

EFFECTIVE PARTICIPATION OF YOUNG DEFENDANTS

Toolkit 8

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This toolkit brings together policy, research and guidance relating to:

1. *Youth Justice*
 2. *Profile*
 3. *The right to effective participation*
 4. *Modifying proceedings to ensure effective participation*
 5. *Effective participation and fitness to plead*
 6. *Special measures statutory provisions*
 7. *Defendant intermediaries: the position at common law*
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- Special Measures Directions*
- ANNEX A: Examples of ways in which a defendant intermediary may assist*

This toolkit contains general guidance and is not a replacement for an intermediary assessment (see section 7) providing communication advice specific to the individual.

KEY POINTS ABOUT YOUNG DEFENDANTS

Young people should be tried and sentenced in the youth court wherever possible (1.1). Trials must proceed as expeditiously as possible (1.3). A vulnerable defendant should be tried on his own unless a joint trial would accord with the overriding objective (1.4). The advocate's duty is to the young client and it may be necessary to take instructions without the presence of parents (1.5).

Particular care is needed where the young defendant has mental health problems, learning or other disabilities or speech and language difficulties (2.2). Many have literacy problems (2.4) and difficulties with court language (2.5). The court must take every reasonable step to facilitate the defendant's effective participation (3.3) and defence representatives should alert the court to factors affecting the defendant's ability to participate effectively (3.2).

The court must ensure that the whole trial is conducted in clear language that the defendant can understand and that questions are short and clear (4.1, 4.2). A familiarisation visit to the courtroom can be useful (1.1). All participants should be on the same or almost the same level if practicable (4.5). The defendant will normally be seated with family members (4.7), not in the dock (4.6).

Vulnerability, disability or communication needs do not necessarily render a young defendant unfit to plead (5.2). The live link is available as a statutory special measure subject to conditions (6.3). Appointment of an intermediary needs the court to use its inherent powers (section 7) but adapting the trial process may be sufficient (7.4). Ask young defendants to tell you if they do not understand something, but do not rely on them to say there is a problem (8.2). The most significant factor in effective communication is the ability to tailor questions to the young defendant's needs and abilities (8.3).

After conviction, magistrates are encouraged to talk directly to the young defendant (9.2). Youth offending teams, community panel members and those involved with restorative justice should be made aware of a young defendant's communication difficulties (9.4).

1. YOUTH JUSTICE

1.1 ***There is a clear principle in statute and domestic and European case law that young people be tried and sentenced in the youth court (dealing with criminal proceedings against those aged 10 to 17) wherever possible*** For exceptions, see Sentencing Guidelines Council [Overarching Principles - Sentencing Youths Definitive Guideline](#) (chapter 12, 2009); CPS [Policy guidance on venue representations where youths are charged with offences capable of being tried on indictment](#). The Senior Presiding Judge's Protocol Sexual Offences in the Youth Court (2010)¹ notes that some sexual offences may be properly dealt with in the youth court.

1.2 ***The court must have regard to:***

- the principal aim of the youth justice system, to prevent offending by children and young persons (section 37(1), [Crime and Disorder Act 1998](#));
- the welfare of the child, as an offender or otherwise (section 44, [Children and Young Persons Act 1933](#)). The younger the offender (taking account of developmental maturity and not just chronological age) the more likely it is that consideration of welfare will be of significance ([Overarching Principles - Sentencing Youths Definitive Guideline](#) (para 4.2, Sentencing Guidelines Council 2009. See also Article 3, [UN Convention on the Rights of the Child](#): in all actions concerning children, their best interests shall be a primary consideration).

1.3 ***Priority should be accorded to the trial of young defendants*** (para XIII A.3(ii), [Criminal Practice Directions](#) 2014).

1.4 ***A vulnerable defendant should be tried on his own*** unless a joint trial would accord with Rule 1, [Criminal Procedure Rules 2014](#), the overriding objective 'that criminal cases be dealt with justly'; and the interests of justice. The court should consider whether modifications in section 3G, [Criminal Practice Directions](#) 2014 should apply to any joint trial.

1.5 ***Reporting restrictions apply*** (sections 39, 49, [Children and Young Persons Act 1933](#); para 3G.5, [Criminal Practice Directions](#) 2014; [Reporting Restrictions in the Criminal Courts](#) Judicial College 2014).

1.6 ***The advocate's duty is to the young client*** and it may be necessary to take instructions otherwise than in the presence of parents.

2. PROFILE

2.1 ***All children under 18 require special consideration*** by virtue of their age and developmental immaturity. Teenagers are at particular risk of miscommunication because of their reluctance to ask for clarification and adults' higher expectation of their ability to understand.

¹ Available to those with access to the [Judicial Intranet](#).

2.2 Particular care is needed where a young defendant has mental health problems, learning or other disabilities or speech and language difficulties These issues are not always identifiable at an early stage (Toolkit 10; paras 2.9 and 4.5-6, [Overarching Principles - Sentencing Youths Definitive Guideline](#) Sentencing Guidelines Council 2009). Research (for summary see Talbot 2010) reveals that:

- over 60% of young people in the youth justice system have speech, language and communication needs (compared with 10% of children in the general population). Around half have poor or very poor communication skills. Some have hearing problems. Their needs often have not been picked up by professionals;
- around 40% have mental health problems (Toolkit 12), most commonly conduct disorders, emotional disorders and attention disorders (at least three times higher than in children in the general population). Substance misuse, which may result in memory impairment, is a particular problem;
- around 60% have a 'mild' or 'moderate' (IQ under 70) or 'borderline' (IQ of 70-79) learning disability (see Toolkit 4) and around 25% have special educational needs;
- around 43% of 14-year-olds in custody have ADHD (Young et al 2011);
- children who are² or have been 'looked after' by the local authority are overrepresented in the criminal justice system;
- children in custody are often particularly vulnerable (see [R \(on the application of the Howard League for Penal Reform v Secretary of State for the Home Department and Department of Health](#) [2002] EWHC 2497 (Admin)).

