

#02 Intermediaries for child defendants

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Intermediaries for child defendants: How to identify whether a child defendant needs an intermediary and how to apply for one

Lawyers representing children in the criminal courts need to recognise when a child defendant may require an intermediary and know how to ensure that the child gets one.

This legal guide is to assist practitioners in identifying when an intermediary may be necessary and in navigating the legal resources and case law relevant to this often-misunderstood niche area of work.

'Assessment by an intermediary should be considered for witnesses and defendants under 18 who seem liable to misunderstand questions or to experience difficulty expressing answers, including those who seem unlikely to be able to recognise a problematic question (such as one that is misleading or not readily understood), and those who may be reluctant to tell a questioner in a position of authority if they do not understand.'

Introduction

This guide addresses the parts of the Criminal Procedure Rules (CrimPR) and the Criminal Practice Directions (CrimPD) and the Equal Treatment Bench Book that apply when a child defendant may need the support of an intermediary. It also considers the case law relating to the use of intermediaries in the youth court, adult magistrates' court and Crown Court.

Rules on when and how to apply for intermediary support can be found in the CrimPR. They are secondary legislation². The CrimPR are supplemented by the CrimPD and act as a guide for the exercise of judicial discretion. The CrimPR and the CrimPD are the law. They are binding on the criminal courts.³ The CrimPD para 3E.4 emphasises that a defendant should be able to give his best evidence and para 3F deals specifically with children.

Consider getting an intermediary assessment and applying for intermediary support for a child defendant if they seem to you to:

- need help with communicating;
- have speech and language difficulties;
- have difficulty recognising unclear or misleading questions;
- have difficulty expressing themselves and answering questions;
- have difficulty telling someone, particularly someone in authority, that they do not understand a question.⁴

This guide sets out the steps you need to take in order to prepare an application to the court for an order granting intermediary support. It also offers practical advice on working with intermediaries in criminal proceedings.

² Courts Act 2003 section 69

³ CrimPD 1A.3

⁴ CrimPD 3F.26

Intermediaries explained

Role of an intermediary

Intermediaries are persons appointed by the court to facilitate a defendant's effective participation in the trial, when the defendant gives evidence or at any other time, where otherwise that defendant's communication needs would impede such participation.⁵ They are communication specialists, often speech and language therapists.⁶ They are specially trained and qualified to facilitate communication between vulnerable defendants, complainants or other witnesses on the one hand, and the decision-makers and professionals involved in the legal process on the other.⁷ Intermediaries are

independent of the person they are assisting; their duty at all times is to the court.⁸

An intermediary will assess the communication ability and the needs of vulnerable defendants or witnesses, and advise lawyers and the court about how best to facilitate accurate and coherent communication with them. See also the definition of an "intermediary" for the purposes of CrimPR Part 18 at CrimPR 18.3.

If appointed, an intermediary is under a duty to continually assess the ability of the witness or defendant (as the case may be) to participate effectively.⁹

When to consider an intermediary for a defendant

Defendants have the right to a fair trial. Although the supply of intermediary support for defendants is not provided for in statute, the CrimPR, the CrimPD and case law make it clear that intermediaries must be provided to certain defendants under the court's inherent powers where this is necessary to ensure effective participation and a fair trial under Article 6 of the European Convention on Human Rights (*see R (C) v Sevenoaks Youth Court*).¹⁰

This was confirmed more recently in *R(TI) v Bromley Youth Court (2020)*:

'The essential point is that any defendant in any criminal proceedings must have a fair trial. Where a defendant cannot participate effectively in the proceedings, whether in whole or in part, he will not have a fair trial.'¹¹

CrimPR 18.27(3) makes clear that the court may exercise its power to appoint an intermediary

(a) for the duration of every hearing that the defendant is due to attend;

(b) for the duration of any specified such hearing(s), or for the duration of a specified part of such a hearing; or

(c) for a specified purpose during a hearing.

CrimPR 18.27(4) provides that, unless the court otherwise directs, the appointment of an intermediary extends to facilitating the defendant's communication with his or her legal representatives for the duration and for the purpose of the appointment.

