

Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model.

Abstract

Since 2004, witness intermediaries have been utilised across the justice system in England and Wales. Two witness intermediary schemes based on the English model have also been introduced in Northern Ireland (2013), and more recently, in New South Wales, Australia (2016). The purpose of the intermediary in these jurisdictions is to facilitate the questioning of vulnerable witnesses, but there are clear differences in the application of the role. This paper presents the first comparative review of the three related intermediary models, and highlights the pressing need for further research into the efficacy and development of the role in practice.

Keywords: vulnerable witness, intermediary, ground rules hearings, cross-examination, evidence.

Introduction

The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries.¹

In 2010 in a landmark Court of Appeal (England and Wales) judgment about the questioning of vulnerable witnesses, the Lord Chief Justice of England and Wales, highlighted the role of the witness intermediary. In England and Wales the intermediary was first used in the criminal justice system in 2004. Witness intermediaries are now utilised across the justice system in England and Wales. Witness intermediary schemes based on the English model have also been introduced in Northern Ireland since 2013 and, more recently, in New South Wales, Australia since 2016. Across all three jurisdictions, the purpose of the witness intermediary is to facilitate communication with, specifically the questioning of, vulnerable people. Despite having a shared purpose and origin, there are marked, yet unexplored, differences in the ways that the intermediary schemes operate. This article analyses the origins of the role, compares the intermediary roles in these three jurisdictions, and considers the impact of research on the evolution and future development of the role.

‘Interlocutor’ to ‘intermediary’: The origins of the intermediary role in England and Wales, Northern Ireland and NSW, Australia

In 1989, the *Pigot Report*² (*Pigot*) envisaged exceptional cases where the court could order ‘that questions advocates wish to put to a child should be relayed through a person approved by the court who enjoys the child’s confidence’.³ *Pigot* referred to this person as the ‘interlocutor’ and recommended,

2.32...the judge's discretion...should extend where necessary to allowing the relaying of questions from counsel through the paediatrician, child psychiatrist, social worker or person who enjoys the child's confidence. In these circumstances nobody except for the trusted party would be visible to the child, although everyone with an interest would be able to communicate, indirectly, though the interlocutor.

2.33 We recognise that this would be a substantial change and we realise that there will be unease at the prospect of interposing a third party between advocate and witness. Clearly some of the advocate's forensic skills, timing, intonation and the rest would be lost, and it is of course possible that a child might be confused by being subjected to testing questioning from someone regarded as a friend. ⁴

The *Pigot* 'interlocutor' role for child witnesses was not implemented. However, something similar was considered in *Speaking up for Justice*.⁵ The role was referred to as a 'communicator or intermediary'⁶ and was being contemplated to assist vulnerable adults as well as children:

...while measures are in place to assist child witnesses, many adult victims and witnesses find the criminal justice system daunting and stressful, particularly those who are vulnerable because of personal circumstances...Another area of concern relates to people with learning disabilities.⁷

Speaking up for Justice noted 'The Western Australia Experience' where legislation had already given the court discretion to appoint a communicator for a child under 16 to explain questions to the child and explain the evidence given by the child, though the role was still at that time 'unexplored'.⁸ The report acknowledged the new role might be similar to that of an interpreter and might 'involve the intermediary/communicator putting supplementary questions to the witness'.⁹ *Speaking up for Justice* noted the danger that a communicator/intermediary might distort evidence or give their 'interpretation of the witnesses' evidence'.¹⁰ *Speaking up for Justice* recommended legislation for a 'communicator or intermediary where this would assist the witness to give their best evidence at both any pre-trial hearing and the trial itself' and the creation of a 'scheme for the accreditation of communication/intermediary'.¹¹

Speaking up for Justice gave rise to 'special measures' for vulnerable witnesses in the Youth Justice and Criminal Evidence Act 1999 and, in Northern Ireland, the Criminal Evidence (Northern Ireland) Order 1999 (CE(NI)O 1999). Special measures include the 'intermediary' role in section 29 of the YJCEA 1999 and article 17 of the CI(NI)O 1999. These two jurisdictions have identical ranges of 'special measures' for children and vulnerable adult witnesses.¹² In 2015 the Australian state of New South Wales (NSW) introduced legislation which included, for the first time in that jurisdiction, a provision for witness intermediaries for child witnesses who are complainants in sexual offences cases. Section 88 of the Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 sets

out the role of the children's champion who 'may also be called a witness intermediary'.

The function of the role as described in the legislation in these three jurisdictions is almost identical. In broad terms, the purpose of the role is to impartially, assist the police and advocates at court to question vulnerable witnesses. In Northern Ireland, the role additionally applies to vulnerable suspects and defendants.

