



The Advocate's Gateway

The Inns of Court College of Advocacy

Intermediaries: step by step

Toolkit 16

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The Advocate's Gateway toolkits aim to support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process. The handling and questioning of vulnerable witnesses and defendants is a specialist skill ([*Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court, 2011*](#)). Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

Courts are expected to make reasonable adjustments to remove barriers for people with disabilities, giving effect to the [*Equality Act 2010*](#).

These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.

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Introduction

The toolkit contains information about intermediaries in criminal cases and is primarily intended for use by advocates as well as judges, solicitors, police officers, dock officers, expert witnesses and social workers.

Key points include:

- courts must take every reasonable step to encourage and to facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant ([Criminal Procedure Rules 2015](#) (CPR) rule 3.9(3));
- the function of the intermediary is to facilitate complete, accurate and coherent communication with the vulnerable defendant or vulnerable witness;
- intermediaries should be considered in every case involving a child witness or child defendant;
- a ground rules hearing (GRH) must take place if the defendant is vulnerable or if a vulnerable witness is due to give evidence; when there is an intermediary they must be included in the GRH discussion ([CPR](#) rule 3.9 (7))

- the Ministry of Justice provides a scheme of registered intermediaries (RIs) – the Witness Intermediary Team (WIT) manages the database and provides a matching service for witnesses;
- for a demonstration of a case involving an intermediary for a witness see the training film [*A Question of Practice*](#) (CBA 2013);
- this toolkit should be read in conjunction with [Toolkit 1 - Ground rules hearings and the fair treatment of vulnerable people in court](#) and the [Ground Rules Hearing Checklist](#);
- the focus of this toolkit is the procedure for use of intermediaries in criminal cases. Guidance on intermediaries in family cases is contained in [Toolkit 13 - Vulnerable witnesses and parties in the family courts](#). An intermediary has also been used in the Court of Protection case (see [A County Council v AB and Others \(Participation of P in Proceedings\)](#) [2016] EWCOP 41). Guidance on vulnerable witness and parties in the civil courts can be found in [Toolkit 17 - Vulnerable witnesses and parties in the civil courts](#).

1. GENERAL PRINCIPLES, DEFINITIONS AND CONTEXT

- 1.1 Intermediaries facilitate communication with vulnerable people in the justice system, thus helping to achieve the overriding objective.** [CPR](#) rule 1.1(1) states the overriding objective is that cases are ‘dealt with justly’. In addition:

In order to prepare for the trial, the court must take every reasonable step— to encourage and to facilitate the attendance of witnesses when they are needed; and to facilitate the participation of any person, including the defendant. [CPR](#) rule 3.9(3)

Facilitating the participation of any person includes giving directions for the appropriate treatment and questioning of a witness or the defendant, especially where the court directs that such questioning is to be conducted through an intermediary.

[CPR](#) rule 3.9(6)

- (7) *Where directions for appropriate treatment and questioning are required, the court must—*
- (a) *invite representations by the parties and by any intermediary; and*
 - (b) *set ground rules for the conduct of the questioning, which rules may include—*
 - (i) *a direction relieving a party of any duty to put that party’s case to a witness or a defendant in its entirety,*
 - (ii) *directions about the manner of questioning,*
 - (iii) *directions about the duration of questioning,*
 - (iv) *if necessary, directions about the questions that may or may not be asked,*
 - (v) *where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and*
 - (vi) *directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.* [Criminal Procedure \(Amendment\) Rules 2015](#) 3.9(7)

1.2 A GRH is required in all intermediary trials and is good practice in any case where a witness or defendant has communication needs. GRHs are recognised by the [Criminal Practice Directions \(CPD\) 2015](#) as a key step in planning the proper questioning of a vulnerable witness or defendant.

- *Discussion of ground rules is required in all intermediary trials where they must be discussed between the judge or magistrates, advocates and intermediary before the witness gives evidence. [CPD](#) 3E.2*
- *Discussion of ground rules is good practice, even if no intermediary is used, in all young witness cases and in other cases where a witness or defendant has communication needs. [CPD](#) 3E.3*

2. ROLE OF THE INTERMEDIARY

2.1 In the justice system where there is a risk of miscommunication on account of age or incapacity the intermediary has a role. Intermediaries are widely used in the justice system to facilitate communication with children and with vulnerable adults who are witnesses or defendants.