Defendants may need the support of an intermediary not just during the proceedings, but beforehand as the defendant's lawyers prepare for trial. The Equal Treatment Bench Book notes 'the vulnerable person is likely to need help not only during hearings but also away from court...'.¹² The defendant must be given such help as he needs to:

- understand the case and witnesses against him;
- give his own side of the story as his defence statement is drawn up;
- prepare a proof of evidence;
- speak to his lawyers before and during court proceedings;
- give his evidence and address the court where otherwise necessary;
- follow the case as it proceeds.¹³

To ensure a defendant gets the intermediary support that is needed, it is best to make the application to the court once there has been an assessment of needs undertaken by an intermediary as well as a mental health expert report prepared. Funding for these assessments is likely to be required from the Legal Aid Agency (LAA) (see Funding for an Intermediary Report below). The application to court will also need to be supported by relevant evidence and submissions quoting the CrimPD, the relevant case law and the Equal Treatment Bench Book.

5 CrimPR 18.3(a)(iv)

6 CrimPR 18.3(a)(iv)

7 CrimPD 3F.1

8 CrimPD 3F.2. See also CrimPR 18.30

9 CrimPR 18.30(2)(b)

10 *R (C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin), para 17

11 *R(TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin), para 23

12 Equal Treatment Bench Book, Judicial College, February 2018 edition (March 2020 revision), chapter 2, para 84

13 *R (C) v Sevenoaks Youth Court*, [2009] EWHC 3088 (Admin), para 17

Intermediaries for child suspects at the police station

Technically intermediaries should be available to help facilitate communication when interviewing child suspects with speech and language difficulties at police stations. However, this is less likely to be authorised by the police as it is not provided for in statute.

Intermediaries are available at the police station for child witnesses and complainants.¹⁴

Protection from disability discrimination could entitle a suspect to intermediary support at the police station. The chapters on children and disability in the Equal Treatment Bench Book are relevant here. See also the United Nations Convention on Rights of Persons with Disabilities.

Appropriate adults and defence representatives should consider asking for an intermediary at an interview for a disabled child suspect at the police station.

Factors that might mean a defendant needs intermediary support

Some factors to consider when assessing whether a child defendant may need the support of an intermediary include:

- Age – is the child one of many young defendants with communication needs?
- Does the defendant have a history of communication needs, learning difficulties or mental health needs and are these documented?
- Does the defendant have an Education, Health and Care (EHC) Plan?¹⁵
- Can the defendant's supporting adult, children's services, and/or the Youth Offending Team provide any information about difficulties that the defendant may have?

Inform the court as soon as possible

The CrimPR states that the parties are under a duty to alert the court to any potential impediment to the defendant's effective participation in the trial.¹⁶ Make the court aware a defendant may need an intermediary as soon as you can.¹⁷ You may want to seek an adjournment on first appearance without the court taking a plea. To preserve a defendant's credit for a guilty plea, you need to explain to the court that you cannot take instructions until an intermediary has assessed what type of communication support a defendant may need to effectively participate in the proceedings.

Some arguments in support of an application for an intermediary for a child defendant

The Equal Treatment Bench Book states 'appointments should be considered in obvious cases [such as] those in which the defendant was a young child or a person with complex problems of the sort that defendants in the reported cases have suffered from.'¹⁸

The CrimPD at 3F covers appointments of intermediaries for defendants regardless of age. Sections 3F.24 – 3F.26 of the CrimPD relate specifically to children in the criminal justice system.

- Many defendants under 18 have communication needs (for example, related to short attention span, suggestibility and reticence in relation to authority figures). Consideration should therefore be given to the communication needs of all children and young people appearing in the criminal courts and to adapting the trial process to address any such needs, as required by the Equal Treatment Bench Book. Guidance is available in publications such as *Planning to Question a Child or Young Person* (Toolkit 6; The Advocate's Gateway, 2015) and *Effective Participation of Young Defendants* (Toolkit 8; The Advocate's Gateway, 2017) (CrimPD 3F.24).

- 14 Achieving Best Evidence in Criminal Proceedings 2011, para 2.194 (at date of publishing although this is due to be updated soon). Please note the police have to make a referral through the National Crime Agency Witness Intermediary Scheme
- 15 EHC Plans have replaced Statement of Education Needs
- 16 CrimPR 3.3(2)(f)
- 17 The court must identify the needs of witnesses at an early stage: CrimPR 3.2(2)(b).
- 18 Equal Treatment Bench Book, chapter 2, para 109

- The appropriateness of an intermediary assessment for witnesses and defendants under 18 must be decided with care. Whilst there is no presumption that they will be assessed by an intermediary (to evaluate their communication needs prior to trial) or assisted by an intermediary at court (for example, if / when giving evidence), the decision to provide them with intermediary support should be made on an individual basis in the context of the circumstances of the particular case (CrimPD3F.25).
- Assessment by an intermediary should be considered for witnesses and defendants under 18 who seem liable to misunderstand questions or to experience difficulty expressing answers, this includes those witnesses and defendants who seem unlikely to be able to recognise a problematic question (such as one that is misleading or not readily understood), and those who may be reluctant to tell a questioner in a position of authority if they do not understand (CrimPD 3F.26).
- There are additional protections a practitioner might want to cite/raise from the perspective of the Equality Act 2010 and under the United Nations Convention on the Rights of Persons with Disabilities and the United Nations Convention on the Rights of the Child.

