

Rationing Defence Intermediaries
under the April 2016 Criminal Practice Direction*

Laura Hoyano, *Wadham College and Faculty of Law, University of Oxford, Barrister, Red Lion Chambers, 18 Red Lion Court, London*

Angela Rafferty QC, *Vice-Chair of the Criminal Bar Association of England & Wales, Barrister, Drystone Chambers, 35 Bedford Row, Recorder (Old Bailey)*

Equality of arms for child and other vulnerable defendants, in particular access to the special measures routinely provided to prosecution witnesses with the same vulnerabilities, has been contentious since 1999. Much progress has been forced through rulings by courts concerned about such defendants' capacity to cope with the demands of the adversarial trial. This progress appears to have been reversed by the April 2016 Criminal Practice Direction stating that the appointment of defendant intermediaries should be "rare" for the defendant's testimony, and "extremely rare" for the entire trial. This article considers the legal options for challenging this retrograde step.

The Problem

When Special Measures Directions were introduced in the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999), defendants with the same communication difficulties as prosecution witnesses were excluded from all Special Measures, including access to intermediaries.¹ Government Ministers justified this because defendants had counsel to represent their interests, they had a choice whether to testify (ignoring the fettering of this "choice" by the adverse inference from failure to testify),² and the trial judge had a duty to ensure a fair trial.³ It did not seem to occur to English policymakers that defence counsel must be able to communicate with their clients in order to obtain instructions, and that defendants with impairments must be

¹ YJCEA 1999 ss.17(1),19(1)(a).

² Criminal Justice and Public Order Act 1994 s.35.

³ Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy across Boundaries* (Oxford: Oxford University Press, 2007, updated paperback edn, 2010), pp.672-673.

able to communicate with the advocates questioning them and with the jury or magistrates. Moreover, they did not think it odd that a person with communicative difficulties testifying for the prosecution would automatically be eligible for an intermediary, but if she then appeared in another trial as a defendant, she would not⁴ -- a scenario which has occurred.⁵ Fortunately for defendants north of the border, the Scottish Parliament in 2004 accorded them access to all special measures for their testimony except for use of the screen and recorded pre-trial cross examination, if they met the same threshold eligibility criteria as prosecution witnesses.⁶

This disparity in treatment between prosecution witnesses and vulnerable defendants in English and Welsh courts is no rare occurrence, because of the prevalence of young and impaired defendants in the criminal justice system. The Prison Reform Trust reported in 2012 that:

- 39% of adult offenders under supervision in one probation area had a current mental illness; and
- 75% of adult prisoners had a dual diagnosis of mental health problems combined with alcohol or drug misuse.⁷

Lord Carlile's Report into the Youth Courts in 2014⁸ added further research data to the Prison Reform Trust's profile:

- over 60% of offenders had communication difficulties, of whom around half have poor or very poor communication skills;
- one third of those in custody had identified special educational needs;
- around a quarter of offenders had an IQ less than 70, signifying a learning disability, rising to 30% for those in custody with persistent offending histories;

⁴ Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Bristol: Policy Press, 2015), p.247.

⁵ Information from Joyce Plotnikoff, supplied 6 October 2016.

⁶ Vulnerable Witnesses (Scotland) Act 2004 s.271F (extended by the Victims and Witnesses (Scotland) Act 2014).

⁷ Jenny Talbot, *Fair Access to Justice? Support for Vulnerable Defendants in the Criminal Courts* (London: Prison Reform Trust, 2012), p.1.

⁸ Lord Carlile of Berriew QC, *Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court* (June 2014), p.15.

- 43% of children on community orders had emotional and health needs, and even higher for those in custody;
- 39% of children in custody had been on the child protection register and/or had experienced abuse or neglect;
- 65% to 75% of children in custody had had a traumatic brain injury; and
- 65% to 78% of children in custody had had a period of non-attendance at school.

