

PART 18

MEASURES TO ASSIST A WITNESS OR DEFENDANT TO GIVE EVIDENCE AND PARTICIPATE

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GENERAL RULES

When this Part applies

This Part applies—

- (a) where the court can give a direction (a 'special measures direction'), under section 19 of the Youth Justice and Criminal Evidence Act 1999⁽¹⁾, on an application or on its own initiative, for any of the following measures—
 - (i) preventing a witness from seeing the defendant (section 23 of the 1999 Act),
 - (ii) allowing a witness to give evidence by live link (section 24 of the 1999 Act⁽²⁾),
 - (iii) hearing a witness' evidence in private (section 25 of the 1999 Act⁽³⁾),
 - (iv) dispensing with the wearing of wigs and gowns (section 26 of the 1999 Act),
 - (v) admitting video recorded evidence (sections 27 and 28 of the 1999 Act⁽⁴⁾),
 - (vi) questioning a witness through an intermediary (section 29 of the 1999 Act⁽⁵⁾),
 - (vii) using a device to help a witness communicate (section 30 of the 1999 Act);
- (b) where the court can vary or discharge such a direction, under section 20 of the 1999 Act⁽⁶⁾;
- (c) where the court can give, vary or discharge a direction (a 'defendant's evidence direction') for a defendant to give evidence—
 - (i) by live link, under section 33A of the 1999 Act⁽⁷⁾, or
 - (ii) through an intermediary, under sections 33BA and 33BB of the 1999 Act⁽⁸⁾;
- (d) where the court can—
 - (i) make a witness anonymity order, under section 86 of the Coroners and Justice Act 2009⁽⁹⁾, or
 - (ii) vary or discharge such an order, under section 91, 92 or 93 of the 2009 Act;
- (e) where the court can give or discharge a direction (a 'live link direction'), on an application or on its own initiative, for a witness to give evidence by live link under—
 - (i) section 32 of the Criminal Justice Act 1988⁽¹⁰⁾, or

¹ 1999 c. 23.

² 1999 c. 23; section 24 was amended by paragraph 385 of Schedule 8 to, and Schedule 10 to, the Courts Act 2003 (c. 39) and section 102(1) of the Coroners and Justice Act 2009 (c. 25).

³ 1999 c. 23; section 25 was amended by paragraphs 1 and 3 of the Schedule to S.I. 2013/554. It is further amended by section 46 of the Modern Slavery Act 2015 (c. 30), with effect from a date to be appointed.

⁴ 1999 c. 23; section 27 was amended by paragraph 384 of Schedule 8 to the Courts Act 2003 (c. 39), paragraph 73 of Schedule 3 and Part 4 of Schedule 37 to the Criminal Justice Act 2003 (c. 44) and sections 102(2), 103(1), (3), (4) and (5), 177(1) and (2) and 178 of, and paragraph 73 of Schedule 21, paragraph 23 of Schedule 22 and Part 3 of Schedule 23 to, the Coroners and Justice Act 2009 (c. 25).

⁵ 1999 c. 23; section 29 was amended by paragraph 384(d) of Schedule 8 to the Courts Act 2003 (c. 39).

⁶ 1999 c. 23; section 20(6) was amended by paragraph 384(a) of Schedule 8 to the Courts Act 2003 (c. 39).

⁷ 1999 c. 23; section 33A was inserted by section 47 of the Police and Justice Act 2006 (c. 48).

⁸ 1999 c. 23; sections 33BA and 33BB are inserted by section 104 of the Coroners and Justice Act 2009 (c. 25), with effect from a date to be appointed.

⁹ 2009 c. 25.

¹⁰ 1988 c. 33; section 32 was amended by section 55 of the Criminal Justice Act 1991 (c. 53), section 29 of, and paragraph 16 of Schedule 2 to, the Criminal Appeal Act 1995 (c. 35), section 62 of the Criminal Procedure and Investigations Act 1996 (c. 25), section 67 of, and Schedule 6 and paragraph 3 of Schedule 7 to, the Youth Justice and Criminal Evidence Act 1999 (c. 23) and paragraphs 24 and 26 of the Schedule to S.I. 2004/2035.

- (ii) sections 51 and 52 of the Criminal Justice Act 2003⁽¹¹⁾;
- (f) where the court can appoint an intermediary to facilitate a defendant's effective participation in that defendant's trial, or vary or discharge such an appointment;
- (g) ~~(f)~~ where the court can exercise any other power it has to give, vary or discharge a direction for a measure to help a witness to give evidence or to help a defendant to participate in that defendant's trial.

