009) *'… If a child does not understand a question, they may be tempted to give the answer that they think the questioner wants, rather than the true answer. The child may also be afraid to disagree with a powerful adult figure. Judicial vigilance is always necessary'.*

The Court of Appeal in *W and M* (2010 EWCA 1926) emphasised that answers to leading questions may be of limited evidential value because of the child's wish to please or simply to bring questioning to an end: *'…particularly with child witnesses short and untagged questions are best at eliciting the evidence. By untagged we mean questions that do not contain a statement of the answer that is sought'.* The conviction was upheld even though the eight year-old complainant retracted much of her account in cross-examination.

[51] A. Graffam Walker (1999) *Handbook on Questioning Children: A Linguistic Perspective.* American Bar Association Center on Children and the Law.

used, as children may not always immediately connect "he" with a question previously put about a person.

Is the witness able to say they do not understand? *Achieving Best Evidence* (2011) policy on this issue concerns young witnesses but is also relevant to vulnerable adults:

> *Box 2.1, page 23: As a general rule of thumb, an intermediary may be able to help improve the quality of evidence of any child who is unable to detect and cope with misunderstanding, particularly in the court context, i.e. if a child seems unlikely to be able to recognise a problematic question or tell the questioner that they have not understood, assessment by an intermediary should be considered.*

Judges are encouraged to explain to young witnesses that they should say so if they do not understand a question[52] but research has found that around half of young people (across age groups) who recognise they have a problem nevertheless do not tell the court.[53] The RI report should explain whether witnesses may have difficulty in identifying questions they do not understand or, even if they can do so, the likelihood of their willingness to do this in the formality of the court setting.

Good practice discussion

Many RIs described aspects of cross-examination which they considered developmentally or otherwise inappropriate for the communication abilities of the individual vulnerable witness or defendant. Problematic approaches included:

- leading questions asked of a suggestible witness who demonstrated during the RI's assessment that she changed previously accurate responses about non-evidential matters when led;
- questions that were both suggestive and difficult linguistically (e.g. double or compound questions or those containing negatives);
- questions about time asked of a teenage witness who could not sequence months, say how long ago he left school or had a recent birthday;
- leading questions coupled with physical cues from the questioner e.g. 'You were on the bus, yes?' asked by an advocate who was nodding; and
- lengthy questions, beyond the scope of the witness's auditory memory (if the witness is asked to repeat a question and is unable to do so, or alters the wording or meaning in saying it back, this helps support a recommendation to simplify sentence length/ complexity).

[52] Section 4.1.3, *Equal Treatment Bench Book*, (2009).

[53] J. Plotnikoff and R. Woolfson *Measuring Up?* (page 111, 2009).

Witness difficulties in responding to leading questions (and physical cues) are not confined to comprehension. When assessing a suggestible witness with learning difficulties and low self-esteem, an RI advised in her report that the witness was more likely to be susceptible to leading questions and to acquiesce; therefore, if the witness appeared to be simply agreeing with the questioner, the RI would intervene to recommend an alternative style of questioning.

In advance of the cross-examination of an adult male rape victim with considerable learning difficulties, an RI proposed (as an alternative to leading questions) the format 'You said X happened. Is that true?' This was accepted.

RIs generally agreed that, where questioning was likely to be misunderstood or there was some other problem, it was important to intervene immediately rather than let the problem persist; to be polite, firm and business-like; and to refer to the report findings and recommendations. It was sometimes necessary to intervene repeatedly.

Some RIs drew the court's attention to *Research-based guidance: Good practice when questioning children at court* at Annex A of *Good practice guidance in managing young witness cases and questioning children* (NSPCC and Nuffield Foundation, 2009).

5.8 Suggesting alternatives to problematic questions

(See Annex C, Exercise at the RI Continuing Professional Development seminar in February 2011)

RIs observed that it is difficult during cross-examination for advocates – and RIs themselves – to come up with an alternative to a problematic question. It is helpful to have enough time to think through alternative approaches. As noted above (see section 4.3), a QC has emphasised the need for RIs to contact advocates *before* the day of trial to plan the best way to approach questioning.[54] This is vital in relation to visual or communication aids, as their usefulness may not be apparent to advocates: 'This may only become clear in discussion with advocates, knowing what questions they want to ask and how they want to ask them'.