2.2 Intermediaries can assist communication with vulnerable people when, for example:

- lawyers explain to suspects what they are accused of;
- police officers interview suspects;
- police officers conduct [Achieving Best Evidence](#) (ABE) interviews of witnesses;
- lawyers take instructions from their clients;
- lawyers take statements from witnesses;
- witnesses/defendants familiarise themselves with the court building and courtroom;
- defendants are in court/the dock attempting to follow what is happening in court;
- advocates are preparing their questions and seek advice from the intermediary before questioning the witness/defendant;
- witnesses are giving testimony including being cross-examined;
- victim personal statements are taken from victims;
- outcomes and sentences are explained to defendants;
- pre-sentencing assessments are being conducted by probation services.

2.3 The role of the intermediary is to support effective communication to enable vulnerable defendants and vulnerable witnesses to participate effectively in the criminal justice system. The function of an intermediary for a witness (not for the accused, see below) is set out in [section 29\(2\) Youth Justice and Criminal Evidence Act \(YJCEA\) 1999](#):

The function of an intermediary is to communicate—

- (a) *to the witness, questions put to the witness, and*

- (b) *to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.*

In England and Wales, to support the implementation of section 29 YJCEA, the Ministry of Justice set up the WIT through which RIs are provided.

2.4 This toolkit describes how intermediaries operate in England and Wales in criminal cases. Northern Ireland has similar legislation that also provides intermediaries for eligible suspects and defendants. Information can be found on the [Northern Ireland Department of Justice website](#). RIs should follow the [Registered Intermediary Procedural Guidance Manual](#) (RIPGM) 2015.

2.5 Intermediaries are not instructed as expert witnesses and thus they cannot give an opinion on the accuracy of a witness's recall of the facts ([RIPGM](#) page 21) or whether a witness is competent to give evidence (the relevant test for witness competence is set out in [section 53\(3\) YJCEA](#) and is determined by the court). They are not a witness supporter ([RIPGM](#) page 21). They are not interpreters where English is not the primary language. They are not advocates. Their paramount duty is to the court ([RIPGM](#) page 20) and their role is to support effective communication. A collaborative approach (between the advocates and the intermediary) to the planning of questioning may be directed (Cooper 2015).

GOOD PRACTICE EXAMPLE

It is now common practice for advocates to supply their proposed questions in writing to the intermediary beforehand. The intermediary will consider the questions and recommended changes where necessary. See, for example, [R v FA](#) [2015] EWCA Crim 209 [13] where an intermediary was used in the Court of Appeal for the first time, and [Re RL](#) [2015] EWCA Crim 1215 [6].

2.6 Intermediaries assist in cases outside the criminal justice system. Intermediaries operate as non-registered intermediaries, for example, for parents and children in family cases, patients at mental health tribunals, claimants in personal injury cases, in courts martial, and in the [Court of Protection](#) etc. Guidance on intermediaries in family cases is contained in [Toolkit 13 - Vulnerable witnesses and parties in the family courts](#).

3. PROSECUTION WITNESSES AND ELIGIBILITY

3.1 Legislation sets out the eligibility criteria for witnesses.

Section 16 YJCEA (emphasis added) states:

Witnesses eligible for assistance on grounds of age or incapacity.

