



**Date: 28.11.18**

**Title: EVIDENCE ONLY?**

IfJ is receiving more requests for intermediaries to assist a defendant's 'evidence only', rather than for pre-trial processes (such as taking instructions) and the duration of the trial. IfJ has gathered the views of its members about the correct approach in this situation. Members consider that it is necessary to assess the individual defendant's communication needs and level of understanding, and then recommend accordingly.

**Background**

There may be times when the communication profile of the vulnerable defendant means that they are fully able to understand what is said in court, but their evidence is unlikely to be clearly understood without intermediary assistance. In such a case, this will become apparent during an intermediary assessment and such recommendations will follow. However, many intermediaries with extensive experience of defendant work suggest this type of communication need is relatively rare.

The effect of a communication impairment is often broader than a non-specialist may observe. For example, it is not unusual for deaf people to have difficulties with reading. People with severe dyslexia may have problems with processing information and word finding. Other vulnerabilities result in restricted vocabulary and limited ability to understand and follow the nuances of the court case against them. Mental health conditions have an adverse impact on the person's understanding, especially in the alien court environment of the dock. An appropriately skilled intermediary can address all these issues, and difficulties are rarely insurmountable. However, adaptation and assistance by a specialist is essential to ensure effective participation in their trial.

Effective participation is an essential part of a vulnerable person's Article 6 rights. (See the Annex below for Article 6 text.) Intermediaries conduct a full assessment of all communication issues relevant to the court process. The intermediary will advise on the best approach to ensure the vulnerable person understands the evidence against them, and can participate effectively.

An intermediary whose assessment indicates that assistance is required for the whole trial will have some professional difficulty with being directed by the court to assist only with evidence. If an intermediary considers that without fully understanding the prosecution evidence, their right to decide whether to give evidence, to instruct their counsel (in the absence of assistance) will adversely affect

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their performance in the witness box, the Intermediary may withdraw as she cannot perform the function for which they are engaged: effective participation.

While it is of course the responsibility of the courts to make decisions about the scope, duration and necessity of intermediary appointments, we ask those in the criminal justice system to acknowledge our role as independent communications experts and our capacity to assess and make communication recommendations in line with the needs of the person before us. Intermediary reports play a vital role to inform judicial decision-making.

### **What is the basis for an intermediary appointment for a vulnerable defendant in the absence of legislation?**

Using the court's inherent duty to ensure the right to a fair trial, a judge may appoint an intermediary to assist a vulnerable defendant.

(Article 6 European Convention of Human Rights, Criminal Procedure Rule 1 and Part 3 Rule 9.) These appointments have been governed by developments in case law e.g. *C v Sevenoaks Youth Court* [2009] EWHC 3088, *R v Dixon* [2013] Crim 465, *R (OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin). However, even where the court has ruled on the desirability of the defendant being assisted by an intermediary, the court's intention can be defeated by lack of funding or difficulties identifying a suitable intermediary who will be available when the case is listed for trial (*R v Cox* [2012] EWCA Crim 549).

There is no Act of Parliament in force providing intermediaries for defendants (section 104, Coroners and Justice Act 2009, a narrow provision enabling appointments for 'evidence only', has never been implemented). Drawing a contrast with the entitlement of witnesses, The Law Commission has highlighted the inconsistent provision for defendants (para 1.27 'Unfitness to plead' 2016).

Information obtained by the Law Commission indicated that 'In the vast majority of cases where judges rule that an intermediary should be made available to assist the defendant, that assistance is granted for the whole of a trial including trial preparation, rather than just for the giving of evidence' (para 2.15, 2016). However, in 2016 new guidance issued by the Lord Chief Justice recommended significant restrictions on the scope of appointments: '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' (para 3F.13). This Practice Direction was issued without consultation and, we would argue, in the face of the available evidence about defendants' levels of communication need in the criminal justice system.