Policy

Achieving Best Evidence (2011) states that:

B.9.32 The intermediary is allowed to explain questions and answers, if that is necessary to enable the witness and the court to communicate. The intermediary does not decide what questions to put…

Good practice discussion

There are circumstances where reviewing the advocate's questions is appropriate, for example if communication aids need to be developed to support specific lines of questioning. Otherwise, intermediaries should be alert to the risk of needing to intervene in a 'previously approved'

[54] Johanna Cutts QC, speaking at the RI Continuing Professional Development Day, 9 February 2011.

question, with the potential for counsel to object 'But you told me it was all right to ask that'. The position should be discussed in the ground rules hearing. The RI should make clear that, even if agreeing to review questions, the RI will still intervene later if the witness appears to have difficulty with the question. If questions are to be reviewed by the RI in advance, involvement of the advocate for the other side, and if necessary the judge, is likely to be helpful.

A number of RIs had experience with being asked to review questions in advance:

- in a case where the witness had learning difficulties and complex communication needs, defence counsel asked if the RI would review cross-examination questions. At the ground rules hearing, the RI talked through her recommendations and said she was willing to go through questions with defence counsel ahead of time but explained that she may still need to intervene if necessary and that advocates need not adhere to her suggestions if an unanticipated question arose. She showed the prosecution and defence counsel the visual aids she had planned, the defence requested some changes and copies were provided. Defence counsel did not in fact ask the RI to review the questions before cross-examination. In retrospect, however, the RI thought it would have been useful to have had further discussion about the application of the recommendations, including 'what you could do if' scenarios;
- the RI and defence counsel agreed ahead of time that cross-examination questions would address a single fact per question and would use the form 'You said X. Is that right?'[55] The advocate went on to say 'Is that right *or not*?' and the RI had to intervene. The advocate argued that she was asking the questions as the RI had suggested. The judge upheld the intervention; and
- defence counsel submitted his questions to the judge, who thought that there were still some leading questions and asked the RI to go through them with defence counsel. The RI met with both advocates, went through each question and where they could not agree they went back to court to ask the judge. About half way through, the prosecution decided to withdraw so the trial was concluded. The RI described the discussion with both counsel as 'necessary and productive' and felt that the presence of the prosecutor during discussion had been particularly valuable in helping protect the RI's independence. The RI adopted the approach of stating the problem and letting the advocate sort out the wording (e.g. 'That is too complicated and needs to be simplified'; 'That's a pronoun, you need to use the name'; 'That's implying the answer, the witness may just agree' etc.).

[55] RIs noted that some witnesses may misunderstand this word or give it undue weight because of the moral connotation. They felt it was preferable to use 'Is that true?'.

5.9 Working alongside someone more familiar with the witness's communication

An RI was appointed post-interview to assess a witness with significant comprehension difficulties, poor expressive language skills, attention and listening difficulties and very poor intelligibility of speech. The RI understood only about 60-70 per cent of what this witness said. The manager of the care home where the witness lived offered to accompany the witness while giving evidence to assist if there were points where the RI could not understand the witness. The RI asked whether it was appropriate to recommend this in her report.

Good practice discussion

It is always open to the RI to suggest that an RI with more appropriate skills be appointed for the witness. Where the communication difficulty is likely to be similar for any RI who is unfamiliar with witness, RIs should alert the prosecution to the possibility that someone else who knows and understands the witness may be able to assist. However, RIs do not have to resolve this by themselves or advise one way or another. They cannot comment on the qualifications of the other person or indeed whether he or she has correctly understood the witness.

The RI report should make clear the limits to their own understanding of the witness, so that the court is forewarned and no one is taken by surprise if the RI acknowledges being unable to explain what the witness has said. The RI may include a short paragraph relating what the person who knows the witness has said about their level of understanding. The police or CPS could then discuss with the person their qualifications and how they think can help. It is for the prosecution to decide what to do. How this would work in practice needs to be handled extremely carefully (not a double act, e.g. 'Do you want to interpret what that answer is?' 'No, you go ahead and do it'). The witness must feel secure when giving evidence and the jury needs to follow clearly and things must be fair to both sides. The fact that the advocate may ask a proper and significant question to which there is no intelligible reply is important when the jury is evaluating the witness.

