



# The City Law School

CITY UNIVERSITY LONDON

## Tell Me What's Happening 3: Registered Intermediary Survey 2011

By Penny Cooper<sup>1</sup>

*“How does it feel to have Asperger syndrome?”*

*If the neurotypical (NT) mind is a boat, my mind is a bike. NTs don't get that. They just think I run a mighty strange boat. They assume I'm in the water and have an engine and a rudder and occasionally jump over the side for a nice swim. They assess and judge me in terms of boats and, when I'm not boat-like, they assume there's something wrong with my boat.*

*But I'm a bike. I'm not compatible with boat rules. I steer with handlebars, use pedal power, and I don't jump over the side because it's a hard road I'll land on. If they could be made to understand that I'm a bike, they would then see that all of my behaviour is logical - for a bike rider. Then I could teach them about bikes, and they could teach me about boats.”<sup>2</sup>*

### Introduction

This is the report of City Law School's third annual survey of Ministry of Justice (MoJ) Registered Intermediaries (RIs). It should be read in conjunction with the 'Tell me What's Happening' RI survey reports of 2009 and 2010. The methodology is similar to that used in the two preceding surveys. Questionnaires were distributed in hard copy to RIs on 29 November

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<sup>1</sup> The author is a Professor of law at The City Law School, City University London. She is grateful to David Wurtzel, Jason Connolly and Joyce Plotnikoff for their comments on an earlier draft and to Registered Intermediaries who gave up their time to complete the survey. The usual caveat applies.

<sup>2</sup> A posting on [aspergeradults.ca](http://www.aspergeradults.ca) in 2008, as quoted on the National Autistic Society Website, <http://www.autism.org.uk/asperger>, accessed 17/4/12. Registered Intermediaries are specialists in assisting witnesses with a wide range of communication needs. Asperger Syndrome (a type of autism) is but one example.

2011 at the Special Measures Training and Development Seminar and an e-copy was posted on RIO<sup>3</sup>. 31 survey responses were received from RIs. They were analysed by Penny Cooper.

### **Facts and figures about Registered Intermediaries (RIs)**

An intermediary is a person who facilitates two-way communication between the vulnerable witness and other participants in the legal process in order to ensure that communication is as complete, accurate and coherent as possible. The ‘intermediary’ is one of the ‘special measures’ created by Part II of the Youth Justice and Criminal Evidence Act 1999<sup>4</sup>.

The MoJ operates the Witness Intermediary Scheme (WIS). RIs are trained by The City Law School and accredited by the MoJ. RI best practice is set out in the Registered Intermediary Procedural Guidance Manual (the Manual), now updated<sup>5</sup> and in its third edition. RIs are bound by a Code of Practice and Code of Ethics as set out in the Manual<sup>6</sup>. Their ‘primary responsibility’<sup>7</sup> is to enable ‘complete, coherent and accurate’<sup>8</sup> communication. RIs compliance with the Code of Practice and Code Ethics is overseen by an Intermediary Registration Board run by the MoJ. Police officers or CPS representatives who wish to engage an RI should do so via the Serious Organised Crime Agency’s Witness Intermediary Team.<sup>9</sup>

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<sup>3</sup> RIO stands for Registered Intermediaries Online, a discussion forum and resource library for RIs which was previously hosted for the MoJ by the National Policing Improvement Agency but which is now hosted by the Serious Organised Crime Agency, into which the former organisation has been subsumed. The discussion boards are moderated by the Vulnerable and Intimidated Witnesses Section, Victims and Witnesses Unit, Justice Policy Group, MoJ.

<sup>4</sup> Section 29 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999

<sup>5</sup> *Registered Intermediary Procedural Guidance Manual*, (2012), (London: MoJ)

<sup>6</sup> See pp 44 – 47.

<sup>7</sup> The Code of Practice for Registered Intermediaries, paragraph 1.