[Note. At the end of this Part is a summary of the circumstances in which a witness or defendant may be eligible for the assistance of one of the measures to which this Part applies.]

Meaning of 'witness'

In this Part, 'witness' means anyone (other than a defendant) for whose benefit an application, direction or order is made.

[Note. At the end of this Part is a summary of the circumstances in which a witness or defendant may be eligible for the assistance of one of the measures to which this Part applies.]

Meaning of 'intermediary' and 'intermediary's report'

In this Part—

- (a) 'intermediary' means a suitably qualified person who is—
 - (i) approved by the court for the purposes of section 29 of the Youth Justice and Criminal Evidence Act 1999 (Examination of witness through intermediary),
 - (ii) approved by the court for the purposes of section 33BA of the 1999 Act (Examination of accused through intermediary),
 - (iii) asked to assess a defendant's communication needs, or
 - (iv) appointed by the court to facilitate a defendant's effective participation in the trial where otherwise that defendant's communication needs would impede such participation; and
- (b) a reference to 'an intermediary's report' means a report by such a person which complies with rule 18.32.

Making an application for a direction or order

~~18.3.~~ A party who wants the court to exercise its power to give or make a direction or order must—

- (a) apply in writing as soon as reasonably practicable, and in any event not more than—
 - (i) 28 days after the defendant pleads not guilty, in a magistrates' court, or
 - (ii) 14 days after the defendant pleads not guilty, in the Crown Court; and
- (b) serve the application on—
 - (i) the court officer, and
 - (ii) each other party.

[Note. See also rule 18.10 (Content of application for a special measures direction), rule 18.15 (Content of application for a defendant's evidence direction), rule 18.19 (Content and conduct of application for a witness anonymity order), ~~and~~ rule 18.24 (Content of application for a live link direction) and rule 18.27 (Appointment of intermediary to facilitate a defendant's participation).

The Practice Direction sets out forms for use in connection with—

- (a) *an application under rule 18.10 for a special measures direction;*

¹¹(1) 2003 c. 44.

- (b) *an application under rule 18.24 for a live link direction (otherwise than as a special measures direction).*]

Decisions and reasons

18.4.— A party who wants to introduce the evidence of a witness who is the subject of an application, direction or order must—

- (c) inform the witness of the court’s decision as soon as reasonably practicable; and
 - (d) explain to the witness the arrangements that as a result will be made for him or her to give evidence.
- (2) The court must—
- (a) promptly determine an application; and
 - (b) allow a party sufficient time to comply with the requirements of—
 - (i) paragraph (1), and
 - (ii) the code of practice issued under section 32 of the Domestic Violence, Crime and Victims Act 2004⁽¹²⁾.
- (3) The court must announce, at a hearing in public before the witness gives evidence or the defendant’s trial begins (as the case may be), the reasons for a decision—
- (a) to give, make, vary or discharge a direction or order; or
 - (b) to refuse to do so.

[Note. See sections 20(5), 33A(8) and 33BB(4) of the Youth Justice and Criminal Evidence Act 1999 and sections 51(8) and 52(7) of the Criminal Justice Act 2003⁽¹³⁾.

Under section 32 of the Domestic Violence, Crime and Victims Act 2004, the Secretary of State for Justice must issue a code of practice as to the services to be provided by specified persons to a victim of criminal conduct.]

Court’s power to vary requirements under this Part

18.5.— The court may—

- (c) shorten or extend (even after it has expired) a time limit under this Part; and
 - (d) allow an application or representations to be made in a different form to one set out in the Practice Direction, or to be made orally.
- (4) A person who wants an extension of time must—
- (a) apply when serving the application or representations for which it is needed; and
 - (b) explain the delay.

Custody of documents

18.6. Unless the court otherwise directs, the court officer may—

- (a) keep a written application or representations; or
- (b) arrange for the whole or any part to be kept by some other appropriate person, subject to any conditions that the court may impose.

Declaration by intermediary

18.7.— ~~This rule applies where—~~

- (c) ~~a video recorded interview with a witness is conducted through an intermediary;~~

¹²(₀) 2004 c. 28; section 32 was amended by article 8 of, and paragraph 10 of the Schedule to, S.I. 2007/2128.