Good practice discussion

Several RIs described actual or possible difficulties in understanding witnesses for whom they had been appointed, for example:

- a witness with a severe stammer and other speech problems as well as concussion from his injuries. The RI acknowledged that in the assessment and interview she had understood only about 60 per cent of what he said, but the interviewer concluded that between them, they had understood enough to go forward with the interview, particularly as there were other witnesses and corroborative evidence to the attack;
- a witness with complex learning difficulties and an idiosyncratic way of talking. During the calm atmosphere of the assessment, in non-evidential discussion the RI understood most of what the witness said and, where she could not follow, the witness was able to use aids to communicate. Prior to the interview, the RI discussed with the officer the possibility of using

the witness's key worker as an 'interpreter' if called upon. During the interview the witness became more anxious and his expressive language became more difficult to follow, so the key worker joined them in the interview. This person 'interpreted' only when requested to do so. Following the interview, the RI recommended that the key worker perform a similar role at trial; and

- a witness with learning difficulties who used Makaton signs. The RI had only completed an introductory course and was concerned that the witness might be mostly reliant on Makaton for communication.[56] At the RI's assessment, the witness's teacher was present (out of the witness's line of sight) throughout. The teacher did not intervene but assisted the RI's assessment of some of the witness's answers with an inconspicuous shake of the head when a reply was inaccurate, which otherwise the RI would not have known. The witness responded verbally to all questions.

Reference to a third party familiar with the signing of a deaf witness is desirable where the witness uses idiosyncratic signs. In these situations, an RI described clarifying signs during rapport building/ assessment sessions, and checking for background information with those familiar with the witness's communication. The RI always worked with a BSL/ English interpreter present and intervened when necessary if unusual signs were used or there was a misunderstanding. Sometimes if the witness was particularly difficult to understand, a three way system operated: the witness communicating to the RI and then the RI to the interpreter who provided the 'voice over' for court (and vice visa).

5.10 Working with a language interpreter

An RI conducted an assessment at a child's home where the interpreter was already present. There was no opportunity to plan beforehand. The RI asked for advice about working with the interpreter at the interview.

Good practice discussion

Having a planning meeting with the interpreter (who may never have worked with an RI) is vital. An RI offered the following advice based on prior experience with an interpreter[57] who had concluded that, without advance planning and involvement in the RI's assessment, he would not have felt prepared to interpret at the police interview:

- working in conjunction with an interpreter inevitably takes more time. It should involve thorough briefing, joint planning, discussion, shared problem-solving and reflection;

[56] Other RIs recommended checking if Makaton helped the witness feel more confident in communicating; whether it was used to support unclear speech or instead of spoken words; and emphasised the need to be able to distinguish Makaton from idiosyncratic signs.

[57] See presentation at RI conference, NPIA, 4.9.2009 *'Working with a communication disorder and foreign language issues (Team work between RI, Police Officer and Interpreter)'*.

- the flow of a police interview may be compromised by the complexity of communication between four parties;
- the interpreter should be asked to repeat RI questions and instructions using language as simple as that of the RI. However, depending upon the structure and vocabulary of the language, the interpreter may not be able to present a verbatim translation to the witness or to the officer. RIs have found that a short question in English may translate as two or three sentences in Urdu or Cantonese, for example. With the added complication of a communication disorder, it is hard to know if the translation being offered is simple enough, and not embellished;
- consider development of culturally appropriate visual materials drawing on the combined skills of the interviewing officer, RI and interpreter); and
- consider the layout of the interview room to ensure that everyone (and visual aids) are captured on camera.