The intermediary in England and Wales

For England and Wales section 29 (2) of the Youth Justice and Criminal Evidence Act 1999 sets out the function of the intermediary:

(2) The function of an intermediary is to communicate—

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

(b) to any person asking such questions, the answers given by the witness in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

Section 29 (3) of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) also sets out how an 'examination of the witness' using an intermediary should operate transparently:

(3) Any examination of the witness in pursuance of subsection (1)

must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which—

- (a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary, and
- (b) (except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness.

Statutory criteria in the YJCEA 1999 set out which 'vulnerable' witnesses are eligible on account of their age or incapacity.¹³ In 2002, the Office for Criminal Justice Reform (OCJR), a department of the Home Office, began preparing for section 29 to be brought into force.¹⁴ In line with the recommendation in *Speaking up for Justice* for accreditation of intermediaries, the OCJR took steps to establish for the first time a scheme of 'Registered Intermediaries'. Invitations to tender went out to training providers and a contract awarded to a law school to design and deliver intermediary training for this new and untested role in England and Wales.¹⁵ The course design and content gave rise to a novel and unique role.

The wording of section 29 YJCEA 1999 allows for communication through an intermediary, which could in theory engage the intermediary in explaining the questions and the answers as would happen with a foreign language interpreter. By the time section 29 was being implemented, other intermediary or intermediary-like roles were operating in other jurisdictions. For example intermediaries had been operating in South

Africa since 1993 in a role which involved them accompanying the child witness in the live link room during the hearing and relaying questions and answers.¹⁶ Israel had a system of child examiners or “youth interrogators” who collected evidence from children for use in court and Norway and Sweden also schemes for taking evidence of children in advance of the trial by an examining magistrate.¹⁷ Intermediaries for vulnerable witnesses had been considered in New Zealand in 1999 but rejected based on fears of practitioners that the process of facilitating testimony did not stand up to scientific scrutiny.¹⁸

From the outset, Registered Intermediaries in England and Wales were trained to facilitate communication by supporting professionals to communicate with the witness rather than acting as the conduit for questions and answers. Intermediaries were taught to assess the witness’s communication needs and abilities, advise the questioners (police and advocates) and only intervene if miscommunication occurred.¹⁹ Registered intermediaries thus became educators and supporters of questioners. Registered Intermediaries were also taught that, as they are ‘part of the broader consideration of special measures’ for a witness,²⁰ they should make recommendations about special measures and other adjustments which could enhance communication with the vulnerable witness

The YJCEA 1999 ‘special measures’ for eligible²¹ vulnerable witnesses are: [screening](#) the witness from the accused (section 23), evidence given by live link (section 24, this may also include a supporter with the witness in

the live link room), evidence given in private (section 25), removal of wigs and gowns while the witness gives evidence (section 26), video recorded evidence in chief (section 27), video recorded cross-examination and re-examination (section 28), evidence given through an intermediary (section 29) and the use of aids to communications (section 30).²² A judge may also order any non-statutory 'extra' special measures, for example allocating a female judge and counsel to a trial with a witness who refused to speak to a man about the alleged offence,²³ if it is deemed fair.

The intermediary's role²⁴ is to assist the police and the court to communicate with the witness so as to obtain the best quality evidence from the vulnerable witness. The advice the intermediary gives is underpinned by the intermediary's assessment of the witness's communication needs; an assessment that is performed on an individual, case-by-case basis. It is usually conducted prior to the witness being interviewed by the police although the intermediary referral can take place later in the proceedings for example after interview but before the witness is questioned at court. Based upon the findings of the communication assessment, an intermediary will advise police officers in the case and the advocates at court how best to communicate so that the questions they ask and so that the answers in reply are understood.

Based on their assessment of the witness's communication needs and abilities, witness intermediaries are able to make witness-specific recommendations about: how police officers, judges, advocates and court staff can communicate

effectively with the witness prior to and during questioning; how best to communicate with the witness when preparing the witness for the various stages of the criminal justice process; how to monitor and manage anxiety associated with giving evidence where it impacts upon communication; and how appropriately to use communication aids (sometimes referred to as 'props') and/or devices to support communication.

The first Registered Intermediaries in England and Wales

The first Registered Intermediaries in England and Wales were trained in 2003 and began accepting referrals in 2004. Intermediaries come from a wide variety of professional backgrounds including speech and language therapy, psychology and social work.²⁵ Each intermediary brings to the role specific expertise and skills in facilitating communication with children and/or adults with communication impairments. The training²⁶ prepares them for a role which includes assessing the individual communication needs and abilities of the witness, advising the police on how best to communicate with the witness at interview, writing a report for the lawyers and judge about how best to adapt their communication at court, and taking part in a pre-trial case management (or 'ground rules') hearing. Rules now require that where there is an intermediary in the case, they should be at the ground rules hearing²⁷ to discuss with the advocates and the trial judge the adjustments to questioning which will enable the witness to give their best evidence. The judge makes the necessary directions to set the parameters for fair treatment of the witness.²⁸ At the ground rules hearing intermediaries also discuss and plan with the judge and the advocates how they, the intermediary, will

intervene during cross-examination if they believe a communication issue has arisen.²⁹

