
STATUTORY INSTRUMENTS

2021 No. 40

The Criminal Procedure (Amendment) Rules 2021

Amendments to the Criminal Procedure Rules

9. In Part 18 (Measures to assist a witness or defendant to give evidence)—
- (a) for the heading to the Part substitute “Measures to help a witness or defendant to give evidence or otherwise participate”;
 - (b) in rule 18.1 (When this Part applies)—
 - (i) at the end of paragraph (e) omit “and”,
 - (ii) for paragraph (f) substitute—
 - “(f) where the court can—
 - (i) appoint an intermediary to facilitate a defendant’s effective participation in that defendant’s trial, when the defendant gives evidence or at any other time, or
 - (ii) vary or discharge such an appointment; and
 - (g) where the court can exercise any other power it has to give, make, vary, rescind, discharge or revoke a direction for a measure to help a witness to give evidence or to help a defendant to participate in that defendant’s trial.”, and
 - (iii) at the end of the rule insert—

“[Note. At the end of this Part there is a summary of the circumstances in which a witness or defendant may be eligible for the assistance of one of the measures to which this Part applies.]”;
 - (c) at the end of rule 18.2 (Meaning of ‘witness’) omit the note to the rule;
 - (d) omit rule 18.7 (Declaration by intermediary);
 - (e) renumber rules 18.3 (Making an application for a direction or order), 18.4 (Decisions and reasons), 18.5 (Court’s power to vary requirements under this Part) and 18.6 (Custody of documents) as rules 18.4, 18.5, 18.7 and 18.7 respectively;
 - (f) after rule 18.2 (Meaning of ‘witness’) insert—

“Meaning of ‘intermediary’ and ‘intermediary’s report’

18.3. In this Part

- (a) ‘intermediary’ means a person who is—
 - (i) approved by the court for the purposes of section 29 of the Youth Justice and Criminal Evidence Act 1999⁽¹⁾ (Examination of witness through intermediary),

(1) 1999 c. 23; section 29 was amended by paragraph 384 of Schedule 8 to the Courts Act 2003 (c. 39).

- (ii) approved by the court for the purposes of section 33BA of the 1999 Act⁽²⁾ (Examination of accused through intermediary),
 - (iii) asked to assess a defendant’s communication needs, or
 - (iv) appointed by the court to facilitate a defendant’s effective participation in the trial, when the defendant gives evidence or at any other time, where otherwise that defendant’s communication needs would impede such participation; and
- (b) a reference to ‘an intermediary’s report’ means a report by such a person which complies with rule 18.32.”;
- (g) in rule 18.4, as thus renumbered (Making an application for a direction or order), in the first paragraph of the note to the rule for “and rule 18.24 (Content of application for a live link direction)” substitute “; rule 18.24 (Content of application for a live link direction) and rule 18.27 ((Appointment of intermediary to facilitate a defendant’s participation)”;
- (h) in rule 18.5, as thus renumbered (Decisions and reasons), in paragraph (3) after “before the witness gives evidence” insert “or the defendant’s trial begins (as the case may be)”;
- (i) in rule 18.24 (Content of application for a live link direction)—
- (i) omit paragraphs (2) and (3),
 - (ii) paragraph (1) becomes the text of the rule, and
 - (iii) for the first paragraph of the note to the rule substitute—
- “[Note. See section 32 of the Criminal Justice Act 1988⁽³⁾ and section 51 of the Criminal Justice Act 2003⁽⁴⁾.”;*
- (j) in rule 18.25 (Application to discharge a live link direction, etc.)—
- (i) in the title to the rule omit “etc.”,
 - (ii) omit paragraphs (3) and (4),
 - (iii) for the note to the rule substitute—
- “[Note. See section 32(4) of the Criminal Justice Act 1988⁽⁵⁾ and section 52(3) of the Criminal Justice Act 2003⁽⁶⁾.]”;*
- (k) after rule 18.26 (live link directions; representations in response) insert—

“INTERMEDIARY FOR A DEFENDANT

Appointment of intermediary to facilitate a defendant’s participation

18.27.—(1) The court must exercise its power to appoint an intermediary to facilitate a defendant’s effective participation in the trial where—

- (a) the defendant’s ability to participate is likely to be diminished by reason of—

(2) 1999 c. 23; section 33BA is inserted by section 104(1) of the Coroners and Justice Act 2009 (c. 25), with effect from a date to be appointed.

(3) 1988 c. 33; section 32 was amended by section 55 of the Criminal Justice Act 1991 (c. 53), section 29 of, and paragraph 16 of Schedule 2 to, the Criminal Appeal Act 1995 (c. 35), sections 67 and 68 of, and Schedule 6 to, the Youth Justice and Criminal Evidence Act 1999 (c. 23) and article 3 of, and paragraph 26 of the Schedule to, S.I. 2004/2035. It is temporarily omitted by section 87 of, and paragraph 10 of Schedule 23 to, the Coronavirus Act 2020 (c. 7).