Matters the Court is required to consider in determining the appointment of an Intermediary

The CrimPR require the court to have regard to a number of specific matters in determining whether it is necessary to appoint an intermediary to facilitate the effective participation of a defendant under 18. These are set out at CrimPR 18.27(2) and include

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| <ul style="list-style-type: none"> (a) the defendant's communication needs as reported to the court (b) the recommendations in any intermediary's report received by the court (c) any views that the defendant has expressed about <ul style="list-style-type: none"> (i) receiving the assistance of an intermediary, or (ii) other measures or arrangements to facilitate the defendant's effective participation in the trial (d) the likely impact of the defendant's age, if under 18, level of intellectual ability or social functioning on the ability to <ul style="list-style-type: none"> (i) give evidence, and (ii) understand what is said and done by the court and other participants (e) the likely impact on such participation and on such understanding of any mental disorder or other significant impairment of intelligence or social functioning | <ul style="list-style-type: none"> (f) the adequacy of arrangements for questioning the defendant in the absence of an intermediary (g) any assistance that the defendant has received in the past <ul style="list-style-type: none"> (i) while giving evidence in legal proceedings (ii) while being questioned during the investigation of an alleged offence, or (iii) as a defendant in a criminal case (h) any assessment of the defendant's health by a mental health practitioner acting independently of the parties to assist the court <ul style="list-style-type: none"> (i) any expert medical opinion that the court may have received, and (j) any other matter that the court thinks relevant. |
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Practical advice: the right to a fair trial

Defendants have the right to a fair trial. Be prepared to argue that if your client does not have an intermediary to help them, their ability to participate will be affected.¹⁹ This concern is highlighted in *R(TI) v Bromley Youth Court*.

¹⁹ V v UK (2000) 30 EHRR 121, SC v UK (2005) 40 EHRR 10, R(TI) v Bromley Youth Court [2020] EWHC 1204 (Admin) para 23

The High Court made clear in *T1* that for the judge to reject an application for intermediary support, the onus is on the court to explain how it will support the defendant to participate effectively at every stage of the proceedings, without the help of an intermediary:

‘...where the evidence demonstrates that the defendant lacks the capacity to participate unaided in the trial process, it is incumbent on the judge to explain how the court will enable the defendant effectively to participate in the proceedings despite that evidence.’²⁰

Opposition to appointing an intermediary for a child defendant

The CrimPD at 3F.12 makes it clear that there is ‘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)’ and that the court ‘will rarely exercise its inherent powers to direct appointment of an intermediary’.

This addition to the CrimPD is reflected in a series of judgments that encourage restraint in the appointment of intermediaries for defendants. See *R v Rashid* [2017] EWCA Crim 2, *R v Biddle* [2019] EWCA Crim 86 and *R v Thomas* [2020] EWCA Crim 117. However, the majority of decisions about intermediaries for defendants relate to adult defendants.

It is also important to note that the CrimPR, updated in April 2021, post-date CrimPD 3F.12. If the CrimPR and the CrimPD appear to contradict each other, the criteria set out by the rules must be applied as the practice direction is simply to act as guidance to the rules. New amendments to the CrimPR state that the court ‘must’ exercise its power to appoint an intermediary to facilitate a defendant’s effective participation in the trial where the defendant’s ability to participate is likely to be diminished by reason of age, if the defendant is under 18.²¹ The CrimPR give special consideration to the provision of intermediary support to those under the age of 18. The court must have specific regard to the likely impact of the defendant’s age, if under 18, on his or her ability to (i) give evidence and (ii) understand what is said and done by the court and other participants.²²

It was recognised in *R(TI) v Bromley Youth Court*²³ that where the defendant is a child, the court has additional duties. These include considering the child’s welfare under section 44 of the Children and Young Persons Act 1933, and their best interests in reference to the United Nations Convention on the Rights of the

Child (UNCRC article 3(1)) when reaching any decision.²⁴ As Lord Steyn found in *R v G*,²⁵ the UNCRC ‘imposes both procedural and substantive obligation on state parties to protect the special position of children in the criminal justice system.