In 2004 in England and Wales the intermediary scheme for witnesses initially covered six areas. In England and Wales an evaluation report³⁰ tracked 102 cases. It recommended that the intermediary scheme should be rolled out nationally based on findings which were largely positive. 'Almost all those who encountered the work of intermediaries in pathfinder cases expressed a positive opinion of their experience and provided specific examples of their contributions.'³¹ Carers felt that intermediaries 'not only facilitated communication but also helped witnesses cope with the stress of giving evidence.'³² In 2007, the scheme was rolled out to cover all 43 police and prosecution areas of England and Wales.

The intermediary was one of the last special measures in the YJCEA 1999 to be implemented and has been described as 'the most innovative of the special measures.'³³

Most of what an intermediary does in a case has evolved through their training and the development of good practice. Only a small part is found in statute. The intermediaries as a body may have done more than anyone to affect a culture change in the way the courts deal with vulnerable witnesses'.³⁴

In England and Wales demand for intermediaries has grown. By 2016 there were approximately 200 Registered Intermediaries on the Ministry of Justice register. Between 1/4/2016 and 30/9/2016 the Witness Intermediary Team (which manages the requests from police and members of the Crown Prosecution Service for Registered Intermediaries) was receiving on average 530 requests per month. Most requests were for prosecution witnesses and less than a handful a year have been for defence witnesses.³⁵ Approximately two thirds of requests have been for a witness who is a complainant in sexual offences cases.³⁶

Northern Ireland: Intermediaries for vulnerable witnesses and vulnerable suspects

The Criminal Evidence (Northern Ireland) Order 1999 has the same range of special measures found in the YJCEA 1999. In May 2013, the Department of Justice, Northern Ireland (DOJ NI), launched its intermediary pilot schemes – one scheme for vulnerable witnesses and one for vulnerable accused people. In identical words to those of section 29 YJCEA 1999, Article 17 of the Criminal Evidence (Northern Ireland) Order 1999, describes the function of the witness intermediary as follows:

(2) The function of an intermediary is to communicate—

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

(b) to any person asking such questions, the answers given by the witness in reply to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

Article 4 of the Criminal Evidence (Northern Ireland) Order 1999 sets out those 'vulnerable witnesses' who are 'eligible for assistance on the grounds of age or incapacity'; it mirrors the legislation in England and Wales. The major difference of the Northern Irish scheme is that it covers the vulnerable accused. In England and Wales, because the legislation behind the scheme excludes the accused, an application for an intermediary for a vulnerable defendant must be dealt with under common law applying the court's inherent jurisdiction to ensure a fair trial. In England and Wales the defendant has no access to the Registered Intermediary scheme and anyone appointed is operating outside the MOJ scheme.³⁷

A report on the second phase of the Northern Ireland pilot scheme, concluded that the intermediary role, '...continues to be essential in assisting vulnerable persons with significant communication problems during their engagement with the criminal justice process and is very well-regarded by all those who come into contact with it.'³⁸ It was then further recommended that the scheme should be made available beyond the

Crown Courts (which deal with the more serious criminal cases) to the lower criminal courts.³⁹

New South Wales, Australia: A pilot scheme for child complainants in sexual offences cases

The English intermediary model was recommended for NSW by a senior member of the NSW Office of the Director of Public Prosecutions who had conducted detailed research into 'models of Intermediaries for child victim and witnesses in the criminal justice system in England, Wales, Ireland, Austria and Norway'.⁴⁰ This research was followed by a fact-finding visit to England and Wales in autumn 2014 by the Attorney General of New South Wales⁴¹ to learn more about the treatment of vulnerable witnesses in England and Wales.⁴² That same year the NSW Parliament published the report *Every Sentence Tells a Story: Report on Sentencing of Child Sexual Assault Offenders*.⁴³ Recommendations included extending the use of pre-recorded cross-examination and 'a Child Sexual Assault Offences Taskforce to investigate and report to the Government on a preferred model for a Child Sexual Assault Offences Specialist Court in NSW.'⁴⁴

In 2015, the Child Sexual Assault Taskforce's recommended a pilot scheme for the implementation of children's champions (or witness intermediaries) and the use of pre-recorded cross-examination for child victims in sexual assault proceedings.⁴⁵ The necessary statutory provisions were enacted in

November 2015 in the Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015.

