

Intermediaries

Commentary

The Queensland Intermediary Scheme (QIS) Pilot Program commenced in July 2021 in Brisbane and Cairns.

The scheme was established in response to recommendations 59 and 60 of the Royal Commission into Institutional Responses to Child Sexual Abuse Criminal Justice report published in August 2017.

The main objective of the scheme is to achieve the best evidence from a witness with communication difficulties.

The insertion of Division 4C to the *Evidence Act 1977* (Qld) provides the framework in which the scheme operates.

The court's power to appoint an intermediary is found in s 21AZL *Evidence Act 1977* (Qld). An intermediary may be appointed for a prosecution witness in a child sexual offence prosecution who:

- is under 16 years; or
- is a person with an impairment of the mind as defined under the Criminal Code; or
- has difficulty communicating; or
- is of a class prescribed by regulation.¹

Intermediaries help vulnerable witnesses to understand and be understood. Intermediaries have specialist skills in communication, holding a tertiary qualification in occupational therapy, psychology, social work or speech pathology.² They facilitate communication between the witness and police, and the witness and courts.

Functions of intermediaries

Intermediaries are officers of the court who must act impartially.³ Pursuant to s 21AZM, intermediaries have the following functions:⁴

- (a) to communicate or explain to the witness questions put to the witness, to the extent necessary to enable the witness to understand the questions;
- (b) to communicate or explain to a person asking questions of the witness the answers given by the witness in reply, to the extent necessary to enable the person to understand the answers.

¹ No regulation has been made under this section; there are no plans to prescribe any additional categories during the pilot phase of the scheme.

² *Evidence Act 1977* (Qld) s 21AZV(5).

³ *Evidence Act 1977* (Qld) s 21AZM(3).

⁴ See also *Evidence Act 1977* (Qld) s 21AZR for the functions of intermediaries at directions hearings.

An intermediary must take an oath or affirmation before performing any function in court.⁵ An intermediary is an essential person⁶ and may be appointed for a witness at any stage of a proceeding.⁷

Police investigation

At the investigation stage, the intermediary assesses the witness and provides advice to the interviewing police officer on his/her communication needs. Such advice may include changing the layout of the interview room, suggesting the frequency of breaks, addressing cultural considerations which may affect communications, and the phrasing of questions. The police interview is conducted taking into account the recommendations and observations of the intermediary. The intermediary may be present during the police interview to monitor communications and intervene if necessary.

In summary, when engaged during a police investigation an intermediary:

- conducts a witness assessment;
- provides recommendations to the police officer on how best to communicate with the witness during the police interview; and
- attends the police interview to ensure the witness understands and their evidence is understood.

Court proceedings

When the court appoints an intermediary, the intermediary will conduct an assessment of the witness' communication needs. The court may direct that the intermediary prepare a written report addressing the witness' communication needs and setting out if and how normal procedures should be adapted for the witness to give their best evidence, including the recommended manner and form of questioning.⁸

A judge considers the intermediary's court report during a 'directions hearing' at court (directions hearings are discussed in the following section). Following the directions hearing, the intermediary will attend court with the witness to ensure the court-approved recommendations are followed and there is clear communication between the witness and counsel and the court.

In summary, an intermediary performs the following functions when engaged at the court stage:

- conducts a witness assessment;
- writes a court report with recommendations about how to best communicate with the witness;

⁵ *Evidence Act 1977* (Qld) s 21AZN. The intermediaries oath can be found in s 30A *Oaths Act 1867* (Qld).

⁶ *Evidence Act 1977* (Qld) s 21AU(4).

⁷ *Evidence Act 1977* (Qld) s 21AZL(3).

⁸ *Evidence Act 1977* (Qld) s 21AZP(4)(a).

- participates in a ‘directions hearing’ where the intermediary’s recommendations are discussed; and
- attends court when the witness gives evidence to ensure the witness understands and their evidence is understood.

Directions hearing

Upon making an order appointing an intermediary, the court must give a direction that a **directions hearing** be held.⁹ The purpose of an intermediary at a directions hearing is to:¹⁰

- inform the court of the communication needs of the witness; and
- recommend to the court the most effective way to communicate with the witness.

An intermediary’s court report informs a directions hearing.

The court may give directions about the giving of evidence by the witness that the court considers appropriate for the fair and efficient conduct of the proceeding.¹¹ The directions made should ensure the witness can understand questions asked when giving their evidence and their answer can be understood by the court.

The directions that can be made under s 21AZS(2) include, but are not limited to:

- the manner of questioning the witness;
- the duration of questioning the witness;
- the questions that may, or may not, be put to the witness;
- if there is more than 1 defendant— the allocation among the defendants of the topics about which the witness may be questioned;
- the use of models, plans, body maps or similar aids to—
- help communicate a question to be put to the witness; or
- help the witness communicate an answer to a question put to the witness;
- the use of an audio visual link or another communication facility—
- to enable the witness and the intermediary to communicate with each other; or
- for another purpose, including, for example, to enable the court, the prosecutor and the legal practitioner representing the defendant to communicate with the intermediary.

⁹ *Evidence Act 1977* (Qld) s 21AZP(1).

¹⁰ *Evidence Act 1977* (Qld) s 21AZR(1).

¹¹ *Evidence Act 1977* (Qld) s 21AZS(1).

Not listed in s 21AZS(2) but of note: The court may direct how and in what circumstances an intermediary can intervene while a witness is giving evidence.

The direction will ultimately depend on how the presiding judge wishes to manage their court.

Further, it is the decision of the judge whether or not to uphold an intermediary's intervention.

Jury directions

If the evidence of a witness is given under an order in s 21AZT(2)(a) or (b), the jury must be instructed in accordance with s 21AZU(2) that –

- (a) they should not draw any inference as to the defendant's guilt from the use of the intermediary; and
- (b) the probative value of the evidence is not increased or decreased because of the use of the intermediary; and
- (c) the evidence is not to be given any greater or lesser weight because of the use of the intermediary.¹²

However, the judge must not give an instruction under subsection (2)(b) or (c) if the judge is satisfied it would not be in the interests of justice to give the instruction.¹³

Other considerations for jury directions

It may be that a witness for whom an intermediary is appointed will also be a special witness or an affected child witness.

Trial judges will need to tailor a direction about the witness's evidence which takes into account as required, in addition to the requirements of s 21AZU(2), the requirements of -

- section 21A(8) *Evidence Act 1977*, for a special witness;
- section 21AW(2) *Evidence Act 1977*, for an affected child witness;

Section 21AZU(3) states that directions about the probative value of a witness' evidence not being increased or decreased; and directions about the witness' evidence not being given greater or lesser weight because of the use of the intermediary must *not* be given if it would not be in the interests of justice to do so. However, directions about those matters must be given in the case of a special witness and in the case of an affected child witness.

¹² The failure to comply with the mandatory requirements of s 21AZU(2) is likely an error of law. The failure to comply with s 21A(8) *Evidence Act 1977* (Qld) resulted in an error of law in *R v Bisht* [2013] QCA 238 at [49] and *R v Little* [2013] QCA 223 at [24].

¹³ *Evidence Act 1977* (Qld) s 21AZU(3).

Draft direction

An intermediary was used for the evidence of the witness [name witness].

You must not draw any inference about the defendant's guilt from the use of the intermediary.

If in the interests of justice to do so (see 21AZU(3)) add:

Nor is the probative value of the witness' evidence increased or decreased because of the use of the intermediary.

Nor is the witness' evidence to be given any greater or lesser weight because of the use of the intermediary.