¹³(₀) 2003 c. 44.

- ~~(d) the court directs the examination of a witness or defendant through an intermediary.~~
- (2) ~~An intermediary must make a declaration—~~
 - ~~(a) before such an interview begins;~~
 - ~~(b) before the examination begins (even if such an interview with the witness was conducted through the same intermediary).~~
- (3) ~~The declaration must be in these terms—~~

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

SPECIAL MEASURES DIRECTIONS

Exercise of court's powers

The court may decide whether to give, vary or discharge a special measures direction—

- (a) at a hearing, in public or in private, or without a hearing;
- (b) in a party's absence, if that party—
 - (i) applied for the direction, variation or discharge, or
 - (ii) has had at least ~~14~~ 10 business days in which to make representations.

Special measures direction for a young witness

— This rule applies where, under section 21 or section 22 of the Youth Justice and Criminal Evidence Act 1999⁽¹⁴⁾, the primary rule requires the court to give a direction for a special measure to assist a child witness or a qualifying witness—

- (c) on an application, if one is made; or
- (d) on the court's own initiative, in any other case.
- (4) A party who wants to introduce the evidence of such a witness must as soon as reasonably practicable—
 - (a) notify the court that the witness is eligible for assistance;
 - (b) provide the court with any information that the court may need to assess the witness' views, if the witness does not want the primary rule to apply; and
 - (c) serve any video recorded evidence on—
 - (i) the court officer, and
 - (ii) each other party.

[Note. Under sections 21 and 22 of the Youth Justice and Criminal Evidence Act 1999, a 'child witness' is one who is under 18, and a 'qualifying witness' is one who was a child witness when interviewed.

Under those sections, the 'primary rule' requires the court to give a direction—

- (a) *for the evidence of a child witness or of a qualifying witness to be admitted—*
 - (i) *by means of a video recording of an interview with the witness, in the place of examination-in-chief, and*
 - (ii) *after that, by live link; or*
- (b) *if one or both of those measures is not taken, for the witness while giving evidence to be screened from seeing the defendant.*

¹⁴ 1999 c. 23; sections 21 and 22 were amended by sections 98, 100 and 178 of, and Part 3 of Schedule 23 to, the Coroners and Justice Act 2009 (c. 25).

The primary rule always applies unless—

- (c) *the witness does not want it to apply, and the court is satisfied that to omit a measure usually required by that rule would not diminish the quality of the witness' evidence; or*
- (d) *the court is satisfied that to direct one of the measures usually required by that rule would not be likely to maximise, so far as practicable, the quality of the witness' evidence.]*

Content of application for a special measures direction

An applicant for a special measures direction must—

- (e) explain how the witness is eligible for assistance;
- (f) explain why special measures would be likely to improve the quality of the witness' evidence;
- (g) propose the measure or measures that in the applicant's opinion would be likely to maximise, so far as practicable, the quality of that evidence;
- (h) report any views that the witness has expressed about—
 - (i) his or her eligibility for assistance,
 - (ii) the likelihood that special measures would improve the quality of his or her evidence, and
 - (iii) the measure or measures proposed by the applicant;
- (i) in a case in which a child witness or a qualifying witness does not want the primary rule to apply, provide any information that the court may need to assess the witness' views;
- (j) in a case in which the applicant proposes that the witness should give evidence by live link—
 - (i) identify someone to accompany the witness while the witness gives evidence,
 - (ii) name that person, if possible, and
 - (iii) explain why that person would be an appropriate companion for the witness, including the witness' own views;
- (k) in a case in which the applicant proposes the admission of video recorded evidence, identify—
 - (i) the date and duration of the recording,
 - (ii) which part the applicant wants the court to admit as evidence, if the applicant does not want the court to admit all of it;
- (l) attach any other material on which the applicant relies; and
- (m) if the applicant wants a hearing, ask for one, and explain why it is needed.

[Note. The Practice Direction sets out a form of application for use in connection with this rule.]

Application to vary or discharge a special measures direction

— A party who wants the court to vary or discharge a special measures direction must—

- (n) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
- (o) serve the application on—
 - (i) the court officer, and
 - (ii) each other party.
- (2) The applicant must—
 - (a) explain what material circumstances have changed since the direction was given (or last varied, if applicable);
 - (b) explain why the direction should be varied or discharged; and

- (c) ask for a hearing, if the applicant wants one, and explain why it is needed.