On the 4th April 2016, a three-year pilot began for children's champions (also known as witness intermediaries) and for pre-recording the cross-examination of child complainants.⁴⁶ Section 88 of the Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 sets out the role of the intermediary:

(1) A person appointed as a children's champion (who may also be called a witness intermediary) for a witness is to communicate:

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

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

The wording is virtually identical to that used in the legislation of England and Wales and Northern Ireland, except 'in reply to' has become 'in replying to'. The NSW Commissioner of Victims Rights summarised the aims and scope of the pilot in 2016 in the NSW Department of Justice *Children's Champion (witness intermediary) Procedural Guidance Manual*:

The NSW Government has made a commitment to pilot a specialist child sexual assault evidence program to include the introduction of children's champions to support child witnesses through the trial process and expand the use of pre-recorded evidence in criminal

court proceedings. These reforms aim to reduce trauma experienced by child witnesses in the criminal justice process while preserving the rights of an accused to a fair trial. The initiative will initially be piloted in Sydney and Newcastle District Courts.⁴⁷

The witness intermediary procedure in the three jurisdictions

The legislation describing the intermediary role in all the three jurisdictions is almost identical. The training delivered in England and Wales, Northern Ireland, and New South Wales has been led by the same course designer and reflects the same model for the operation of the role.⁴⁸ The procedure described below is a reflection of the guidance in all three jurisdictions provided to intermediaries in the form of a jurisdiction specific Procedural Guidance Manual.⁴⁹

The Ministry of Justice (England and Wales) and the Departments of Justice (Northern Ireland and New South Wales) have referral services which match intermediaries with witnesses according to the intermediary's skill-set and geographical availability. Upon accepting an appointment, the intermediary gathers basic information about the person and the nature of the allegation. If appropriate consent has been obtained they will also gather, from third parties, further information about the person's communication needs and abilities. Information gathering may include speaking with parents, carers, teachers etc., and/or reading relevant school or psychology/psychiatric reports. During initial contact, the intermediary will arrange provisional dates for assessment of the vulnerable person and for the police interview. Planning an assessment of

a vulnerable person includes careful discussion with the police about when and where the intermediary assessment should take place, who should be present and what areas of communication should be explored.

The intermediary should never be alone with the person they are assessing. This is to avoid any perception that the witness has been coached by the intermediary and to avoid the intermediary becoming a witness in the case, for example, if a child witness were to make a disclosure during the assessment. It is important that, where possible, the third-party present with the intermediary and the witness is the interviewing officer as this enables the interviewer to observe the assessment and thereby gain a firsthand understanding of the person's communication needs and abilities.

Intermediary assessments

There is currently no formal or standard protocol for the structure of an intermediary communication assessment; the assessment framework described below is based on the second author's direct practice experience, discussions with and observations of the assessment practice of other intermediaries. Intermediary assessments generally last approximately one hour but the range is generally 40 minutes to 120 minutes. Some people with very complex needs may require more than one assessment/meeting prior to giving evidence. The assessment must

not involve any discussion about the case or the evidence; rather, the assessment includes a range of tasks that are designed to quickly assess communication as relevant to the process of giving evidence. The assessment framework may include exploration of the person's:

- (i) receptive communication (ability to understand language and question forms);
- (ii) expressive language (ability to use language to inform, describe and clarify);
- (iii) ability to refute inaccurate suggestions;
- (iv) ability to shift perspective (comprehension of other people's thoughts and beliefs and feelings);
- (v) ability to concentrate and attend to tasks, and to manage his/her own arousal and anxiety;
- (vi) use of external aids to support communication, such as drawing and 'cue cards' - this enables a person to effectively learn and practice the communication 'rules' associated with giving evidence such as 'Say if you don't know', 'Say if someone gets it wrong' and 'No guessing'.

The findings from assessment inform the intermediary's subsequent recommendations to the police and / or the court. During the police interview, the intermediary sits beside the witness and facilitates

communication, listening carefully to the questions asked by the police interviewer and monitoring whether questions are appropriate to the communication needs and abilities of the person.

In the event of a breakdown in communication, or if there is an apparent risk of such occurring (for example a question contains vocabulary that is not likely to be understood by the witness), the intermediary should intervene in the manner agreed in prior planning with the interviewer. The intermediary should call attention to the issue and suggest a way to resolve it; the purpose of this is to enable the issue to be resolved quickly before a breakdown in communication occurs or escalates. The intermediary's role is to also monitor and facilitate management of the person's anxiety and arousal levels to ensure that they can communicate effectively.⁵⁰ The intermediary also provides and facilitates the use of communication aids (e.g., drawing, body maps and cue cards), if agreed during the planning meeting.

If the matter proceeds to trial, the intermediary produces a report for the court. The court report gives the full details of the intermediary's communication assessment and the findings, including any communication matters observed at interview. Recommendations are made for 'ground rules', and for the use of other 'special measures' to be combined with the use of the intermediary.