ANNEX A COMMUNICATION RESOURCES

Resources mentioned by RIs include the following:

Visual Aids for Learning has created downloadable visuals to help people (including children with learning difficulties) learn everyday activities. Where appropriate, the images are gender specific. These include pictures of male/female figures, dressed and naked (front only) ranging from toddlers through to adults (from the home page, go to 'The Complete Adolescent Pack' and then 'My Changing Body'). It is possible to cut out the clothes and use them with Blue-tac to cover the bodies. www.visualaidsforlearning.com/products/index.htm

Symbols for abusive acts*, feelings and private body parts* are available without charge at http://www.triangle.org.uk/howitis. Some of these are now incorporated into generic symbol sets, e.g. www.widgit.com.[58]

Colour photo cards (e.g. Familiar Verbs, Expressive Verbs), puppets and other resources. http://www.winslow-cat.com.

Boardmaker Software to create and print symbol-based materials.

iPad apps supporting communication for 'children and students with disabilities', for example http://ruralinstitute.umt.edu/APPS/?p=326, listed with other guidance at http://www.netbuddy.org.uk/.

Diagrams or body maps CPS policy (*Safeguarding Children: Guidance on Children as Victims and Witnesses* (2009)) states that: It is almost always inappropriate and unnecessary to have the child point to parts of their own bodies. Consider using diagrams or body maps.

Body diagrams (front and back) shown at Annex B (Questions concerning intimate touching) in *Good practice guidance in managing young witness cases and questioning children* (NSPCC and Nuffield Foundation, 2009)

Talking Mats These help people with communication problems 'understand, reflect and organise their thoughts'.

Eye transfer (E-tran) frame This is described as a low-tech communication aid for people who have difficulty with speech. The frame is held by the communication partner about 18 inches in front of the user's face at eye level. The user looks at the place where the letter they wish to communicate is positioned and then to the corresponding colour disc of that letter. The communication partner confirms each letter.

How to make information accessible: a guide to producing easy read documents produced by CHANGE and the National Equality Partnership, aimed at people with learning disabilities.

[58] Cited at footnote 7, page 92, *Achieving Best Evidence* (2011).

Supporting victims (in the 'Books without Words' series from the Royal College of Psychiatrists) explains special measures, including the role of the intermediary.

Other communication aids mentioned by RIs included:

- time lines;
- pictures showing a range of emotions;
- a visual pain scale (with numbers and faces along a scale of 0-5);
- pictures of a child, with removable clothes attached by Blu-Tack;
- precut 'gingerbread people' – gender neutral and different sizes to allow children to create their own representations;
- Lego models;
- doll house furniture;
- pipe cleaner figures in different colours and sizes, with polystyrene heads that could be drawn on to represent different individuals. (These were used at interview with four children with learning disabilities. They initially provided minimal information on their family but, given the figures, were able to provide much more information and insight into what family life was like for them. Pipe cleaners made it easy to make large numbers at limited cost. It is preferable for each child to have a fresh set); and
- wooden artist mannequins with movable limb joints. These are robust, reusable, gender-neutral, move in a realistic way and come in different sizes. However, they are much more expensive than pipe cleaners and it is not so easy for the child to mark them in a way to represent different people.

Young Witness Pack booklets have been updated and re-printed to include legislative changes on special measures which came into effect in June 2011. The CPS has distributed them (including Welsh-language versions in Wales) to a central point within each police force area and to Witness Care Units and other service providers, subject to local arrangements. There are also on-line versions:

- Going to Crown Court (for younger children);
- Going to Magistrates Court (for younger children);
- Going to Court (covers Crown, magistrates and youth court);
- Being a witness (for older children and teenagers);
- Your child is a witness (for parents and carers).

ANNEX B Live links responsibilities under section 24 Youth Justice and Criminal Evidence Act 1999: excerpt from Live Links Protocol (Office for Criminal Justice Reform, Ministry of Justice, undated)

Her Majesty's Courts Service

- Inform the Witness Service (or other support provider) of the date and time of hearings which are known to involve a special measures application to enable them to be present, where possible;
- Ensure that video-recorded evidence is tested on the court equipment and at any remote facility in advance of the trial to avoid delay and witness distress;
- An Officer of the Court should ensure that the appropriate oath/affirmation/holy books are available in the live link room, after liaising with the WCU and /or the Witness Service; and
- Following a successful application from the prosecution, or a Court Order on its own motion, the Officer of the Court should check ahead of the hearing that the defendant will not be visible to the witness on the screen and, where practicable, endeavour to ensure that the defendant will not be able to see the witness on the live link screen (i.e. by placing a screen around the defendant).