Inequality of Arms: Calls for Reform

From the outset, the exclusion of child defendants and adult defendants with cognitive or communicative impairments from special measures was a matter of great concern for those at the coalface. Lord Justice Auld in his comprehensive review of the court system in 2001 noted that there was “a striking difference” between the care for children as prosecution or defence witnesses in the YJCEA 1999 and the “lack of any corresponding provision for them when they are accused of grave crimes in the Crown Court, a disparity that concerns many judges”.⁹ Magistrates had the same concern.¹⁰ Since then a succession of reports has urged that vulnerable defendants be given statutory access to special measures according to their personal needs, to enhance their ability to participate effectively in the court process as required by Article 6 of the European Convention on Human Rights (ECHR), and to receive equal

⁹ Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (September 2001) para.126; *R v GP and four others* Leeds Crown Court, 20 July 2012 (HHJ Peter Collier QC, Recorder of Leeds), [25] (available at <https://www.crimeline.info/case/r-v-g-p-and-4-others>).

¹⁰ In three of the six cases consolidated on appeal as *R v Camberwell Green Youth Court ex parte D* [2005] UKHL 4; [2005] 1 WLR 393, the magistrates had refused Special Measures Directions to prosecution child witnesses because they were not available to the child defendants. See also Mandy Burton, Roger Evans and Andrew Sanders, “Protecting Children in Criminal Proceedings: Parity for Child Witnesses and Child Defendants” [2006] CFLQ 397.\

treatment with prosecution witnesses similarly situated in terms of youth or disabilities.¹¹

Alongside these critical reports, the European Court of Human Rights found the UK in breach of Article 6 by failing to adapt the adversarial trial to the needs of vulnerable defendants, especially those under 18 appearing in the Crown Court.¹²

Inequality of Arms: the Response of the Criminal Justice System

The Government's response to this pressure has been grudging and penny-pinching. Defendants under 18 years were given access to the live link only in 2007, after the Court of Appeal had ruled that the courts' inherent jurisdiction did not extend to adding defendants' access to the video link to the "statutory code" for that special measure.¹³ But unlike all other child witnesses, they still are not automatically eligible; rather, the child on trial must be proved to have a *compromised ability* to participate effectively in the proceedings as a witness giving oral evidence due to his level of intellectual ability or social functioning, and must additionally show that the live link would enable the child to participate more effectively, and – surely an otiose requirement – that it is in *the interests of justice* to allow use of the live link.¹⁴ Notably, there is no reference to a physical disability or disorder diminishing the quality of testimony, although this is a statutory ground for vulnerable adult witnesses to have access to special measures.¹⁵ The threshold for adult defendants is even higher for

¹¹ Lord Bradley, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or with Learning Disabilities in the Criminal Justice System* (April 2009), p.61 and Recommendation 17; Talbot, *Fair Access to Justice?*, p.3; Law Commission of England & Wales, *Unfitness to Plead* (2016) Vol. 1 paras 2.31-2.37; Lord Carlile *Operation and Effectiveness of the Youth Court* (June 2014), pp.27-28. See also the Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (17 November 2010, edited 31 May 2011), Guidelines III.B, III.C, III.D, IV.5, and Explanatory Memorandum, paras.21-25 and Pt IV.

¹² *T & V v UK* (1999) 30 EHRR 121; [2000] Crim LR 187, at [55], [60], [84]-[91]; *SC v UK* [2004] ECHR 263, [2005] FCR 347, at [33]-[36].

¹³ *R v Ukpabio* [2007] EWCA Crim 2108; [2008] 1 WLR 728.

¹⁴ YJCEA 1999 s 33A(2), inserted by the Police and Justice Act 2007 s 47.

¹⁵ Laura Hoyano, "Coroners and Justice Act 2009 -- (3) Special Measures Directions Take Two: Entrenching Unequal Access to Justice?" [2010] Crim LR 345, pp.353-357.

the live link, as the defendant must be shown to have a mental disorder within the meaning of the Mental Health Act 1983 or otherwise to have a *significant* impairment of intelligence and social function which would render him *unable* to participate effectively in the proceedings.¹⁶

Access to intermediaries on a similarly unequal basis, with high impairment hurdles to clear,¹⁷ was enacted by the CAJA 2009,¹⁸ but here there is yet another superadded requirement, that an intermediary direction is *necessary* to ensure that the child or adult defendant receives a fair trial.¹⁹ Notably, this provision would authorise only the appointment of an intermediary for the defendant's testimony. This amendment has never been implemented, reportedly due to resource concerns within the Ministry of Justice, but advocates for vulnerable defendants, at least until now, have been relieved that the measure has been left to lie upon the statute books. This is because the trial courts, encouraged by the Law Lords,²⁰ had already interpreted their inherent jurisdiction to control the trial process and to ensure a fair trial as authorising special procedures to accommodate a defendant's special needs, including directing that an intermediary be appointed to assist a vulnerable defendant.²¹ These appointments have usually extended to the entire trial where the defendant's disabilities have gone beyond merely the capacity to express himself whilst testifying, to understanding what is happening in the course of the trial,

¹⁶ YJCEA 1999 s 33A(5), added in 2009.