- (1) *For the purposes of this Chapter a witness in criminal proceedings (**other than the accused**) is eligible for assistance by virtue of this section—*
 - (a) *if **under the age of 17 [now 18]** at the time of the hearing; or*
 - (b) *if the court considers that the **quality of evidence given by the witness is likely to be diminished** by reason of any circumstances falling within subsection (2).*
- (2) *The circumstances falling within this subsection are—*
 - (a) *that the witness—*
 - (i) *suffers from **mental disorder** within the meaning of the Mental Health Act 1983, or*
 - (ii) ***otherwise has a significant impairment of intelligence and social functioning;***
 - (b) ***that the witness has a physical disability or is suffering from a physical disorder.***
- (3) *In subsection (1)(a) ‘the time of the hearing’, in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.*
- (4) *In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.*
- (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.*

4. PROSECUTION WITNESSES – THE PROCESS

- 4.1 The steps in the process are as follows, though it is acknowledged that in some cases the need for an intermediary is not realised at the outset i.e. when the police officer first meets the witness. If witness vulnerability is identified or becomes apparent later, for example, after the ABE interview, a request for an intermediary should be made by the CPS.

The fact that later the prosecution involved an intermediary who gave advice on the form of questioning does not lead to a conclusion that the guidance was breached at the interview stage. [R v Boxer](#) [2015] EWCA Crim 1684 [23]

1. Police identify that the witness has a communication need due to age or incapacity and might benefit from an intermediary.

Assessment by an intermediary should be considered if the person 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 ages, fall into one or other or both categories. A deaf person should always be assessed by an expert in deafness and/or a suitably qualified and experienced intermediary. [Equal Treatment Bench Book 2013](#) page 56.

2. The police and the CPS should have an early special measures meeting/discussion about the use of an intermediary.
3. After discussion, if the police officer wishes to seek the services of an intermediary she must first obtain the witness's consent.
4. A Request for Service form is sent by the police to the WIT (WIT contact details are set out at the end of this toolkit) – tick boxes and brief narrative information are used to indicate the police's understanding of the witness's communication needs.
5. A suitable RI is identified on the WIT database and the RI is contacted by the WIT and asked to take the case. RIs are self-employed and as such may choose to take the case or not. They should not accept a case that is beyond their skill or expertise ([RIPGM](#) page 17).
6. The intermediary and the police officer establish contact and the intermediary is given what information there is about the witness's communication needs. The officer will supply only limited information about the alleged offence. The

intermediary keeps case notes throughout their involvement ([RIPGM](#) page 22).

7. The intermediary and the police officer arrange the witness assessment visit. Venues vary and the assessment may take place at the witness's school, their home, the police station ABE suite etc.
8. The intermediary meets the witness and conducts his/her assessment of the witness. The assessment will address the communication needs and abilities in light of the proposed ABE interview and giving evidence in court and the assessment method will depend upon the witness and the expertise of the intermediary ([RIPGM](#) page 23). There must be a responsible third-party present ([RIPGM](#) page 29), ideally the interviewing officer, but in any event not someone (apart from the interviewing officer) who is or is likely to be a witness in the case. The social worker might also, or alternatively, be present if it is a joint investigation and the social worker is to conduct the interview. Observing the assessment will often assist the interviewer in understanding the witness's communication needs and abilities. Many intermediaries will audio record the assessment, with the witness's permission, so that later, when they prepare their written court report, they can give precise examples of the witness's communication skills.
9. The intermediary prepares his/her preliminary report (verbal or written) for the interviewer ([RIPGM](#) page 23).
10. The interviewing officer and the intermediary have a planning meeting to discuss how best the interviewer can communicate with the witness in the ABE interview. This is likely to include, for example, discussion on how best to test truth and lies, the venue (interview suite or care home, for example), the layout of the interview room, the frequency of breaks, the type of vocabulary appropriate for the witness, how to make sentences clear and unambiguous, the use of communication aids (for example, pen and paper for drawing, maps, pictures, models etc.) and how and when communication aids might be introduced during the interview etc. 'Aids to communication' are a special measure by virtue of [section 30 YJCEA](#). See [Toolkit 14 - Using communication aids in the criminal justice system](#) for further guidance.
11. The ABE recording starts and the intermediary is recorded making the intermediary declaration (also called the intermediary oath, specified in

[section 29\(5\) YJCEA](#) and [RIPGM](#) page 31) at the start of the interview. This may be done before the witness is brought into the room.