The Court

- Determine at the earliest opportunity applications by a party (or raise of his/her own motion) for vulnerable or intimidated witnesses to give evidence via live link and make a special measures direction as appropriate.

Crown Prosecution Service and Defence

- In consultation with the police (via an early special measures meeting if appropriate) and the WCU determine the needs of each witness, identify VIWs and make special measures applications in accordance with the time limits set out in Crim PR r.29.1(4) for live links (and any other special measure); and
- Prior to making any special measures application, discuss the benefits and drawbacks of giving evidence by live link with the witness, consider their views and inform the court of any views expressed by the witness if an application is deemed necessary.

Remote links

Her Majesty's Courts Service

- If providing the remote facility, ensure on the day prior to the hearing, and a reasonable time before the start of proceedings on the day of the trial, that the equipment connecting the

court to the link room is operating effectively; arrange for any defects to be rectified immediately;

- If the remote facility is being provided by another agency, arrange a date and time to test the link in advance of the day of trial, where possible, and prior to the hearing on the day of the trial;
- Provide, where necessary, for a suitably vetted court usher to be present at the remote site; and
- The usher should ensure that the appropriate oath/affirmation/holy books are available at the remote site, after liaising with the WCU and / or the Witness Service and / or the Defence. The usher should normally administer the oath or affirmation of the witness(es).

The Court

- When directing that a witness may give evidence from a remote site, consider the proximity of the facility in order that a witness may be brought to court if necessary within a reasonable period of time, and to enable exhibits to be transferred to and from the facility expeditiously;
- Decide at the earliest opportunity which exhibits are required to remain in court;
- At the same time, decide and direct who will be required to administer the oath or affirmation in the live link room and, as far as possible, specify who will need to make an oath or affirmation;
- At the beginning of the hearing, ensure that the Court, jury, magistrates, Legal Adviser and the parties are introduced to the witness and that all those present in the link room are identified to those in the Court;
- Arrange for the witness(es) oath to be taken (and, where necessary, the oath of the witness supporter) by an appropriate Officer of the Court; and
- At a hearing in the Crown Court, explain to the jury the purpose of the live link facility and the roles of each individual in the link room. In cases in the magistrates' court, the Justices' Clerk/Assistant Justices Clerk should explain this to the Justices.

Witness Care Units

- Arrange for witness(es) to attend the remote site in good time prior to them giving evidence on the day of the trial; and
- In consultation with the party and HMCS, arrange for the booking of a remote link once a live link has been granted by the court.

Crown Prosecution Service and Defence

- Parties to check on HMCS web site whether their local court has the facilities required on the proposed date of trial prior to making any application;

- Where practicable, visit the remote site before the trial with the witness(es) or speak to the witness(es) over the live link prior to the beginning of the hearing;
- If responsible for providing the remote facility, inform the court of the location and type of facility. Maintain that facility and ensure the equipment is operating effectively both before and during the trial; and
- Arrange for a suitable time with the Court to test that the equipment is operating effectively in advance of the day of the trial, where possible, and prior to the start of the hearing on the day of the trial.

Police

- Conduct a risk assessment of each remote link facility, including security and health and safety issues, i.e. wheelchair access, designated waiting areas (see Appendix 6 for guidance) liaising with the Witness Service and HMCS;
- Inform the other agencies of potential risks, both in general and for specific witnesses;
- The officer in the case should normally facilitate the safe passage of the witness(es) to and from the remote site, in conjunction with the WCU in appropriate cases; and
- An Exhibits Officer, or a nominee, will facilitate the safe passage of real or physical exhibits from the court to remote site and back again.

Provider of the remote site

- Appoint a remote site manager to be the on site contact point to consult with HMCS, WCU and CPS/Defence on all matters relating to the site; and
- Maintain fax and phone facilities for the transfer of documentary exhibits.