¹⁷ Hoyano, "Entrenching Unequal Access to Justice?", 354-361.

¹⁸ Inserting YJCEA 1999 s.33BA(2).

¹⁹ YJCEA 1999 s.332AB(2)(b).

²⁰ *Camberwell Green Youth Court* [2005] 1 WLR 393 at [17] (Lord Rodger), at [59] (Baroness Hale), at [83] (Lord Brown).

²¹ As in *R v H* [2003] EWCA Crim 1208; *R (on the application of TP) v West London Youth Court* [2005] EWHC 2583 (Admin); [2006] 1 All ER 477; [2006] 1 WLR 1219; [2006] 1 Cr App Rep 402; *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) [2010] 1 All ER 735; *R (on the application of AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin); [2012] Crim LR 478; *R v Dixon (Jordan)* [2013] EWCA Crim 465; [2014] 1 WLR 525; [2014] Crim LR 141.

commonly due to learning disabilities, autistic spectrum disorders or ADHD.²² The openness to defendant intermediary appointments was buttressed by the judicially-endorsed Toolkits published by the Advocate's Gateway,²³ especially Toolkit 8, *Effective Participation of Young Defendants* (2013) and Toolkit 16, *Intermediaries: Step By Step* (2015). However, after initially permitting defence legal advisers to use the Intermediary Register maintained by the Witness Intermediary Service, in September 2011 the Ministry of Justice abruptly terminated access,²⁴ relegating solicitors to reliance upon an unpublished circular to HMCTS staff²⁵ which in turn diverted them to organisations which could not provide them with intermediaries²⁶ whilst not referring them to those which could.²⁷ This new mutation of inequality of arms set up the next challenge under ECHR Article 6.

Challenging Inequality of Access to Registered Intermediaries

In *OP v Secretary of State for Justice*,²⁸ Just for Kids Law successfully challenged the refusal of the Ministry of Justice to afford a vulnerable young defendant

²² Of the 417 defendant appointments collated by Plotnikoff and Woolfson from the Ministry of Justice, and the two private intermediary providers Communicourt and Triangle, just under 10% were for the defendant's testimony only, and overall between a quarter and half of these defendants did not give evidence: Plotnikoff and Woolfson, *Intermediaries in the Criminal Justice System*, pp.249-250.

However, the Divisional Court in *OP v Secretary of State for Justice* [2014] EWHC 1944 (Admin); [2015] 1 Cr App R 7; [2015] Crim LR 79 [41] discouraged this practice, stating that in most cases an intermediary was required only for the "pinch point" of giving evidence and that a witness supporter should otherwise suffice for the rest of the trial. This was criticised by Hoyano, [2015] Crim LR 79. It should be noted that often intermediaries after assessment recommend that if certain adjustments are made to the usual court procedures to enable a particular defendant to cope, attendance of an intermediary at trial would not be necessary.

²³ Crim PD 2015 I.3D.6-7.

²⁴ The Ministry of Justice's reasons are set out in an affidavit quoted in *OP* [2015] 1 Cr App R 7 at [29].

²⁵ <http://www.intermediaries-for-justice.org/>.

²⁶ Talbot, *Fair Access to Justice?*, p.21. Ministry of Justice, *Registered and Non-Registered Intermediaries for Vulnerable Defendants and Vulnerable Defence and Prosecution Witnesses: Guidance for HMCTS Staff* (2014) para.3.1.

²⁷ Communicourt and Triangle. The new site Intermediaries for Justice provides a matching service for defence legal advisers and intermediaries (<http://www.intermediaries-for-justice.org/>).

