

# The Advocate's Gateway

**Intermediaries: step by step**

Toolkit 16

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The Advocate's Gateway toolkits aim to support the 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.

*'Advocates must adapt to the witness, not the other way round.'* Lady Justice Hallett in [R v Lubemba; R v JP](#) [2014] EWCA Crim 2064, para 45.

The handling and questioning of vulnerable witnesses and defendants is a specialist skill. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

*'We confirm, if confirmation is needed, that the principles in Lubemba apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness. We also confirm the importance of training for the profession which was made clear at paragraph 80 of the judgment in R v Rashid (Yahya) (to which we have referred at paragraph 111 above). We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.'* Lord Thomas of Cwmgiedd, CJ in [R v Grant-Murray & Anor](#) [2017] EWCA Crim 1228, para 226.

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## Introduction

The toolkit contains information about intermediaries in criminal cases in England and Wales 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](#) (CPR) 3.9(3). This facilitation includes giving directions for the appropriate treatment and questioning of a witness or defendant especially where there is an intermediary (CPR 3.9(6));
- 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 directions for appropriate treatment and questioning are required and the court must invite representations by the intermediary (CPR 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 main sources referenced in this toolkit as at 20 July 2019 are available on line - the [Criminal Procedure Rules](#) (CPR) and [Criminal Practice Directions](#) (CPD), the [Registered Intermediary Procedural Guidance Manual 2015](#) (RIPGM), the [Equal Treatment Bench Book 2018](#) (ETBB) and the [Crown Court Compendium Part 1 2018](#).
- 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.

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## 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 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 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 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) 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*

**1.3 The role of the intermediary.**

*'Intermediaries are impartial, neutral officers of the court. They are not expert witnesses. Their job is to facilitate communication between all parties and to ensure the vulnerable person's understanding and participation in the proceedings. This includes making an assessment and reporting, orally or in writing, to the court about the communication needs of the vulnerable person and the steps that should be taken to meet those needs.'* (ETBB, 2-21, para 82)

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## 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 facilitate communication with witnesses and defendants who have communication needs. Their primary function is to improve the quality of evidence and aid understanding between the court, the advocates and the witness or defendant’* (CPD 3F.1) Intermediaries are used in civil cases, in family cases (in accordance with the Family Procedure Rules; see Toolkit 13), mental health tribunals and the Court of Protection.

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

- police officers conduct *Achieving Best Evidence* (ABE) interviews with witnesses;
- police officers interview suspects;
- lawyers take instructions from their clients;
- lawyers take statements from witnesses;
- witnesses refresh their memories from written statements or the recording of their ABE interview;
- witnesses/ defendants are familiarised with the court building and courtroom;
- witnesses need to practice using the live link;
- advocates are preparing their questions and seek advice from the intermediary before questioning the witness/defendant;
- facilitating the participation of the defendant during their trial;
- witnesses are giving testimony including being cross-examined;
- Victim Personal Statements are taken from victims;
- pre-sentencing assessments are being conducted by probation services and outcomes and sentences are explained to defendants.

**2.2 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.**

**2.3** 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 comparable legislation however, unlike England and Wales, its provisions cover eligible suspects at interview and eligible defendants when giving evidence. Information can be found on the Northern Ireland Department of Justice website.

**2.5 Intermediaries are independent of parties and owe their duty to the court. (CPD 3.F.2)** They are impartial, neutral officers of the court (ETBB 2-21, para 82). The court needs to be vigilant to ensure that they act impartially and that their assistance to witnesses and defendants is transparent (CPD 3.F.2) As such they are not expert witnesses (ETBB paragraph 82; Registered Intermediary Procedural Guidance Manual (RIPGM) 2015 page 21) and cannot express an opinion on the accuracy or competence of a witness. Neither are they language interpreters or advocates.

**2.6 Intermediaries are not the same as expert witnesses .**

Lady Justice Hallett in *R v Mahmoud* [2019] EWCA Crim 667, para 24:

*‘A trial judge will allow the instruction of an intermediary to a witness or a defendant to assist them in communicating and participating in the trial. The role of an intermediary is not to provide expert or professional opinion on the level of cognitive skills or intellectual*



*functioning of a defendant or witness...If evidence of cognitive skills or intellectual functioning is both relevant and admissible, it should come from an expert suitably qualified to comment.'*

- 2.7** Intermediaries should not 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 a judge to order that counsel submit their proposed questions for vetting to an intermediary where there is one and it is expected that in appropriate cases the advocate will have prepared cross-examination in writing for consideration by the court. See, for example, [R v FA](#) [2015] EWCA Crim 209 [13] where a Registered Intermediary (RI) was used in the Court of Appeal for the first time, and [Re RL](#) [2015] EWCA Crim 1215 [6].