The CrimPD also states in 3F.12 ‘where a defendant is vulnerable or for some other reason experiences communication or hearing difficulties.... the court should consider sympathetically any application for the defendant to be accompanied throughout the trial by a support worker or other appropriate companion who can provide that assistance.’ This is not intermediary assistance.

The CrimPD at 3F.13 states: ‘The court may exercise its inherent powers to direct appointment of an intermediary to assist a defendant giving evidence or for the entire trial’ but that ‘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’. However, *R(TI) v Bromley Youth Court* provides clarification in the context of a child defendant as to how to interpret rare and extremely rare. The High Court said ‘rare’ and ‘extremely rare’ are in the context of all cases that come before the criminal courts: in that context ‘most cases will involve defendants who do not require the assistance of an intermediary. Therefore, the appointment of an intermediary will be rare. It does not follow that there is a high hurdle to overcome for the appointment of an intermediary if one is necessary for the effective participation of a defendant in the trial process.’²⁶ The CrimPD at 3F.25 states that ‘the decision should be made on an individual basis in the context of the circumstances of the particular case’.²⁷

20 *R(TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin) para 43

21 CrimPR 18.27(1)(a)(i)

22 CrimPR 18.27(2)(d)

23 *R(TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin) para 21

24 *R(TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin) para 23

25 *R v G* [2003] UKHL 50, para 53

26 *R(TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin) para 39

27 CrimPD 3F.25

How to get an intermediary

Assessment by a mental health expert

Intermediaries are the communication specialists tasked with assessing functional communication needs for court. A well-documented history of a child defendant's communication or other difficulty may be sufficient for an intermediary to undertake their assessment for the court without an additional expert report. However, in many cases, you will need to instruct a mental health expert (usually a child and adolescent forensic psychiatrist or psychologist) to do a full assessment of the defendant's needs and write up a report. The

intermediary report will be independent, objective and evidence-based. However, the courts may believe the intermediary has a vested interest in being appointed and therefore view the mental health expert report as more objective.

It is also important to note that a child psychologist may not be considered to be a medical practitioner if the report is also sought to be relied upon where fitness to plead is an issue, but their report may be the one that is most helpful to an intermediary's assessment.

How to fund and instruct a mental health expert's report

For a child defendant who has legal aid funding, a solicitor will need to obtain 'prior authority' from the LAA for a mental health expert to do their assessment and write their report. It may be easier to obtain funding if you have written legal advice from counsel as to why it is required. Once you

have the written advice from counsel it will help to include it when submitting a CRM4 form to the LAA.²⁸

If a child defendant does not have legal aid, expert reports will have to be paid for privately.

Ask the mental health expert to write the report

Once you have prior authority from the LAA, ask the mental health expert to consider:

- Is the child defendant fit to plead?²⁹ Set out the *Pritchard*³⁰ criteria for the expert, namely: Can the defendant:
 - understand the charges;
 - decide whether to plead guilty or not guilty;
 - follow the course of proceedings;
 - instruct a lawyer;
 - challenge a juror;
 - give evidence in their own defence.³¹
- Is the child defendant able to effectively participate in the proceedings (setting out what constitutes effective participation for the expert)?³²
- Is the child defendant suggestible or compliant, and, if so, in what settings?

- Are there any special measures that would help the defendant to participate effectively in the proceedings? Draw the expert's attention to the modifications available in law to child defendants in the CrimPD. Modifications do not need to be limited to those contained in the CrimPD and experts should be made aware that they can suggest other modifications which could assist a defendant's communication during proceedings (for example sitting with a social worker or supporter, or regular and frequent breaks).
- How could intermediary support help the defendant to participate effectively, and in which part of the proceedings is an intermediary needed? (For example, taking instructions and understanding case papers; following proceedings in court; giving evidence; or for conferences with counsel).