2.3 Needs arising from experiences of abuse are common Children's development occurs across four main areas - physical, intellectual, emotional and social, all of which interact. Abuse, neglect and deprivation may impair intellectual and emotional functioning and delay physical development. The brains of extremely abused and neglected children have been shown to be smaller than those of normal children. There is an interaction between 'nature' (hardwiring of the brain) and 'nurture' (environment). Developmental immaturity affects children's capacity for decision-making. Many young defendants suffer from delayed brain development and impaired reasoning ability and may not be fully able to comprehend the seriousness or longer-term consequences of their criminal behaviour or the impact upon the victim (Vizard 2009).

2.4 Many young defendants have literacy problems They may be unable to read their police interview, the oath or court orders. Problems with reading and writing may be associated with difficulty in understanding, processing and retaining information and in organising an appropriate response to questions (see Toolkit 5, Planning to question someone with 'hidden' disabilities).

2.5 Difficulties with court language Young people in the youth justice system have poor understanding of words like 'offence', 'comply', 'breach', 'conviction', 'alleged' and 'magistrate' and struggle to understand language in court (NACRO 2011). Everyday words

² [Youth Offenders: Offending Behaviour in Children's Homes](#) (Crown Prosecution Service) provides guidance on determining the public interest test.

in a legal context may be misinterpreted eg 'appearing in court as required' may be thought to concern 'what to wear to court'.

2.6 ***Be alert to the potential for any young defendant to have communication needs***

Children with good vocabulary and speech sounds but poor understanding are most at risk of being missed (Bercow Report 2008). Inability to participate leads to feelings of isolation and confusion. Consider instructing a relevant expert to suggest what adaptations may be necessary.

3. THE RIGHT TO EFFECTIVE PARTICIPATION

3.1 ***Entitlement to an appropriate adult at the police station now applies to 17-year-olds:***

[Code C](#), *Revised Code of Practice for the Detention Treatment and Questioning of Persons by Police Officers* (2014) deals with this at para 1.5A. The Code covers provision of appropriate adults (para 1.5) and interpreters (paras 3.1(a)(iv), 3.5(c)(ii), 3.12, 3.21(b), Note 6B and section 13) but does not mention intermediaries. Appropriate adult responsibilities include facilitating communication with the interviewee (para 11.17). They need not have specialist skills in assessment and communication so an intermediary may also need to assess the defendant and facilitate communication at interview (O'Mahony et al 2012).

3.2 ***Defence representatives should alert the court promptly to factors affecting the defendant's ability to participate effectively*** and request appropriate adjustments to be made. This includes communication needs, attention span and anything that may impair quality of participation eg the impact of an early start if produced from detention or the effect of a long wait at court. The Bench must be provided (eg in its pre-court briefing) with information supplied by the parties for the purpose of case management and any previous directions about case management and the giving of evidence.

3.3 ***In preparation for trial, the court must take every reasonable step to facilitate the defendant's effective participation*** (Rule 3.9(3)(b), [Criminal Procedure Rules 2014](#)). This includes enabling defendants to give their best evidence and to comprehend the proceedings and engage fully with their defence. The pre-trial and trial process should, so far as necessary, be adapted to meet those ends (para 3D.2, [Criminal Practice Directions 2014](#); see also [SC v UK](#) (2004) ECHR 263, para 28):

- courts have powers and duties under the Rules to take reasonable steps to ensure the defendant's effective participation, especially someone affected by a learning disability or communication difficulty ([A Guide to the Criminal Procedure \(Amendment\) Rules 2013 \(S.I. 2013/1554\)](#));
- notwithstanding the absence of any express statutory power, the youth court has a duty under the inherent powers and under the [Criminal Procedure Rules 2014](#) to take such steps as are necessary to ensure that [the defendant] has a fair trial, not just during the proceedings, but beforehand as he and his lawyers prepare for the trial. 'It is in the highest degree unlikely that [the required] level of help can be given by a lawyer...' ([C v Sevenoaks Youth Court](#) [2009] EWHC 3088 (Admin) para 17, involving a 12 year-old

with complex learning and behavioural difficulties). Processes have to be adapted to ensure that the individual is not disadvantaged as a result of personal difficulties (the LCJ in [R v Cox](#) [2012] EWCA Crim 549, para 29, a case involving an adult defendant);

- courts are expected to make reasonable adjustments to remove barriers for people with disabilities ([Equal Treatment Bench Book](#) 2013, applying the [Equality Act 2010](#)).

3.4 ***Is the young defendant's presence necessary at case management hearings?*** If not, consider requesting that the young person be excused.

4. MODIFYING PROCEEDINGS TO ENSURE EFFECTIVE PARTICIPATION

4.1 ***Language*** The court must ensure that the whole trial is conducted in clear language that the defendant can understand and that questions are short and clear.