This would always happen in section 28 cases [Annex to Criminal Procedure Rule 18]. The intermediary will consider the questions and recommend changes where appropriate. This practice has been endorsed by the Court of Appeal several times. See [R v Dinc](#) [2017] EWCA Crim 1206 'Far from prejudicing the defence.. . the practice ensures that defence advocates ask focussed and often more effective questions of a vulnerable child witness'

- 2.8 Intermediaries also 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.

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### 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.*

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## 4. PROSECUTION WITNESSES – THE PROCESS

### 4.1 When to consider an intermediary.

#### Equal Treatment Bench Book (Judicial College, 2018) guidance:

- *‘The need for an intermediary should be considered at the earliest stage in the proceedings possible’ (ETBB, page 2-22, 84)*
- *‘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.’ (ETBB, page 2-21, para 97)*
- *‘All young witnesses should ideally have an intermediary assessment as, no matter how advanced they appear, their language comprehension is likely to be less than that of an adult witness.’ (ETBB, page 2-21, para 98)*
- *‘A deaf person should always be assessed by an expert in deafness and/or a suitably qualified and experienced intermediary.’ (ETBB, page 2-21, para 99)*

#### Achieving Best Evidence (Ministry of Justice, 2011) guidance:

- *‘While an intermediary should be considered in every case where a witness has a learning disability, the services of an intermediary are essential in circumstances where a witness communicates using a mixture of words and gestures.’ (ABE, 32, para 2.84)*
- *‘[The] services of an intermediary are essential in circumstances where a witness uses an alternative method of communication instead of speech’ (ABE, 32, para 2.85).*
- *‘For witnesses with hearing and communication difficulties, every effort should be made to ensure that their usual means of communication is supported at interview by means of an interpreter (and/or an intermediary, if appropriate).’ (ABE, 32, para 2.88)*
- *‘Examples of pictorial symbol systems include Makaton, Rebus and Bliss. Communication boards may also be personalised and composed of words,*

*pictures and symbols. In these circumstances, an intermediary capable of using the communication system in question will be required.’ (ABE, 32, para 2.90)*

*However, the fact that there was no intermediary at interview and 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, para 23.*

**4.2 The following are the steps taken in a case involving an intermediary. Steps 1-14 are predicated on the police identifying early on that the witness is vulnerable and at least prior to the *Achieving Best Evidence* interview.**

1. **Police identify that the witness has a communication need due to age or incapacity and might benefit from an intermediary.** In the case of witnesses under the age of 10, police will identify any potential need for an intermediary to assist with communication and where such a need is identified, ensure the engagement of an RI as early as possible in the investigation and prior to the witness being interviewed ([A Protocol between the National Police Chiefs’ Council, the Crown Prosecution Service and HMCTS to Expedite Cases Involving Witnesses under 10 Years](#), 2018).
2. **The police and the CPS should have an early special measures meeting/discussion** about the use of an intermediary. Although in practice such meetings have been rare, it is important to inform the CPS of any factors which affect the way in which the witness will be giving their evidence.
3. **If the police officer wishes to seek the services of an intermediary** the witness must give their consent. Any preferences in terms, say, of intermediary gender, need to be ascertained.
4. **The police must send a Request for Service** form to the Ministry of Justice ‘matching service’ (operated by the WIT, contact details are set out at the end of this toolkit). The forms should be used to set out certain information including the police’s understanding of the witness’s communication needs.
5. **The matching service** identifies from their database a Registered Intermediary (RI) that is someone who has been accredited by the Ministry of Justice and is bound by the Ministry’s Codes of Practice and Ethics, based on their clinical

skills, geography and availability. They should only accept a case that is within their skill or expertise (RIPGM, page 17).