The intermediary report includes a summary table of recommendations for trial evidence/cross examination. Recommendations cover a wide range of areas, not just the structure and format of questions, and may detail how and when communication aids should be used (if at all), how questions should be paced and what tone should be used, as well as handling of the person's confusion or distress should it arise. Additionally, if necessary there will be recommendations about managing the vulnerable person's emotions including the frequency of breaks and the use of calming play materials. Although not appropriate for all vulnerable people, very traumatised children who have been witness to a murder or extreme violence or have suffered severe abuse, have benefitted from the use of 'tents' and 'dens' in order to feel safe and contained while giving evidence. Tents and dens were first introduced for child witnesses in England and Wales by a Registered Intermediary.⁵¹

The need for an intermediary is sometimes only identified after an investigative interview has taken place. In these instances, the intermediary contacts the referrer in order to conduct a communication assessment. The format of the assessment is the same as described above.

Prior to a vulnerable person giving evidence in court, the intermediary will arrange for the witness to have a pre-trial court visit. The intermediary role at this stage is to work collaboratively with the court staff and witness supporters to facilitate communication during the visit, ensuring that information about going to court is explained in ways that can be understood. The pre-trial visit allows witnesses become familiar with the space where they will be giving evidence, and when possible, to 'practice' communication (about neutral topics) via video-link or inside a courtroom.

The intermediary also facilitates the process of witness memory refreshing. Here, the intermediary recommends how the person's communication needs should be met, and may also be actively involved in emotional state management, and in helping the person to attend to their previously recorded video interview or statement. For some, refreshing their testimony can be a difficult experience, and requires careful management and facilitation.

Prior to the start of the trial, the intermediary, advocates and judge should have a scheduled discussion about the person's communication needs as outlined in the report. This is known as a 'ground rules hearing' and it allows the intermediary to highlight key recommendations about communication needs (including the structure of questions, frequency of breaks, and use of communication aids) and for agreement to be made as

to how the intermediary should intervene in cross-examination if a breakdown in communication occurs or there is a risk of one. At this stage, the judge makes directions for the proper questioning and treatment of the vulnerable person. Directions from the judge might include that the intermediary reviews the advocates' cross-examination questions prior to the vulnerable person giving evidence at court. This practice enables questions to be prepared and framed according to the communication needs and abilities of the person, and minimises the extent to which the intermediary is likely to need to intervene during cross-examination.

During cross-examination, the intermediary role is to be seated beside the vulnerable person, to assist with their emotional state management when needed, and to carefully monitor the structure and phrasing of questions. In addition, the intermediary may be required to relay the answers for instance is a witness was only able to write their answers rather than speak them. The role includes facilitating the use of communication aids (if necessary), monitoring the witness's concentration and anxiety, providing recommendations about the duration and frequency of breaks. The intermediary should intervene and call judge's attention to a communication difficulty should it arise.

Comparing three intermediary schemes in three jurisdictions

Clearly the intermediary schemes in England and Wales, Northern Ireland and NSW, Australia are at three different stages in their development, have their own eligibility criteria, and cover different geographical areas with populations of different sizes. They represent three versions of a new role in the criminal justice system. The usage statistics are therefore not directly comparable. Nevertheless, the figures give a broad idea of the volume and type of work carried out under the schemes.

Since August 2009, 15,274 witnesses⁵² have been seen and/or assisted in some way by an intermediary in England and Wales. Between 1 April 2015 and 31 March 2016⁵³ there were a total of 5772 requests for Ministry of Justice Registered Intermediaries of which 3994 (69%) were for children.⁵⁴ Looking at the same period for Northern Ireland between the total number of requests was 428 of which 301 (70%) were for children.⁵⁵ For Northern Ireland the total referrals include vulnerable suspects and defendants whereas in England and Wales the figures are for witnesses only. In New South Wales, from the commencement of the pilot scheme, the Department of Justice has received 751 intermediary referrals in just under fourteen months (4 April 2016 to 31 May 2017).⁵⁶ The legislation makes intermediaries in NSW available for children only.⁵⁷

Although the function of the role is described in an almost identical fashion in the respective statutes and the procedural guidance is very similar, there are some significant differences, notably the eligibility criteria, the availability of pre-recording of cross-examination, the guidance for

those interviewing vulnerable witnesses and the use of ground rules hearings.

Eligibility

In England and Wales, Section 16 of the Youth Justice and Criminal Evidence Act 1999 recognises that certain witnesses are 'vulnerable' and makes them 'eligible for assistance on the grounds of age or incapacity'.⁵⁸ Witnesses under 18 are eligible; these may be prosecution or defence witnesses as no distinction is made. Only the accused is excluded.⁵⁹ A person with an incapacity in this context is defined as someone suffering 'from mental disorder within the meaning of the Mental Health Act 1983' or have a 'significant impairment of intelligence and social functioning' or have 'a physical disability or is suffering from a physical disorder' which is likely to diminish the quality of their evidence.