²⁸ *OP* [2015] 1 Cr App R 7, [2015] Crim LR 79 (commentary by Hoyano).

with a court appointment for a Registered Intermediary (RI) access to the Witness Intermediary Service, so as to instruct one. The claimant's argument for inequality of arms with the prosecution was that a Non-Registered Intermediary might have received no, or no adequate, training,²⁹ might not be regulated by any professional organisation, would not have been matched with the suspect or defendant's needs as would be an RI, might not have been trained in assessing a defendant so as to write a report for the court and the parties, and might not be familiar with the guidance manual, the code of ethics, and rules as to confidentiality. Rafferty LJ described the situation in trenchant terms:

46. We are not reassured that an arguable inequality of arms has not been revealed by a review of the legal framework and supporting information in this case. In any event there is either a risk of unfairness or at its lowest a perceived risk of unfairness. At the point, should he elect so to do, at which he goes into the witness box, the system in place should offer the Claimant the best opportunity to do himself justice.

47. A moment's reflection shows why. Leaving aside the jeopardy in which he is and which crystallises at that point, the scheme as currently operated would allow a witness for the Crown to be supported by a RI matched by the WIS but the defendant against whom he gave evidence denied one under the same scheme. The intelligent observer would be puzzled by why that were so.

The Divisional Court ordered that the Ministry of Justice carefully consider whether it was justifiable to refuse to give equal provision for a prosecution witness and the defendant in enabling evidence to be given satisfactorily.³⁰ Whilst the ruling was necessarily confined to OP himself, it is clear from the reasoning that it was the system which was being subjected to such searing criticism.

²⁹ Although it should be noted that the two private providers of intermediaries, Communicourt and Triangle, provide intensive defence-oriented training to their staff.

³⁰ *OP* [2015] 1 Cr App R 7, at [48].

The response to *OP*

The then Secretary of State for Justice filed, then abandoned, an application for leave to appeal from the Divisional Court, leaving many to hope that he had allied himself with Lady Justice Rafferty's "intelligent observer". The 2015 Consolidated Criminal Practice Directions in CPD I.3F: INTERMEDIARIES provided strong reinforcement of the inherent jurisdiction of the trial court to ensure that vulnerable defendants should be enabled to participate fully in the proceedings, engage fully with their defence, and give their best evidence, with detailed directions as to how this could be achieved.³¹ The case management rules included a detailed discussion of the appointment of intermediaries to assist defendants, including attending pre-trial familiarisation visits to the court.³² The tone of the CPD was clearly receptive to the value which defence intermediaries could provide to achieve the "Overriding Objective" that criminal cases be dealt with justly, recognising the rights of the defendant to a fair trial under ECHR Article 6.³³

In January 2016 the Law Commission of England & Wales, in an incisive analysis of the difficulties faced by vulnerable defendants, stated that a statutory entitlement to an intermediary in appropriate circumstances was "essential" to rectify the inequity of the comparative positions of defence and prosecution witnesses, to ensure compliance with the Equality Act 2010, s.20, and the UN Convention on the Rights of Persons with Disabilities, Articles 12(3) and 13, and to provide a proper framework, provision and funding for "what has become a practical reality" through the exercise of inherent jurisdiction.³⁴ The proposed entitlement would encompass intermediary assistance both for the giving of evidence and for as much of the wider trial proceedings as necessary for the defendant to have a fair trial.³⁵ This powerful recommendation strengthened aspirations that equal treatment of all vulnerable participants in the criminal trial might at last be achievable – only to be dashed by the

³¹ Crim PD 2015 I.3D.2, I.3G paras.1-14 and Pt 29.

³² Crim PD 2015 I.3F and para. 3G.3.

³³ Crim PR 1.1 (1) and (2)(c).

³⁴ Law Commission, *Unfitness to Plead* (2016), Vol. 1, paras.2.31-2.37.

³⁵ *Ibid.*, paras. 2.62-2.69.

Criminal Practice Direction announced, without formal consultation with legal or other interested professions, on 23rd March 2016, taking effect on 4th April 2016.³⁶

A comparison of the 2015 and 2016 Criminal Practice Directions

What a difference a year makes. There has been a remarkable change in tone and content between the 2015 and 2016 CPDs, which we summarise here.

