



**Date:** 03.06.19

**Title:** IfJ's response to a Crown Prosecution Service consultation which seeks views on how the criminal justice system deals with those suffering from mental health issues – focussing on revised guidance which is designed to assist decision making throughout the life of a criminal case, from the initial decision to prosecute, through fitness to plead to sentencing.

*Intermediaries for Justice* is an organisation concerned with promoting equal access to justice for vulnerable people.

Thank you for inviting IfJ to comment on the draft Legal Guidance for mental health conditions and disorders.

In response to your request we wish to respond to question 5:

*Do you have any further comments on the revised mental health conditions and disorders legal guidance?*

Our response concerns the provision of intermediaries and how this relates to the defendant's ability to effectively participate in their trial. Whilst IfJ recognises that the guidance is intended to reflect the current arrangements within the system we wish to point out the ways in which the accused is disadvantaged through the inequality of provision within that system.

The guidance states:

*Legislation providing the use of an intermediary by the accused is not yet in force (section 33BA YCJEA 1999 inserted by section 104 of the Coroners and Justice Act 2009).*

**In practice this means that an individual with communication needs can benefit from the assistance of an intermediary to enable their understanding when giving evidence as a witness through statutory provision (the Witness Intermediary Scheme). However, the same individual on trial, as a suspect or defendant, would be unlikely to have the assistance necessary to understand their trial and therefore effectively participate as the scheme does not extend to defendants.**

We refer you to the Intermediaries for Justice statement on supporting defendants for evidence only. This draws attention to the Lord Chief Justice's recommendation on appointing intermediaries for defendants:

*'Terms of appointment are for the court and there is no illogicality in restricting the appointment to the defendant's evidence (R v R [2015] EWCA Crim 1870), when the 'most pressing need' arises (OP v Secretary of State for Justice [2014] EWHC 1944*

*(Admin)). ...Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare' (para 3F.13).'*

The Criminal Practice directions 2015. CPD 3.D2 acknowledges that *both witness and defendant* may require assistance;

*'The court is required to take every reasonable step to facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant. This included enabling a witness or defendant to comprehend the proceedings and engage fully with his or her defence and the pre-trial, and trial process should be adapted as necessary to meet those needs.'*

**IfJ is concerned about the way in which courts are interpreting the direction as a result of (CPD 1 General matters 3F.12 and 3F.13):**

*'There is also merit in an application to appoint a support worker or other companion who can provide assistance when it has not been necessary to appoint an intermediary, as a defendant may still benefit from some additional support to understand proceedings'*

**Support workers are not trained to assess communication. They do not have the forum to advise the court on how to adapt proceedings to ensure that a defendant can effectively participate in the same way that intermediaries do. They may be able to give emotional support but that is a different function to that of an Intermediary whose job it is to promote best communication. To do this they will do a comprehensive assessment of the specific communication needs of the defendant arising from their mental health needs and from this make recommendations to the court to ensure effective participation.**

The guidance states:

*'There are a very wide range of mental health conditions and developmental disorders, and each will impact on individuals in different ways.'*

In addition to the highlighting the wide range of conditions/disorders we would also draw attention to the spectrum of complexity and severity within them. Many individuals will also have more than one condition/disorder. The benefit of an intermediary assessment is that it can identify the specific communication needs arising from their individual presentation.

We are also concerned about the lack of specific guidance for vulnerable defendants with mental illness in the youth courts.

We acknowledge the reference to *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) that there will not be a presumption to appoint an intermediary for vulnerable defendants. We would draw your attention to the MOJ's 2016 Taylor Review into the youth justice system. Having acknowledged how youth courts are adapted for children it comments:

*'Despite these adaptations and the best efforts of magistrates and judges, it is clear that the courts are simply not set up to ensure the full participation of children in criminal proceedings.'* CH4 para 91.

This is for children in general.

*The Advocates Gateway Toolkit 8 Effective Participation for Young Defendants* (referred to in the guidance) highlights the even greater challenges for young defendants with mental health needs:

*'Particular care is needed where a young person has mental health problems, learning or other disabilities or speech and language difficulties.'*

As things currently stand we believe the proposed guidance is unlikely to support young defendants to effectively participate in the youth court process with inadequate provision to assess and adapt to the unique communication needs arising in this group. For both adult and child defendants lack of quality provision may impact on their access to justice and their right to a fair trial under Article 6 of the European Convention on Human Rights.

The draft guidance mentions *The Advocate's Gateway which provides information on the effective participation of young defendants*.

The guidance may also want to draw attention to Toolkit 12: General Principles when Questioning Witnesses and Defendant's with Mental Disorder (which is currently under review).