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Introduction

An intermediary is a communication specialist who facilitates two-way communication between a vulnerable person and the other participants in the legal process. Intermediaries provide impartial assistance to those with communication difficulties, learning difficulties or mental health problems. Their duty is to the Court not to the parties involved.

An intermediary will assess the communication needs and abilities of the vulnerable person and advise on how best to communicate with the individual. An intermediary's role is to facilitate complete, accurate and coherent communication.

*Assessment by an intermediary should be considered for ... defendants under 18 who ... seem unlikely to be able to recognise a problematic question (such as one that is misleading or not readily understood), and those who may be reluctant to tell a questioner in a position of authority they do not understand.*¹

Studies suggest that the majority of young witnesses, across all ages, fall into one or other or both categories.²

This guide applies to the use of intermediaries in the youth court, adult magistrates' court and Crown Court. Practitioners should be aware that in the youth court and adult magistrates' court cases involving intermediaries will normally be billed as a non-standard fee for the purposes of legal aid (using form [CRM7](#)).

Intermediaries can also help children detained at police stations. Police officers, appropriate adults and defence representatives should consider the use of an intermediary. Funding can be sought from the Legal Aid Agency (LAA).

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Key Points

- Always consider whether a child defendant needs an intermediary
- Intermediaries can help children in a police interview, talking to their lawyer, understanding what is happening in court and when giving their evidence
- Intermediaries should attend the Ground Rules Hearing

¹ [Criminal Practice Direction 2015 \(updated 4 April 2016\)](#); paragraph 3F.26

² [Paragraph 79, Chapter 5, Equal Treatment Bench Book 2013](#)

Practical Guidance & Legal Overview

Identify whether the defendant may need an intermediary

Has the defendant got communication needs, learning difficulty or mental health needs? Do they have a statement of special educational needs? What can you learn from the Youth Offending Team? See the [Identifying Vulnerability in Witnesses and Defendants, Toolkit 10, The Advocate's Gateway](#) and [Intermediaries: Step-by-Step, Toolkit 16, The Advocate's Gateway](#).

It is important to make the court aware as soon as possible that the defendant may need an intermediary. You may want to seek an adjournment, ask the court not to take a plea (and preserve any credit for a guilty plea) until you know the defendant is fit to plead or you are able to take instructions using an intermediary.

Instruct an expert

Obtain prior authority from the Legal Aid Agency (LAA) to instruct an expert. It may be easier to obtain funding with a written advice. Prior authority is sought using a [CRM4](#) form.

The expert should be asked to consider:

- Whether the defendant is fit to plead?
- Whether the defendant can effectively participate in the proceedings?
- The defendant's suggestibility and compliance;
- Whether there are any measures that would assist the defendant in participating in the proceedings? The expert's attention should be drawn to special measures open to the defendant, but suggestions should not be limited to those;
- Whether an intermediary could enable the defendant's effective participation, and if so whether they would be needed for: taking instructions and understanding case papers; understanding the trial; giving evidence; for conferences with counsel.

When you might need a forensic or clinical psychologist:

- Learning Disability
- Autism Spectrum Disorder (including Asperger's Syndrome)
- Attention Deficit Hyperactive Disorder
- Post Traumatic Stress Disorder
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When you might need a psychiatrist:

- Mental Illness DSM-IV

- Schizophrenia
- Bi-polar (manic depressive)
- Drug induced psychosis
- Personality disorders

Instruct an intermediary who will write a report

Although it is possible to make an application for an intermediary without an intermediary report, the court may not have sufficient information and this may make it harder to persuade the court to grant an intermediary.

- Apply for funding from LAA for an intermediary report. Prior authority is sought using a [CRM4](#) form
- Find an Intermediary (see our YJLC guide)
- Instruct the intermediary to prepare a report. The intermediary will meet with the defendant. This report should address:
 - The difficulties the defendant will face during criminal proceedings;
 - What modifications need to be made to proceedings in order to allow the defendant to effectively participate;
 - What the intermediary will do to assist the defendant;
 - What parts of the proceedings the intermediary will be present at and why e.g. the preparation of the case, understanding the evidence against them and giving instructions;
 - Attendance at pre trial hearings and Ground Rules Hearing;
 - The duration of the trial (understanding the witnesses' testimony and enabling the defendant to challenge the evidence of the witnesses);
 - In giving evidence and being cross examined.

Make an application to the court for an intermediary

There is no statutory power for the court to grant an intermediary, but the court can grant an intermediary using its inherent powers ([C v Sevenoaks \[2009\] EWHC 3008 \(Admin\)](#)). The Witness Intermediary Scheme (WIS) is not presently available to defendants.³ Defendants must therefore appoint intermediaries outside the Registered Intermediary scheme.