The intermediary declaration ‘I solemnly, sincerely and truly declare that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding.’([CPR](#) rule 18.7(3); [RIPGM](#) page 31)

12. The ABE interview is conducted by the police officer (or in appropriate circumstances, this might be a social worker working in conjunction with the police) with the intermediary present and visible on camera. The intermediary’s role must always be transparent. They are not a second interviewer ([RIPGM](#) page 23).
13. After the interview and if the police are proceeding with the case, the intermediary writes a report for court and sends it to the ‘end user’ (i.e. the person who made the referral to the WIT), who is usually the police officer. Ordinarily, the intermediary report is completed within approximately two weeks of the ABE interview and will be based on the intermediary’s assessment and other information (if any) gathered from family, carers and professionals (with consent obtained by the officer for these to be shared with the intermediary) about the witness’s communication needs and abilities.
14. If the CPS decides to proceed with the case and is likely to require the services of the intermediary at trial, the CPS must complete a new Request for Service and send it to the WIT.
15. The CPS application for a special measures direction is made with the intermediary report attached to the Special Measures Direction form (See [Application for a Special Measures Direction](#), Part F), assuming the intermediary report supports this. (See [CPR](#) rule 29.3 and also Blackstone’s (OUP 2015) at D14.6 ‘Procedure Relating to Special Measures Directions’). The prosecution or defence bears the responsibility of informing the intermediary of the case listing ([RIPGM](#) page 40).
16. If the application for an intermediary is opposed, the intermediary should be at the contested hearing ([RIPGM](#) page 35).

It may be suggested that the intermediary is not needed at trial because:

the interview was conducted without the need for an intermediary.

Communication during the trial process is more challenging than the investigative interview, leading to greater stress and potentially more opportunities for miscommunication

an intermediary was present at the interview but apparently took no active part.

This is often because the intermediary had already provided advice to the interviewer about how to adapt his or her questions and therefore did not need to intervene

the advocates will comply with guidance in the intermediary's report. *In practice, many advocates find it more difficult to adapt key questions than they anticipate. It can also be difficult to keep in mind all aspects of questioning that may be problematic for the individual witness. An intermediary who has already assessed the witness's communication is able to alert the court to any problems or loss of concentration.* [*Equal Treatment Bench Book 2013*](#) page 56

17. The intermediary accompanies the witness on their court witness familiarisation visit which is usually conducted by the WIT (there may be a need for more than one pre-trial visit). The intermediary may be the person who liaises with the court Witness Service to arrange the date and time of the witness's visit. The officer in the case usually attends. A witness supporter might also be present. The Witness Service shows the witness the live link and the courtroom and screens. Special requests for the witness and their medical needs may be discussed with the Witness Service, for example, if the witness needs to be near to a toilet or the steps to be taken in the event of a medical emergency such as the witness having a seizure. This familiarisation visit might take place two to three weeks before the trial. The witness should have the opportunity to practise with the live link, as detailed in the [*Code of Practice for Victims of Crime 2015*](#) page 65). Visits therefore usually take place at 9/9.30 am, lunchtime or 4/4.30 pm. The court clerks will operate the live link technology and may also be willing to ask questions (prepared in advance by the intermediary and nothing to do with the evidence in the case) so that the witness can practise using the live link.

GOOD PRACTICE EXAMPLE

The intermediary arranged for the witness with a learning disability to visit the court to see the live link room and decide whether he would prefer to give evidence over the live link or in court behind a screen. When the witness was in the live link room with the intermediary he practised answering questions read out by the court clerk in the courtroom. The questions, scripted by the intermediary and unrelated to the evidence, included a tag question. This allowed the witness to practise using the live link and it also allowed the intermediary to recheck the witness's ability to deal with a linguistically complex and powerfully suggestive tag question.