<sup>8</sup> These three words (included in paragraphs 1 and 15 of the Code of Practice and paragraph 3 of the Code of Ethics) reflect the wording in the eligibility test for special measures in section 16 of the Youth Justice and Criminal Evidence Act 1999. Section 16(5): ‘In this Chapter references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.’

<sup>9</sup> <http://www.soca.gov.uk/about-soca/specialist-operations-centre/witness-intermediary-team> ‘The National Vulnerable Witness Adviser manages the Witness Intermediary Team and regularly deploys to major crime investigations, assisting in the development of interview and witness management strategies

Following the successful use of RIs for victims and witnesses in criminal courts, intermediaries have become more widely requested for defendants in criminal cases and more recently for vulnerable witnesses in family courts. However the engagement of intermediaries in those circumstances is outside the scope of the MoJ's WIS. There is no legislation in force for intermediaries for defendants<sup>10</sup> and there is no legislation at all for 'special measures' for witnesses in the family courts<sup>11</sup>. In both these instances where courts permit the use of intermediaries<sup>12</sup> it is on an ad-hoc basis in which a judge invokes their inherent powers to ensure a fair trial.

### **Information from the Ministry of Justice<sup>13</sup>**

There have been over 5300 requests for a Registered Intermediary since the WIS was first implemented as a pilot project in 2004. Of that number (as at 31 March 2012), 3318 requests have been made since August 2009 when the National Policing Improvement Agency (now

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in cases that involve particularly challenging vulnerable or intimidated witnesses.' SOCA took over the operation of the RI matching service from the NPIA on 02 April 2012.

<sup>10</sup> Section 29 of the YJCEA 1999 applies to prosecution and defence witnesses only. The inclusion of special measures for defendants has been piecemeal: first, section 47 of the Police and Justice Act 2006 allowed vulnerable defendants to give evidence by live link; second, section 104 of the Coroners and Justice Act 2009 (when implemented) will allow for a vulnerable accused to give their oral evidence with the assistance of an intermediary. It will insert into the Youth Justice and Criminal Evidence Act 1999 (c. 23) section 33BA 'Examination of accused through intermediary'. Note that the eligibility criteria differ depending on whether the accused is under 18 or has attained the age of 18 and in any event are not the same as the eligibility criteria for intermediaries for witnesses as set out in section 16 of the YJCEA 1999. However, comparing sections 29 (2) and 33BA (4), the function of the intermediary is described in equivalent terms. Note also that section 33BA only covers the period when the defendant is giving oral evidence. It does not provide for the assistance of an intermediary during any other part of the trial.

<sup>11</sup> See P Cooper, 'ABE Interviews, Children's Testimony and Hearing the Voice of the Child in Family Cases: Are we Barking up the Right Tree?', (2011), Thorpe LJ and Tyzack (Eds), *Dear David: A Memo to the Norgrove Committee from the Dartington Conference 2011* (Bristol: Jordans) available at <http://openaccess.city.ac.uk/613/2/Penny%20Cooper%20FJC%20paper%20Oct%202011.pdf>

<sup>12</sup> The intermediary is NOT a Registered Intermediary in these circumstances. Even if a Registered Intermediary were to take on such work it would be outside the scope of the WIS and therefore they would be operating as an intermediary not as an accredited member of the MoJ's scheme. The distinct use of the terms 'RI' and 'intermediary' is deliberate. The distinction is important. The former is accredited by the MoJ, engaged through the MoJ and subject to RI professional regulation, the latter is not.

<sup>13</sup> Provided by the Vulnerable and Intimidated Witnesses Section, Victims and Witnesses Unit, Justice Policy Group, Ministry of Justice, London by email to the author on 24 April 2012

Serious Organised Crime Agency) took over the matching service on behalf of the Ministry of Justice. As at Monday 23 April 2012 there were 144 RIs on the register and of that number, 104 were classed as active and 40 inactive.

