



Intermediaries and Communication Assistance: Drawing international comparisons as the profession grows

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Intermediaries: A definition and the position in E&W

- Helps convey questions to and answers from a witness
- Takes a variety of forms: some intermediaries relay questions, others conduct the questioning themselves, others help plan communications and only step in if questioning breaks down.
- Section 29 *Youth Justice and Criminal Evidence Act 1999* – intermediaries in action from 2004
- Eligibility in legislation – age or incapacity
- But for the accused the legislation (an amendment from 2011) is not yet in force – judges still relying on ‘inherent jurisdiction’ to direct an intermediary if one is required for a fair trial

The profession 'grows'

- Other types of intermediary 'are available' around the globe... however in England and Wales a model developed, followed by versions of it in Northern Ireland, Australia - NSW, Victoria and ACT, as well as New Zealand
- But having taken years to spread intermediaries are still:
 - Under-researched; their effectiveness is rarely the subject of academic study.
 - Niche; they are rare because they are for court users deemed so vulnerable that they need special assistance.
 - Temporary 'fixes'; the traditional mores of court culture which dictate how most court users participate remain unchanged

Overall it is probably 'ground rules hearings' (Cooper, Backen and Marchant, 2015) that have had a bigger impact because they are of wider application.

Ground Rules Hearings: Rules & Legislation (Cooper in Jacobson & Cooper (eds) 2020)

Jurisdiction	Ground Rules Hearing procedure statute, rule or practice guidance	Year procedure was first written into statute, rule or practice guidance
Criminal Justice System, England and Wales	Criminal Procedure Rules, Rule 3.9 (7) (see also Criminal Practice Direction, paragraph 3E).	2014
Family Justice System, England and Wales	Practice Direction 3AA Vulnerable Persons: Participation in Proceedings and Giving Evidence. Paragraph 5.2 – 5.7.	2017
Criminal Justice System, Victoria, Australia	Criminal Procedure Act 2009, Part 8.2A—Ground rules hearings and intermediaries, page 23, paragraph 13.	2018
Criminal Justice System, New South Wales, Australia	Criminal Trial Courts Bench Book, District Court Criminal Practice Note 11.	2019
Criminal Justice System, Australian Capital Territory	Evidence (Miscellaneous Provisions) Amendment Act 2019, part 2.	2019
Criminal Justice System, Scotland	Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, section 1ZD.	2019

England: Intermediaries and defendants

- *TI v Bromley Youth Court* [2020] EWHC 1204 (Admin)
- Amendment to the *Criminal Practice Directions* in April 2016 at CPD 3F.13, 'Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare...'
- Confirmation in *R v Rashid* [2017] EWCA Crim 2
- President of the QBD: '...most cases will involve defendants who do not require the assistance of an intermediary. Therefore, the appointment of an intermediary will be rare. It does not follow that there is a high hurdle to overcome for the appointment of an intermediary if one is necessary for the effective participation of a defendant in the trial process' [39].

The 'general consensus' submission in *T/ v Bromley*

- 'The general consensus is that the measures currently deployed are simply not good enough to ensure effective participation. See also the Law Commission report 'Unfitness to Plead (Law Com No. 364) and the Review of the Youth Justice System in England and Wales by Charlie Taylor pointing to significant deficits in the Youth Court (Chapter 4), notwithstanding the adjustments made to facilitate a child's participation.' [29]
- The court rejected the invitation 'to provide a judicial view on the so-called general consensus' because it 'can only apply the law as it is' [30].
- What is the current general consensus?

Inclusive justice: a system designed for all (EHRC, 2020)

- If anything, concern is probably greater since COVID-19 accelerated a move towards virtual hearings.
- ‘Almost all the criminal justice professionals in England and Wales who we interviewed felt that use of video hearings does not enable defendants or accused people to participate effectively, and reduces opportunities to identify if they have a cognitive impairment, mental health condition and / or neuro-diverse condition.’ (EHRC, Findings and recommendations, 2020: 9).
- Still the ‘old’ problems e.g. arcane language, lack of representation etc

Looking ahead: Intermediaries & remote witness assessments

- NSW
 - COVID-19
 - England & Wales
-
- Participation, not digitisation, should be the watchword as we move forward.

‘Participation’, not ‘digitisation’, should be the watchword for court reform

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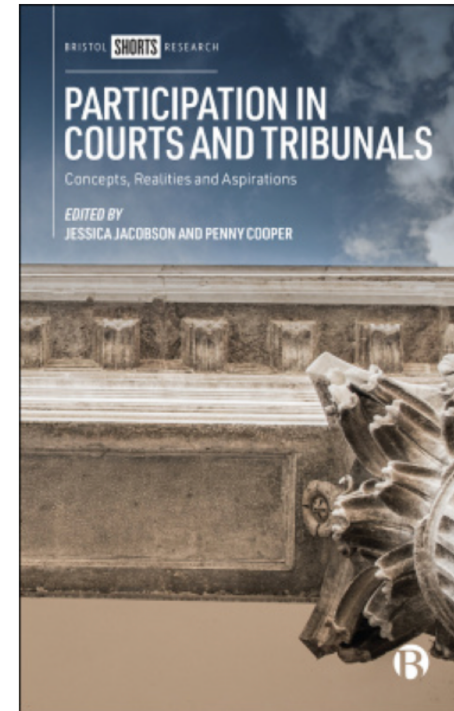
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