18. Witness memory refreshment, for example, viewing the DVD of their video-recorded interview, should take place at a different time to the court visit so as to avoid 'information overload' for the witness ([CPD 18C3\(i\)](#)). The intermediary accompanies the officer and the witness for memory refreshing; the officer in the case will be there to ensure memory refreshment is carried out in accordance with [ABE guidance](#). The witness may need to see their DVD more than once – the court will need to ask for the intermediary's advice on this ([CPD 18 C3 \(iii\)](#)).
19. The court familiarisation and/or memory refreshment may prompt the need for an addendum intermediary report. For example, the witness's communication abilities might have changed since the initial assessment or the witness might change their mind about which they prefer to use – live link or screens in court.
20. If a new intermediary is appointed (for example, because the original intermediary is not available for the trial), they must also meet and assess the witness so that they are speaking from their own experience of the witness. They must then write their own report. Whether this is a fresh report or an addendum to the existing report depends on the individual circumstances.
21. There is a GRH ([CPD 3E](#)) that the intermediary must attend and their report of this should form the basis of the agenda for the discussion that should ensue ([CPD 3E.2](#)) (see also Cooper, Backen and Marchant 2015). It is not necessary for the intermediary to take their Oath at this stage. At this stage the judge may require the advocate to go through their proposed questions in writing

with the intermediary. If there is a question of physical contact between the intermediary and the witness during the course of the witness's evidence (as occurred in [R v Christian](#) [2015] EWCA Crim 1582), it is best to discuss this at the GRH. (See [Toolkit 1 Ground rules hearings and the fair treatment of vulnerable people in court](#) and the [Ground rules hearing checklist](#) which are designed to facilitate the role of the intermediary at trial. Toolkit 1 and [The Crown Court Compendium](#) include examples of how a judge would introduce the intermediary role to the jury.)

22. Memory refreshment should be conducted if necessary/it has not occurred already.
23. The intermediary attends court and supports the advocates' and judge's communication with the witness, including if the judge and advocates meet the witness before they give their evidence. *'In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties.'* [R v Lubemba](#) [2014] EWCA Crim 2064 [43]
24. The intermediary takes the intermediary oath before the witness gives evidence and intervenes only as necessary, in line with the rules set at the GRH and in accordance with their professional guidance.

5. DEFENCE WITNESSES

The process for defence witnesses would follow similar steps. Defence solicitors should identify at the earliest stage whether any potential defence witnesses require an intermediary. [Toolkit 10 - Identifying vulnerability in witnesses and defendants](#) may help to do this. The use of an intermediary should always be considered for a child witness. Defence solicitors (the 'end user' in this instance) should contact the WIT (see Acknowledgements and references section below for contact details):

The assessment of a defence witness follows the same principles. The responsible third party will probably be the solicitor. The preliminary report is addressed to the defence solicitor who interviews the defence witness. [RIPGM](#) page 30

If the report recommends an intermediary, an application for special measures will need to be made.

6. USAGE AND STATISTICS

- 6.1 Intermediaries are not used in as many cases as they could be, probably due to poor awareness of the benefits of using an intermediary.** That said, demand is high compared to supply; at the time of writing (winter 2016) there are approximately 200 RIs on the Ministry of Justice register covering England and Wales. Between 1 April 2016 and 30 September 2016 the WIT received, on average, 530 requests per month. Most are for prosecution witnesses and less than a handful a year are for defence witnesses.
- 6.2 Intermediaries are under-utilised for child witnesses.** The police should ensure that *‘intermediaries are considered and used where appropriate’* and the CPS should *‘ensure intermediaries are considered for use at court in every case involving a child witness and a written record is maintained of the decision, particularly of the rationale where an intermediary is not used’* (Criminal Justice Joint Inspectorate report, [Achieving Best Evidence in Child Sexual Abuse Cases: a Joint Inspection](#), December 2014).

7. DEFENDANTS AND ELIGIBILITY

7.1 Intermediaries for vulnerable defendants are granted under the courts' inherent powers invoked to ensure a fair trial. There are no set eligibility criteria. In [R v R \[2015\] EWCA Crim 1870 \[15\]](#), the Court of Appeal did not consider that a ruling as to the provision of an intermediary for a defendant 'is something which goes to the root of the case' and therefore it did 'not have jurisdiction to entertain an appeal on this ground'.

Note: [section 104 Coroner's and Justice Act \(CJA\) 2009](#), providing intermediaries for eligible defendants, is not yet in force and would only provide for an intermediary for the defendant's testimony (see Cooper and Wurtzel 2013).