6. **The police and RI establish contact** and the RI is given what information there is about the witness's communication needs. Consent should have been obtained from the witness for any further enquiries. These could include speaking to people who know them and the obtaining of reports about the witness's communication needs and/or abilities. In respect of the alleged offence, the police should only supply the RI with such information as will assist in the assessment, e.g., whether family members are involved. From the moment of first contact, the RI keeps case notes and continues to make notes throughout their involvement in the matter (RIPGM, page 22). These are potentially disclosable.
7. **Arrangements are made for the RI to meet and assess the witness** at a suitable venue which could be the witness's day centre, school, home, the police station ABE suite etc depending on the circumstances of the case.
8. **The RI conducts their assessment of the witness.** There is no standard method of assessment but see further, in the references section below, Cooper & Mattison (2017) for suggestions as to what the assessment might cover. This is not an enquiry for diagnostic purposes. It is guided by the purpose of the assessment, which is to ascertain how best to communicate with the witness. Matters such as the ability to do sequencing and complexity of language may be assessed.
9. **Throughout the case the RI must not be alone with the witness** and so at the assessment there must be present a responsible third party who is not a witness in the matter (RIPGM, page 29). This should be the interviewing officer who will learn first-hand how to communicate best with the witness. A social worker may be present if this is a joint investigation and the social worker will conduct the interview. With the witness's consent, the RI may audio record the assessment and in some instances the police have video-record the RI's assessment.
10. **The RI's report should address the witness's 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).

11. **The intermediary prepares their preliminary report** for the interviewer (RIPGM, page 23). The intermediary prepares a preliminary report for the interviewer, which may be verbal or in writing, depending on when the interview itself takes place viz. the assessment (RIPGM page 23)
12. **The interviewing officer and the RI plan** (the 'planning meeting') how best the interviewer can communicate with the witness in the ABE interview. This may include, for example, the venue for the interview (interview suite or care home, for example), the layout of the interview room including furniture, who else will be present in the interview (e.g. witness supporter, social worker etc.), frequency of breaks, vocabulary appropriate for the witness, 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 in themselves [section 30 YJCEA](#). See Toolkit 14 - Using communication aids in the criminal justice system for further guidance.
13. **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 as required by section 29(5) YJCEA and set out in CPD 18.7:  
  
*'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.'*
14. **Throughout the interview the intermediary's role must always be transparent.** They may, for example, assist in checking the witness's understanding and in proposing and conducting the use of communication aids. The intermediary is not a second interviewer (RIPGM, page 23). The conduct of the interview rests with the police officer or a social worker where appropriate. If an intermediary

is not seen to intervene, that may be a reflection of the success of the planning meeting with the police (ETBB, para 101).

15. **After the interview, if the matter proceeds, the RI then writes their report** based on the findings of the assessment including relevant information gathered from family, carers and professionals and any communication issues which arose during the interview. They send their report to the person (known as the 'end user') who made the referral to the WIT; this is usually the police officer. The purpose of the report is to assist those who will need subsequently to question the witness. It is not a clinical report on the witness and should not without consent by or on behalf of the witness or a court order, be supplied to anyone other than the police and the Crown Prosecution Service, and in due course, the court.
16. **A template for reports can be found in the RIPGM.** A report ought to contain a schedule of recommendations. In respect of questioning it should include the questioning strategy, setting out the kind of question which is likely to be problematic for the witness together with an alternative method of seeking the same information and the rationale for this recommendation. Intermediaries' reports 'are valued as a guide to how questioning can best be adapted to the individual's needs' (ETBB, page 2-22, para 85). A copy of the report should be provided with any application under CPR Part 18 for the use of an intermediary (CPD 3F.7)
17. **If the suspect is charged and the CPS proceed** with the matter and wish the intermediary at trial, the CPS must complete a fresh Request for Service and send it to the matching service run by the WIT.
18. **If there is a late recognition of a witness's vulnerability and there is no referral until after the Achieving Best Evidence interview has taken place then** the intermediary assesses the witness as above before watching the ABE interview. They then written their report. If for any reason one intermediary needs to 'hand over' the case to another intermediary, the second intermediary should herself assess the witness so as to be able to speak of the witness's needs from their own findings. They may then either adopt the first intermediary's report,

adopt it with any addendum of their own, or to write a fresh report. (RIPGM, page 33).