[Note. Under section 20 of the Youth Justice and Criminal Evidence Act 1999, the court can vary or discharge a special measures direction—

- (a) *on application, if there has been a material change of circumstances; or*
- (b) *on the court's own initiative.]*

Application containing information withheld from another party

— This rule applies where—

- (c) an applicant serves an application for a special measures direction, or for its variation or discharge; and
 - (d) the application includes information that the applicant thinks ought not be revealed to another party.
- (2) The applicant must—
- (a) omit that information from the part of the application that is served on that other party;
 - (b) mark the other part to show that, unless the court otherwise directs, it is only for the court; and
 - (c) in that other part, explain why the applicant has withheld that information from that other party.
- (3) Any hearing of an application to which this rule applies—
- (a) must be in private, unless the court otherwise directs; and
 - (b) if the court so directs, may be, wholly or in part, in the absence of a party from whom information has been withheld.
- (4) At any hearing of an application to which this rule applies—
- (a) the general rule is that the court must consider, in the following sequence—
 - (i) representations first by the applicant and then by each other party, in all the parties' presence, and then
 - (ii) further representations by the applicant, in the absence of a party from whom information has been withheld; but
 - (b) the court may direct other arrangements for the hearing.

[Note. See section 20 of the Youth Justice and Criminal Evidence Act 1999.]

Representations in response

— This rule applies where a party wants to make representations about—

- (c) an application for a special measures direction;
 - (d) an application for the variation or discharge of such a direction; or
 - (e) a direction, variation or discharge that the court proposes on its own initiative.
- (5) Such a party must—
- (a) serve the representations on—
 - (i) the court officer, and
 - (ii) each other party;
 - (b) do so not more than ~~14~~ 10 business days after, as applicable—
 - (i) service of the application, or
 - (ii) notice of the direction, variation or discharge that the court proposes; and
 - (c) ask for a hearing, if that party wants one, and explain why it is needed.

- (6) Where representations include information that the person making them thinks ought not be revealed to another party, that person must—
- (a) omit that information from the representations served on that other party;
 - (b) mark the information to show that, unless the court otherwise directs, it is only for the court; and
 - (c) with that information include an explanation of why it has been withheld from that other party.
- (7) Representations against a special measures direction must explain, as appropriate—
- (a) why the witness is not eligible for assistance;
 - (b) if the witness is eligible for assistance, why—
 - (i) no special measure would be likely to improve the quality of the witness' evidence,
 - (ii) the proposed measure or measures would not be likely to maximise, so far as practicable, the quality of the witness' evidence, or
 - (iii) the proposed measure or measures might tend to inhibit the effective testing of that evidence;
 - (c) in a case in which the admission of video recorded evidence is proposed, why it would not be in the interests of justice for the recording, or part of it, to be admitted as evidence.
- (8) Representations against the variation or discharge of a special measures direction must explain why it should not be varied or discharged.

[Note. Under sections 21 and 22 of the Youth Justice and Criminal Evidence Act 1999, where the witness is a child witness or a qualifying witness the special measures that the court usually must direct must be treated as likely to maximise, so far as practicable, the quality of the witness' evidence, irrespective of representations to the contrary.]

DEFENDANT'S EVIDENCE DIRECTIONS

Exercise of court's powers

The court may decide whether to give, vary or discharge a defendant's evidence direction—

- (a) at a hearing, in public or in private, or without a hearing;
- (b) in a party's absence, if that party—
 - (i) applied for the direction, variation or discharge, or
 - (ii) has had at least ~~14~~ 10 business days in which to make representations.

Content of application for a defendant's evidence direction

An applicant for a defendant's evidence direction must—

- (d) explain how the proposed direction meets the conditions prescribed by the Youth Justice and Criminal Evidence Act 1999;
- (e) in a case in which the applicant proposes that the defendant give evidence by live link—
 - (i) identify a person to accompany the defendant while the defendant gives evidence, and
 - (ii) explain why that person is appropriate;
- (f) ask for a hearing, if the applicant wants one, and explain why it is needed.

[Note. See sections 33A and 33BA of the Youth Justice and Criminal Evidence Act 1999.]