7.2 In the past research has shown that when defendant intermediaries are granted by judges it is usually for the whole trial (Cooper 2014) not just for their testimony, should they decide to give evidence. However, the [Criminal Practice Directions 2015 Amendment No 1 \[2016\]](#) (in force since 4 April 2016) state that directions to appoint an intermediary for a defendant's evidence will be rare, and for the entire trial will be extremely rare:

3F.12 The court may direct the appointment of an intermediary to assist a defendant in reliance on its inherent powers (C v Sevenoaks Youth Court [2009] EWHC 3088 (Admin)). There is however no presumption that a defendant will be so assisted and, even where an intermediary would improve the trial process, appointment is not mandatory (R v Cox [2012] EWCA Crim 549). 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.

3F.13 The court may exercise its inherent powers to direct appointment of an intermediary to assist a defendant giving evidence or for the entire trial. Terms of appointment are for the court and there is no illogicality in restricting the appointment to the defendant's evidence (R v R [2015] EWCA Crim 1870), when the 'most pressing need' arises (OP v Secretary of State for Justice [2014] EWHC 1944 (Admin)).

Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare.

GOOD PRACTICE EXAMPLE

The intermediary accompanied the defendant in the dock and assisted him in following the prosecution case, including taking notes, simplifying language and reviewing written transcripts. The advocate reported that without the assistance of the intermediary the defendant would not have been able to fully understand implications of giving evidence or not. With the assistance of the intermediary the advocate was properly able to advise the defendant and take instructions.

- 7.3 Time is of the essence.** Finding and funding an intermediary suitably qualified to meet the defendant's particular communication needs for the whole case may not be straightforward (Cooper and Wurtzel 2013). Consideration should be given to the use of an intermediary at the earliest stage to avoid 'running out of time' to engage one. The non-provision of an RI for a vulnerable defendant giving testimony was successfully challenged in *R (on the Application of OP) v the Secretary of State for Justice and Others* [2014] EWHC 1944 (Admin).

8. DEFENDANTS – THE PROCESS

8.1 A significant proportion of defendants have communication issues and might benefit from an intermediary. The steps in the process are as follows though it is acknowledged that in some cases the need for an intermediary is not realised at the outset of the case.

1. The first step is recognising that the defendant has or may have a communication need. [Toolkit 10 - Identifying vulnerability in witnesses and defendants](#) may help to do this.
2. The next step may be to instruct an expert witness (such as a forensic/clinical psychologist or psychiatrist) to report on the defendant's ability to participate effectively in his or her trial including whether an intermediary assessment is required.
3. If fitness to plead and stand trial is an issue, this should be considered in light of special measures potentially available to vulnerable defendants, including an intermediary.
4. Prior authority for the intermediary's assessment and report (based upon the intermediary's estimate of fees) should be sought from the Legal Aid Agency. If funding is granted, the intermediary conducts the assessment and produces the report. Depending upon the findings of the intermediary report, defence solicitors may apply to the court for the use of an intermediary at trial for the defendant, at which point the court is asked to authorise the intermediary quote and HM Courts and Tribunals Service (HMCTS) funding for intermediary attendance at trial. For the basis on which the court will consider an application for an intermediary for a defendant, see [R v Rashid](#) [2017] EWCA Crim 2.
5. It is the defence solicitor's responsibility to identify a suitable intermediary for the defendant and to make such applications as are necessary for the intermediary's funding and use at court.
6. An intermediary assessment is not an alternative to an expert witness assessment. Expert opinion about the defendant's communication needs should be shared with the intermediary. Even if there is no expert evidence, there may be school, family or social care reports or information from the police which suggests a communication issue. These should be made available

to the intermediary. It should be noted that the intermediary cannot offer a diagnosis; their role is purely to report on communication and their report is not provided as evidence in the case. On occasion, an intermediary report may not concur with an expert witness recommendation, for example, if the intermediary recommends that even with such assistance the defendant will not be able to participate and instruct.