4.2 ***Explanations*** The court should:

- ensure that what is to take place has been explained to a vulnerable defendant in terms he can understand. Do not assume that young defendants who have been in court before have a better understanding: one young person, when asked what he understood by *'the sentence'*, said *'It's something you write down'*. Another thought *'intervention'* was *'something to do with an owl in a tree'*³;
- remind the defendant's legal representative/ supporting adult of their responsibility to explain 'each step as it takes place' and, at trial, to explain the possible consequences of a guilty verdict and credit for a guilty plea (para 3G.9, [Criminal Practice Directions](#) 2014).

4.3 ***Ground rules agreed by the advocates and Bench will help ensure that the defendant can follow proceedings*** even if (s)he does not intend to give evidence (see Toolkit 1c: Ground Rules). The court should ensure that the decisions of the ground rules hearing are followed; advocates should use and follow toolkits on www.theadvocatesgateway.org (paras 3D7, 3G.10, [Criminal Practice Directions](#) 2014). The Court of Appeal has endorsed modifications imposed by the trial judge in respect of an adult defendant with complex learning difficulties, eg directing that *all* witness evidence be adduced by 'very simply phrased' questions, with witnesses asked to answer in short sentences; and short periods of evidence, followed by 20 minute breaks to enable the defendant 'to relax and his counsel to summarise the evidence for him and to take further instructions' (para 21, [R v Cox](#) [2012] EWCA Crim 549).

4.4 ***A familiarisation visit to the courtroom***, out of court hours and before the trial, sentencing or appeal hearing (para 3G.2, [Criminal Practice Directions](#) 2014) can be useful even for those who have been to court before. **Good practice example**: an explanatory visit helped alleviate anxieties of a defendant who was worried by large plasma screens in court, thinking this was to do with reporting the case.

³ *The Guardian* (8 February 2012) 'When sorry seems to be the hardest word' (quoting examples from Youth Offending Team speech and language therapist Ian Warriner).

Steps to ensure a fair trial of a young defendant (Divisional Court in [R \(TP\) v West London Youth Court](#) [2005] EWHC 2583 (Admin))

- keep in mind the young person's level of cognitive functioning;
- use concise and simple language;
- have frequent and regular breaks, taking account of the young person's concentration span (see also para 3G.10, [Criminal Practice Directions](#) 2014);
- be proactive in ensuring the young person has access to support;
- take additional time to explain court proceedings and ensure the young person understands the ingredients of the charge, possible outcomes and sentences;
- carefully control cross-examination so that questions are short and clear and frustration is minimised.

4.5 **All participants should be on the same or almost the same level** if practicable, subject to appropriate security arrangements (para 3G.7, [Criminal Practice Directions](#) 2014). The youth court does not have to sit in a formal courtroom and can adapt court premises ([R \(on the application of\) H, A and O v Southampton Youth Court](#) [2004] EWHC 2912 (Admin), para 40).

4.6 **A young defendant will not normally be in the dock** unless there are 'security considerations' (Appendix A.2, [Youth Court Bench Book](#) 2013), and should be able to have 'easy, informal communication with his legal representatives' (para 3G.8, [Criminal Practice Directions](#) 2014). The Bench should consider the effect of holding the defendant in the dock on his or her ability to participate effectively in the proceedings. **Poor practice example:** a young defendant with learning difficulties and a hearing loss (but who did not have his hearing aid) was seated in a youth court dock behind a glass security screen. He was unable to hear or follow what was said.

4.7 **The young defendant should be seated with family members** or 'others in a like relationship' allowing 'easy, informal communication' with legal representatives. A suitable supporting adult should be available throughout the proceedings (para 3G.8, [Criminal Practice Directions](#) 2014).

4.8 **Efforts to reduce feelings of intimidation and inhibition** include how the trial is conducted (para 28, [SC v UK](#) (2004) ECHR 263). In the youth court, lawyers remain seated and young defendants are called by their first name. The Crown Court should take account of the wishes of both a vulnerable defendant and any vulnerable witness in respect of the wearing of wigs and gowns. It is desirable that officers be out of uniform (para 3G.12, [Criminal Practice Directions](#) 2014).

5. EFFECTIVE PARTICIPATION AND FITNESS TO PLEAD

5.1 **Fitness to plead hearings can only be held in the Crown Court** There is no specific procedure to determine this in the youth court, where the primary focus is on capacity.

5.2 **Vulnerability, disability or communication needs** do not necessarily render a young defendant unfit to plead. In [R \(TP\) v West London Youth Court](#) [2005] EWHC 2583 (Admin), the defendant was aged 15 but his cognitive abilities were below the age of 10. The Divisional Court held that neither youth nor limited intellectual capacity necessarily leads to a breach of Article 6, [European Convention on Human Rights](#), at least until all possible practical measures enabling effective participation have been exhausted.

5.3 **Minimum requirements for a fair trial** The Divisional Court in *R (TP)* said that a court had to be satisfied that the defendant knew it was wrong when he committed the offence (by act or omission). The defendant had to be able to:

- understand the ingredients of the charge and what, if any, defences are available;
- give proper instructions and make representations, once he understands the issues involved;
- participate by providing answers to questions and suggesting questions to his lawyers in the circumstances of the trial as they arose.

5.4 **Before embarking on ‘the very significant step’ of a trial of fitness to plead**, ‘plainly’ the court should consider its inherent power to appoint an intermediary or other ways to accommodate the defendant’s limitations ([R v Walls](#) [2011] EWCA Crim 443, para 37 (ii)).

5.5 **The Law Commission’s [Unfitness to Plead](#) consultation** states that ‘effective participation requires active involvement on the part of the accused rather than just a passive presence... where the accused’s abilities are limited, he or she may still be able to participate effectively in the trial as long as certain steps are taken’ (para 2.102, 2010).