19. **The CPS application** should ensure that the RI report is submitted with their application (if any) for the intermediary special measure. The RI report is attached to the Special Measures Direction form (See [Application for a Special Measures Direction](#), Part F), if the intermediary report supports this. (See CPR rule 29.3). The prosecution or defence bears the responsibility of informing the intermediary of the case listing (RIPGM, page 40).
20. **At the PTPH** orders should be given concerning the involvement of an intermediary which should include (i) the order appointing the intermediary, (ii) the instructions given to the intermediary, (iii) the date for filing of the report, (iv) the date by which advocates must file their questions with the intermediary and the Court, (v) arrangements for advocates and the intermediary to discuss the questions before the day of the Ground Rules Hearing, (vi) the date and time of the Ground Rules Hearing and an order that the intermediary must attend the GRH (Crown Court Compendium, Part 1, page 3-32 and CPD 3F.27).
21. **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 (ETBB, 2-23 to 2-24, para 101):*

- ***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 their 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.*

22. **Once an order is made for the use of an intermediary**, it is binding until the matter is determined (YJCEA 1999, section 20(1)) unless the court discharges the order in the interests of justice of its own motion or if there is an application on the basis that there has been a material change of circumstances (section 20(2))
23. **Vulnerable witnesses are entitled to attend court ahead of the trial for a familiarisation visit**, to express their views as to how their evidence should be given, including whether they would give their best evidence from behind a screen or alternatively via the live link (ETBB, page 2-18, para 62) and to practise speaking and listening on the live link (ditto, para 67). Practising on the live link is also seen as a means of making an informed view on special measures (CPD 18B.4). The witness is also entitled to refresh their memory by watching their ABE interview on a scheduled day before the day of their evidence (ETBB, page 2-20, paras 75-77). That means that, contrary to previous practice, they do not watch it at the same time as the jury.
24. **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 the witness familiarisation visit. A witness supporter might also be present. The Witness Service may show the witness the live link and the courtroom and screens. If necessary and with appropriate consent, the intermediary may explain the witness's care/ medical needs 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. Witness care matters are looked after by the Witness Service, not by the intermediary. 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.
25. **A court clerk often operates the live link during the practice** and can ask questions of the witness. These questions can be prepared in advance by the

intermediary with notice to the CPS to ensure they do not relate to any evidence in the case. If matters arise during the court familiarisation visit and/or the memory refreshing which could impact on the witness's communication needs or if it appears that the witness's communication abilities may have changed since the initial assessment, then the RI may need to add an addendum to their report.

26. **Resident judges should tend to permit photographs** to be taken by the intermediary for the purpose of familiarising the witness with the setting so as to be better able to give their best evidence (CPD 3F.29)
27. **Memory refreshing does not have to take place the same day as the familiarisation visit for risk of 'information overload'** (CPD 18C.3(i)) and does not in itself have to take place in a court building. A third person must be present during memory refreshing to take a note of anything said and to report that to the court. That person however must not be the intermediary who is nevertheless entitled to be present during the viewing (CPD 18.C.4 and ETBB, page 2-21 para 77). The court will need to ask the advice of the intermediary, if there is one, as to whether the witness may need to see their DVD more than once (CPD 18.C3(iii))

#### **GOOD PRACTICE EXAMPLE**

*The intermediary arranged for a small child to visit the court and to practice on the live link. During this she noted that the child communicated with small gestures which would not come over clearly on screen to those in the court room. She therefore recommended, as a supplement to her existing report, that the judge and counsel sit in the live link room with the child in order to take into account her means of communication. The judge held that the live link was an extension of the court room and that this procedure would (and did) take place.*

28. **Ground rules discussions/hearings ('GRH's') are required in all intermediary trials**, between the judge or magistrates, advocates and intermediary prior to the witness giving evidence, regardless of whether the participants have previously worked with an intermediary (ETBB, page 2-27, para 120). The intermediary must be present (CPR 3F.27) but is not required to take the

oath/declaration (CPD 3E.2). GRH's should usually be held as early as possible and if at all possible before the day of the hearing (ETBB, page 2-27, para 199). It may be helpful for a trial practice note to be made of boundaries to be created at the end of the discussion which the judge may use in ensuring that the agreed ground rules are complied with (CPD 3E.3).