(4) 2003 c. 44; section 51 is temporarily amended by section 87 of, and paragraph 2 of Schedule 23 to, the Coronavirus Act 2020 (c. 7).

(5) 1988 c. 33; section 32(4) was amended by article 3 of, and paragraph 26 of the Schedule to, S.I. 2004/2035.

(6) 2003 c. 44; section 52 is temporarily omitted by section 87 of, and paragraph 2 of Schedule 23 to, the Coronavirus Act 2020 (c. 7).

- (i) age, if the defendant is under 18, or
 - (ii) mental disorder (as defined in section 1(2) of the Mental Health Act 1983(7)), a significant impairment of intelligence and social functioning, or a physical disability or disorder; and
 - (b) the appointment is necessary for that purpose.
- (2) In determining whether such an appointment is necessary, who to appoint and the duration or purpose of the appointment, the court must have regard to—
- (a) the defendant’s communication needs as reported to the court;
 - (b) the recommendations in any intermediary’s report received by the court;
 - (c) any views that the defendant has expressed about—
 - (i) receiving the assistance of an intermediary,
 - (ii) other measures or arrangements to facilitate the defendant’s effective participation in the trial;
 - (d) the likely impact of the defendant’s age, if under 18, level of intellectual ability or social functioning on the ability to—
 - (i) give evidence, and
 - (ii) understand what is said and done by the court and other participants;
 - (e) the likely impact on such participation and on such understanding of any mental disorder or other significant impairment of intelligence or social functioning;
 - (f) the adequacy of arrangements for questioning the defendant in the absence of an intermediary;
 - (g) any assistance that the defendant has received in the past—
 - (i) while giving evidence in legal proceedings,
 - (ii) while being questioned during the investigation of an alleged offence, or
 - (iii) as a defendant in a criminal case;
 - (h) any assessment of the defendant’s health by a mental health practitioner acting independently of the parties to assist the court;
 - (i) any expert medical opinion that the court may have received; and
 - (j) any other matter that the court thinks relevant.
- (3) The court may exercise its power to appoint an intermediary—
- (a) for the duration of every hearing that the defendant is due to attend;
 - (b) for the duration of any specified such hearing or hearings, or for the duration of a specified part of such a hearing; or
 - (c) for a specified purpose during a hearing.
- (4) Unless the court otherwise directs, the appointment of an intermediary extends to facilitating the defendant’s communication with that defendant’s legal representatives for the duration and for the purpose of the appointment.
- (5) The court may decide whether to appoint an intermediary to facilitate a defendant’s effective participation in the trial and whether to vary or discharge any such appointment—
- (a) on application or on the court’s own initiative;
 - (b) at a hearing, in public or in private, or without a hearing; and

(7) 1983 c. 20; section 1(2) was amended by sections 1, 55 and 56 of, and Schedule 11 to, the Mental Health Act 2007 (c. 12).

- (c) in a party's absence, if that party—
 - (i) applied for the appointment, variation or discharge, or
 - (ii) has had at least 10 business days in which to make representations.
- (6) The court must not exercise its power to vary or discharge a direction for the appointment of an intermediary unless satisfied that—
 - (a) since the direction was made—
 - (i) the defendant's communication needs have changed materially, or
 - (ii) any other material circumstance has changed materially; and
 - (b) the defendant will be able to participate effectively in the trial despite the variation or discharge of the direction.

Application to vary or discharge the appointment of an intermediary for a defendant

- 18.28.**—(1) A party who wants the court to vary or discharge the appointment of an intermediary to facilitate a defendant's effective participation in the trial must—
- (a) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
 - (b) serve the application on—
 - (i) the court officer, and
 - (ii) each other party.
- (2) The applicant must—
- (a) explain how the criteria listed in rule 18.27(7) are met (variation or discharge of appointment); and
 - (b) ask for a hearing, if the applicant wants one, and explain why it is needed.

Representations in response to application or proposal

- 18.29.**—(1) This rule applies where a party wants to make representations about—
- (a) an application or proposal for the appointment of an intermediary to facilitate a defendant's effective participation in the trial; or
 - (b) an application or proposal for the variation or discharge of such an appointment.
- (2) Such a party must—
- (a) serve the representations on—
 - (i) the court officer, and
 - (ii) each other party;
 - (b) do so not more than 10 business days after, as applicable—
 - (i) service of the application, or
 - (ii) notice of the appointment, variation or discharge that the court proposes; and
 - (c) ask for a hearing, if that party wants one, and explain why it is needed.
- (3) Representations against such an appointment, variation or discharge must explain why the criteria that apply are not met.