Over the 12 month period April 2011 – March 2012, an average of 105 requests per month were received for the services of a Registered Intermediary for a victim or witness. Over the same period an average of 3 requests per month were received for the services of a Registered Intermediary for a defendant, however it is the responsibility of the defence lawyer in conjunction with the court to make the necessary arrangements for the appointment of an intermediary for a defendant. The MoJ advises that enquiries on this subject should be redirected to the court involved for it to deal with in accordance with the guidance provided to its staff.

For the period of this survey, September 2010 to August 2011 inclusive, 1245 referrals were accepted by RIs.

### **Case law<sup>14</sup>, judicial comment and published research**

The role of the intermediary has received further judicial attention since the three judgments from the higher courts (two from the Court of Appeal Criminal Division and one from The Supreme Court)<sup>15</sup> were noted in the 2010 report.

*R v Walls* [2011] EWCA Crim 443 concerned a defendant's fitness to plead with comments on the quality of expert evidence (para 29). The court, referring to the judge's inherent powers to ensure a fair trial, said that that consideration should be given to the use of 'intermediary powers under the Sevenoaks case' (para 37(ii)).

In *The Queen on the Application of AS v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin) the court quashed the youth court's decision not to allow the defendant to have the benefit of an intermediary.

In *R v Cox* [2012] EWCA Crim 549 it was decided that if no intermediary is available for a defendant it is for the judge to decide whether the absence would make a trial unfair. In this case the judge concluded that he 'would have to be "rather more interventionalist" than normal. He would play "part of the role which an intermediary, if available, would otherwise have played"' (para 22).

<sup>14</sup> Readers looking for free online transcripts of these judgments should note that neither *Cox*, *Wills* nor *Edwards* are, at the time of writing, available on bailii.org

<sup>15</sup> *R v Barker* [2010] EWCA Crim 4, *R v Watts* [2010] EWCA Crim 1824 and *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12

The judgment *Re X (A child)* [2011] EWHC 3401 (Fam) included discussion of the use of an intermediary for a vulnerable young person who might be a witness in a family case. The judge highlighted the absence of an intermediary scheme in family cases and the ‘real obstacles’ to finding intermediary support (para 42).

Also of great interest<sup>16</sup> is *R v Wills* [2011] EWCA Crim 1938 where the trial judge had set down ground rules as to how to cross-examine a young complainant (one counsel followed it but the other did not) and *R v Edwards* [2011] EWCA Crim 3028 where the judge told defence counsel that in a case with a child witness/victim aged 5, the traditional form of cross-examination would not occur and would be restricted to asking necessary questions.

The Lord Chief Justice spoke in September 2011 on *Vulnerable Witnesses in the Administration of Criminal Justice*<sup>17</sup> at the 17th Australian Institute of Judicial Administration and said this about intermediaries:

The use of intermediaries has introduced fresh insights into the criminal justice process. There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested that they were expert witnesses or supporters of the witness. They are not. They are independent and neutral. They are properly registered. Their responsibility is to the court. And they are used at much earlier stages in the process, to flag up potential difficulties in advance of the trial. These can then be addressed during the trial process... We must ensure that the question whether an intermediary should be used or not is decided finally well before the trial date. But their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial.

2011 saw the publication of Joyce Plotnikoff and Richard Woolfon’s *Registered Intermediaries in Action - Messages for the CJS from the Witness Intermediary Scheme SmartSite*<sup>18</sup>. This NSPCC/MoJ funded research identified themes and best practice guidance emerging from RIO’s predecessor, the SmartSite. It covered a wide range of matters including the ambit of the intermediary role, case management, facilitating communication and checklists.

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<sup>16</sup> These two cases are not about intermediaries but they are about setting Ground Rules for questioning vulnerable witnesses in court.

<sup>17</sup> Speech of The Rt. Hon. The Lord Judge, Lord Chief Justice of England and Wales available at <http://www.judiciary.gov.uk/media/speeches/2011/lcj-speech-vulnerable-witnesses-in-admin-criminal-justice>

<sup>18</sup> See <http://lexiconlimited.co.uk/PDF%20files/rtheCJSfromtheWitnessIntermediaryScheme-Formatted-v1-WEB.pdf>

## 2011 SURVEY RESULTS AND ANALYSIS

31 responses were received in total. Percentages are rounded to the nearest whole number. Where there was an equivalent question in the 2009 or 2010 survey the results for those questions are compared.