28 Submitting a CRM4, eForms Quick Guide, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/319336/legal-aid-submitting-crm4.pdf

29 Whether a defendant is fit to plead is determined by the court in a formal process which requires the written or oral evidence of two or more registered medical practitioners, at least one of whom is approved under the Mental Health Act 1983

30 R v Pritchard (1836) 7 C&P 303

31 Added by R v John M [2003] EWCA Crim 3452

32 For more on effective participation see <https://yjlc.uk/>

1. Finding an intermediary

These organisations may be able to match a child defendant with a suitable intermediary:

- Communicourt³³
- Triangle³⁴
- Intermediaries for Justice³⁵

The court may also have a list of intermediaries that are available locally - ask the clerk, the legal adviser or the list office. The Witness Intermediary Scheme (WIS) run by the Ministry of

Justice (MoJ) matches registered intermediaries (RIs) to complainants and witnesses. The WIS will not appoint intermediaries for defendants. This is despite a decision in 2010 that refusing access to the WIS to identify an RI for a defendant gives rise to an equality of arms argument and 'a risk of unfairness or at its lowest a perceived risk of unfairness.'³⁶

Types of intermediaries

Registered Intermediaries (technically available for complainants and witnesses only)

As part of the WIS scheme, RIs are trained and accredited by the MOJ to assist complainants and witnesses who need communication support when giving evidence. They can assist both when

a witness is being interviewed at the police station and/or is giving evidence in court. As mentioned above, the WIS scheme will not provide an intermediary for a defendant.

Non-registered intermediaries

Intermediary support for vulnerable defendants is currently not provided for in statute. Intermediary support for defendants has been developed through common law case decisions, under the court's inherent powers.³⁷

Intermediaries who have been trained and accredited under the MOJ WIS scheme can act outside of the scheme as intermediaries for defendants. You can find out which intermediaries have

been trained as RIs through organisations that provide intermediaries to defendants. The Equal Treatment Bench Book states 'any intermediary appointed to assist a defendant is considered to be 'non-registered' even though the individual carrying out this role may be a Registered Intermediary in respect of witnesses.'³⁸

For more information, contact the organisations listed in *Finding an intermediary* above.

2. Funding for an intermediary report and intermediary attendances

Once you have found an intermediary for the defendant, you need to apply for funding again from the LAA via a CRM4 form, so the intermediary can prepare a report. You can apply to the court for the appointment of an intermediary without a report but it is likely to be harder to persuade the court that your defendant needs an intermediary.

The LAA pays for a non-registered intermediary's assessment, report and pre-trial involve-

ment, subject to prior authority. The intermediary's attendance at trial, should one be appointed, is paid for by HM Courts and Tribunals Service from Central Funds.³⁹

Prior authority from the LAA may need to be extended to cover the costs of the attendance of the intermediary while taking instructions, at conferences with counsel, at pre-trial hearings and at court familiarisation visits.

33 See <https://www.communicourt.co.uk>

34 See <https://triangle.org.uk/service/intermediaries>

35 <https://www.intermediaries-for-justice.org>

36 R (OP) v Secretary of State for Justice and others [2014] EWHC 1944 (Admin) para 46

37 R (C) v Sevenoaks Youth Court [2009] EWHC 3088 (Admin) para 17 'notwithstanding the absence of any express statutory power, the Youth Court has a duty under its inherent powers and under the Criminal Procedure Rules to take such steps as are necessary...'

38 Equal Treatment Bench Book March 2020, chapter 2, para 108

39 Pursuant to an agreement between the Legal Aid Agency, Ministry of Justice and HM Courts and Tribunals Service (see Equal Treatment Bench Book March 2020, chapter 2, para 110 and CrimPD 3F.16)

3. The intermediary assessment and report

Once funding for an assessment has been granted, the intermediary will review the mental health expert's report and any other relevant evidence, meet the defendant to assess their communication needs, and write a report on the support that is needed so the defendant can effectively participate.

CrimPR 18.32 sets out the matters that *must* be included in an intermediary's report in every case. Ensure that you draw the intermediary's attention to these matters, and ask the intermediary to cover the following points in particular:

- the specific communication difficulties the defendant faces;
 - individual needs of the particular defendant and any particular circumstances relating to the individual case;
 - how the defendant's specific needs inhibit their effective participation in proceedings;
 - the parts of the proceedings for which the defendant needs support, and why (to make sure the court grants support required at the various points it is needed – see below 'Practical advice: intermediary involvement during the whole trial versus for giving evidence only');
 - how without this support a defendant would not be able to participate effectively in these proceedings;
 - what support the defendant will need at different parts of the proceedings and how each part of the proceedings can be adapted so they can communicate effectively. Intermediaries can be involved at various stages, including:
 - the preparation of the case for the defendant to understand the evidence against them and to give instructions;
 - attending court for pre-trial hearings and Ground Rules Hearings;
 - the prosecution's case and the evidence at the trial (understanding witnesses' testimony and enabling the defendant to challenge their evidence); and
 - giving evidence including cross-examination.
- Any other modifications that could be made to proceedings to facilitate the defendant's communication in order to participate effectively.
 - Suggest communication aids. 'Courts have permitted a wide range to augment or replace oral testimony, e.g. pen and paper, models, picture cards, signal boards, visual timetables, human figure drawings and technology.'⁴⁰ For additional examples see *The Advocate's Gateway – Toolkit 14 – Using communication aids in the criminal justice system*.⁴¹
 - Practical measures and support the intermediary will provide to assist the defendant. This should include guidance for the lawyers and the court on how all oral communications with the defendant and witnesses can be facilitated to ensure the defendant understands the evidence, understands the questions and answers of those witnesses, and is able to respond appropriately.
 - The views of the defendant on receiving the assistance of an intermediary.

Practical advice: intermediary involvement during the whole trial versus for giving evidence only

Some intermediaries will only agree to support defendants if they can be present for the whole trial, not just the defendant's giving of evidence. Courts have been critical of this approach and the CrimPD states at 3F.5 that in light of the scarcity of intermediaries they should be reserved for the defendants and witnesses most in need.

Intermediaries who will only act for the whole of trial believe that attending just to support with the giving of evidence

- prevents the intermediary from understanding how the evidence against a defendant has come out in the court (for example if different from in witnesses' written statements or supplemented);
- prevents the intermediary from knowing whether the defendant has understood the Crown's case against them;
- prevents the intermediary from knowing how the defendant has interpreted or understood the evidence.

⁴⁰ Equal Treatment Bench Book, chapter 2, para 112

⁴¹ <https://www.theadvocatesgateway.org/toolkits>.

These factors could both prevent a defendant from participating effectively and affect a defendant's ability to give a reliable account when giving evidence.

In a judicial review hearing in 2020, the High Court recognised that a defendant's effective participation is required for the whole of a trial, finding that a situation where a defendant is unable to follow the trial proceedings without the support of an intermediary 'is not consistent with a fair trial'.⁴²

If the intermediary believes their attendance is needed for the whole of trial, or for the preparation of trial, to ensure a child defendant's effective participation, the intermediary should carefully explain this in their report. In doing so, they should make clear the relevant circumstances particular to this defendant, the elements of the offence charged, and the circumstances of the particular trial.

In 2020, a decision overturning a conviction where an intermediary order was refused, the Court of Appeal stated that 'there will be cases when the needs of the defendant and the circumstances of the trial will be such that an intermediary will be required for the entire trial whilst in others, notwithstanding the defendant's difficulties, a fair trial can be secured without the appointment of an intermediary for any stage of the proceedings. There are of course other variations coming somewhere between these two extremes. An intermediary may only be necessary for a particular part or for particular parts of the trial process, such as the defendant's evidence.'⁴³

4. Application to the court

When the intermediary's report is complete, you need to apply to the court to grant the defendant intermediary support in court, if that is the recommendation. As stated above, the court can grant an intermediary for a defendant using its inherent powers (see *R (C) v Sevenoaks Youth Court*).⁴⁴

The application⁴⁵ to the court should follow the Criminal Procedure Rules (CrimPR) Part 18⁴⁶ and include:

- a copy of the intermediary's report, and
- specific arguments as to why your defendant needs an intermediary.

Apply as soon as possible to put the court on notice, particularly if a defendant needs intermediary support while giving instructions or in conference with counsel. If necessary, apply for extra time for serving the defence statement or for credit to be preserved.

42 *R(TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin) para 42

43 *R v Dean Thomas* [2020] EWCA Crim 117 para 34

44 *R (C) v Sevenoaks Youth Court*, [2009] EWHC 3088 (Admin), para 17

45 The application should be made via the Application for a Special Measures Direction form in accordance with the CrimPR. The form can be found here: <https://www.justice.gov.uk/courts/procedure-rules/criminal/mae001-eng.pdf>

46 CrimPD 3F.7

Working with intermediaries during the proceedings

Intermediaries at Ground Rules Hearings (GRH)

'Ground rules hearings provide an opportunity to plan any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person.'⁴⁷

A GRH should take place as early as possible, ideally before the first day of the hearing,⁴⁸ and the intermediary should be present if they have been granted by the court.⁴⁹ The intermediary will be required to answer questions, but not take an oath, as to the recommendations in their report and their reasoning. If the court decides that limitations on questioning are necessary and appropriate, they must be clearly defined⁵⁰ and the questions may be written down in advance.⁵¹

Where an intermediary is appointed, 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.'⁵²

CrimPD 3E.2 says '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'.