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 (R v Cox [2012] EWCA Crim 549, [2012] 2 Cr App R 6). (CPD 3F.6)

7. If an intermediary accepts the referral, the intermediary will assess the defendant's communication needs and abilities. It is important the intermediary has the relevant background information such as reports from educational psychologists/expert witnesses/family members about the defendant's communication needs and abilities. A responsible third party (e.g. solicitor) should be present whilst the intermediary is with the defendant, though this is not always possible in practice.

Note: in theory an intermediary could assist a vulnerable suspect in the **police station**, for example, during an interview under caution, though this rarely happens in England and Wales. The intermediary's assessment of the suspect would have to take place in the police station. The responsible third party accompanying the intermediary should be the solicitor. It should not be a police officer. The 'appropriate adult' role is not the same as the intermediary role.

8. The intermediary completes their court report and sends it to the defence solicitors.
9. If the report recommends intermediary assistance, defence solicitors will need to apply for a special measures direction for the defendant. Advocates and courts should be aware that it may be necessary for there to be more than one intermediary for a defendant, taking turns to assist.
10. Defence solicitors may apply to the court for other special measures for the defendant. Section 33A YJCEA provides for a live link for an eligible defendant (section 33A YJCEA was inserted by [section 47 Police and Justice Act 2006](#)). Other special measures for the defendant might include, for example, removal of wigs and gowns, use of communication aids etc. Where no statutory basis

exists the court may use its inherent powers to order these in the interests of a fair trial (see also McEwan 2013).

11. If special measures are requested but not granted this may raise fitness to plead issues (see Taylor 2014) and defence solicitors may require further expert witness opinion specifically on this matter.
12. Defence solicitors are responsible for the defendant's court familiarisation – the court should be willing to facilitate this ([CPD 3G.2](#)). The intermediary should be present ([CPD 3G.3](#)), as well as a third party. If the defendant is going to use the live link he or she should have an opportunity to have a practice session ([CPD 3G.4](#)) and the intermediary can assist with this.
13. Discussion of ground rules before the day of trial is preferable to give advocates time to adapt their questions to the witness's needs ([CPD 3E.3](#)) and the intermediary must be invited to make representations ([CPR 3.9 \(7\)\(a\)](#)).
14. If the defendant gives testimony, there should be a further GRH prior to their testimony. See [Toolkit 1 - Ground rules hearings and the fair treatment of vulnerable people in court](#).

9. THE INTERMEDIARY REPORT

- 9.1 The intermediary report, whether for a witness or for a defendant, is key.** An application to court for the use of an intermediary must be supported by a report. Recommendations in it must be based on the intermediary's assessment of the witness; these in turn provide the basis for the judge determining if the intermediary is required at trial and for discussions at the GRH.
- 9.2 There may need to be more than one intermediary report.** Some cases will require an addendum to the original intermediary report, particularly if the witness's/defendant's needs have changed since the initial assessment and the report is many months old by the time of the trial. If the first assessing intermediary is no longer available for the trial, a 'new' intermediary will need to conduct his/her own assessment and write a report, albeit that only a short addendum to the original report may be required. If possible, the new intermediary should liaise with the original one.
- 9.3 The report should only contain what is necessary and relevant.** A report on the witness is likely to be seen by the defendant or at least discussed with him or her so should only contain information that is relevant to the report and should not include personal data or information about the witness which the defendant would not already know.
- 9.4 Any intermediary report, whether from an RI or non-registered intermediary, should:**
- a. Indicate if an intermediary is necessary to support communication i.e. examination through an intermediary ([section 29 YJCEA](#)) for a witness/for effective participation if for a defendant.
 - b. Include a summary of the intermediary assessment process, giving actual examples of communication which illustrate the communication needs and abilities of the witness.
 - c. Indicate what other special measures or arrangements besides the intermediary are necessary at the trial to facilitate communication with the person they have assessed. For the witness this might include screening from the accused ([section 23 YJCEA](#)), live link ([section 24 YJCEA](#)), presence of a witness supporter ([section 102 CJA](#) inserting [sections 24\(1A\)](#) and [29\(9A\) YJCEA](#)), evidence given in private ([section 25 YJCEA](#)), removal of wigs and gowns ([section 26 YJCEA](#)), video-recorded