### Referrals and Trials in Criminal Cases for witnesses or defendants

#### 1. For how many months were you practising as a RI, i.e. were you available to take WIS referrals, during the twelve months from September 2010 to August 2011?

Responses ranged from 2 to 12 months with 24 respondents having practised for 9 months or more. The total was 304 months for 31 RIs.

#### 2. How many case referrals did you accept in the twelve months?

The total accepted referrals reported by respondents was 382, (fractionally more than 30% of the total number of referrals for this period as reported by the MoJ), which equates to a little more than one case referral per month per intermediary. Clearly some RIs are in a position to accept more than others<sup>19</sup>. At one end of the range one RI had accepted 33 referrals in 11 months whereas others had accepted 5 or fewer in a similar period.

#### 2. (a) How many witnesses was this for in total in the twelve months?

The total was 369.

#### (b) How many defendants was this for in total in the twelve months?

The total was 23. (This is almost 6% of the total number of referrals accepted by respondents)

#### 3. How many trials have you been involved in during the twelve months?

The total from all 31 respondents was 81. 8 answered 0 therefore the subsequent answers up to and including question 12 were from the data from the 23 who had been involved in a trial/s.

### Applications for the use of an RI, speaking to counsel and Ground Rules

#### 4. In cases that proceeded to trial in the twelve months, when was the application for the use of the RI at trial made?

18 said 'Mostly they were dealt with at the pleas and case management hearing' (78% of respondents)

<sup>19</sup> RIs operate on a self-employed basis in respect of their RI work for the MoJ. They may accept or reject requests sent by the matching service.

- 3 said 'Mostly they were dealt with on the first day of the trial' (13% of respondents)
- 2 said 'Other' (9% of respondents)

In the 2010 survey there were 26 responses and 13 had said 'mostly at the pleas and case management hearing'. Almost as many had said 'mostly they were dealt with on the first day of the trial'.

**5. In how many of 'your' trials in the twelve months did you get the chance to speak to Prosecution and Defence counsel before the witness gave evidence?**

The respondents indicated 61 trials out of 81 i.e. a little over three quarters.

	2009	2010	2011
Trials when RI spoke in advance with prosecution and defence counsel	47%	57%	75%

**6. In how many of those trials in the twelve months did you have a Ground Rules Hearing i.e. a meeting all together with the Judge, Prosecution and Defence counsel in the trial to establish the best way to question the witness and to clarify your role during evidence?**

The total for all respondents indicated this happened in 62 trials of 81 trials reported.

	2009	2010	2011
Trials when a Ground Rules hearing occurred	42%	61%	76%

**7. Considering 'your' trials overall where Ground Rule/s had been set by the judge which statement best describes what happened?**

Respondents could select more than one answer hence the total number of answers can add up to more than 23.

The results:

8 said breaches occurred in all trials (36% of respondents)

6 said breaches occurred in most trials (28% of respondents)

8 said breaches occurred in some trials (36% of respondents)

0 said no breaches occurred

In other words breaches occurred in most or all trials for approximately three quarters of respondents.

And in relation to pointing out breaches:

19 RIs said that they were usually the first to point out the breach

3 said that sometimes the judge allowed the question even after they had pointed out the breach

2 said the judge was usually the first to point out the breach by counsel

### **Witness waiting in criminal trials**

#### **8. Of the witnesses you have worked with in the twelve months, how many had to wait more than two hours at court before they gave evidence?**

The answer from the 16 respondents who indicated witnesses had had to wait was 59 witnesses in total. (16% of all witnesses, not including defendants, who gave evidence)

#### **9. If any of these witnesses had to wait more than two hours did this make a difference?**

15 out of the 16 replied in the affirmative and cited in respect of those witnesses : increased anxiety, worry, fear, frustration, fatigue, loss in concentration, boredom, feeling helpless and in the 'worst case' the witness 'refusing to go into [link] room' to answer questions. Some mentioned the need employ strategies to divert the witness's attention onto other things whilst waiting.