5.6 **There is no specific procedure by which fitness to plead can be determined in the magistrates’ court** but arrangements exist under section 37, [Mental Health Act 1983](#) and section 11, [Powers of the Criminal Court Sentencing Act 2000](#) to determine whether the defendant did the acts alleged and then, in light of any medical evidence, to make such orders, if any, the justices think fit under section 37(3) (*R (Varma) v Redbridge Magistrates’ Court* [2009] EWHC 836 (Admin) para 14). Powers under section 37(3) are ‘considerably less strict and more flexible’ than common law rules governing fitness to plead in the Crown Court ([P v Barking Youth Court](#) [2002] EWHC 734 (Admin), para 10).

5.7 **The issue of capacity in the youth court** was addressed in [CPS v P](#) [2007] EWHC 946 (Admin). Questions about a child’s capacity are essentially of fact, to be determined on the basis of all the information available at the time of the decision. Just because the child is unfit to plead or unable to take part in a trial on one occasion, does not mean that he will still be unfit or unable on another: ‘the issue of the child’s ability to participate effectively must be decided afresh’. Where the court proceeds to decide whether the person did the acts alleged:

- the proceedings are not a criminal trial;
- the court may consider whether to proceed to decide the facts at any stage;
- it may decide to do so before hearing any evidence or it may stop the criminal procedure and switch to the fact-finding procedure at any stage;

- if the court proceeds with fact-finding only, the fact that the defendant does not or cannot take any part in the proceedings does not render them unfair or improper; ‘the defendant’s Article 6 rights are not engaged by that process’ (paras 60-62).

5.8 ***If it becomes apparent during the hearing that the defendant is unable effectively to participate*** the judge can stay the proceedings. This is better than doing so at the outset before it is known whether steps can be taken to enable a fair trial to proceed (CPS, Youth Offenders: [Trial procedure for youths with mental disorders including learning disabilities](#)).

5.9 ***Each case will depend on the vulnerability of the particular defendant*** Arguably it would be an abuse of process to try the defendant if safeguards remain insufficient to allow the defendant to participate effectively in the trial (*R v Cox* [2012] EWCA Crim 549, a case involving an adult defendant with complex difficulties).

6. SPECIAL MEASURES STATUTORY PROVISIONS

6.1 See Hoyano’s *Special Measures for Vulnerable Defendants* flowchart below.

6.2 ***Defendants⁴ under 18 (unlike witnesses of this age) are not automatically eligible for special measures:***

- a young defendant cannot give evidence-in-chief by pre-recorded video interview (paras 22-24, *R v SH* [2003] EWCA Crim 1208, also noting logistical difficulties);
- there is no qualifying statutory condition relating to a physical disability or disorder diminishing the quality of the defendant’s testimony;
- there is no statutory provision for communication aids for defendants.

6.3 ***Live link: section 47, [Police and Justice Act 2006](#)*** (creating new section 33A-C, [Youth Justice and Criminal Evidence Act 1999](#)) provides for defendants under 18 to give evidence by live link if the court considers the following conditions are satisfied:

- it is in the interests of justice (section 33A(2)(b));
- if the young defendant’s ability to participate effectively while giving oral evidence is compromised by level of intellectual ability or social functioning (section 33A(4)(a));
- use of a live link would enable him to participate more effectively as a witness, whether by improving the quality of evidence or otherwise (section 33A(4)(b)).

6.4 ***The live link provision is not triggered ‘merely because an accused is a juvenile and is nervous’*** (Police and Justice Act 2006 [Explanatory Notes](#)). Its use remains unusual.

6.5 ***A vulnerable defendant’s use of the live link to give evidence should be considered at the case management hearing*** The applicant must explain how the conditions prescribed by the Act are met; identify someone to accompany the defendant while giving evidence and explain why that person is appropriate; and if asking for a hearing, explain why it is needed (Rule 29.15, [Criminal Procedure Rules 2014](#)). The defendant should have the opportunity to practise on the link: some young people’s communication is impaired.

⁴ A young defence *witness* is eligible under the same criteria as a young prosecution witness: section 16 YJCEA 1999.

6.6 **A risk of intimidation from co-defendants**, given restriction of eligibility to intellectual ability or social functioning, seems to preclude access to the live link ([S v Waltham Forest Youth Court](#) [2004] EWHC 715 (Admin)⁵, in which a girl with learning disabilities was too frightened to testify in the presence of co-defendants, whom she claimed had threatened her). In such circumstances, consider an application for a screen, based on the court's common law powers (*R v Smellie* (1919) 14 Cr. App. R. 128 CA).⁶

6.7 **The defendant must give all his evidence through the live link** (section 33A(6)) unless the direction is discharged in the interests of justice (section 33A(7)).

6.8 **Intermediary: section 104, Coroners and Justice Act 2009** creates a new section 33BA [Youth Justice and Criminal Evidence Act 1999](#) that provides an intermediary to an eligible defendant, but only while giving evidence.⁷ This has not been implemented.

6.9 **The vulnerable defendant's eligibility criteria for an intermediary differ from the eligibility criteria for a vulnerable witness** Section 33BA provides for examination of a defendant under 18 through an intermediary:

- if the defendant's ability to participate effectively in terms of giving oral evidence is compromised by his or her level of intellectual ability or social functioning; and
- making the direction is necessary to ensure that the accused receives a fair trial.