29. **Topics for a GRH should include how the advocates, judge and intermediary will interact with the witness** and with each other including how they will be addressed, the frequency of breaks, the length of the questioning, the language to be used and any aids to communication (Crown Court Compendium, Part 1, , page 10-21 paragraph 15).
30. **Where there is an intermediary the purpose of the GRH** is 'to establish how questions should be put to help the witness understand them and how the intermediary will alert the court if the witness has not understood or needs a break' (ETBB, page 2-27, para 116).
31. **Where the report recommends that there should be some restrictions on cross-examination**, the judge should review the proposed questions by the advocates with the intermediary at the ground rules hearing (ETBB, page 2-22, para 86). The identification of any limitations on cross-examination should take place at an early stage; the Court of Appeal assumes that this will occur at the GRH when the judge will discuss with the advocates the nature and extent of the limitations imposed. (*R v YGM* [2018] EWCA Crim 2458, para 21) Where limitations on questioning are necessary and appropriate, they must be clearly defined (CPD 3E.4). The intermediary's report is valued as a guide to how questioning can best be adapted to the individual's needs (ETBB, page 2-22, para 85) but it is the judge who will make the final decision about which questions are or are not to be asked (ETBB, page 2-22, para 87). *R v Dinc* [2017] EWCA Crim 1206 :  
*'There is nothing inherently unfair in restricting the scope, structure and nature of cross-examination and or in requiring questions to be submitted in advance, in any case involving a child witness who suffers from a mental disability or disorder':*
32. The Court of Appeal has expressly disapproved of the practice of not cross-examining a vulnerable witness particularly a child: if the child is assessed as

competent, the Court would expect the child to be called and cross-examined with the benefit of special measures (*R v RK* [2018] EWCA Crim 603).

33. **In cases where there is pre-recording of cross-examination and re-examination for witnesses pursuant to section 28 of the YJCEA 1999**, the parties must comply with the Judicial Guidance and the provisions of CPD 18E. Advocates should master the toolkits available (CPD 18E.32). The witness, like any other witness, is entitled to a familiarisation visit, to memory refreshing and to practice on the live link. Any appointed RI must attend the GRH (CPD 18E.33). Section 28 ground rules hearings have their own form which should be used in every case (ETBB, page 2-27, para 118). The intermediary may provide advance indications of the topics for discussion, which in any event must include the overall length of cross-examination and any restrictions on the usual duty to “put the defence case” (CPD 18E.35). During the evidence the intermediary must sit in the live link room with the witness. Since the role is transparent, they must be visible and audible both during the cross-examination and in the subsequent replaying (CPD 18E.38). The Directions specifically cite the possible instance of the judge and advocates being in the witness suite with the witness if they have particular communication needs (CPD 18E.39).
34. **Efforts should be made to organise the court listings**; the more they are done precisely and with greater certainty, the more likely it will be that more Registered Intermediaries will be available for work. In turn, that would improve waiting times for victims and witnesses (ETBB, page 2-22, para 88). Intermediary trials should be fixed rather than placed in warned lists (CPD 3F.28)
35. **However, the absence of an intermediary on the day does not necessarily mean that a fair hearing cannot take place** and it would be unusual to stay or adjourn but the court’s responsibility is to ensure a fair hearing and to adapt the trial procedure to ensure effective participation. This might require reconvening the GRH and re-visiting directions (ETBB, page 2-24, para 102).
36. **The judge should explain at the outset to the jury the role of the intermediary**, namely, that it is a neutral one to assist the court by allowing the witness to communicate effectively and that this has nothing to do with the defendant and should not prejudice them against him. The explanation must include the facts that the intermediary is independent, is not an expert, is present to assist the

court with communication, and will only intervene when communication is a problem. The judge should also explain in neutral terms any particular health problems of the witness (Crown Court Compendium Part 1, page 3-31, paras 3-7 (3), (4) and (5)). A sample direction can be found in the Crown Court Compendium, page 3-33, paras 3-7 (10), repeated in the ETBB.

37. **Before the evidence begins, the intermediary should take the intermediary oath/declaration** as set out in paragraph 13 above.
38. **During the witness's evidence the intermediary intervenes in line with the rules set out at the GRH.** The intermediary is expected to prevent miscommunication from arising and 'actively to intervene when miscommunication may or is likely to have occurred or to be occurring' (ETBB, page 2-22, para 89). Intermediaries have a role and specialism which is sometimes essential for a fair hearing but the court can and should play 'a significant role' in facilitating questioning (ETBB, page 2-23, para 100) and the responsibility to control questioning remains with the judge or magistrates (ETBB, page 2-22, para 89), and especially to ensure that any limitations to questioning agreed during the GRH are complied with (ETBB, page 2-35, para 152 and CPD 3E.4).