### **Use of leading questions in criminal trials**

#### **10. Just considering the cases in the twelve months that went to court and where the witness gave evidence, for how many witnesses (include defendants if any) did you recommend that leading questions should not be used?**

17 intermediaries answered that they had recommended that leading questions should not be used. In total this was for 72 witnesses/defendants.

Three intermediaries, not in the 17 above, made comments in relation to this. One said, ‘I never recommend leading questions should not be used but give examples of the type of leading questions that the witness will not understand and recommend these are not used’. Another said, ‘I do however in almost all cases state that certain types of leading questions should not be used (especially tags)’. A third commented that she recommends leading questions are ‘used with caution but not “banned” overall’.

**11. Considering all the instances where you said there should be no leading questions for a witness/ defendant, which statement best describes the overall position?**

15 said that their recommendation was always agreed by the judge i.e. it became a Ground Rule

1 said that on half or more of the occasions where they recommended it, it was agreed by the judge

1 said that in fewer than half the occasions where they recommended it, it was agreed by the judge

0 said every time they have recommended it, it has been rejected by the judge.

**12. In your cases (if any) where your ‘no leading questions’ recommendation became a Ground Rule, how do the cross-examining advocates respond to this Ground Rule? (Please tick one)**

7 said advocates all abided by the Ground Rule of no leadings questions (44% of those who responded to the question)

1 said most advocates have abided by it (6% of respondents who answered this question)

5 said most have not abided by it (31% of respondents who answered this question)

3 said none has completely abided by it (19% of respondents who answered this question)

**Referrals in family cases (e.g. Care cases, contact/residence disputes)**

**14. How many family case referrals (through the WIS or otherwise) have you accepted in the twelve months?**

Only one intermediary reported referrals of this kind. She had 4 referrals.

In response to **question 15** asking about funding arrangements, the intermediary said ‘all 4 are currently stuck in funding negotiations’ and added that all these referrals had come other than through the MoJ’s WIS.

## Feedback

### 16. Have you received feedback or comment from anyone on your role in any of the cases you dealt with in the twelve months?

25 said 'Yes' and all the examples were of positive feedback. They included:

'You lot (RIs) have totally changed what we can do for people' [from a detective]

'One barrister said I had changed her view of intermediaries'

The RI was 'invaluable to me taking instructions from my client'

'The Judge publicly thanked me in court...He said I had amazing skill (Since [the witness] and I, had been waiting 3 DAYS to give evidence I had ample opportunity to get to know her well and tune into her disordered speech)'

One RI commented: 'Still feel that for many barristers this is their first experience of a trial with an Intermediary – but all have commented that they would use an Intermediary again'.

Another said: 'I find on the whole our service is becoming more and more valued in contrast to [people] often thinking we were nuisances and trouble makers in the early days'

### Other feedback via the MoJ

It should be noted that the MoJ has an 'End-User' feedback system therefore sometimes feedback goes directly to the MoJ.

In February 2012 the MoJ received this unsolicited feedback (now anonymised and reproduced with permission) from a witness service manager:

"The intermediary I am referring to is XX...I feel compelled to let someone know about how brilliant she was.

The victim in the case was extremely vulnerable and very very sensitive. Taking evidence proved to be a difficult process because he kept running out of the link room despite being given 10 minute breaks regularly. I was particularly impressed by the way XX had the gumption to negotiate 5 minute breaks against arguments by barristers and the judge feeling that perhaps they should just stop the trial or taking his evidence - thereby denying the victim the right to have his account put forward. The victim despite the difficulty really wanted to give evidence and was very willing to keep going back into the link room. I have seen experienced intermediaries giving in or not pushing hard enough for grounds rule meeting or consistently renegotiating to assist the victims ongoing needs - and that's why I just needed to highlight this.