6.10 **The function of the intermediary** is to 'communicate to the accused, questions put to the accused, and to any person asking such questions, the answers given by the accused in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the accused or the person in question' (section 33BA(4), [Youth Justice and Criminal Evidence Act 1999](#)). The Court of Appeal describes the intermediary's function as 'actively to intervene when miscommunication may or is likely to have occurred or to be occurring' ([R v Cox](#) [2012] EWCA Crim 549 (para 28)).

7. DEFENDANT INTERMEDIARIES: THE POSITION AT COMMON LAW

7.1 **Intermediary appointments for defendants are uncommon** However, a court may use its inherent powers to appoint an intermediary to assist the defendant's communication where this is consonant with the requirements of:

- the [European Convention on Human Rights](#), that steps be taken to promote a young defendant's ability to understand what is said in court and to participate in the entire proceedings, if necessary with assistance ([T v UK](#) (1999) ECHR 170; [V v UK](#) (1999) ECHR 171; [SC v UK](#) (2004) ECHR 263); [C v Sevenoaks Youth Court](#) [2009] EWHC 3088 (Admin) (see above);

⁵ Criticism of this decision in [R v Camberwell Green Youth Court](#) [2005] UKHL 4 was one reason for extending live link provisions to vulnerable defendants in section 47, [Police and Justice Act 2006](#).

⁶ Hoyano (2010) notes that the requirement for compromised intellectual ability or social functioning may conflict with the principle of equality of arms because Article 6(3)(d), [European Convention on Human Rights](#) guarantees defendants the right to have defence witnesses examined 'under the same conditions as witnesses against him'.

⁷ Vulnerable defendants are included in the Registered Intermediaries Schemes pilot launched by the Department of Justice Northern Ireland in May 2013.

- Rule 1, [Criminal Procedure Rules 2014](#): the overriding objective ‘that criminal cases be dealt with justly’. This includes Rule 1.1(2)(c) recognising the defendant’s rights (particularly those under Article 6, [European Convention on Human Rights](#)); and Rule 3.10(c)(v): in order to manage a trial or an appeal, ‘the court may require a party to identify what arrangements are desirable to facilitate the participation of any other person, including the defendant’;
- the [Criminal Practice Directions](#) 2014, that the judiciary ensure ‘by any appropriate means’ that the defendant understands what is happening and what has been said by those on the Bench, the advocates and witnesses (para 3G.9).

7.2 The judge may authorise intermediary use 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’ (Recorder of Leeds, in [R v GP and 4 Others](#), (2012) T20120409, ‘Guidance for future applications’ para 66(3)). Unpublished guidance to court staff defines a vulnerable defendant as one who is ‘young and overtly immature’, indicating that children are not automatically considered vulnerable by HM Courts and Tribunals Service (McEwan 2013).

7.3 The judge has a responsibility to ensure the defendant’s active participation even where an intermediary has been appointed (para 97, [R v Dixon](#) [2013] Crim 465).

7.4 Adapting the trial process may be sufficient where the trial judge conducts proceedings ‘with appropriate and necessary caution’: an appeal was dismissed where an intermediary application had been granted for an adult defendant with complex needs, but where no intermediary could be found. Trials should not be stayed where an asserted unfairness can be met by modifying the trial process (para 21, [R v Cox](#) [2012] EWCA Crim 549).

7.5 All intermediaries who assist defendants are ‘non-registered’ even though an individual carrying out this role for a defendant may be a Registered Intermediary in respect of witnesses.⁸ Registration and appointment through the Witness Intermediary Scheme involves Ministry of Justice regulation, CRB checks, accreditation training, support and standards for matching skills to needs. There are no equivalents for defendant intermediaries. Registered Intermediary accreditation training does not cover work with defendants.

7.6 The intermediary should assess the defendant’s communication abilities (as Registered Intermediaries do) in order to advise on the most effective means of communication, tailored to the individual’s needs and vocabulary required by the case.⁹ More than one assessment interview may be appropriate. A defendant intermediary may request that a defence team member be present during assessment and other contacts.¹⁰

⁸ Leeds Crown Court expects requests to be raised at the PCMH and if an intermediary is to be used the court will attempt to find an appropriate one, following the HMCTS guidance (unreported judgment of Recorder of Leeds, in [R v GP and 4 Others](#) (2012) T20120409 ‘Guidance for future applications’).

⁹ Matters of capacity to consent, competence and credibility are all beyond the intermediary remit.

¹⁰ Registered Intermediaries are not permitted to be alone with witnesses (section 1.23, [RI Procedural Guidance Manual](#) Ministry of Justice 2012). However, the intermediary is effectively alone with a defendant seated in the dock.