Witness Service (or other support provider)

- Arrange for witness(es) to attend the remote site in good time prior to them giving evidence on the day of the trial wherever possible;
- Consult with witness(es) as to any health needs or requirements, both pre-trial and on the day of trial, that have not already been identified by the WCU;
- Alert the party who has called the witness and ,where appropriate, HMCS to the health needs and requirements of the witness(es) in advance of the hearing where not already identified by the WCU;
- Alert the Court to any concerns whilst the remote link is being used according to local arrangements; and
- Inform witness(es) at the pre-trial visit to the remote site or before trial about what they will be able to see on the screen, who will be able to see them in court and explain that technical difficulties may occur on the day.

ANNEX C LEADING QUESTIONS EXERCISE (RI CPD seminar, February 2011)

At the seminar, RIs discussed interventions in leading questions and suggested alternatives (assuming an agreed ground rule that leading questions would not used with the witness).[59]

QUESTION	SUGGESTED ALTERNATIVE(S)
"You didn't see Jack take the phone, did you?"	1) Use of stress and pause e.g. Did you SEE (place stress on word SEE) 2) Jack says he did not take the phone. Did you see Jack take the phone? However, also consider the following: Is *"Jack says he did not take the phone"* appropriate? Will a vulnerable witness think "If Jack says I am wrong then I must be wrong?" 3) Are you sure you saw Jack take the phone? Did you *see* Jack take the phone? What happened? What room were you in? Did you see Jack?
"I suggest it was you who took the phone and money from X."	1) Jack says you took the money. Did you take the money? 2) Did *you* take the money? (stress) 3) Did *you* take the phone? 4) Are you trying to get X into trouble?
"When did you start taking money from X's bag?"	1) Have you (ever) taken money from X's bag? 2) [If the answer is 'Yes'] When? 3) It is possible for the RI to say "I think the witness might be answering a different question." **(**avoid assumptions/leading) 4) Have you ever taken money from X's bag? 5) When was that? The context of a question often determines whether or not it is leading, e.g. "When did you start taking money from X's bag?" and "Have you now stopped telling lies about your friends?" could be allowed in a certain context and might not be leading but it depends on the evidential context. For example if it went (W for witness, C for counsel) W: "I started taking money from her bag so that I could pay my dealer" C: "When did you start taking money from X's bag?" - is not leading since the start taking money is already in evidence from the witness and the question is 'when' which is open. However: W: "I admit that sometimes I used to tell lies about my friends" C: "Have you now stopped telling lies about your friends?" - *is* leading as is suggests to the witness that she has stopped, but it is not leading on the fact of telling lies about friends as that is already in evidence from the witness.

[59] The table was compiled by Tina Pereira, with input from fellow RIs Sharon Richardson and Kate Man, and comments from Johanna Cutts QC and barristers Penny Cooper and David Wurtzel.

ANNEX D CHECKLIST FOR POLICE/ CPS AT THE INTERVIEW STAGE

- the role of the Registered Intermediary (RI) is to advise on the witness's ability to communicate their evidence and whether use of an intermediary is likely to improve the quality (completeness, coherence and accuracy) (section 2.1)
- RI should attend any second attempt to interview the witness (section 2.4)
- RI is entitled to see to the witness statement after the RI's assessment (section 2.5)
- RI may advise about modifying identification procedures (section 2.6)
- RI may attend an Early Special Measures meeting or other case conference (section 2.7)
- all witnesses are entitled to refresh their memory and RI may assist (section 2.10)
- witnesses may not admit to literacy difficulties. Some written statements are unusable because the witness cannot read it or would not have used the wording. This can result in cases being dropped (section 2.10)
- questioning that jumps around at interview in relation to separate offences may result in a DVD being unusable where only one offence is the subject of a retrial (section 2.12)
- memory-refreshing should be filmed only in exceptional circumstances (section 2.11)
- RI may assist at the taking of a victim personal statement (section 2.16)
- RI report should avoid information that could lead to tracing the witness (section 2.17)
- RI is entitled to pass on concerns about safeguarding the witness (section 2.18)
- RI should seek advice from the lawyer if the witness discloses that they have been the victim of another offence (section 2.19)
- RI is not a witness (section 3.1), a supporter (section 3.2); an expert witness re capacity to consent (section 3.3) or competence (section 3.4); and cannot advise about legal decisions (section 3.5)
- RI must not be left alone with the witness (section 4.1)
- it is the police's responsibility to help arrange the RI's assessment of the witness, even if the request for appointment comes from the CPS (section 4.1)
- even where the assessment has to take place on the same day as the interview, there should be enough time between them for the RI and interviewing officer to discuss ways to obtain 'best evidence' and agree ground rules for the RI's role (e.g. how does the officer want the RI to indicate a potential communication difficulty and when this should be done) (section 4.1)
- police officers have primary responsibility for obtaining consent to include information from third party sources in RI reports (section 4.2)