(1) *Assessments of need for intermediary assistance*

The statutory *Code of Practice for Victims of Crime* (2015) recommends that the interview plan should take account of the need for a Registered Intermediary, as does *Achieving Best Evidence* (2016).³⁷ Until its replacement as of April 4, 2016, CPD I para. 3F.5 had stated that

Assessment should be considered if a child or young person under 18 seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority. *Studies suggest that the majority of young witnesses, across all age groups, fall into one or other of these categories. For children aged 11 years and under in particular, there should be a presumption that an intermediary assessment is appropriate.* Once the child's individual requirements are known and discussed at the ground rules hearing, the intermediary may agree that his or her presence is not needed for the trial. [Emphasis added].

The replacement CPD in paras. 3F.5 and 3F.25 has revoked both this advice concerning under 18's and this presumption for children 11 and under, "in light of the scarcity of intermediaries". The new CPD states that the appropriateness of assessment must be decided with care "to ensure their availability for those witnesses

³⁶ Technically the CPD is the first amendment to CPD 2015 [2015] EWCA 1567, but to avoid confusion we refer to it as the CPD 2016.

³⁷ *Achieving Best Evidence* (2016 edition) paras. 2.202-2.210.

and defendants who are most in need”, so the decision must be made on a case-by-case basis. It remains unclear as to how the witnesses and defendants “most in need” will be identified without an assessment. People with intellectual impairments and communication difficulties often develop coping strategies to conceal their disabilities, so they may remain hidden until late in the criminal justice process.³⁸ This is a common discovery for defence advocates, often late in the day when they seek to take instructions. There is circularity in reserving assessments to those most in need, when the very purpose of the assessment is to ascertain the existence and extent of that need.

Moreover, rational rationing decisions can only be made in the knowledge of what resources are available. It is difficult to see how a police interviewer, a legal adviser or a trial judge could make such a rationing calculation without knowing the demand for, and supply of, intermediaries in any given week, especially where specialized skills are required for a particular assessment.

(2) Intermediary appointments for defendants

The CPD in confirming rationing of access to intermediaries means that those with a statutory entitlement to assistance, i.e. witnesses who are not defendants, inevitably will take priority. The new direction taken by the April 2016 CPD: para. 3F.12 states that because the court should adapt the trial process to address a defendant’s communication needs, the court “will *rarely* exercise its inherent powers to direct appointment of an intermediary”, and para. 3F.13 emphasises that “directions to appoint an intermediary for a defendant’s evidence will thus be *rare*, but for the entire trial *extremely rare*” [emphasis added]. There are a number of important facets to this succinct declaration.

³⁸ Criminal Justice Joint Inspection, *A joint inspection of the Treatment of Offenders with Learning Disabilities within the Criminal Justice System – Phase 1 from Arrest to Sentence* (January 2014), 2; *The Bradley Report*, p.19; *Equal Treatment Bench Book 2013* (2013) guidance on mental disabilities, specific learning difficulties and mental capacity; Jenny McEwan, “Vulnerable Defendants and the Fairness of Trials” [2013] Crim LR 100, pp.106-107.

First, no equivalent rarity practice direction applies to any vulnerable prosecution witness, or to any other defence witness, for whom presumably the same trial process adjustments could be made for their -- much more limited -- participation. This alone makes the inequality of arms alarmingly stark.

Second, there is a subtle change in tone between the two versions of the CPD in describing the implications of a failure to appoint an intermediary where one is thought advisable. The leading authority is *Cox*³⁹ where an appropriate intermediary for a defendant with complex psychiatric disorders and learning disabilities was not available. The Court of Appeal upheld the trial judge's conclusion that sufficient adjustments could be made to the ordinary trial process to enable the defendant to have a fair trial, even though this meant that he did not testify.⁴⁰ The Court of Appeal noted that although intermediaries made a valuable contribution to the administration of justice, and there were many occasions when their use would improve the trial process, that was far from saying that it was mandatory for an intermediary to be made available.⁴¹ Importantly, the Court of Appeal did not rule out the possibility that the absence of an intermediary could make the proposed trial unfair if adapting the processes of trial would still leave a defendant disadvantaged by his personal difficulties, whatever form they might take.⁴² This caveat appeared in the 2015 CPD I.3F.6.⁴³ In short, there was no presumption, or even assumption, that a fair trial can be achieved in all cases without an intermediary; the issue had to be evaluated carefully by the trial judge. In contrast, the 2016 CPD I.3F.12 describes the ruling in *Cox* as follows: “[t]here is however no presumption that the defendant will be so assisted, and even where an intermediary would improve the trial process, appointment is not mandatory”; and then proceeds with the assertion quoted above that the court will “rarely” exercise its powers to make the appointment. There is no