#### **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 were scripted by the intermediary and unrelated to the evidence. This allowed the witness to practise using the live link and it also allowed the intermediary to recheck the witness's communication ability.

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## 5. DEFENCE WITNESSES

**5.1 Defence witnesses other than the defendant may be assisted by an RI** if they fulfil the criteria for vulnerability set out in section 16, Youth Justice and Criminal Evidence Act 1999 as set out above.

**5.2 The duty to identify vulnerability falls on the defendant's legal representatives:** see Toolkit 10: Identifying vulnerability in witnesses and defendants.

**5.3 Defence solicitors may access the 'matching service' in the same way as the police.**

**5.4 The assessment of a defence witness** follows the same principles as assessment of a prosecution witness. The responsible third party at the interview will probably be the defence solicitor who would also be responsible, should it be appropriate, for filming the equivalent of an ABE interview. In the latter instance the intermediary would need to make their preliminary report to the defence solicitor.

**5.5 The intermediary's report** would need to be attached to any defence application for special measures.

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## 6. USAGE AND SCARCITY

**6.1 Intermediaries are a scarce resource. There have rarely been enough RIs to match the demand.** Most requests are for prosecution witnesses and less than a handful a year are for defence witnesses.

*‘In the light of the scarcity of intermediaries, the appropriateness of assessment must be decided with care in order to ensure their availability for those most in need.’ (CPD 3F.5)*

**6.2 It has been reported that 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).

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## 7. DEFENDANTS AND ELIGIBILITY

- 7.1 Intermediaries for vulnerable defendants are granted under the courts' inherent powers.** The statutory power which also defines eligibility, [section 104 Coroner's and Justice Act \(CJA\) 2009](#), has not yet been brought into effect. Defendants are otherwise precluded from the special measures regime apart from an application to give evidence by live link. Until section 104 is commenced, judges will continue to exercise their inherent jurisdiction to appoint an intermediary to assist a defendant either throughout the trial or only while he gives evidence should he elect to do so. Such an intermediary is known as a 'non registered intermediary' although that person may in respect of prosecution or defence witnesses act as a Registered Intermediary (ETBB, page 2-25, paras 106, 108).
- 7.2 The court is required to take 'every reasonable step' to facilitate the participation of any person including the defendant (CPR3.9(3)(a) and (b)).** This includes enabling them to give their best evidence and to comprehend the proceedings and engage fully with their defence (CPD 3D.2). As such the court is obliged to adapt the trial process to address the communication needs of a defendant. However there is no presumption that the defendant will be assisted by an intermediary and an appointment is not mandatory even though would improve the trial process (CPD 3F.12 and [R v Cox](#) [2012] EWCA Crim 549).
- 7.3 Where a defendant is under the age of 18,** the appropriateness of an intermediary assessment must be decided with care and although there is no presumption in favour of assessment or of an intermediary assisting at court, the decision should be made on an individual basis in the context of the circumstances of the particular case (CPD 3F.25).
- 7.4 If a defendant is vulnerable or suffers from communication difficulties so that they need more help to follow the proceedings than their legal representatives can be expected to provide, then the court should sympathetically consider an application for the defendant to be accompanied by a support worker or other appropriate companion** who can provide that assistance (CPD 3F.12) The appointment of an intermediary for a defendant's evidence 'will thus be rare, but for the entire trial extremely rare' (CPD 3F.13).



*‘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.’*

- 7.5 However appointments should be considered in ‘obvious cases’** such as where the defendant is a young child or a person with complex problems comparable to those of defendants in the reported cases (ETBB page 2-25, paragraph 109). An intermediary may be appointed where competent legal representation and good trial management is insufficient to allow the defendant to give best quality evidence, participate in his trial and receive a fair trial because of the defendant’s mental or other disability ([R v Rashid](#) [2017] EWCA Crim 2, para 73).
- 7.6 When considering an application by the defence that the defendant is unfit to plead,** the court needs to give consideration to its powers to accommodate the trial process so that the defendant’s limitations can be understood by the jury, one of those powers being the ability to allow the use of an intermediary ([R v Walls](#) [2011] EWCA Crim 443, para 37).
- 7.7 There are no established criteria for eligibility for the use of an intermediary in a police station during a suspect’s interview under caution** but such an appointment in suitable circumstances has received the implicit support of the Court of Appeal: Lord Justice Simon in [R v Jones](#) [2018] EWCA Crim 2816, para 82:

*'We have no doubt that if the trial were to take place now, it would take a different form. First, the appellant would be very likely to receive the support and assistance of an intermediary both at the stage of police interviews and at trial.'*

- 7.8 The Legal Aid Agency pays for a non-registered intermediary's assessment and pre-trial involvement, subject to prior authority. Attendance at trial is paid for by HM Courts and Tribunals Service from Central Funds.** The matching service maintained by the Ministry of Justice is not available for those requiring a non-registered intermediary (ETBB, page 2-26, para 110). There is no accreditation process, no standard training (Cooper & Wurtzel, 2013, Cooper & Mattison, 2017) and rates of payments are unregulated (CPD 3F.15).
- 7.9 The intermediary's involvement with the defendant and their representatives should be treated as taking place in a confidential manner,** that is, they should not disclose anything they learn about the defendant without the defendant's express consent or an order of the court.

#### **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.

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## 8. DEFENDANTS – THE PROCESS

**8.1 The steps in the process are as follows.** There will be instances of a late recognition of a defendant’s vulnerability. There have been instances where through the process of ascertaining the defendant’s communication needs, previously undiagnosed conditions have come to light.

1. **Recognition that the defendant has or may have a communication need.** The legal representatives should become aware of this, perhaps through information from the defendant or their family. See Toolkit 10 – Identifying vulnerability in witnesses and defendants.
2. **The next step may be to instruct an expert witness** (such as a clinical psychologist) to report on the defendant’s ability to participate effectively in their trial and whether an intermediary assessment is recommended.
3. **Where a defendant is publicly funded**, an application should be made to the Legal Aid Agency for prior authority to fund pre-trial assessment by an intermediary. If that is refused, then the application may be made to the court to use its inherent powers to direct a pre-trial assessment and funding thereof (CPD 3F.16). If funding is granted then the intermediary conducts the assessment and produces a report as a Registered Intermediary would do for a witness. The assessment is concerned with the communication needs of the defendant; it is not a substitute for an expert report and it cannot offer a diagnosis. The intermediary will however benefit from seeing any expert report on the defendant in addition to any other reports or information from family or schools.
4. **A responsible third party** (e.g., the solicitor) should be present when the intermediary is with the defendant though in practice this has not always been possible. If an intermediary assists a suspect in the police station, the responsible third party should not be a police officer in case the defendant says something in relation to the case.
5. **It is the responsibility of the defence solicitor to identify a suitable intermediary for the defendant and to make the arrangements about funding.** In the absence of an accreditation scheme, the court needs to be satisfied that

the non-registered intermediary has suitable expertise to meet the defendant's communication needs (CPD3F.17).

6. **After the assessment the intermediary completes their report** and sends it to the defence solicitors.
7. **The application for the use of an intermediary** to assist a defendant, together with the intermediary's report in support, is made to the court, when the judge will decide whether an intermediary is required at all and if so at what stage(s) of the trial. The application can be made together with an application if appropriate for special measures for the use of a live link under section 33A Youth Justice and Criminal Evidence Act 1999 (as amended by section 47 Police and Justice Act 2006). The defendant is not entitled to any other statutory special measures but the court is not restricted in its discretion in the way it may adapt the trial process in order to accommodate the defendant's communication needs.
8. **If the application is granted** for the use of an intermediary at trial either during evidence or for the entire trial, court staff are responsible for arranging payment from Central Funds. The court staff have internal guidance. (CPD3F.16). An application for the use of an intermediary for a defendant at trial is a case management decision and the Court of Appeal does not have jurisdiction to hear an interlocutory appeal from it (*R v R* [2015] EWCA Crim 1870).
9. **When deciding what assistance is needed**, the court must take into account the fact that the advocates will have undergone specific training and must have satisfied themselves that their training and experience enables them to conduct a case in accordance with 'proper professional competence'; any advocate who continues with a case without being able to carry out the essential requirements for advocacy in cross-examining witnesses or in taking instructions would be in serious dereliction of their duty: *R v Rashid* [2017] EWCA Crim 2 at paragraph 80. 'It would be difficult to conceive of an advocate being competent to at in a case involving young witnesses or defendants unless the advocate has undertaken specific training': *R v Grant Murray and Henry* [2017] EWCA Crim 1228.
10. **Even if a judge in a preliminary hearing orders the use of an intermediary** during the trial, the subsequent trial judge is not bound by that decision or by

any recommendation by the intermediary and is entitled to revisit the issue as if the earlier decision had not been made: *R v Biddle* [2019] EWCA Crim 86, where the Court of Appeal also expressly disapproved of any policy whereby an intermediary might decline an appointment to assist a defendant during the giving of evidence unless the intermediary also assisted the defendant throughout the trial.