IfJ supports a regulated structure for intermediaries accepting appointments for defendants (currently unregulated) which will also regulate payment. It also supports the findings and recommendations of the Law Commission:

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‘Without a statutory entitlement there are also significant resource issues where intermediary assistance is granted for a defendant, particularly in terms of identifying an available intermediary and obtaining funding’ (para 1.28. 2016)

‘Although intermediary assistance is not a remedy for all participation difficulties, we consider that for many defendants with significant difficulties it offers the best mechanism for facilitating their effective participation in trial. With the overwhelming support of our consultees, we recommend that a statutory entitlement be created for a defendant to have the assistance of an intermediary, both for the giving of evidence and otherwise in trial proceedings, where that is required. Under our recommendation, intermediary assistance would only be granted where such assistance is necessary for a defendant to have a fair trial, and only for as much of the proceedings as is required to achieve that aim.

Replacing the current ad hoc practice, of the court granting intermediary assistance under its inherent jurisdiction, with a statutory scheme and a clear test for granting assistance would ensure more consistent and cost-effective provision for defendants’ (para 1.33).

**Are there circumstances when a defendant’s communication profile may suggest, before an intermediary is appointed, that an intermediary is required for evidence only?**

In a minority of cases where a vulnerable person has competent understanding, and good mental health, but has speech impairment, it may be appropriate for the judge to appoint an intermediary for the period of giving evidence only. This assessment would require the professional skills of an intermediary to provide specialist advice to the court, particularly as the person will need to use impaired speech to instruct counsel.

A judge may order that the intermediary is present to support their expressive communication during their evidence. However, we are uncertain of the practicalities of this order. How does the defendant communicate effectively outside the court hearing? How does he instruct his lawyers, give statements to the police or, in family cases, to social workers etc involved? It has been suggested that family, friends or carers can provide this assistance. However, frequently there are family inherited conditions or impoverishment of vocabulary, which render the family supporter also unable to understand the process.

The problem in dispensing with intermediary assistance arises when the person has marked deficits in their understanding. Often people who have reached adulthood with a marked Specific Learning Difficulty or Learning Disability, will be expert at masking this and will pretend that they do understand. They will say “yes” when asked “do you understand?” as they do not want to appear stupid. They may then sit back and disengage for the rest of their trial because it is too difficult to follow. So when asked to give evidence, they are oblivious to the implications of legal argument, forensic evidence, expert input, what their lawyers are advising them based on those facts and what they need to understand in order to meaningfully answer the questions put to them. When transcripts are read aloud in court, many vulnerable communicators struggle to retain more than the first sentence, as this is too much information to process and the vocabulary is too complex. Words which seem part of usual language

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have different meanings in court e.g. admissions, case, furnish, putting the case, while other words are clearly outside their vocabulary e.g. prosecution, evidence, mitigation, collaboration.

Registered intermediaries are trained to assist witness's early detection by the police throughout the criminal justice process ie police interview/ABE, memory refresh, court familiarisation visit, evidence, impact statement). At present, very few intermediaries have been appointed at the suspect interview state and as previously stated, there is no statutory right for a defendant to be assisted by an intermediary at any stage.

### **How can the CPD 2016 be viewed?**

The new 2016 Practice Direction advocates that Intermediaries are used rarely and that when they are, any assistance beyond help with cross-examination should be extremely rare. Therefore, from the outset the vulnerable defendant (innocent until proven guilty) is disadvantaged. There is no legal or clinical reason for a change in approach. It is suggested that this change relates to funding. This does not add up when the costs of a successful Article 6 challenge will dwarf the costs of an intermediary assisting throughout a trial.

If a defendant cannot understand the charges against them, cannot meaningfully instruct lawyers, or understand the evidence presented in court, he is not given the same access to the judicial process as a vulnerable witness/victim counterpart.

During a training session for members of the judiciary, an intermediary read a passage with fabricated words and phrases i.e. *trotonomy* and *he is a trotonomist*. Participants proceeded to coherently answer questions about the passage, even though they had not understood several words. When finally challenged to explain the meaning of the words, they admitted to not knowing. In effect they had been answering questions with incomplete understanding. This is often the experience of vulnerable people in the witness box.

### **Vulnerable defendants - the facts**

- Over 60% of children who offend have communication difficulties and, of this group, around half have poor or very poor communication skills (RCSLT);
- Around a quarter of children who offend have an IQ of less than 70;
- 7% of adult prisoners have an IQ of less than 70 and a further 25% have an IQ between 70-79; it is generally acknowledged that between 5 and 10% of the adult offender population has a learning disability;
- 43% of children on community orders have emotional and health needs, and the prevalence amongst children in custody is higher;

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- 39% of adult offenders under supervision in one probation area had a current mental illness, and 49% had a past/lifetime mental illness;
- 75% of adult prisoners have a dual diagnosis (mental health problems combined with alcohol or drug misuse).