³ *R (on the Application of OP) v the Secretary of State for Justice and Others [2014] EWHC 1944 (Admin)* – OP successfully challenged the WIS and the Ministry of Justice was ordered to consider carefully whether it was justifiable to refuse equal provision to witnesses and defendants with respect to their evidence.

- Make the application in accordance with Criminal Procedure Rules (CrimPR) Part 18 and, where possible, include the intermediary report with the application ([CPD 3F.7](#)).
- The application should be made as soon as possible e.g. it may be necessary to have an intermediary for taking instructions and conferences with counsel. If necessary, apply for extra time for filing the defence statement or for credit to be preserved.
- Once the application has been granted, the funding of the intermediary is covered by the court paid from central funds.⁴
- Prior authority may need to be sought for legal aid to cover attendance of the intermediary for taking instructions, conferences with counsel, pre-trial hearings and familiarisation visit.

Practitioners should be aware that the Criminal Practice Directions 2015 (amended in April 2016) state that although the court may exercise its inherent powers to appoint an intermediary to assist a defendant in giving evidence or for the entire trial, it will be 'extremely rare' for directions to be given to appoint an intermediary for the entire trial (CPD 3F.13). Even where appointment for the entire trial would be of assistance, it is not mandatory: the court should adapt the trial process to address a defendant's communication needs (*R v Cox* [2012] EWCA Crim 549) and will rarely exercise its inherent powers to direct appointment of an intermediary (CPD 3F.12).

The above Practice Directions were cited in *R v Yahya Rashid* [2017] EWCA Crim 2. It should be noted, however, that this case concerned an adult defendant and the court concluded that there was nothing to suggest that the defendant had been unable to participate fully in his trial. Where the defendant is a child, the court must have consideration for its welfare duties (section 44 Children and Young Persons Act 1933) when reaching any decision. Arguably, and depending on the facts of the case, to refuse an intermediary or to appoint one only for the giving of evidence would prevent a vulnerable child defendant from effectively participating in their trial and as such, constitute an abuse of process.⁵

Advocates ought to consider the other relevant case law, which provides guidance on the use of intermediaries to assist vulnerable defendants to effectively participate and

⁴ Internal guidance for court staff is in *Guidance for HMCTS Staff: Registered and Non Registered Intermediaries for Vulnerable Defendants and Vulnerable Defence and Prosecution Witnesses* (Her Majesty's Courts and Tribunals Service, 2016)

⁵ For further information on effective participation, please see <http://www.yjlc.uk/legal-materials/effective-participation>

to have a fair trial: [R \(AS\) v Great Yarmouth Youth Court \[2011\] EWHC 2059 \(Admin\)](#) concerning a child with ADHD held that '[T]here was a right, which might in certain circumstances amount to a duty, to appoint a registered intermediary to assist a defendant to follow the proceedings and give evidence if without assistance he would not be able to have a fair trial' (para 6); [R v Walls \[2011\] EWCA Crim 443](#) makes it plain that the appointment of an intermediary is one mechanism which allows defendants to stand trial in circumstances where they may otherwise be unable to effectively participate and where the jury may not otherwise understand the defendant's limitations; in the case of [R \(on the Application of OP\) v the Secretary of State for Justice \[2014\] EWHC 1944 \(Admin\)](#) the judge found that the Secretary of State was wrong in his decision to refuse a young defendant access to a registered intermediary on the basis that access necessarily would require the provision of an intermediary for the duration of the trial. However, in this case, the Secretary of State was ordered to reconsider his decision on the basis that the intermediary would only be required to assist the defendant in giving evidence.

Other cases to consider include:

- [R v H \[2003\] EWCA Crim 1208](#)
- [R\(D\) v Camberwell Green Youth Court \[2005\] UKHL 4](#)
- [R\(TP\) v West London Youth Court \[2005\] EWHC 2583 \(Admin\)](#)

Finding an intermediary

[Communicourt](#), [Triangle](#) and [Intermediaries for Justice](#) provide intermediaries. The Witness Intermediary Scheme (WIS) matches registered intermediaries (RIs) for witnesses. Referrals can be made by the police, Crown Prosecution Service or defence solicitors to socwitnessint@nca.x.gsi.gov.uk.⁶

A practical issue that has arisen is the refusal by intermediaries to act when the court does not direct attendance for the full duration of the trial. Some intermediaries would argue that attending just to help with evidence does not enable defendants to properly understand what is happening in the trial and that it denies the intermediary the opportunity to develop a rapport with the defendant such as to enable them to best communicate with that individual. If the intermediary is required to facilitate more than a child's giving of evidence and is needed to ensure a child's effective participation in the trial this should be explained in any expert or intermediary report.