Application to vary or discharge a defendant's evidence direction

— A party who wants the court to vary or discharge a defendant's evidence direction must—

- (g) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
- (h) serve the application on—
 - (i) the court officer, and
 - (ii) each other party.
- (3) The applicant must—
 - (a) on an application to discharge a live link direction, explain why it is in the interests of justice to do so;
 - (b) on an application to discharge a direction for an intermediary, explain why it is no longer necessary in order to ensure that the defendant receives a fair trial;
 - (c) on an application to vary a direction for an intermediary, explain why it is necessary for the direction to be varied in order to ensure that the defendant receives a fair trial; and
 - (d) ask for a hearing, if the applicant wants one, and explain why it is needed.

[Note. See sections 33A(7) and 33BB of the Youth Justice and Criminal Evidence Act 1999.]

Representations in response

- This rule applies where a party wants to make representations about—
 - (e) an application for a defendant’s evidence direction;
 - (f) an application for the variation or discharge of such a direction; or
 - (g) a direction, variation or discharge that the court proposes on its own initiative.
- (4) Such a party must—
 - (a) serve the representations on—
 - (i) the court officer, and
 - (ii) each other party;
 - (b) do so not more than ~~14~~ 10 business days after, as applicable—
 - (i) service of the application, or
 - (ii) notice of the direction, variation or discharge that the court proposes; and
 - (c) ask for a hearing, if that party wants one, and explain why it is needed.
- (5) Representations against a direction, variation or discharge must explain why the conditions prescribed by the Youth Justice and Criminal Evidence Act 1999 are not met.

...

INTERMEDIARY FOR A DEFENDANT

Appointment of intermediary to facilitate a defendant’s participation

18.27.— The court must exercise its power to appoint an intermediary to facilitate a defendant’s effective participation in the trial where the appointment is necessary for that purpose.

- (6) In determining whether such an appointment is necessary, who to appoint and the duration or purpose of the appointment, the court must have regard to—
 - (a) the defendant’s communication needs as reported to the court;
 - (b) the recommendations in any intermediary’s report received by the court;
 - (c) any views that the defendant has expressed about—
 - (i) receiving the assistance of an intermediary,
 - (ii) other measures or arrangements to facilitate the defendant’s effective participation in the trial;

- (d) the likely impact of the defendant’s level of intellectual ability or social functioning on the ability to—
 - (i) participate as a witness, and
 - (ii) understand what is said and done by the court and other participants;
 - (e) the likely impact on such participation and on such understanding of any mental disorder or other significant impairment of intelligence or social functioning;
 - (f) the adequacy of arrangements for questioning the defendant in the absence of an intermediary;
 - (g) such assistance, if any, as the defendant has received in the past—
 - (i) while giving evidence in legal proceedings, or
 - (ii) as a defendant in a criminal case;
 - (h) such expert medical opinion as was received by the court where despite eventually ordering that the trial must continue—
 - (i) a magistrates’ court has received such opinion about the potential suitability of a hospital order under section 37(3) of the Mental Health Act 1983⁽¹⁵⁾ (hospital order without convicting the defendant),
 - (ii) the Crown Court has received such opinion about the defendant’s fitness to participate at trial, under section 4 of the Criminal Procedure (Insanity) Act 1964⁽¹⁶⁾, or
 - (iii) a magistrates’ court or the Crown Court has received such opinion to help the court determine a question of intent or insanity; and
 - (i) any other matter that the court thinks relevant.
- (7) The court may appoint as an intermediary—
- (a) the author of an intermediary’s report received by the court; or
 - (b) another suitably qualified person.
- (8) The court may exercise its power to appoint an intermediary—
- (a) for the duration of every hearing that the defendant is due to attend;
 - (b) for the duration of any specified such hearing or hearings, or for the duration of a specified part of such a hearing;
 - (c) for a specified purpose during a hearing.
- (9) Unless the court otherwise directs, the appointment of an intermediary extends to facilitating the defendant’s communication with that defendant’s legal representatives for the duration and for the purpose of the appointment.
- (10) The court may decide whether to appoint an intermediary to facilitate a defendant’s effective participation in the trial and whether to vary or discharge any such appointment—
- (a) on application or on the court’s own initiative;
 - (b) at a hearing, in public or in private, or without a hearing;
 - (c) in a party’s absence, if that party—
 - (i) applied for the appointment, variation or discharge, or
 - (ii) has had at least 10 business days in which to make representations.
- (11) The court must not exercise its power to vary or discharge a direction for the appointment of an intermediary unless satisfied that—
- (a) since the direction was made—

¹⁵() 1983 c. 20; section 37(3) was amended by sections 1 and 55 of, and paragraphs 1 and 7 of Schedule 1 and Schedule 11 to, the Mental Health Act 2007 (c. 12).