³⁹ *R v Cox (Anthony Russell)* [2012] EWCA Crim 549; [2012] Crim LR 621 (commentary by Hoyano).

⁴⁰ *Ibid.*, at [25]-[26]. Instead, the trial judge summarised the defendant's exculpatory version of events for the jury as if it were evidence, over the prosecution's objections.

⁴¹ *Ibid.*, at [29].

⁴² *Ibid.*, at [29]-[30].

⁴³ “In the absence of an intermediary for the defendant, trials should not be stayed where an asserted unfairness can be met by the trial judge adapting the trial process with appropriate and necessary caution”, citing *Cox*.

reference to any such “presumption” in the judgment in *Cox*, and no court judgment of which we are aware has ever stated that appointments for defendants should be rare.

Third, the 2015 Direction provided specific guidance as to what adjustments should be considered in case an intermediary appointment proved ineffective: ground rules for all witness testimony to help the defendant follow proceedings; directing that all evidence be adduced by simple questions, with witnesses asked to answer in short sentences; short periods of evidence followed by breaks to enable the defendant to relax and for counsel to summarise the evidence for him and take further instructions. Regrettably, this sage guidance has been entirely deleted from the 2016 ‘rareness’ CPD.

Fourth, the promulgation of a new rule that the appointment of an intermediary for the entire trial shall be “extremely rare” represents a reversal of current practice, and arguably undermines the case-specific, evidence-based assessment of the trial judges making roughly 90% of defence intermediary appointments that assistance throughout is necessary for a fair trial. This form of appointment enables the intermediary to perform an unseen, and hence often unrecognised, role: assisting defence legal advisers to take instructions before and during the trial.⁴⁴ This is particularly important because, as the 2015 CPD acknowledged, young or learning-disabled people are likely to have difficulty in recognising when they do not understand,⁴⁵ while other clients may recognise they do not understand but feel intimidated about indicating this even when invited to do so. Lawyers and judges tend to underestimate the great complexity of the decisions which their clients must take in preparing for and in the course of the trial. The accompanying diagram (“Decision-Making and Effective Participation in the Criminal Process”) maps those decisions, with the boxes shaded in grey indicating where a defendant with communication difficulties could be assisted by an intermediary. It must be stressed however that there is little that an intermediary can do to mitigate anterior serious cognitive difficulties so that the advocate can be confident that the client has understood the issue and

⁴⁴ Plotnikoff and Woolfson, *Intermediaries in the Criminal Justice System*, pp.249, 271-272 provide one example where an intermediary demonstrated to the defence advocate that his client could not have understood the questions in the police interview; this resulted in the prosecution being dropped after the interview was ruled inadmissible (at p.258).

⁴⁵ *Ibid.*, 267.

provided reliable instructions. In such cases, then serious questions of fitness to stand trial⁴⁶ need to be explored through expert assessment which an intermediary cannot provide.

Fifth, the 2016 CPD seems to condone the refusal of the Ministry of Justice to respect the ruling in *OP* on inequality of arms by giving defence legal advisers access to the Witness Intermediary Service. CPD I.3F.15 simply notes that “[t]he WIS is not presently available to identify intermediaries for defendants (although in *OP*... the Ministry of Justice was ordered to consider carefully whether it were [*sic*] justifiable to refuse equal provision to witnesses and defendants with respect to their evidence).” There has been no indication whatever, at least in public, that such consideration has been given by the Ministry, and the new CPD signifies a worrying willingness to contemplate an even greater inequality of arms than had prevailed when *OP* was decided.