Intermediaries were brought about as a special measure to give those victims and witnesses a voice that they otherwise wouldn't have within the Criminal Justice System - and I saw this struggle yesterday and without XX the victim would have been denied that voice.”

### **Additional comments from RIs**

Several RIs were concerned about what one described as the ‘free for all’ around intermediaries for defendants. There was a concern expressed by some that using unregulated non-registered intermediaries could affect the good name and credibility that RIs have built up. One RI said that people ‘will be confused, and standards will not be set/ maintained’. Another reported that the issues associated with getting intermediaries for defendants had already led ‘to confusion and anger by some barristers towards the scheme’.

One judge was reported to have disliked a reference to a Ground Rules Meeting and said ‘Nobody holds meetings in my court’. The better title is Ground Rules Hearing.

Some RIs also commented on pay rates and the geographical differences in take up of the scheme. Other remarks referred to CPS case management, the need for specialisation within the RI field of work, speculation that an increasing proportion of requests for service are coming after the ABE, assisting with victim impact statements and how to stay in contact with other RIs.

### **CONCLUSIONS<sup>20</sup>**

#### *Late applications and waiting times impacting on the vulnerable witness*

Three quarters of the RIs surveyed felt that applications for special measures for the use of an RI were mostly made at the PCMH. This is an improvement on last year though results suggest a significant proportion is still dealt with on or very close to the first day of trial. As was stated last year, a late application means that the RI and, more worryingly, the vulnerable witness are left uncertain right up to the last minute about the special measures, if any, that the court will order.

The 2009, 2010 and 2011 survey results about waiting times indicate unacceptable waiting times and very poor consequences for some witnesses. This continues to be something that judges, using their case management power, need to address. One answer could be the bringing into effect of pre-trial recorded cross-examination (Section 28, YJCEA 1999). However, no pilot is currently underway and no date has been set for its implementation.

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<sup>20</sup> As was said in the 2010 report, the limitations of this survey are acknowledged in particular the small number of respondents and the respondents’ necessary approximations in answers to some questions.

*Ground Rules Hearings on the increase*

It appears that the current special measures application form which requires Ground Rules to be discussed between the court, the advocates and the intermediary<sup>21</sup> is having a positive effect. Instances of Ground Rules Hearings have been increasing, from 42% to 61% to 76% over the last three annual surveys. Of course there could be other reasons as well such as a better understanding of good practice. Certainly cases such as *R v Wills* and *R v Edwards*, cited above, demonstrate the principle and purpose of Ground Rules. It is not too much to hope that within a few years Ground Rules Hearings will precede the evidence of every vulnerable witness at court, not just those with intermediaries.

It is relevant to note here that at the RI CPD day in Ryton in March 2012 delegates discussed standard agenda items for Ground Rules Hearings<sup>22</sup>. RIs suggested that they run more smoothly when the do's and don'ts page of their report is photocopied in advance and distributed for the hearing to judge and counsel<sup>23</sup>. RIs suggested the topics to be addressed at the Ground Rules hearing should include: the RI recommendation for Ground Rules, confirmation (if for prosecution witness) that the RI is there as much to help the defence as the prosecution and judge, how to address the witness (by their first name?), how to address the RI (by their first name?), if communication aids are to be used how that will be done, where the RI will sit in the live link room so that she is visible on the TV screen, or if in court where she would sit so that she can see the witness and catch the eye of the judge if necessary, when and where the RI will take the RI oath<sup>24</sup> (in court and then go to the live link room or from the live link room?), how the RI will signal to the judge a need to intervene if that becomes necessary, timing of witness breaks (including how long and how often) and then an opportunity for any other matters to be raised or residual questions from the judge and counsel.

<sup>21</sup> See Criminal Procedure Rules 2012, rule 29.10 and the Application for a Special Measures Direction Form, at Part F <http://www.justice.gov.uk/courts/procedure-rules/criminal/formspage>

<sup>22</sup> The form (supra) at Part F, only refers to the purpose being 'to establish (a) how questions should be put to help the witness understand them, and (b) how the proposed intermediary will alert the court if the witness has not understood, or needs a break.'

