

## **DECISION MAKING IN RESPECT OF INTERMEDIARY APPOINTMENTS FOR DEFENDANTS**

This paper addresses:

- Problems associated with requests for intermediary appointments for ‘evidence only’
- Intermediary appointments to ensure the defendant’s effective participation at key stages
- What about dealing with the ‘rare’ circumstances when judges still make appointments for duration of the trial?

Since 2011 Communicourt has worked with over 4000 cases involving vulnerable defendants. Occasionally, a judge grants an intermediary for when the defendant gives evidence, but not for conferences and the prosecution case.

We recognise the budgetary constraints that may influence this decision<sup>1</sup>, but would like to point out the following issues for consideration:

1. Many defendants are not able to instruct their advocate sufficiently due to:
  - a. Minimal understanding of the details of the prosecution case
  - b. Minimal understanding of the implications of giving / not giving evidence
2. With the assistance of an intermediary pre-trial, some defendants finally understand the evidence that will be presented at trial, and in view of this better understanding choose to plead guilty. Apart from the obvious benefits to victims, this saves considerable court time and money.
3. Understanding the prosecution case as it unfolds will have an impact on how s/he instructs his/her legal team and very importantly, whether the defendant chooses to give evidence.
4. It is very difficult for an intermediary coming in late in proceedings to build adequate rapport with the defendant and be ‘in tune’ with the specifics and context of the case. The intermediary has no measure of how the defendant has understood the first half of the case, and has not had a chance to assess (informally) the true level of the defendant’s communication skills in the stressful situation of court.
5. If instructed only at the point of giving evidence the intermediary will not have sufficient time to advise and assist prosecution in the preparation of question style. Intermediary interventions are therefore increasingly likely to disturb the flow of the cross-examination. A ‘good result’ is when ground rules are agreed and adhered to and the intermediary does not need to intervene during questioning.
6. Communicourt studied a sample of 250 cases involving intermediaries. Only 47% of defendants using intermediaries chose to give evidence. Without an intermediary present throughout the ‘first half’ to assist the defendant in understanding the impact of this decision, many vulnerable people will not avail themselves of this legal right.
7. The intermediary’s role is to facilitate communication (both understanding and expression). Witnesses may have the assistance of an intermediary for all parts of the process which are relevant to them - for the ABE interview, for their court familiarisation visit, and when they give their evidence in court. By the same token, vulnerable defendants should have the assistance of an intermediary for the parts that are relevant for them – for conferences, for the prosecution

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<sup>1</sup> It is worth noting that the Ministry of Justice has centralised the funding for defendant intermediaries since October 2013, so individual court budgets are not affected by authorising funding.

case, for giving instructions, and for decisions such as how to plead and whether or not to give evidence. It is never considered appropriate for a defendant who is not fluent in English to have an interpreter only at the time of giving evidence.

8. Decisions about when an intermediary is required need to be made on a case by case basis. If the assessing intermediary is of the view that the defendant would not fully understand the prosecution case and be able to instruct his/her legal team without the use of an intermediary, Communicourt will not accept a booking which is only for the point of giving evidence.

#### **Do intermediaries always recommend that an intermediary is required for the whole trial?**

9. In 24% of assessments carried out by Communicourt, the intermediary does not recommend that an intermediary required. The report may advise that the defendant's communication deficits can be managed by reasonable adjustments in court (and make recommendations about how this could be done). Occasionally the report will say that the defendant's communication deficits are too severe and even with the support of an intermediary the defendant would not be able to fully understand the trial.
10. It is important to note that judges usually do not see the reports which do not recommend an intermediary is required in court, as there will be no application for special measures from the advocates in the case.
11. Communicourt intermediaries are full time employees with permanent contracts. They do not gain in any way from recommending an intermediary is required for the whole trial. This is important so that courts can be reassured that the recommendations arising from a Communicourt assessment are totally impartial.