DUTIES OF INTERMEDIARIES

Intermediary's duty to the court

- 18.30.**—(1) This rule applies to an intermediary who accepts—
- (a) approval by the court for the purposes of section 29 of the Youth Justice and Criminal Evidence Act 1999⁽⁸⁾ (Examination of witness through intermediary);
 - (b) approval by the court for the purposes of section 33BA of the 1999 Act⁽⁹⁾ (Examination of accused through intermediary); or
 - (c) appointment by the court to facilitate a defendant's effective participation in the trial, when the defendant gives evidence or at any other time.
- (2) The intermediary must help the court to achieve the overriding objective—
- (a) to the best of the intermediary's skill and understanding by—
 - (i) communicating to the witness or defendant (as the case may be) questions put to them,
 - (ii) communicating to the questioner and the court the replies, and
 - (iii) explaining such questions and answers so that they can be understood;
 - (b) by assessing continually the witness' or the defendant's (as the case may be) ability to participate effectively and intervening if necessary;
 - (c) where the intermediary is appointed to facilitate a defendant's effective participation, by explaining to the defendant, in terms the defendant can understand, what is said and done by the court and other participants; and
 - (d) by actively assisting the court in fulfilling its duties under rule 3.2 (Case management; The duty of the court) and rule 3.9 (Case management; Ground rules hearing), in particular by—
 - (i) complying with directions made by the court, and
 - (ii) at once informing the court of any significant failure (by the intermediary or another) to take any step required by such a direction.
- (3) This duty overrides any obligation to the witness or to the defendant (as the case may be), or to the person by whom the intermediary is paid.

Declaration by intermediary

- 18.31.**—(1) This rule applies where—
- (a) a video recorded interview with a witness is conducted through an intermediary; or
 - (b) the court directs the examination of a witness or defendant through an intermediary.
- (2) The intermediary must make a declaration—
- (a) before such an interview begins; and
 - (b) before the examination begins (even if such an interview with the witness was conducted through the same intermediary).

⁽⁸⁾ 1999 c. 23; section 29 was amended by paragraph 384 of Schedule 8 to the Courts Act 2003 (c. 39).

⁽⁹⁾ 1999 c. 23; section 33BA is inserted by section 104(1) of the Coroners and Justice Act 2009 (c. 25), with effect from a date to be appointed.

(3) The declaration must be in these terms, or in any corresponding terms that the intermediary declares to be binding—

“I swear by Almighty God [*or* I solemnly, sincerely and truly declare and affirm] that I shall faithfully communicate questions and answers and make true explanation of all matters and things required of me according to the best of my skill and understanding.”

Content of intermediary’s report

18.32.—(1) An intermediary’s report must, in every case—

- (a) give details of the intermediary’s qualifications, relevant experience and any accreditation;
- (b) identify the commissioner of the report;
- (c) identify those from whom the intermediary has obtained information material to the report;
- (d) list the documents received or inspected by the intermediary which contained such information and give an indication of their content;
- (e) give the date or dates on which the intermediary met the witness or defendant, as the case may be, for the purpose of preparing the report;
- (f) describe the nature and duration of the intermediary’s assessment, or assessments, of the witness or defendant;
- (g) by reference to examples drawn from the intermediary’s assessment of the witness or defendant explain why in this particular case intermediary assistance is necessary;
- (h) include an evaluation of—
 - (i) the impact of any condition or conditions which, whether in isolation or together, may adversely affect the witness’ or the defendant’s ability to communicate, and
 - (ii) the extent, if any, to which that impact may be exacerbated by the trial;
- (i) if the intermediary is not able to reach an evaluation without qualifying it, state the qualification;
- (j) report the views of the witness or defendant, as the case may be, on receiving the assistance of an intermediary;
- (k) include in a summary of the intermediary’s conclusions any recommendation, with reasons, for—
 - (i) the approval or appointment of an intermediary,
 - (ii) the manner and duration of any questioning of the witness or defendant, as the case may be, and
 - (iii) arrangements for the way in which the intermediary, if approved or appointed, should participate; and
- (l) contain a statement that the intermediary—
 - (i) understands an intermediary’s duty to the court, and
 - (ii) will comply with that duty if approved or appointed.

(2) Where the intermediary is asked to evaluate a defendant’s communication needs the report must also—

- (a) include an evaluation of the extent to which any measures or arrangements beside the appointment of an intermediary will facilitate the defendant's effective participation in the trial; and
- (b) in the summary of the intermediary's conclusions include any recommendation, with reasons, for—
 - (i) the duration and purpose of any appointment of an intermediary, and
 - (ii) other measures or arrangements to help the defendant to participate effectively in the trial.”;
- (l) amend the table of contents correspondingly; and
- (m) in the note at the end of the Part—
 - (i) omit the third and fourth paragraphs after the heading “Live link direction” (which paragraphs concern the Criminal Justice (European Investigation Order) Regulations 2017), and
 - (ii) at the end of the note insert—

“Intermediary for a defendant

In order to ensure the defendant's effective participation in his or her trial the court has an inherent power to appoint an intermediary to facilitate that participation, including during the giving of evidence by the defendant.”.