<sup>23</sup> Counsel and the judge should already have had and read a complete copy of the RI report which would have been appended to the application for special measures.

<sup>24</sup> The RI is not a witness and the RI oath for court and declaration in their report has its own special wording – see p 19 of the Manual. The Perjury Act 1911 applies – see section 29 (7) of the YJCEA 1999. One RI commented in correspondence to the author (March 2012) 'Perhaps one just needs to say, I have my declaration, your honour, where and when would you like me to take it. I have had some cases where the judge has wanted me to do it in court, in front of the jury.'

*Ground Rules still not followed by counsel*

The challenge of making sure that the Ground Rules are followed still remains. Breaches are said by the majority of respondents to occur in most or all of their trials. Almost all respondents felt it was they rather than the judge who was the one to point out the breach. Results indicate that where RIs did intervene to point out a breach this was usually upheld by the judge.

The majority of RIs say that when they suggest ‘no leading questions’ it is always agreed by the judge. However in the instances where a ‘no leading questions’ Ground Rule had been set, fewer than half of the respondents said that all counsel abided by it. As with any Ground Rule recommendation, ‘no leading questions’ must be explained and justified in the RI report. In some cases it will be appropriate to identify the types of questions that should be avoided for that particular witness as opposed to giving a blanket ‘no leading questions’ recommendation.

The Court of Appeal decision in *R v Wills* upheld the correct approach is following the judge’s Ground Rules - in this case the appellant counsel complained that he had followed them whereas his opponent, whose lay client was acquitted, had not. Subsequently in *R v Edwards* the Court of Appeal<sup>25</sup> noted that the judge ‘made it quite plain that the modus of cross-examination was his decision’ and found no force in defence counsel’s argument that the defendant’s right to fair trial was compromised because ‘the defence was deprived of the opportunity’ to cross-examine in the traditional way.

The setting and enforcing of appropriate Ground Rules for vulnerable witnesses is key to getting complete, accurate and coherent communication. Further research is required to look at judicial approaches to setting and enforcing Ground Rules. It is also suggested that the barristers’ code of conduct should require<sup>26</sup> counsel to stay within Ground Rules set by judges in the interests of justice.

*Intermediaries for Defendants*

Requests for intermediaries for defendants are significant in number. They may be increasing on account of growing awareness of the role. There is now a body of case law relating to non-

<sup>25</sup> With echoes of *R v Barker* at para 42 ‘Aspects of evidence which undermine or are believed to undermine the child’s credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources.’

<sup>26</sup> Perhaps inserted into Code of Conduct of the Bar of England & Wales (8<sup>th</sup> Edition) at Para 708 ‘Conduct in Court’ could be ‘A barrister when conducting proceedings in Court must not knowingly or recklessly breach a Ground Rule set by the judge in relation to a vulnerable witness or defendant’?

registered intermediaries for defendants. Although the bringing into force of a statutory scheme for defendants would to some extent address concerns about what has been described as a ‘free for all’, the picture would still be far from clear because the legislation, not yet in force, does not provide for the assistance of an intermediary during parts of the trial other than the giving of the defendant’s evidence<sup>27</sup>.

### *Intermediaries in the Family Justice System*

The response received adds weight to the family judge’s view in *Re X (A child)*: the absence of a scheme and funding in the FJS is an urgent problem. This continues to be the case even though the December 2011 Family Justice Council ‘Guidelines in relation to children giving evidence in family proceedings’ encourage practitioners to consider the use of intermediaries at the ‘earliest opportunity’<sup>28</sup>.

Penny Cooper, April 2012

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<sup>27</sup> See fn 10

<sup>28</sup> See para 14 ‘At the earliest opportunity and in any event before the hearing at which child’s evidence is taken, the following matters need to be considered: a. if ‘live’ cross examination is appropriate, the need for and use of a registered intermediary’