In Northern Ireland Article 4 of the Criminal Evidence (Northern Ireland) Order 1999 sets out those 'vulnerable witnesses' who are 'eligible for assistance on the grounds of age or incapacity'⁶⁰. These 'vulnerable' witnesses must, at the time of the hearing, be either under 18 or suffering 'from mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986' or have a 'significant impairment of intelligence and social functioning' or have 'a physical disability or is suffering from a physical disorder' which is likely to diminish the quality of their evidence.

The criteria for witness eligibility mirrors that seen in the equivalent legislation (YJCEA 1999) in England and Wales. The CE(NI)O 1999 goes

much further in that vulnerable suspects at interview and vulnerable defendants who give evidence at trial are also eligible for the assistance of an intermediary. Eligibility of the accused is set out in Article 21BA of the CE(NI)O 1999.⁶¹ In practice, Registered Intermediaries may be appointed for vulnerable suspects at the police station and vulnerable defendants at court if they elect to give evidence at trial.⁶²

However, in Northern Ireland the eligibility tests for witnesses and the accused are not the same as each other. In Article 4 for the vulnerable witness eligibility arises where it avoids diminishing the 'quality of evidence', but in Article 21B for the vulnerable accused eligibility arises so as to avoid the accused's 'ability to participate effectively in the proceedings as a witness' being compromised.

In NSW section 89(3) Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 provides that:

'the Court: (a) must (except as provided by subclause (4)) appoint a children's champion for a witness who is less than 16 years of age, and (b) may, on its own motion or the application of a party to the proceedings, appoint a children's champion for a witness who is 16 or more years of age if satisfied that the witness has difficulty communicating.'

Section 89(4) then provides conditions under which the court is not required to appoint an intermediary for a child including a final catch all

discretion to *not* appoint where 'it is not otherwise in the interests of justice to appoint a children's champion'.⁶³

In Northern Ireland eligibility for intermediaries is the widest of all three jurisdictions as it covers children and vulnerable adults and includes the vulnerable accused. In England and Wales legislation providing an intermediary for the accused is not yet in force.⁶⁴ New South Wales eligibility criteria is the narrowest of all since the intermediary is only available to children who are complainants in sexual offences cases. There is no apparent objective justification for these differences in eligibility; criteria were most likely simply shaped by the political objectives of the legislature at the time, but research evidence has long reported that vulnerability in the criminal justice system is not limited to children whom are victims of or witnesses to sexual offences. Vulnerability in a wider context is first defined by an individual's specific characteristics, which includes age and psychological factors.⁶⁵ An individual's role in the criminal justice system whether as a victim, witness, suspect or defendant is another factor which may result in or contribute to vulnerability. In all three jurisdictions reform of eligibility criteria is required if access to an intermediary is to be available for all vulnerable victims, witnesses, suspects and defendants.

Pre-recording of cross-examination

The availability of pre-recording of evidence is markedly different in all three jurisdictions. In Australia, pre-recording of cross-examination is commonplace and has been for years in most states.⁶⁶ Pre-recording of

cross-examination is a relatively small change procedurally, yet it has potential to drastically reduce the stress for witnesses who no longer have the prospect of giving evidence hanging over them.⁶⁷

In England and Wales of all the special measures in the Youth Justice and Criminal Evidence Act 1999, pre-recording of cross-examination, or 'section 28' as it is known for short, is the last one to be brought into effect. In 1989 *Pigot* suggested pre-recording of child witness evidence:

...outside the courtroom in informal surroundings and ... video recorded. Nobody should be present in the same room as the child except the judge, advocates and a parent or supporter, but the accused should be able to hear and view the proceedings through closed circuit television or a two way mirror and communicate with his legal representatives.⁶⁸

A pilot scheme for pre-recording the evidence of vulnerable witnesses in England and Wales has been operating since December 2013 but is restricted to three Crown Court areas. The evaluation report of the pilot scheme⁶⁹ was undertaken to help inform decisions on whether and how best to roll out section 28 more widely after the pilot. Following the positive evaluation, it was stated in Parliament: 'Recorded pre-trial cross-examination in the crown courts will be rolled out from 2017 so that vulnerable witnesses, including children under 18, do not have to give their evidence at trial.'⁷⁰ The pre-recording being done now is not at an informal venue as *Pigot* recommended; it takes place at the court in a designated live-link room set up with recording equipment and the

questioning is carried out by advocates in the courtroom linked to the room by closed circuit television.