- 7.7 **If communication problems relate only to expressive language**, not to understanding, intermediary assistance may only be required if the defendant is going to give evidence.
- 7.8 **Use of an intermediary should be considered as early as possible** Time is needed to identify someone with appropriate skills (preferably one near to the trial court), obtain authority and arrange for assessment. Even if funding is agreed, most intermediaries are unable to assist if the request is delayed until shortly before the trial.¹¹
- 7.9 **Courts may appoint an intermediary for the defendant's evidence or for the whole trial**¹² '[T]here was a right, which might in certain circumstances amount to a duty, to appoint a registered intermediary to assist the defendant to follow the proceedings and give evidence if without assistance he would not be able to have a fair trial' ([R \(AS\) v Great Yarmouth Youth Court](#) [2011] EWHC 2059 (Admin) para 6, involving a child with ADHD). See also *R v SH* [2003] EWCA Crim 1208; [R \(D\) v Camberwell Green Youth Court](#), [2005] UKHL 4; [R \(TP\) v West London Youth Court](#) [2005] EWHC 2583 (Admin). However, in [R \(OP\) v Secretary of State for Justice](#) [2014] EWHC 1944 (Admin) the Divisional Court was '*not persuaded that it is essential a registered intermediary be available to all defendants for the duration of their trials*'; it ordered the Ministry of Justice to provide a Registered Intermediary for the purpose of giving evidence only.
- 7.10 **Applications are dealt with on a case-by-case basis** and are subject to judicial approval of the individual's suitability to act as intermediary. The application should be based on the intermediary's assessment report (if any) and other relevant information about the defendant's communication abilities and needs.
- 7.11 **Contested application for an intermediary** An intermediary who has already assessed the witness should be authorised to attend a contested application.
- 7.12 **Funding arrangements differ for pre-trial and trial** The Legal Services Commission is expected to bear the cost of an intermediary's initial conference with the client and solicitors.¹³ Prior authority can be sought for intermediary fees¹⁴ for initial work with the client [ie the assessment] and pre-trial conferences, but not for court attendance. Funding for the intermediary's attendance at trial will be paid for by HM Courts and Tribunals Service. Costs¹⁵ for the intermediary to attend court are submitted as for others such as interpreters (unpublished agreement between the Legal Services Commission, Ministry of Justice and HM Courts and Tribunals Service regarding the funding of an intermediary in publicly funded criminal matters: see Cooper and Wurtzel 2013). Intermediaries are likely to ask for written confirmation that their estimate is accepted before taking the case.

¹¹ In the Crown Court, a request for authorisation of an intermediary should be raised no later than the Plea and Case Management Hearing ([R v GP and 4 Others](#), Leeds Crown Court 20 July 2012). In another case due to last 12 weeks, the judge authorised appointment of two defendant intermediaries who took turns to attend the trial. Both were present for cross-examination.

¹² Section 104, [Coroners and Justice Act 2009](#) confines intermediary appointment to the defendant's oral evidence at trial (see section 6.8 above).

¹³ While this is the policy, in some instances intermediaries report pre-trial work being paid for by HMCTS.

¹⁴ The Legal Services Commission authorises costs at the Ministry of Justice guideline rates of £36.00 per hour for preparation/attendance time and £16.00 per hour travel time. Mileage can be claimed on assessment at 45p per mile and VAT can be claimed if applicable.

¹⁵ At the same rates as in fn 13.

- 7.13 ***There is no standard way of finding a defendant intermediary*** The court has responsibility, in liaison with the defence, to commission a non-registered intermediary (eg a speech and language therapist or psychologist) with experience relevant to the defendant's needs. Unpublished guidance to courts provides a 'non-exhaustive' list of organisations as a starting point in identifying a non-registered intermediary. The Prison Reform Trust's check of these organisations found that three might be able to assist but none did so routinely (p 16, [Talbot 2012](#)). The matching service for Registered Intermediaries run by the Ministry of Justice and the [National Crime Agency](#)¹⁶ cannot assist in obtaining a non-registered intermediary. The Internet identifies private organisations which provide defendant intermediaries.
- 7.14 ***The intermediary is not part of the defence team and must agree their role with the defence*** (Cooper and Wurtzel 2013). Are they needed at conferences and to provide a written report? What case information should they receive (eg the case summary and interview exhibits)? An intermediary who assists in explaining material to the defendant may need to see it in advance to prepare simplified explanations.
- 7.15 ***Confidentiality*** There is no direct authority on the point, but Cooper and Wurtzel (2013) suggest that 'under principles of the common law duty of confidentiality and data protection legislation, anything said to a defendant intermediary by the defendant or by a third party about the defendant should be deemed to be confidential and (without the express consent of the defendant or an overriding public interest) should not be disclosed outside the defence legal team. This must be so because in order for the intermediary to complete a thorough and accurate assessment of the defendant's communication needs, the information provider should be able to trust that what is disclosed (oftentimes highly sensitive personal information) will not be used elsewhere'.
- 7.16 ***Time with the intermediary before the trial starts*** A vulnerable defendant may be agitated on arrival and need time to calm down. **Good practice example:** following intermediary advice, the lawyer asked for the defendant to be produced from custody with enough time to allow him to settle. Effective communication then took place.
- 7.17 ***Unless there are safety concerns, the intermediary usually sits beside the defendant*** and accompanies him to the witness box if he gives evidence. Some signs of loss of concentration can only be observed at close quarters. **Poor practice example:** in a case with no safety concerns, the judge required the intermediary to sit in court, away from the defendant who was seated in the dock.
- 7.18 ***A ground rules discussion is essential*** to establish the role of the intermediary at trial (see section 4.3 above).
- 7.19 ***For examples of how intermediaries have been used, see [ANNEX A below](#).***

¹⁶ A Registered Intermediary can be requested for a vulnerable defence *witness* by emailing soc@nca.x.gsi.gov.uk.

8. QUESTIONING (see Toolkit 6, Planning to question a child or young person)

8.1 **Over-rigorous cross-examination of a child witness should be stopped** This includes a young defendant. No court user should be put in a position where they face hostility or ridicule ([Equal Treatment Bench Book](#) 2013).

8.2 **Ask young defendants to tell you if they do not understand something, but do not rely on them to say there is a problem** They may lack the ability to identify when they do not understand, and are likely to be reluctant to say they are having a problem. Be alert to non-verbal clues to miscommunication, eg puzzled looks, knitted eyebrows, downcast eyes and long pauses.

