

## USING INTERMEDIARIES IN CARE PROCEEDINGS TO ENSURE THE EFFECTIVE PARTICIPATION OF VULNERABLE CLIENTS

### Part 1 - Introduction of Intermediaries and early developments

#### First use of intermediaries:

- The Youth Justice and Criminal Evidence Act (“YJCEA”) 1999, s16 set out range of “special measures” for vulnerable witnesses (but **not** defendants).
- S29 YJCEA provides:
  - (1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (“an intermediary”).
  - (2) 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,and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
- Witnesses are eligible for such a direction if (s16 YJCEA):
  - they are under the age of 18 at the time of the hearing; or
  - if the court considers that the quality of evidence given by the witness is likely to be diminished because they suffer from a mental disorder within the meaning of the Mental Health Act 1983, or otherwise have a significant impairment of intelligence and social functioning; or if they have a physical disability or suffer from a physical disorder.
- The first intermediaries were trained in 2003 and evaluated in six areas from 2004
- National roll-out was recommended and completed by September 2008
- At that point there were about 130 registered intermediaries

#### Intermediaries for defendants

- It was accepted at an early stage that there would be defendants in the criminal justice system who might need the assistance of an intermediary but there was no statutory means to appoint (or fund) them.
- Courts used their inherent powers in such situations
- A very early case on this is *R v H* [2003] EWCA Crim 1208:

- The appellant had IQ of 51
  - A psychological report recommended he have the assistance of an intermediary.
  - Leave was sought from trial judge for D to give his evidence-in-chief by means of a pre-recorded video and to have the assistance of an intermediary when under cross-examination;
  - Trial judge refused to allow pre-recorded evidence but agreed to a “supporter” who could effectively act as an “interpreter” in the dock through the trial.
  - The Court of Appeal set out guidance for cases where assistance is needed by defendants, observing that intermediaries were akin to interpreters and a court was entitled to appoint them, in appropriate cases, but also noting that the trial judge could also use case management powers to ensure the fairness of proceedings
- The importance of ensuring effective participation, and what that involved, was considered by the ECtHR, in **SC v the United Kingdom 2005 40 EHRR 10**
    - The 11-year-old applicant had learning difficulties. He had been convicted of robbery in the Crown Court and brought a complaint to the EctHR complained he had not been able to participate effectively in his trial because of his youth and low intellectual ability
    - The ECHR allowed the claim and set out the following points of principle:  
*“The right of an accused to effective participation in his or her criminal trial generally includes, inter alia, not only the right to be present, but also to hear and follow the proceedings. In the case of a child it is essential that he be dealt with in a manner which takes full account of his age, level of maturity, and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings, including conducting the hearing in such a way as to reduce, as far as possible, his feelings of intimidation and inhibition”*
  - The Court held that that “effective participation” means that:
    - the defendant needs to have a broad understanding of the nature of the trial process, and of what is at stake for him or her, including the significance of any penalty which may be imposed;
    - the defendant, with the assistance of for example an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court; and
    - the defendant should be able to follow what is said by the prosecution witnesses, and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees, and make them aware of any facts which should be put forward in his defence

### **The intermediary’s role**

- Very much the same role as we are now familiar with in the family justice system
- The basic framework is set out in s29 YCJEA 1999, with more detail added by the Criminal Procedure rules, which state that:

*“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.”*

- It has been asserted that *“experience has shown that one of the most useful functions of intermediaries is to assist the trial judge and counsel in establishing what types of question are likely to cause misunderstanding and thus averted”* (cited in Blackstones Criminal Practice and repeated in R v Cox [2012] EWCA Crim 549).
- The Court of Appeal in Cox went on to observe that: *“Although it is clear from s 29 of the 1999 Act which creates the discretion to use intermediaries as a special measure, that an intermediary can also assist a witness to communicate by explaining questions and answers, again as Blackstone records, this “happens rarely in practice”. Questions, therefore, are usually put directly to the witness. The intermediary’s function is actively to intervene when miscommunication may or is likely to have occurred or to be occurring.”*