The reality of inequality of arms in court

We suggest that it is vital that policymakers within the Ministry of Justice understand what really transpires on a daily basis in the cells and in the courtrooms of every criminal court across England and Wales. We offer two recent examples of trials with similar complex charges in multi-handed trials, with similarly intellectually-impaired defendants presenting similar challenges for them and their advocates in giving instructions and in understanding the course of their trials. Both trials proceeded before the new more restrictive 2016 regime for defence intermediaries.

In *Case A* in 2014, a 25-year-old young man was charged with very serious sexual offences with several co-defendants, who allegedly had groomed and exploited several teenage girls. The defendant had significant learning difficulties which had been masked for years within a close family and community. His great vulnerability had been completely missed by the police, and so he had no intermediary for his interview. A defence-instructed psychiatrist had considered that such was his cognitive deficit that he was unfit to be tried, but the trial judge ruled that while his learning difficulties “might have an impact on his capacity”, “there [was] clear capacity for him

⁴⁶ A term which we prefer to “fitness to plead”, as being more descriptive of the issue.

to be fit to plead and stand his trial particularly with the appropriate modifications to the court proceedings recommended in the Intermediary Report". The trial judge appointed two intermediaries, tag-teaming, to assist him throughout the trial, funded from the Crown Court's budget.

The modifications included sitting outside the dock with the intermediary, physical aids, and stress management techniques. The court exempted the defendant from being present during irrelevant parts of the evidence. These measures allowed the trial to proceed to the close of the Crown's case. It was clear in evidence that even the teenage complainants had noticed the defendant's intellectual difficulties in their encounters with him. The prosecution witnesses also had a range of special measures, including in one case an intermediary, so the trial process catered for the needs of all vulnerable participants.

It was only possible to extract details of the defence case from the accused because of the intermediaries' assistance, including an indication that one of the girls had incited this vulnerable man to have sex with her. Surprisingly, under cross-examination she agreed with this suggestion. The trial was stopped against this defendant at the close of the Crown's evidence. It continued to conviction and long prison terms for several other defendants.

What would have happened if intermediaries had not been engaged? It is very likely that under the new CPD this adult defendant would have been denied this support. Would the fitness issue have been decided differently? Would the case have proceeded past the close of the Crown's evidence? Would the defendant now be serving many years in prison? This was a case where the use of intermediaries was vital to the effective participation of the defendant.

Case B involved a 17-year-old defendant from a minority group, charged with many other men on a split indictment with multiple rape and serious offences against a young girl. The charges were of the utmost gravity and the allegations very disturbing

and harrowing. The prosecution claimed that this defendant had initiated the conduct that culminated in the complainant's exploitation.

It became clear to defence counsel that the defendant had impaired capacity to participate in his trial. He too had been protected and supported by his family and community and, as is so common, did not wish to be perceived as in any way intellectually challenged or vulnerable. He was completely incapable of dealing with any leading question and was highly suggestible and easily manipulated.

A psychological report indicated that he had an extremely low IQ, on the borderline of learning-disabled, on the basis of which the defence applied for an intermediary assessment. Given the complexity of the trial, it would be impossible for counsel to deal with his communication difficulties as well as prepare and present the case.

The judge did not grant even an intermediary assessment. The absence of an intermediary made the process very difficult for counsel and the defendant, who was in custody. He was routinely distressed, confused and bewildered. The judge did allow breaks and other accommodations but he had many hours of difficult evidence to sit through. It was not always possible for counsel to ascertain in court if he was following proceedings, and many times there was no opportunity to check his understanding of key evidence against him.

As in *Case A*, the complainant during cross-examination accepted that this defendant seemed disadvantaged intellectually, to the point where she said she felt sorry for him. She also noticed that he had been bullied and manipulated by the other defendants. Indeed, this was apparent in the course of her first interview. It seemed that the witness was able to perform an assessment that was beyond the investigators.

The complainant had no cognitive impairments but had emotional difficulties and volatility that made it difficult to communicate with her. The prosecution engaged two Registered Intermediaries to assist the complainant at trial and in all preparation and refreshing of memory before trial, and stringent ground rules were established for her evidence. The complainant's accuracy, reliability and veracity were extraordinarily undermined by the unused material, such that the case was stopped at the close of the Crown's case. Had the case got past half-time, this defendant would have had great difficulty in testifying with his learning difficulties and speech impediment, in front of his peers who had bullied him, especially given his great reticence about sexual matters.