¹⁶() 1964 c. 84; section 4 was substituted, together with section 4A, for section 4 as originally enacted, by section 2 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (c. 25), and amended by section 22 of the Domestic Violence, Crime and Victims Act 2004 (c. 28).

- (i) the defendant's communication needs have changed materially, or
- (ii) any other material circumstance has changed materially; and
- (b) the defendant will be able to participate effectively in the trial despite the variation or discharge of the direction.

Application to vary or discharge the appointment of an intermediary for a defendant

18.28.— A party who wants the court to vary or discharge the appointment of an intermediary to facilitate a defendant's effective participation in the trial must—

- (c) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
- (d) serve the application on—
 - (i) the court officer, and
 - (ii) each other party.
- (12) The applicant must—
 - (a) explain how the criteria listed in rule 18.27(7) are met (variation or discharge of appointment); and
 - (b) ask for a hearing, if the applicant wants one, and explain why it is needed.

Representations in response to application or proposal

18.29.— This rule applies where a party wants to make representations about—

- (c) an application or proposal for the appointment of an intermediary to facilitate a defendant's effective participation in the trial; or
- (d) an application or proposal for the variation or discharge of such an appointment.
- (13) Such a party must—
 - (a) serve the representations on—
 - (i) the court officer, and
 - (ii) each other party;
 - (b) do so not more than 10 business days after, as applicable—
 - (i) service of the application, or
 - (ii) notice of the appointment, variation or discharge that the court proposes; and
 - (c) ask for a hearing, if that party wants one, and explain why it is needed.
- (14) Representations against such an appointment, variation or discharge must explain why the criteria that apply are not met.

DUTIES OF INTERMEDIARIES

Intermediary's duty to the court

18.30.— This rule applies to an intermediary who is—

- (c) approved by the court for the purposes of section 29 of the Youth Justice and Criminal Evidence Act 1999 (Examination of witness through intermediary);
- (d) approved by the court for the purposes of section 33BA of the 1999 Act (Examination of accused through intermediary); or
- (e) appointed by the court to facilitate a defendant's effective participation in the trial.
- (2) The intermediary must help the court to achieve the overriding objective—
 - (a) to the best of the intermediary's skill and understanding by—

- (i) communicating to the witness or defendant (as the case may be) questions put to them,
- (ii) communicating to the questioner and the court the replies, and
- (iii) explaining such questions and answers so that they can be understood;
- (b) by assessing continually during questioning the witness' or the defendant's (as the case may be) ability to participate and inviting the court's intervention if necessary;
- (c) where the intermediary is appointed to facilitate a defendant's effective participation, by explaining to the defendant, in terms the defendant can understand, what is said and done by the court and other participants; and
- (d) by actively assisting the court in fulfilling its duty of case management under rule 3.2, in particular by—
 - (i) complying with directions made by the court, and
 - (ii) at once informing the court of any significant failure (by the intermediary or another) to take any step required by such a direction.
- (3) This duty overrides any obligation to the witness or to the defendant (as the case may be), or to the person by whom the intermediary is paid.

Declaration by intermediary

18.31.— This rule applies where—

- (a) a video recorded interview with a witness is conducted through an intermediary;
- (b) the court directs the examination of a witness or defendant through an intermediary.
- (4) An intermediary must make a declaration—
 - (a) before such an interview begins;
 - (b) before the examination begins (even if such an interview with the witness was conducted through the same intermediary).
- (5) The declaration must be in these terms—

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

Content of intermediary's report

18.32.— An intermediary's report must, in every case—

- (a) give details of the intermediary's qualifications, relevant experience and any accreditation;
- (b) identify the commissioner of the report;
- (c) identify those from whom the intermediary has obtained information material to the assessments in the report;
- (d) list the documents received or inspected by the intermediary which contained such information;
- (e) summarise the facts reported to the intermediary, distinguishing facts which are within the intermediary's own knowledge;
- (f) give the date or dates on which the intermediary met the witness or defendant (as the case may be) for the purpose of preparing the report;
- (g) by reference to examples drawn from the intermediary's examination of the witness or defendant, include assessments of that person's—
 - (i) attention and listening ability, including emotional self-regulation,
 - (ii) auditory comprehension, including auditory working memory and vocabulary,
 - (iii) speech sound intelligibility,