Restrictions on intermediary appointments can be interpreted as a money saving exercise. Often, where the costs of an intermediary are saved, this simply shifts costs to other parts of the public sector; for example, the prison service is accommodating a vast number of vulnerable people who have been unable to navigate their way through the legal maze and have not understood what went on in court and the reason for their conviction. Anecdotally we have heard from defendants that their attitude and behaviour to serving a prison sentence, and possibly in terms of reoffending, can be affected by whether they understand the reasons for being convicted. Understanding consequences requires higher-level verbal reasoning skills. This can lead to the vulnerable person spending the duration of their sentence working against a system, which has put them in that position, for reasons they have not understood.

There are also wasted costs of police time and resource when interviews are conducted in ways that are not adapted to the needs of the vulnerable suspect. Appropriate Adults are not trained to assess communication and are essentially present for the welfare of the suspect. CPS decisions to prosecute (or not) are then made based on evidence obtained from a vulnerable person who may not have understood the questions. The subsequent legal process may be very costly. Experience has shown that when an intermediary is appointed to assist a vulnerable suspect, evidence gathered is more consistent, valuable and may avoid a lengthy trial. When intermediaries assist a defendant pre-trial, and subsequently the vulnerable person understands the case, there may be a guilty plea. In these ways, intermediaries can substantially reduce rather than increase costs. Without having access to communication intermediaries, the professionals involved in every stage of the justice system are also disadvantaged in trying to carry out their roles in a fair and non-discriminatory way.

Vulnerable people are not being afforded the right to the effective participation they are entitled to in law.

## **Annex: Article 6**

- 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
- 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
- 3. Everyone charged with a criminal offence has the following minimum rights:*

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- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- (b) to have adequate time and the facilities for the preparation of his defence;*
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

## **FEES**

Colleagues in the Criminal Justice System have mentioned some inaccurate assumptions about intermediary fees. We would like to clarify how Intermediaries are paid.

### **Registered Intermediaries**

The Ministry of Justice is responsible for the Registered Intermediary scheme which matches vulnerable witnesses/victims involved in the criminal justice system with suitably skilled Registered Intermediaries.

The Registered Intermediary Scheme began in 2004. There was one pay increase in 2006, then no increase again until 2015. For the past two years, there has been an annual review with an average 2% increase to the hourly rate. In real terms, this hourly rate is currently less than originally intended because for 9 years the hourly rate did not rise in line with the cost of living.

Of course, we accept that public sector funding is under pressure across the justice system. We are all professionals who do the work because we believe in equal access to justice.

### **Non-registered Intermediaries**

Apart from the scheme for witnesses in the criminal courts, there is no publicly funded registered scheme where vulnerable people are matched with intermediaries and rates and terms of service are prescribed. The MoJ is currently reflecting on its position relating to intermediaries for defendants and will hopefully publish a response to questions raised about this discrepancy, depending on whether you are accused of, or you have witnessed, a crime.

Currently, Non-registered intermediaries' fees are not regulated. Each practitioner charges what they consider to be a reasonable rate for the services provided. This applies to criminal defendants and suspects as well as vulnerable people in the family, commercial or other jurisdictions.

The current pathway for appointing a Non-registered intermediary is by contacting private companies set up to meet this need, or via the IfJ website. The private companies set their own rates and are not regulated by the MoJ.

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**In a recent IfJ survey of their members, over half of respondents were in favour of Non-registered intermediaries sourced via the IfJ website charging in line with the MoJ Registered Intermediary Scheme rate. Many IfJ members already charge in this manner.**

We do not seek to profit from the discrepancy of provision depending on whether the vulnerable person is accused of a crime, involved in a family issue or a witness. We trust that there will eventually be equality of access in all jurisdictions via a regulated scheme.

Until then, IfJ members strive to meet the growing need and welcome requests for intermediary assistance to any vulnerable person.

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