11. **Where a suitable intermediary is not available for the defendant** the next stage is for the judge to make an informed assessment of whether the absence of an intermediary would make the proposed trial an unfair trial. This would be ‘most unusual’ if the defendant was in any event fit to plead: *R v Cox* [2012] EWCA Crim 549 at paragraph 30. A trial will not be rendered unfair because a direction to appoint an intermediary for the defendant is ineffective (CPD 3F.20).
12. **If there is an ineffective direction**, the court remains responsible to adapt the trial process to address the defendant’s communication needs. A ground rules hearing (GRH) should be convened to ensure that every reasonable step is taken to facilitate the defendant’s participation (CPD 3F.21-22).
13. **It may be appropriate, before the trial begins, for the defendant to visit, out of court hours, the courtroom to familiarise himself or herself with it** (CPD 3G.2). When an intermediary has been appointed, they should accompany the defendant on this visit. This may include matters such as where he will sit (dock or otherwise), court officials (what their roles are and where they sit), who else might be in court (e.g., in the public gallery or press box), the location of the witness box, and basic court procedure (CPD 3G.3). He should also be able to practice on the live link if that is being considered (CPD 3G.4).
14. **A discussion of ground rules must take place in all trials in which an intermediary assists a defendant**, and it is good practice even if no intermediary is used in young witness cases and where the person has communication needs (CPD 3.E2-3). The intermediary must be invited to make representations (CPR 3.9(7)(a)). It is preferable for the GRH to take place before the day of trial and it may be helpful for a trial practice note of boundaries to be created at the end of the discussion. The judge may use such a document in ensuring that the agreed ground rules are complied with (CPD 3.E.3)

15. **There should be an agreed form of words in which to explain to the jury** the difficulties of the defendant and the defendant's need for an intermediary but not including any information which might later be relied on if the defendant elects not to give evidence. "Communication difficulties" is a suitable neutral phrase. The presence of the intermediary sitting next to the defendant in the dock should also be explained (Crown Court Compendium Part 1, page 3-32, para 8; a sample direction is on page 3-33)
16. **Before the defendant gives evidence**, the judge should explain to the jury the need for an intermediary, the purpose of the intermediary, the fact that the intermediary is independent, is there only to assist communication and is not a witness, and that the use of intermediary must not affect the jury's assessment of the evidence and is no reflection on the defendant (Crown Court Compendium Part 1, page 3-32, paragraph 9).
17. **The intermediary must take the intermediary oath/affirmation** in the presence of the jury before the defendant begins their evidence.
18. **Depending on the length of the trial, there may be more than one intermediary**, each of whom takes turns to assist.
19. **The fact that an intermediary has been appointed does not absolve the court from making sufficient adjustments to ensure the defendant's participation** (ETBB, page 2-25, para 109 and [R v Dixon](#) [2013] EWCA Crim 465).
20. **During the hearing it can be useful to have regular breaks** with sufficient time for the intermediary to explain to the defendant what has happened and is about to happen as well as time for a proper break in itself. The frequency of such breaks may depend on the nature of the evidence (ETBB, page 2-22, para 91).
21. **Defendants should be enabled to give the best evidence they can** and this may mean departing radically from traditional cross-examination (CPD3E.4)
22. **If the defendant elects to give evidence, there should be a further GRH** prior to that. This must include, as with any witness, the manner in which the intermediary may intervene. See Toolkit 1 – Ground rules hearings and the fair treatment of vulnerable people in court.

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## 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 their 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 them 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 example, for a 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](#)) or removal of wigs and gowns ([section 26 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 their 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 rather than simply saying '*avoid tag questions*', '*use signposting*' or '*slow down the pace*'. 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.



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## ACKNOWLEDGEMENTS AND REFERENCES

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

- **Criminal Procedure Rules**
- **Criminal Practice Directions**
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