evidence-in-chief ([section 27 YJCEA](#)), video-recorded cross-examination or re-examination ([section 28 YJCEA](#), currently being piloted at Kingston, Leeds and Liverpool Crown Courts and due for national roll-out in 2017), aids to communication ([section 30 YJCEA](#)). For the defendant this might include live link for testimony (section 33A YJCEA inserted by [section 47 Police and Justice Act 2006](#)) and other non-legislative special arrangements (see [CPD 3E](#) and [3G](#)) such as the defendant sitting outside the dock next to his/her parent or supporter, removal of wigs and gowns etc.

- d. Recommend any other arrangements which are necessary to support effective communication such as meeting the judge and advocates, practising with live link and memory refreshing.
- e. Recommend how witness/defendant questioning should be conducted. For example, breaks (how often and for how long), question structure, use of ‘signposting’, use of names rather than pronouns, use of short questions with one idea per question, avoiding idioms, controlling pace and tone etc. Practical examples must be given. Simply saying ‘*avoid tag questions*’, ‘*use signposting*’ or ‘*slow down the pace*’ is not enough. The report should give practical examples of what to avoid and what to do instead.
- f. Recommend the logistics of working with the intermediary, for example, where they will sit, how they will indicate (whether from the dock or the witness box) if there is a communication problem.
- g. Provide their recommendations in a format in the report that enables recommendations to be ‘checked’ off at the GRH.

The [RIPGM](#) includes a report template for those operating under the Ministry of Justice RI scheme.

ACKNOWLEDGEMENTS AND REFERENCES

AUTHOR:

- Professor Penny Cooper

CONTRIBUTORS:

- Kate Aubrey-Johnson
- Paula Backen
- Sarah Clarke
- Sarah Forshaw
- Felicity Gerry
- Helen Johnson
- Kate Man
- Ruth Marchant
- Dr Michelle Mattison
- Dr Brendan O'Mahony
- Nick Peel
- Angela Rafferty
- Sue Thurman
- David Wurtzel

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The toolkit summarises key points from law, policy, research and guidance including:

- [Criminal Procedure Rules 2015](#)
- [Criminal Practice Directions 2015](#)
- Judicial College (2013) *Equal Treatment Bench Book 2013*
(Judicial College 2013)
- Cooper, P, 'Clear direction'
Counsel 10–12 (June 2015)
- Cooper, P, *Highs and Lows: The 4th Intermediary Survey*
(Kingston University 2014)
- Cooper, P, 'Intermediaries – a law of unintended consequences'
Paper presented at the Vulnerable Defendants and Witnesses CBA Annual Conference (6 December 2014)

- Cooper, P, Backen, P and Marchant, R, 'Getting to grips with ground rules hearings: a checklist for judges, advocates and intermediaries to promote the fair treatment of vulnerable people in court'

6 Criminal Law Review 417–432 (2015)

- Cooper, P and Wurtzel, D, 'A day late and a dollar short: in search of an intermediary scheme for vulnerable defendants in England and Wales'

1 Criminal Law Review 4–22 (2013)

- McEwan, Jenny, 'Vulnerable defendants and the fairness of trials'

2 Criminal Law Review 100–113 (2013)

- Ministry of Justice, [Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures](#)

(Crown Copyright 2011)

- Ministry of Justice, [Registered Intermediary Procedural Guidance Manual](#)

(Ministry of Justice 2015)

- Taylor, A, 'From fitness to plead to effective participation'

178 Criminal Law and Justice Weekly (2014)

- **Witness Intermediary Team:**

Organised Crime Command

Specialist Operational Support

Specialist Operations Centre

National Crime Agency Knowledge Centre

Wyboston Lakes

Great North Road

Wyboston

Bedfordshire MK44 3BY

T: +44 (0) 1480 334728 E: wit@nca.pnn.police.uk (pnn users) E: wit@nca.x.gsi.gov.uk (all other users)

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2 King's Bench Walk,
London
EC4Y 7DE
T: 020 7822 0763
E: info@icca.ac.uk

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