### **Later developments**

- Despite being the trailblazer in the sense that it was the jurisdiction in which intermediaries were first introduced, criminal proceedings now lag behind family proceedings in terms of the availability of intermediaries as far as defendants are concerned
- A leading case on the appointment of intermediaries for defendants is *R (OP) v Ministry of Justice* [2014] EWHC 1944 (Admin). The defendant had a significant learning disability and ASD. The issue for the Divisional Court was whether an intermediary was required for the whole trial, or just whilst the defendant gave his evidence. Analysing this issue, Rafferty LJ identified two distinct needs which could arise:
  - *“The first is founded in general support, reassurance and calm interpretation of unfolding events. The second requires skilled support and interpretation with the potential for intervention and on occasion suggestion to the Bench associated with the giving of the defendant’s evidence.*
  - *The first is a task readily achievable by an adult with experience of life and the cast of mind apt to facilitate comprehension by a worried individual on trial. In play are understandable emotions: uncertainty, perhaps a sense of territorial disadvantage, nervousness and agitation.*
  - *The second requires developed skills of the type contemplated by inclusion in the [Witness Intermediary] Scheme. The most pressing need for the help of an intermediary self-evidently bites at the point of maximum strain, that is when an accused should he*

*do so elects to give an account of himself by entering the witness box and submitting to cross-examination.”*

- The Court held that: *“We are not persuaded that it is essential a [Registered Intermediary] be available to all defendants for the duration of their trials. In many instances the provision of help centred upon the cast of mind and life experience we have described are likely to prove sufficient. The pinch point is at the giving of evidence when in our view it is unarguable that an individual in jeopardy should be put in the best position to do himself justice”*
- The decision was later endorsed by the Law Commission in a report from 2016 “Unfitness to Plead”, although the Law Commission specifically noted that an intermediary would be required for the whole trial for defendants who had various identified disabilities such as dissociative identity disorder or a significant learning disability combined with, for example, extremely limited working memory or Attention Deficit Hyperactivity Disorder
- The case of *R v Lubemba and R v JP* [2014] EWCA Crim 2064 is an example of the approach in R (OP) being applied in practice, and of the onus being placed on practitioners and the judiciary to ensure effective participation for vulnerable defendants. This case also established that ground rules hearings should be held in every case involving a vulnerable witness/defendant, regardless of whether or not there is an intermediary

**Development of principles of good practice (or establishment of safety nets for the vulnerable defendant when an intermediary is not available)**

- Early on, training was developed to try to assist tribunals and advocates to meet the needs of vulnerable witnesses and defendants:
  - In 2011, the Advocacy Training Council published its report “Raising the Bar”, which provided recommendations for training barristers in handling vulnerable witnesses and defendants and set out what became the first “toolkit” for advocates
  - This led to “Advocacy and the Vulnerable” training being rolled out, and in particular the “Vulnerable Witness training” course for criminal practitioners

**Current approach to appointment of intermediaries in criminal jurisdiction - key points**

- The use of intermediaries for vulnerable witnesses is well-established now, and commonplace, thanks to ss16 and 29 YCJEA 1999
- It has been a much bumpier path for intermediaries for defendants, however. The principles are include the following (largely set out in the case of *R v Cox* [2012] EWCA Crim 549 but also now enshrined in the criminal practice direction):
  - No presumption that a defendant will be assisted by an intermediary and, even where an intermediary would improve the trial process, appointment is not mandatory;

- The court is expected to adapt the trial process to address a defendant's communication needs;
- Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial, extremely rare;
- However, 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;
- A trial will not be rendered unfair because a direction to appoint an intermediary for the defendant is ineffective (because one cannot be found);
- Faced with an ineffective direction, it remains the court's responsibility to adapt the trial process to address the defendant's communication needs.

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