GRHs are therefore mandatory in all trials using intermediaries, and constitute good practice even if an intermediary is not being used. A GRH is good practice in all cases where there is a young witness or a vulnerable defendant with communication needs⁵³ and is also appropriate where a defendant is unrepresented.⁵⁴

Failure to hold a GRH for a vulnerable defendant, where an intermediary was not present but had previously emphasised in their report that the defendant has learning disabilities, was a factor in making a finding of unsafe conviction at the Court of Appeal in *R v Pringle*.⁵⁵

In practice, the judge can invite the advocates to share the proposed questions with the intermediary in advance of the GRH. The intermediary then reviews the questions and makes suggested changes to the language and structure as appropriate.

The Equal Treatment Bench Book states:

'Judicial interventions in questioning can be minimised if the approach to questioning is discussed in advance at a ground rules hearing and adhered to by the advocates. It is now quite common (and expected) for advocates to be directed to disclose their proposed questions in writing to the judge in advance of the ground rules hearing. Those are then discussed at the ground rules hearing and approved or amended as appropriate.'⁵⁶ These discussions should involve the intermediary.

The Inns of Court College of Advocacy recommends that a 'trial practice note' is created following the GRH, indicating the agreed ground rules and boundaries are complied with.

See The Advocate's Gateway's - Toolkit 1 - *Ground Rules Hearings*.⁵⁷

47 Equal Treatment Bench Book, chapter 2, para 115

48 Equal Treatment Bench Book, chapter 2, para 119 and CrimPD 3E.3

49 CrimPD 3E.2 and CrimPR 3.9

50 CrimPD 3E.4

51 CrimPD 3E.3

52 Equal Treatment Bench Book, chapter 2, para 116

53 CrimPD 3E.3

54 Equal Treatment Bench Book, chapter 2, para 120

55 *R v Pringle* [2019] EWCA Crim 1722 paras 101 and 109

56 Equal Treatment Bench Book, chapter 2, para 123

57 <https://www.theadvocatesgateway.org/toolkits>.

Some practicalities when using an intermediary during court proceedings

'When intermediaries are appointed to facilitate communication of witnesses or defendants at Crown Court, it is customary for the judge to explain their presence to the jury. The intermediary may also be asked to explain to the jury his or her role and qualifications and the purpose of any communication aids'.⁵⁸

Subject to appropriate security provisions being available, child defendants should be permitted to sit outside the dock during trial, either with family members or other suitable supporting adults and close to their legal representative.⁵⁹ It is best practice for the intermediary to sit with the defendant during the trial.⁶⁰

Intermediaries should highlight to the court any other steps or measures that should be taken to ensure the effective participation of the defendant. The role of the intermediary should be explained to the jury.⁶¹

Intermediaries usually stand in or near the witness box when the defendant gives evidence,

but this is a matter on which the court's direction should be sought. Intermediaries should try not to intervene if counsel's questions or the defendant's answers are not clear but should indicate to the trial judge that this is the case. It is then for the court to decide how the matter should be handled. The manner in which the intermediary should intervene should be agreed at the GRH.

Questioning of a defendant with communication needs can include dispensing with normal practice and allowing the judge to 'impose restrictions on the advocate 'putting his case'⁶² to enable a defendant 'to give the best evidence they can. In relation to young and/or vulnerable people, this may mean departing radically from traditional cross examination.'⁶³ This should have been agreed at the GRH, see *Intermediaries at Ground Rules Hearing* above.

Intermediaries at sentencing

Intermediaries may attend any sentencing hearing to explain the sentencing process and the sentence imposed to the defendant. Intermediaries can also assist the Youth Offending Team (YOT) or other staff with information about the

defendant's needs. Such attendance will usually be appropriate where an intermediary has been granted for the whole trial rather than for evidence only.

58 Equal Treatment Bench Book, chapter 2, para 156

59 CrimPD 3G.8

60 Intermediaries: step by step' Toolkit 16; The Advocate's Gateway, 2019 (see <https://www.theadvocatesgateway.org/images/toolkits/16-intermediaries-step-by-step-2019.pdf>)

61 The Crown Court Compendium, 2016, part I, section 3-7 'Intermediaries', paragraph 3 available at: <https://www.judiciary.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf>.