- RI will need a brief overview of the case but not all the details (section 5.1)
- RIs may employ a range of strategies to facilitate interviews with very young children (section 5.2) and to clarify what they mean (section 0); to facilitate communication with witnesses who can only answer ‘yes’ or ‘no’ (section 5.4); to help keep calm a witness prone to temper outbursts (section 5.5); and to assist an inaudible witness (section 5.6)
- RI may advise if someone else is better able to understand the witness (section 5.9)
- Working with an RI and a language interpreter always requires additional planning time (section 5.10).

ANNEX E CHECKLIST FOR THE JUDICIARY, ADVOCATES AND CPS AT THE TRIAL STAGE

- role of the Registered Intermediary (RI) is to advise on the witness's ability to communicate their evidence and whether use of an intermediary is likely to improve the quality (completeness, coherence and accuracy) (section 2.1)
- RI should *always* be in court for a contested intermediary application (section 2.9)
- RI report should not be provided to the Witness Service. The RI will provide information relevant to the supporter separately (section 2.13)
- RI may assist at the taking of a victim personal statement (section 2.16)
- RI report should not be disclosed outside the criminal case without first seeking witness consent and RI views (section 2.21)
- RI report is not an exhibit (section 3.1). RI is not a witness (section 3.1), a supporter (section 3.2); an expert witness re capacity to consent (section 3.3) or competence (section 3.4); and cannot advise about legal decisions (section 3.5)
- RI must not be left alone with the witness (section 4.1)
- before the witness gives evidence, a ground rules hearing *must* be held in every trial using an intermediary. It is preferable for this to be not to be scheduled at the last minute, but giving everyone involved enough time to plan how questioning should take place (section 4.3)
- It is generally the judge's responsibility to explain to the jury why the RI has been appointed and the general nature of the witness's communication difficulties. There is no set form of words. The RI report should not be given or read to the jury (section 4.4)
- witnesses who do not watch their evidence-in-chief at the same time as the jury should take the oath immediately before cross examination (section 4.5)
- there are a range of ways to maximise the quality of evidence from vulnerable witnesses over the live link or at court or from a remote site (section 4.6)
- RI may recommend the avoidance of leading questions, including tag questions, where the RI's assessment of the witness indicates these may result in unreliable answers (section 5.5). Where possible, the RI should suggest appropriate alternatives (section 5.6).

See also Table 2, Checklist of items for discussion at the ground rules hearing.

ANNEX F CHECKLIST FOR THE WITNESS SERVICE

- the Registered Intermediary (RI) may facilitate communication when the witness's memory is refreshed/ advise how best this is to be carried out (section 2.10)
- RI should advise the Witness Service about anything which would impact on the witness's welfare at court and assist supporters to prepare for the witness's particular needs, including role play preparation for questioning, having first obtained permission from the witness or person with parental responsibility (section 2.13)
- RI should advise the Witness Service about how best to tailor the content of the witness's familiarisation visit to the court, and alert the Witness Service to anything that the witness may find distressing (section 2.13)
- RI should let the Witness Service manager know about the purpose and timing of the ground rules hearing if it is useful for the manager to attend (section 2.13)
- RI may adapt written material provided by the Witness Service to make the information accessible by the individual witness (section 2.13)
- RI may work with the supporter in familiarising the witness with the 'rules' about questioning at trial (e.g. It's OK to say 'I don't understand') using non-evidential subjects (section 2.14)
- RI practice varies in respect of routinely waiting with the witness in the waiting room. This often depends on the needs of the witness (section 2.15)
- RI must never be left alone with the witness (section 2.15)
- RI is not a supporter or an alternative for a supporter (3.2)
- RI should liaise with the Witness Service to facilitate best evidence over a live link at court or from a remote location (section 4.6).