In Northern Ireland plans are being made for a pre-recorded cross-examination pilot in Belfast Crown Court in 2017 for vulnerable and intimidated witnesses.⁷¹ In NSW, pre-recording of cross-examination was introduced for child complainants in sexual offences cases alongside the introduction of the witness intermediaries. In November 2016, a member of the NSW Child Abuse Squad⁷² told the Royal Commission into Institutional Responses to Child Sexual Abuse that before pre-recorded cross-examination, 'children have waited years before their evidence is heard ... The feedback I'm getting from both families and victims [about pre-recording cross-examination] is nothing short of positive'.⁷³

The induction of the intermediary in NSW is no doubt supported by the use of pre-recording; the intermediary can seek to improve the quality of the questioning but pre-recording can reduce waiting times and the risk of memories being lost or contaminated over the long wait for a trial. All three jurisdictions have been relatively slow to introduce pre-recording of cross-examination considering the longstanding use of pre-recording in other parts of Australia.

Guidance for those interviewing vulnerable witnesses

Following the Cleveland Enquiry (1988), guidelines for those interviewing child witnesses have been available in England and Wales since the publication of the Memorandum of Good Practice⁷⁴ (MOGP) in 1992. In

2001, the MOGP was replaced with *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (London: MOJ)⁷⁵ ('ABE').

Northern Ireland developed their own ABE in 2003: *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, the use of special measures, and the provision of pre-trial therapy* (Department of Justice, NI). ABE in both jurisdictions contain common, detailed guidance about the preparation, planning and conduct of interviews with vulnerable victims and witnesses. Both versions of ABE are guided by scientific research which recommends a four-phased approach to interviewing: i) rapport ii) free narrative, iii) questioning, and iv) closure. Further, both guidance documents include recommendations about the use of intermediaries in their respective jurisdictions.

The New South Wales Police Force also provides an internal guidance document for officers who conduct investigative interviews with children. Although much more concise than ABE guidelines in England and Wales, and Northern Ireland, the recommendations for conducting interviews largely follow the same principles outlined above. At present, no government department in New South Wales has produced an 'official' and extensive, publicly available document about the interviewing of children and vulnerable adults, which is comparable to ABE.

Ground rules hearings

In England and Wales, in accordance with their training, intermediaries instigated at court the use of ‘ground rules hearings’ for setting the parameters for the proper treatment of vulnerable people. Research revealed an inconsistent application of the ground rules approach⁷⁶ and some ground rules hearings have been ‘perfunctory’ or appear to have been treated by the court as a mere ‘tick box’ exercise.⁷⁷ In the early years of the intermediary scheme in England and Wales, intermediaries found that compliance with rules for good communication aimed at promoting the witnesses best evidence were often not adhered to. In response to research conducted with intermediaries, the Criminal Procedure Rule Committee included new specific criminal procedure rules on the ground rules approach in England and Wales.⁷⁸

The Criminal Procedure Rules were amended in April 2015 to include the following provision for ground rules hearings rule 3.9 (7):

‘Where directions for appropriate treatment and questioning are required, the court must—

(a) invite representations by the parties and by any intermediary;
and

(b) set ground rules for the conduct of the questioning, which rules may include—

(i) a direction relieving a party of any duty to put that party’s case to a witness or a defendant in its entirety,

- (ii) directions about the manner of questioning,
- (iii) directions about the duration of questioning,
- (iv) if necessary, directions about the questions that may or may not be asked,
- (v) where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and
- (vi) directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.'

As in the early days of the intermediary scheme in England and Wales, neither Northern Ireland nor New South Wales has court rules requiring a ground rules hearing. However, the Northern Ireland intermediary pilot review 'considered that it would be helpful to formally provide for [ground rules hearings] in the statutory case management Regulations'.⁷⁹ In New South Wales Ground Rules Hearings were 'not permitted' but 'after a change of personnel' they are now being used and seen as a 'productive' way of doing things.⁸⁰

Evaluation of the Intermediary Role in Practice

Children and adults with disabilities or disorders affecting communication face numerous challenges in the criminal justice system, and research has

long documented the ways in which some of these challenges can be addressed.⁸¹ The experiences and challenges faced by vulnerable people with communication needs who have not been appointed an intermediary, centre upon appropriate adjustments to the criminal justice process not taking place, and their needs not being appropriately met by police, advocates and judges. This can lead to a breakdown in communication which can reduce the quality of the evidence obtained or, additionally in the case of the accused, their ability effectively to engage with their legal advisor. A breakdown in communication can have detrimental effects upon that vulnerable person's experience of the criminal justice process, the fairness of the outcome and other people's perceptions of the fairness of the system. Thus, the impact of the intermediary role goes beyond facilitating communication.