- (iv) spoken expression,
 - (v) reading and writing ability, and
 - (vi) non-verbal communication ability;
 - (h) include an assessment of—
 - (i) the impact of any diagnosed mental ill-health on the witness' or the defendant's ability to communicate, and
 - (ii) the extent, if any, to which that impact may be exacerbated by the trial;
 - (i) include an assessment of the cumulative effect, if any, on the witness or defendant (as the case may be) of the matters listed in paragraphs (g) and (h), where that is material to the intermediary's recommendations;
 - (j) if the intermediary is not able to make an assessment without qualifying it, state the qualification;
 - (k) report the views of the witness or defendant (as the case may be) on receiving the assistance of an intermediary;
 - (l) include in a summary of the intermediary's conclusions any recommendation, with reasons, for—
 - (i) the approval or appointment of an intermediary,
 - (ii) the manner and duration of any questioning of the witness or defendant (as the case may be), and
 - (iii) arrangements for the way in which the intermediary, if approved or appointed, should participate;
 - (m) contain a statement that the intermediary—
 - (i) understands an intermediary's duty to the court, and
 - (ii) will comply with that duty if approved or appointed; and
 - (n) contain the same declaration of truth as a witness statement.
- (15) Where the intermediary is asked to assess a defendant's communication needs the report must also—
- (a) describe the assistance, if any, that the defendant has received in the past in meeting those needs, for example during the defendant's education or during any legal proceedings in which the defendant has been a participant;
 - (b) include an assessment of the extent to which any measures or arrangements beside the appointment of an intermediary will facilitate the defendant's effective participation in the trial; and
 - (c) in the summary of the intermediary's conclusions include any recommendation, with reasons, for—
 - (i) the duration and purpose of any appointment of an intermediary, and
 - (ii) other measures or arrangements to help the defendant to participate effectively in the trial.

Summary of eligibility for measures to which this Part applies

Special measures direction

Under section 16 of the Youth Justice and Criminal Evidence Act 1999⁽¹⁷⁾, a witness is eligible for the assistance of a special measures direction given under section 19 of that Act if—

- (a) *the witness is under 18; or*
- (b) *the witness has—*

¹⁷(1) 1999 c. 23.

- (i) *a mental disorder, or a significant impairment of intelligence and social functioning, or*
- (ii) *a physical disability or disorder*

and the court considers that the completeness, coherence and accuracy (the 'quality') of evidence given by the witness is likely to be diminished by reason of those circumstances.

Under section 17 of the 1999⁽¹⁸⁾ Act, a witness is eligible for such assistance if—

- (a) *the court is satisfied that the quality of evidence given by the witness is likely to be diminished because of his or her fear or distress in connection with giving evidence, taking account particularly of—*
 - (i) *the circumstances of the offence,*
 - (ii) *the witness' age, social and cultural background, ethnic origins, domestic and employment circumstances, religious beliefs or political opinions,*
 - (iii) *any behaviour towards the witness on the part of the defendant, the defendant's family or associates, or any other potential defendant or witness, and*
 - (iv) *the witness' own views;*
- (b) *the witness is the complainant in respect of a sexual offence, and has not declined such assistance; or*
- (c) *the offence is one of a list of offences involving weapons, and the witness has not declined such assistance.*

Section 28 of the 1999 Act (video recorded cross-examination or re-examination) is not yet in force. With that exception, all the special measures listed in rule 18.1 potentially are available where the witness is eligible for assistance under section 16 of the Act. Those numbered (i) to (v) are available where the witness is eligible for assistance under section 17.

As a general rule, but with exceptions, the court must give a special measures direction—

- (a) *under section 21 or 22 of the 1999 Act⁽¹⁹⁾, where the witness—*
 - (i) *is under 18, or*
 - (ii) *was under that age when interviewed*

whether or not an application for a direction is made;

- (b) *under section 22A of the 1999 Act⁽²⁰⁾, where an application is made in the Crown Court for the evidence of a witness who is the complainant of a sexual offence to be admitted by means of a video recording of an interview with the witness in the place of examination-in-chief.*

Defendant's evidence direction

Under section 33A of the 1999 Act⁽²¹⁾, the court can allow a defendant to give evidence by live link, or (when the Coroners and Justice Act 2009 comes into force) under section 33BA⁽²²⁾ can allow a defendant to give evidence through an intermediary, if—

- (a) *the defendant—*

¹⁸() 1999 c. 23; section 17 was amended by section 99 of the Coroners and Justice Act 2009 (c. 25) and paragraphs 1 and 2 of the Schedule to S.I. 2013/554. It is further amended by section 46 of the Modern Slavery Act 2015 (c. 30), with effect from a date to be appointed.