62 CrimPD 3E.4

63 CrimPD 3E.4

Relevant case law, reports and resources

Additional case law relevant to your submissions

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

A child defendant with ADHD was refused an intermediary by the youth court. On judicial review the High Court held that 'there is a right, which might in certain circumstances amount to a duty, to appoint a registered intermediary to assist a defendant to follow the proceedings and give evidence if without assistance he would not be able to have a fair trial'.⁶⁴

R v Walls [2011] EWCA Crim 443

Appointing an intermediary is one mechanism which enables defendants to stand trial in circumstances where they may otherwise be unable to effectively participate and the jury would have been unable to understand the defendant's limitations.

R (OP) v the Secretary of State for Justice and others [2014] EWHC 1944 (Admin)

The High Court found that the Secretary of State was wrong to refuse a defendant access to a registered intermediary. The Secretary of State was ordered to reconsider his decision to refuse an

RI to a defendant: 'there are likely to be two roles during a trial for which an intermediary is fitted.

The first is founded in general support, reassurance and calm interpretation of unfolding events.

The second requires skilled support and interpretation with the potential for intervention and on occasion suggestion to the Bench associated with the giving of the defendant's evidence. The first is a task readily achievable by an adult with experience of life and the cast of mind apt to facilitate comprehension by a worried individual on trial. In play are understandable emotions: uncertainty, perhaps a sense of territorial disadvantage, nervousness and agitation. The second requires developed skills of the type contemplated by inclusion in the WIS scheme'.⁶⁵

R v Pringle [2019] EWCA Crim 172266 (relying upon R v Beards and Beards [2016] EW Misc B143)

In certain circumstances, even if an intermediary is not ultimately used at trial, the intermediary's report, or parts of the report, can be put before the jury.

Other Relevant Case Law

R v Dean Thomas [2020] EWCA Crim 117

R v Biddle [2019] EWCA Crim 86

R v Yahya Rashid [2017] EWCA Crim 2

R v Cox [2012] EWCA Crim 549 – appointment of an intermediary not mandatory even if helpful.

Guidance

Equal Treatment Bench Book, Judicial College, March 2020⁶⁷

Registered Intermediaries Procedural Guidance Manual, Ministry of Justice, 2020⁶⁸

Government guidance at <https://www.gov.uk/guidance/ministry-of-justice-witness-intermediary-scheme>

Blackstones D14.24 – 14.25 *Eligibility of Defendants for an Intermediary*

The Law Commission's Unfitness to Plead review (2016) states:

'Although intermediary assistance is not a remedy for all participation difficulties, we consider that for many defendants with significant difficulties it offers the best mechanism for facilitating their effective participation in trial'.⁶⁹

Toolkits & Guides

The Advocate's Gateway Toolkits:⁷⁰

- Intermediaries: Step-by-Step

- Identifying Vulnerability in Witnesses and Defendants
- Ground Rules Hearings

64 Para 6

65 *R (OP) v Secretary of State for Justice and others [2014] EWHC 1944 (Admin)* paras 34–36

66 See paras 101 and 109

67 <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>

68 Registered Intermediaries Procedural Guidance Manual, Ministry of Justice, 2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831537/moj-registered-intermediary-procedural-guidance.pdf

69 Unfitness to Plead, Law Commission, 2016, available at: <https://www.lawcom.gov.uk/project/unfitness-to-plead/>.

70 The Advocate's Gateway Toolkits are available at: <https://www.theadvocatesgateway.org/toolkits>



#02

Intermediaries for Child Defendants

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YJLC

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Youth Justice Legal Centre

yjlc.uk

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

Doughty Street Chambers

doughtystreet.co.uk

Doughty Street Chambers offers extensive expertise across numerous child rights-related areas and has wide-ranging experience in bringing ground-breaking litigation for and concerning children in public law, extradition, immigration, mental health, community care, prison law, trafficking, education, criminal justice, clinical negligence and inquests. Many of our members specialise in complex and developing areas concerning the rights of children, including female genital cutting (FGC) and children, abortion rights for vulnerable teenagers, unaccompanied minors' rights, the education rights of children in custody, inclusive education for disabled children, children's effective participation in criminal trials, and the rights of LGBTQI children.

Just for Kids Law

justforkidslaw.org

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

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