⁶ The Ministry of Justice's Witness Intermediary Scheme (WIS) is now provided by the National Crime Agency who run a matching service providing Registered Intermediaries.

There is no statutory definition of ‘intermediary’, therefore it may be possible to use any individual who has the necessary skill. CPD I 3F.1 states:

“Intermediaries are communication specialists (not supporters or expert witnesses) whose role is to facilitate communication between the witness and the court, including the advocates. Intermediaries are independent of the parties and owe their duty to the court.”

Such a person can be:

- (1) A registered intermediary registered by the Intermediaries Registration Board, chosen for their skill in facilitating communication with vulnerable people and who has completed an approved assessed training course on the role of intermediaries in criminal proceedings;
- (2) An unregistered intermediary but someone who is a recognised professional in two way communication such as a speech therapist;
- (3) In an appropriate and rare case, a carer or family member, who can overcome particular problems with a witness and a person who knows the witness well. In such a case, a registered intermediary should have positively evaluated the ability of the carer or family member to facilitate communication.

Ground Rules Hearing & Other Pre-Trial Issues

See [Ground Rules Hearings, Toolkit 1, The Advocate’s Gateway](#).

The intermediary report will usually recommend a Ground Rules Hearing (GRH), to discuss the implications of the report and to agree the defendant’s communication needs and any modifications to the trial procedure. It is preferable for the GRH to take place before the first day of the trial ([CPD 3E.3](#)) and the intermediary must be present ([CPD 3E.2](#)). Where limitations on questioning are necessary and appropriate, they must be clearly defined ([CPD 3E.4](#)) and might be written down ([CPD 3E.3](#)).

If there are pre-trial hearings, consider whether the defendant’s attendance may be excused or whether the intermediary should be at court. Defence representatives will be responsible for the defendant’s court familiarisation visit.

Trial

An intermediary should be able to sit with a defendant during the trial and in the adult magistrates’ court or Crown Court. This should usually be outside the dock

close to the legal representative. The intermediary should highlight if there are any other steps or measures that should be taken to ensure the effective participation of the defendant. The role of the intermediary should be explained to the jury ([Crown Court Compendium, 2016, 3-7 Intermediaries](#)).

A further GRH may take place before a defendant gives evidence.

An intermediary will usually stand in or near the witness box when the defendant gives evidence, and will interrupt counsel if the questions or answers are unclear.

Usually an intermediary will not rephrase a question, but will highlight what the issue is, and then allow counsel to rephrase. How exactly this will work will be established at the GRH. It can be easier for questions to be agreed in advance.

The intermediary may attend any sentencing hearing to explain the sentencing process and the sentence imposed. This can avoid the defendant breaching an order or failing to attend appointments. The intermediary can also assist the Youth Offending Team or other staff with information about the defendant's needs.

Legislation

Section 33BA & BB Youth Justice and Criminal Evidence Act 1999 - Examination of accused through an intermediary [not currently in force]

Case Law

[R \(on the Application of OP\) v the Secretary of State for Justice \[2014\] EWHC 1944 \(Admin\)](#)

[R v Dixon \[2013\] EWCA Crim 465](#)

[R \(AS\) v Great Yarmouth Youth Court \[2011\] EWHC 2059 \(Admin\)](#)

[C v Sevenoaks Youth Court \[2009\] EWHC 3088 \(Admin\)](#)

[R v Roland Ukpabio \[2007\] EWCA Crim 2108](#)

[R v Yahya Rashid \[2017\] EWCA Crim 2](#)

Guidance

[Amended Criminal Practice Directions \(CPD\) 2015 \(updated 4 April 2016\)](#);
paragraphs 3D – Vulnerable people in court, 3E – Ground rules hearings to plan the questioning of a vulnerable witness or defendant, 3F – Intermediaries, 3G – Vulnerable Defendants

[Criminal Procedure Rules \(CPR\), 2015 \(as amended April 2016\), Part 3 – Case Management](#), rule 3.9 – Case preparation and progression; [Part 18 – Measures to Assist a Witness or Defendant Give Evidence](#)
[Equal Treatment Bench Book, Judicial College, 2013](#)

Registered Intermediaries Procedural Guidance Manual, Ministry of Justice 2012

Toolkits & Guides

[Intermediaries: Step-by-Step, Toolkit 16, The Advocate's Gateway](#)

[Effective Participation of Young Defendants, Toolkit 8, The Advocate's Gateway](#)

[Ground Rules Hearings, Toolkit 1, The Advocate's Gateway](#)