There was obvious inequality of arms in Case B. The complainant was assisted, supported, and her communication facilitated, in every possible way, whilst the innocent defendant was not. Fortunately, there was material available to the defence to discredit her entirely, but in other cases there often is not, leaving the prospect of a miscarriage of justice because the defendant could not participate appropriately in his own trial. The case illustrates that the adjustments recommended in *Cox* are not a panacea for all disabled defendants and will not always result in a fair trial.

Conclusion

The upward curve of demand for assistance by an intermediary for vulnerable witnesses and defendants is due to their needs and difficulties in coping with the orthodox adversarial trial process being identified more frequently, thanks to enhanced training of those working in the criminal justice system. Logically, this means that there should be more provision of intermediaries, not less. So the root cause of the problem must be addressed, not camouflaged by facile resort to a rationing ethos without underpinning logic or method.

Whilst it is extremely important not to conflate the distinct, but evidentially linked, issue of fitness to stand trial with the communication needs of a particular defendant,⁴⁷ it is possible that the courts will see more applications to declare defendants unfit to plead if they are deprived of access to intermediaries under the

⁴⁷ See Hoyano's commentary to *Cox* [2012] Crim LR 621, p.623.

2016 CPD, especially if they need assistance throughout the trial in order to be able to follow the evidence and instruct their lawyers. This route would assure them an assessment possibly denied them under the 2016 CPD. Accordingly the rationing measure may well prove self-defeating in terms of the financial and moral costs to the criminal justice system.

One possible solution to the rationing problem is to have a Registered Intermediary assigned to (and perhaps employed by) each Court Centre, to ensure availability of expertise and continuity of advice to judges and to prosecution and defence advocates alike, and to instantiate their status as independent advisors to the court. An alternative is to extend more widely the practice already adopted at the Old Bailey, where a clinical nurse specialist employed by the National Health Service screens expert reports on defendants and steers their legal advisers toward a list of intermediaries used by London Crown Courts, where it appears that this could benefit their clients.⁴⁸ The drawback to this system however is that someone must already have identified the possibility of a cognitive or communication deficit, and have persuaded legal aid to pay for an expert report. That said, an intermediary could be readily integrated into the cross-government Health and Criminal Justice Liaison and Diversion Service, established in response to the *Bradley Report*⁴⁹ to identify and divert, or support, defendants with mental health or other difficulties potentially affecting their capacity to participate in the criminal justice system, intended for national implementation by 2017/2018.⁵⁰ Having an intermediary assigned to each Crown Court as an integral part of this visionary scheme would enable both prosecution and defence to make informal referrals for preliminary assessments, and if need be to arrange for further assessment by an intermediary with a particular skill set matching the witness's or defendant's needs.

We suggest that the 2016 CPD with its "rarity" injunction to trial judges is susceptible to a court challenge under the Human Rights Act 1998, in the right case, on the basis that it more deeply entrenches inequality of arms. We hope that the Rules

⁴⁸ Plotnikoff and Woolfson, *Intermediaries in the Criminal Justice System*, p.251.

⁴⁹ <https://www.england.nhs.uk/commissioning/health-just/liaison-and-diversion/> (accessed 13 November 2016).

⁵⁰ Described in Law Commission, *Unfitness to Plead*, para. 1.3 and fn 7, paras 1.101, 2.87-2.89, 2.91, 4.15, 4.74-4.76.

Committee will reconsider its position quickly, not least because the amendment is clearly inconsistent with the Criminal Procedure Rules requiring the court to take every reasonable step to facilitate the participation of defendants in the proceedings.⁵¹ We have less reason to be optimistic that the Government will implement the Law Commission's impregnable recommendation for an accused's statutory entitlement to an intermediary, for so much of the proceedings as is required to achieve a fair trial.⁵² The current position is clearly dissonant with the Equal Treatment Bench Book, the Equality Act 2010, and the United Nations Convention on the Rights of Persons with Disabilities guaranteeing equal access to justice, which surely must prevail over a Practice Direction where the case warrants it.

⁵¹ Crim PR rr3.9(3)(b) and 3.9(6).

⁵² Law Commission, *Unfitness to Plead*, para. 1.33.