



# Advancing Equal Access to Justice: How Intermediaries and Advocates can work together successfully

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# Introduction

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- 7,312 requests for RI assistance were received in 2020/2021; 6% increase on the previous year and a new record for number of requests received in a 12-month period to 31 March 2021.
- A 518% increase in the number of requests for RIs since 2010.
- Feedback from users was overwhelmingly positive: 99.9% of responses were either “excellent”, “more than satisfactory” or “satisfactory”.
- Trends point to increasing work for RI in the criminal courts.
  - Aim to return the volumes of rape cases going to court to at least 2016 levels.
  - Continued roll out of video recorded cross-examination and re-examination of children and complainants and witnesses in cases of rape and modern slavery (section 28) is likely to see with it an increase in the use of RIs in criminal cases.
- “Scarcity” of RIs (recognised in the Criminal Practice Direction, paragraphs 3F.5 and 3F.19).

# The Intermediary and the Advocate

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- The role of the advocate:

It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness (**R v. Lubemba** [2014] EWCA Crim 2064, paragraph 45)

# The Intermediary and the Advocate

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- Section 29(2) of the Youth Justice and Criminal Evidence Act 1999 as amended describes the function of an intermediary is to communicate:
  - a) The questions put to the witness, and
  - b) To any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
- Section 53 of the Youth Justice and Criminal Evidence Act 1999 (as amended) defines the competency of a person to give evidence.
  - A person is not competent to give evidence in criminal proceedings if it appears to the court that she or he is not a person who is able to understand questions put to them as a witness and to give answers to them which can be understood.

# The Intermediary and the Advocate

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- the background of this provision the RI's role is often critical to the administration of justice. In **R v. B** [2010] EWCA Crim 4; paragraphs 38- 42:

*Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent. If the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood he is not. The questions come, of course, from both sides. If the child is called as a witness by the prosecution he or she must have the ability to understand the questions put to him by the defence as well as the prosecution and to provide answers to them which are understandable...*

*The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.*

*The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished.*

# The Intermediary and the Advocate

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- The procedures we now have, consisting of special measures, adaptations to the trial process, and the use of RIs has improved the experience for witnesses, for defendants and for advocates.
- Criminal Procedure Rules 2020, rule 3.9(2) provides for ground rule hearings for the purpose of giving directions for appropriate treatment and questioning of a witness, and demonstrates how RIs and advocates are to work together.
  - a) The parties and any intermediary must attend, unless the court otherwise directs, and actively assist the court in setting ground rules and giving directions.
  - b) The court must discuss proposed ground rules and directions with the parties and any intermediary, set ground rules for the conduct of questioning of the witness or defendant, as applicable, and give such other directions as may be required to facilitate the effective participation of that witness or defendant.

# The Intermediary and the Advocate

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- The wider context of the role of the RI:
  - The overriding objective of the Criminal Procedure Rules 2020, rule 1.1.
    - Acquitting the innocent and convicting the guilty.
    - Treating all participants with politeness and respect.
    - Dealing with the prosecution and the defence fairly.
    - Recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights
    - Respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case.
    - Dealing with the case efficiently and expeditiously.
  - The duty of the participants in a criminal case is to prepare and conduct the case in accordance with the overriding objective. Anyone involved in any way with a criminal case is a participant in its conduct (Criminal Procedure Rules 2020, rules 1.2(1) and (2)).

# The Intermediary and the Advocate

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The Criminal Practice Direction [2020] EWCA CRIM1347 paragraphs 3F.1 and 3F.2 on the role and functions of intermediaries in criminal courts:

- Intermediaries facilitate communication with witnesses and defendants who have communication needs. Their primary function is to improve the quality of evidence and aid understanding between the court, the advocates and the witness or defendant. For example, they commonly advise on the formulation of questions so as to avoid misunderstanding. On occasion, they actively assist and intervene during questioning. The extent to which they do so (if at all) depends on factors such as the communication needs of the witness or defendant, and the skills of the advocates in adapting their language and questioning style to meet those needs.
- Intermediaries are independent of parties and owe their duty to the court. The court and parties should be vigilant to ensure they act impartially and their assistance to witnesses and defendants is transparent. It is however permissible for an advocate to have a private consultation with an intermediary when formulating questions (although control of questioning remains the overall responsibility of the court).

# Intermediaries for Defendants

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## **The Criminal Practice Direction [2020] EWCA CRIM1347 paragraphs 3F.12 and 3F.13:**

The court may direct the appointment of an intermediary to assist a defendant in reliance on its inherent powers (**C v. Sevenoaks Youth Court** [2009] EWHC 3088 (Admin)). There is however no presumption that a defendant will be so assisted and, even where an intermediary would improve the trial process, appointment is not mandatory (**R v. Cox** [2012] EWCA Crim 549). The court should adapt the trial process to address a defendant's communication needs (**R v. Cox** [2012] EWCA Crim 549). It will rarely exercise its inherent powers to direct appointment of an intermediary but where a defendant is vulnerable or for some other reason experiences communication or hearing difficulties, such that he or she needs more help to follow the proceedings than her or his legal representatives readily can give having regard to their other functions on the defendant's behalf, then the court should consider sympathetically any application for the defendant to be accompanied throughout the trial by a support worker or other appropriate companion who can provide that assistance...

# Intermediaries for Defendants

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...The court may exercise its inherent powers to direct appointment of an intermediary to assist a defendant giving evidence or for the entire trial. Terms of appointment are for the court and there is no illogicality in restricting the appointment to the defendant's evidence (**R v. R** [2015] EWCA Crim 1870), when the "most pressing need" arises (**OP v. Secretary of State for Justice** [2014] EWHC 1944 (Admin)). Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare.

*(Criminal Practice Direction [2020] EWCA CRIM1347 paragraphs 3F.12 and 3F.13)*

# Intermediaries for Defendants

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- Specific tasks that the intermediary can help a defendant (and their representatives) with depending on terms of appointment (and the scope of the funding) include:
  - Assessing the communication needs of the defendant.
  - Providing instructions in conference with representatives.
  - Helping defendants understand documents drafted on their behalf, such as their Defence Statement.
  - Understand court procedure and whether they give evidence or not and the consequences of not doing so.
  - Following the proceedings in court.
  - Give their best evidence
- Where no intermediary is available, the court is expected to adapt its procedures.

# How Can Intermediaries Help Advocates?

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- Suggest additional or different special measures which might assist the witness to give their best evidence.
- Provide guidance on how to keep the witness settled during questioning and maintain their concentration.
- Help the advocate build a rapport or understanding with the witness.
- Assist with the formulation of questions and the structure of questioning.
- Helping advocates with the best way to communicate with the particular witness on particular topics arising in the case:
  - Use of aids- body maps or dolls; plans; numbers etc.
- Help pace the advocate and stop them asking questions too fast.
- Remind advocates (and the court) where there is a need for a break.
  - Being next to the witness and knowing the witness better than the advocates and the Judge, having met with them and undertaken their assessment, RI's can identify when a witness is tired or distressed.

# How Can Advocates Help Intermediaries?

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- Read the RI's report thoroughly and apply the advice and guidance offered.
- Set an agenda for the ground rules hearing (adopting the toolkit GRH checklist) and involve the RI in the discussion.
- Help the RI to understand the issues in the case/ the nature of the defence.
- Provide a list of questions which employ the techniques contained in the toolkit and any recommendations in the RI's report in good time.
- Help the RI to understand what the advocate is trying to get from the question.