¹⁹() 1999 c. 23; sections 21 and 22 were amended by sections 98, 100 and 178 of, and Part 3 of Schedule 23 to, the Coroners and Justice Act 2009 (c. 25).

²⁰() 1999 c. 23; section 22A was inserted by section 101 of the Coroners and Justice Act 2009 (c. 25).

²¹() 1999 c. 23; section 33A was inserted by section 47 of the Police and Justice Act 2006 (c. 48).

²²() 1999 c. 23; section 33BA is inserted by section 104 of the Coroners and Justice Act 2009 (c. 25), with effect from a date to be appointed.

- (i) *is under 18, and the defendant's ability to participate effectively as a witness giving oral evidence is compromised by his or her level of intellectual ability or social functioning; or*
- (ii) *suffers from a mental disorder or some other significant impairment of intelligence and social functioning and cannot participate effectively as a witness giving oral evidence for that reason;*
- (b) *the use of a live link—*
 - (i) *would enable the defendant to participate more effectively, and*
 - (ii) *is in the interests of justice;*
- (c) *the examination of the defendant through an intermediary is necessary to ensure that the defendant receives a fair trial.*

Witness anonymity order

Under section 86 of the Coroners and Justice Act 2009⁽²³⁾, a witness anonymity order is an order that specifies measures to be taken to ensure that the identity of a witness is not disclosed, such as withholding the witness' name from materials disclosed to a party to the proceedings, the use of a pseudonym, the screening of the witness from view, the modulation of the witness' voice, and the prohibition of questions that might reveal his or her identity. Before making such an order, the court must—

- (a) *be satisfied that three conditions prescribed by the Act are met (section 88 of the 2009 Act); and*
- (b) *have regard to considerations specified by the Act (section 89 of the 2009 Act).*

Live link direction

Under section 32 of the Criminal Justice Act 1988, the court can allow a witness who is outside the United Kingdom to give evidence by live link—

- (a) *in proceedings in a youth court, or on appeal from such proceedings; or*
- (b) *at a trial in the Crown Court, or on appeal from such a trial.*

Under section 51 of the Criminal Justice Act 2003, on an application or on its own initiative, the court can allow a witness who is in the United Kingdom, but outside the building in which the proceedings are held, to give evidence by live link. The court must be satisfied that that is in the interests of the efficient or effective administration of justice.

The Criminal Justice (European Investigation Order) Regulations 2017 give effect in the United Kingdom to Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. Under regulation 6 of the 2017 Regulations the court can make an order specifying one or more 'investigative measures' that are to be carried out in a State listed in Schedule 2 to those Regulations (a 'participating State'). One such measure is hearing in proceedings in England and Wales, by live video or, potentially, audio link (described in the Regulations as 'videoconference or other audio visual transmission' and as 'telephone conference' respectively), a witness who is in a participating State. See also regulations 6(4)(c) and 14 of the 2017 Regulations, and regulation 9 which governs the transmission of an order to the participating State.

Under regulations 6(4)(b) and 11 of the 2017 Regulations any such measure must be one that could have been ordered or undertaken under the same conditions in a similar domestic case; but under regulation 11(5) that does not require the court to take into account any provision of domestic law imposing a procedural requirement which the court considers cannot effectively be applied when making a European investigation order for the measure concerned.

²³() 2009 c. 25.

If a witness is eligible for the assistance of a special measures direction (as to which, see the note above), the court can allow the witness to give evidence by live link under sections 19 and 24 of the 1999 Act²⁴). See rules 18.8 to 18.13.

Intermediary for a defendant

In order to ensure the defendant's effective participation in his or her trial the court has an inherent power to appoint an intermediary to facilitate that participation, including during the giving of evidence by the defendant.

²⁴ 1999 c. 23; section 24 was amended by paragraph 385 of Schedule 8 to, and Schedule 10 to, the Courts Act 2003 (c. 39) and section 102(1) of the Coroners and Justice Act 2009 (c. 25).