#### **What about R v Rashid [2017] EWCA Crim 2?**

12. The intermediary assessment for Rashid was not from Communicourt. We do not have access to the report, or details of his specific communication difficulties. We cannot comment on the assessment tasks and activities or the quality of the report.
13. However, what we do know about Rashid is that he did not receive any outside help<sup>2</sup> with his learning at school and managed to (falsely) gain a place at university to study electronic engineering without alerting his lecturers of any communication difficulties<sup>3</sup>. His teachers reported a 'lack of interest in learning' rather than any specific needs<sup>4</sup>. Three experts were instructed in the original case and could not agree on his intellectual ability or his need for an intermediary to support him at trial.

#### **And the Criminal Practice Direction Amendment No 1 [2016] EWCA Crim 97?**

14. It is for the judge to decide for which parts of the trial to authorise an intermediary, assisted by the LCJ guidance, the intermediary report and the recommendations of experts.
15. Whilst we appreciate that judges are under pressure to protect the public purse, Communicourt intermediaries cannot adjust their assessment findings to adapt to the budget.
16. In 2017, Communicourt and Triangle collated data on trials which used defendant intermediaries. The study found that intermediaries are currently only being used in 1 in every 4500 criminal trials across England and Wales<sup>5</sup> indicating that in line with [2016] EWCA Crim 97, directions to appoint an intermediary for the entire trial are indeed extremely rare.

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<sup>2</sup> Point 3 - R v Rashid [2017] EWCA Crim 2

<sup>3</sup> Point 8 - R v Rashid [2017] EWCA Crim 2

<sup>4</sup> Point 4 - R v Rashid [2017] EWCA Crim 2

<sup>5</sup> See document – 'How often do defendants have the assistance of an intermediary'

## How often do defendants have the assistance of an intermediary?

### Background

Between August 2009 and August 2011, the Witness Intermediary Scheme (WIS) piloted the provision of defendant intermediaries for vulnerable defendants. During this time, 83 defendants were supported for the duration of the trial. This was a drain on the limited resource of Registered Intermediaries (RIs). For this reason, the MoJ ceased to provide a matching service for defendants from Summer 2011.

Since then, a service for defendants has been provided by Communicourt (working with defendants of all ages), Triangle (working with defendants under 25) and a small number of independent practitioners.

### Statistics

This information is based on data collected by Communicourt and Triangle for their own use and also publicly available statistics provided by the MoJ.

	Communicourt	Triangle	Total
Number of criminal trials in 2017 (England and Wales)			<b>1,508,544</b>
Enquiries for intermediary assessment of defendant	833	344	<b>1,177</b>
Assessments carried out	579	184	<b>763</b>
% of assessments recommending intermediary	66%	(Data not collected)	-
Intermediary assisted at all stages of the trial process	302*	(Data not collected)	-
Intermediary recommended only at the point of giving evidence	3	4	<b>7</b>

\*Communicourt were unable to cover all court requests for intermediary attendance at trial due to limited resource

### Conclusions

- In 34% of assessments, an intermediary is not recommended at trial either because
  - the client has significant communication difficulties which cannot be overcome with strategies implemented by an intermediary, or
  - the vulnerable person's communication level is adequate for understanding the evidence in their trial and giving instructions to their legal team.
- Intermediaries supporting defendants are currently assisting the criminal courts in approx. 0.03%\*\* of trials equating to just one in every 3400. Therefore, it is still extremely rare for a defendant to be supported by an intermediary for the duration of the trial.

\*\*based on approximate figure of 75% recommendations for intermediary assistance at trial from Triangle

### References:

The amended Criminal Practice Directions [2015] EWCA Crim 1567 consolidated Amendment No. 1 to the Criminal Practice Directions 2015 [2016] EWCA Crim 97.

R v Yahya Rashid [2017] EWCA Crim 2

R (OP)V Ministry of Justice [2014] EWHC 1944

Statistics provided courtesy of Communicourt Ltd and Triangle

Criminal court statistics: October to December 2017 (main tables) [<https://www.gov.uk/government/collections/criminal-court-statistics>] accessed April 2018