8.3 **The most significant factor in effective communication is the ability to tailor questions to the young defendant's needs and abilities** enabling him or her to understand the questions and give answers that (s)he believes to be correct (chapter 5, [Equal Treatment Bench Book](#) 2013). This requires considerable skill and is very different from conversation with young people in the family context. It involves advance preparation as well as the ability to respond flexibly *during* cross examination (an intermediary can assist with this). Taking account of the child's needs may mean further adaptation or even abandoning of pre-planned questions:

- speak slowly and allow the young person enough thinking time to give a full answer;
- ask short, simple questions, one idea at a time, following a logical, chronological order;
- use simple, common, concrete and unambiguous words (the literal meaning);
- repeat names, places and objects often;
- signpost the subject and explain when the subject is about to be changed;
- check directly on understanding, using simple words;
- avoid question types which carry a high risk of being misunderstood or producing unreliable answers, such as leading/ 'tag' questions which make a statement then add a short question inviting confirmation; other forms of assertion, including questions in the form of statements, which may not be understood as questions; and questions containing one or more negatives.

9. AFTER CONVICTION

9.1 **The court has a duty to give reasons for and explain in ordinary language** This includes the effect of the sentence; non-compliance with orders; the court's power to vary them; and failure to pay any fine (section 54(3), Legal Aid, Sentencing and Punishment of Offenders Act 2012).

9.2 **After conviction, magistrates are encouraged to talk directly to ('engage with') the young defendant** and their parents (p 2, [Youth Court Bench Book](#) 2013). However, many young people feel discouraged from speaking up and many lack the communication skills to do so. Without prior preparation and support, well-meaning attempts to engage them in court may heighten stress and leave them feeling even more alienated by procedures intended to draw them in and help prevent re-offending (Plotnikoff and Woolfson 2003).

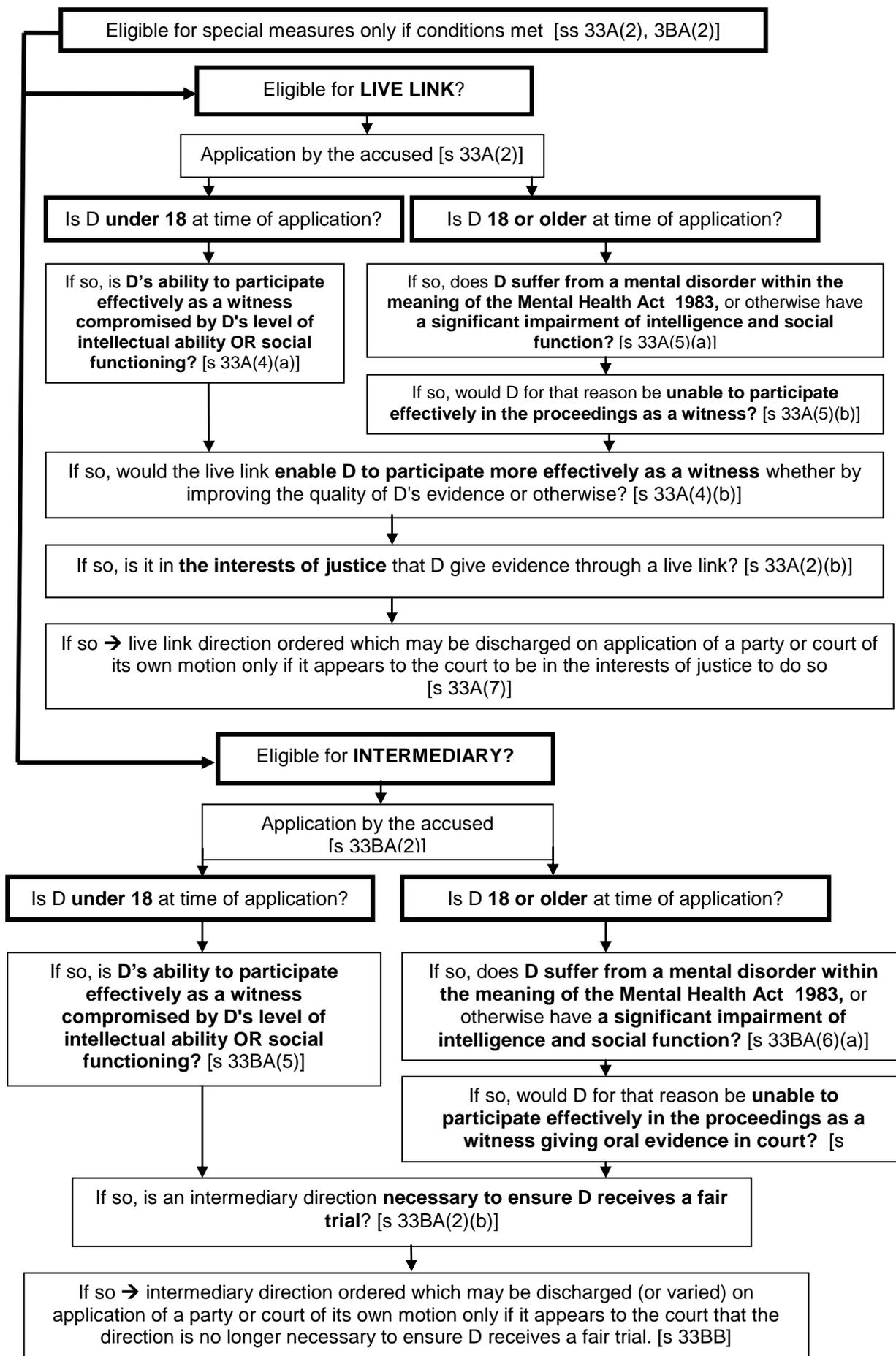
Advocates should explain this process to young defendants and the type of questions they may be asked, so that the young person can prepare to respond.

- 9.3 ***Young defendants' difficulties 'including lack of maturity, embarrassment or even nerves'*** should not tempt the chairman or other parties 'to fill silent gaps with further questions or remarks... questions should be in plain language and at a level the young defendant can understand' (p 2, [Youth Court Bench Book](#) 2013).
- 9.4 ***Youth offending teams, community panel members and those involved with restorative justice*** should be made aware of any difficulties in communicating with the young defendant.

10. RESOURCES

- 10.1 ***Mental health and learning disabilities in the criminal courts*** (2013) is an online/print resource with DVD material produced by the Prison Reform Trust and Rethink Mental Illness for magistrates, district judges and court staff (www.mhldc.org.uk).
- 10.2 ***A Youth Justice Court Pack*** for lawyers containing cases, policies etc. has been developed by Just for Kids Law: contact info@justforkidslaw.org.
- 10.3 ***Guidance for the youth justice workforce and the judiciary*** See film [Sentence Trouble](#) (Communication Trust); [Speech, language and communication difficulties: young people in trouble with the law](#) (NACRO 2011); and [A common sense approach to working with defendants and offenders with mental health problems](#) (London Criminal Justice Partnership and Department of Health 2010).
- 10.4 ***MIND Rights Guide 5: Mental Health and the Courts*** is aimed at users of mental health services, their relatives and friends, with includes explanations of court process and legal terminology like 'unfit to plead'.
- 10.5 ***Guidance for young defendants*** is found on the government website: [Young people: Going to court after being charged with a crime](#).
- 10.6 ***A film for young people with a learning disability or communication difficulty*** Getting Ready for Court ('[Raising Your Game](#)' project, Mencap). It shows how to prepare for court, who's who in the courtroom and what to do if you do not understand something.
- 10.7 ***A visual Easy Read Legal Aid Dictionary*** produced by the Legal Services Commission and Inspired Services, explaining key terms. For information about other Easy Read documents in the criminal justice system, see www.keyring.org/cjs-easyread.

Special Measures Directions for Vulnerable Defendants
showing amendments made by the Coroners & Justice Act 2009



ANNEX A EXAMPLES OF WAYS IN WHICH A DEFENDANT INTERMEDIARY MAY ASSIST

Before the trial or hearing, defendant intermediaries have:

- assisted in explaining charges; pleas (eg through a flow chart showing consequences of plea and conviction); contents of a breach report; and court procedures and functions;
- helped with the taking of instructions; drafting a defence statement; and informed discussions about whether the young defendant should testify;
- discussed their recommendations at pre-trial and case management hearings;
- arranged a court familiarisation visit with the lawyer, who asked the defendant non-evidential questions. This contributed to assessment of his communication abilities;
- assisted in memory-refreshing, helping the defendant review the complainant's DVD evidence-in-chief and witness statements to ensure they were understood;
- ensured that evidential photos were sufficiently large, with sharp contrast, to support questioning of a defendant with a visual impairment;
- facilitated communication at expert assessments;
- recommended use of the live link and helped the defendant prepare for it;
- worked with the dock officer and others to manage a young defendant with autism, reducing his outbursts during transportation and in custody. He was enabled to attend calmly throughout the trial and to give his own evidence clearly;
- prepared simple guidance and resources to enable a young defendant remain calm enough to attend and respond to questions during meetings with the legal team;
- helped advocates (separately) to prepare their questions.

At trial, defendant intermediaries have:

- facilitated questioning of the defendant and intervened where non-literal language was used during the trial (eg '*caught red-handed*'; '*put into the long grass*');;
- developed picture symbols to support counsel's explanation of 'joint enterprise' and for use, with figurines and signing, to facilitate questioning of the defendant;
- provided and updated a visual timetable for proceedings at trial, enabling the defendant to prepare for each stage;
- read from the defendant's interview transcript. The officer read the questions. The intermediary read the defendant's answers, prefacing each response by saying to him '*You said...*';
- gave simple explanations/ wrote brief notes for the defendant, and kept track of his questions so he could concentrate on what was happening; and noted when he had difficulty understanding, so that legal representatives could assist him later;
- alerted the legal representative (by passing a note via the usher) to issues the defendant wished to raise urgently during cross-examination of witnesses;
- helped a defendant to find the relevant place (eg in his defence statement, phone records and witness statements) and requested that he be given extra time to locate individual photographs in the evidence book and to process questions about them;

- instructed the defendant in use of cue cards (time to listen/ look; I can't hear; I don't understand; I need a break);
- intervened to ask for a break (sometimes brief) at agreed intervals or as needed, sometimes signalled by use of a red card or, if needed 'soon', by a yellow card;
- in jury trials, recommended that a defendant with impaired vision be seated in the back row in court, near the jury box, while jurors were empanelled, and explained proceedings to the defendant, eg what was meant when the defendant was asked if he 'objected' to members of the jury.

After the trial, defendant intermediaries have:

- helped advocates explain the sentence; sex offender orders; and conditions of community/ suspended sentences (in one case, the judge came off the bench to assist);
- facilitated interviews with probation officers and youth offending teams eg in addressing the defendant's attitude to the offence and the victim and ensuring that the defendant understood the implications of sentence recommendations (the advocate has a role in ensuring the intermediary is engaged in this process).

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