Intermediaries have also given expert guidance on making new, sometimes scientifically untested, adjustments that go further than those listed in legislation as 'special measures'.⁸² These 'extra special measures' including things such as short and frequent in-room breaks (when judges and the jury stay in court while the young child has a break in the audio-visual live link room), and lawyers going into the live link room to conduct the questioning rather than doing so from the court over the closed circuit TV link.

There is a substantial body of evidence to suggest that many vulnerable people are better able to communicate information when they are able to ‘show and tell’ rather than just describe events verbally. Evidence in this regard is growing, for example, children with autism have been found to perform on par with their typically developing peers when asked to draw about events that they have experienced during interview.⁸³ Guidelines in England and Wales⁸⁴ advocate the appropriate use of props such as drawings, body diagrams, and other tools to facilitate communication. An intermediary can explore and test props in a neutral and safe environment (during assessment), prior to interview and cross-examination, but the extent to which these practices occur, is not known; nor is it known if intermediaries are aware of the risks and pitfalls in the use of such props.

Following assessment, an intermediary can play a key role in effective interview/cross-examination planning and in the development of a protocol for the appropriate use of props with a vulnerable witness.⁸⁵ Specifically, an intermediary can inform practitioners about how to best address the specific communication needs of vulnerable person thereby addressing the communication challenges that vulnerable person may face when tasked with providing evidence. Understanding the specific needs and abilities of a vulnerable person is not something advocacy training can address. However, such training should raise awareness of vulnerabilities and how to identify the need for an intermediary assessment.

A witness may be identified as vulnerable by virtue of their age or level of communication (such as very young children, and people with profound disability), but misconceptions about a very young witness's inability to provide evidence can affect decisions about whether or not to conduct an investigative interview, thereby affecting the extent that complaints are investigated.⁸⁶ There is a growing body of evidence which suggests that with appropriate preparation and questioning, quality evidence can (and has been) gathered from children as young as 22 months.⁸⁷ Advocates require training about the capabilities of very vulnerable witnesses when communication is supported by an intermediary.

Vulnerability may emanate from a mental health disorder, or an impairment in intellectual or social functioning – factors that are considered 'hidden', and may not be identified by police or the court. Typically developing adolescents are not always perceived as having communication needs that warrant the appointment of an intermediary. This can result in adolescents being treated like robust adults, despite clear developmental and communication differences.⁸⁸ Practitioners may not be aware of the differences in communication and memory retrieval ability of vulnerable people or the effects that trauma can have upon communication. Identifying vulnerability and the need for an intermediary assessment may be a challenge.

At present, there is a distinct lack of empirical research into the intermediary role, which limits scope for rigorous evaluation, and indeed development, of the role within the respective jurisdictions. For example, because there is no standard guidance, it is not clear how practitioners recognise the need for an intermediary assessment, and conversely, how the decision is reached when establishing that an intermediary is not required (at both investigation and court stage). The latter is particularly pertinent in light of the recommendation in England and Wales that a written record is maintained about such decisions.⁸⁹ In cases where an intermediary has been appointed, intermediary assessments have not been evaluated including whether or not they are addressing the factors pertinent to an individuals' need and abilities to communicate their best evidence. While the Registered Intermediary Procedural Guidance Manuals for each jurisdiction propose a format for intermediary reports (including recommended subheadings), there is no standard guidance available about the structure and specific features of the assessment. Should assessment guidance be produced, a degree of flexibility needs to be afforded because intermediaries are recruited from a variety of professions and are skilled in their work with a range of vulnerabilities, thus it is expected that intermediaries will be trained and experienced in the use of different formal and informal communication assessment tools. Nonetheless, the absence of an intermediary assessment protocol limits the ways in which assessments can be reviewed including how such assessments feed into the planning of interviews and cross-examination.

Each intermediary report gives detailed guidance on how to approach the questioning of that person, and recently, the Court of Appeal (England and Wales) has endorsed the practice of advocates writing out their questions in advance and seeking advice from the intermediary.⁹⁰ A study published in 2016 involved mock jurors observing a mock cross-examination of a four or 13-year-old child. The results showed that when an intermediary was present the children's behaviour and the quality of cross-examination was more highly rated when the intermediary was involved.⁹¹ Whether this effect is due to the intermediary reviewing questions, is unknown. At the time of writing, no research has been published comparing the quality (the completeness, coherence and accuracy⁹²) of witness evidence with/without an intermediary. However, one recent study claimed that the use of intermediaries with 6 to 11 year old 'witnesses' in mock interviews improved the volume of *accurate* recall for typically developing children (n=199) but not for those with Autism Spectrum Disorder (n=71).⁹³ Because of the limited empirical research available, exactly how intermediaries function in practice during investigative interviews and at court (including during ground rules hearings), is unclear.

As with the process of identifying the need for an intermediary, and the process of assessment, standard guidance is limited in each of the three jurisdictions. Further, there is no standard police guidance on using intermediaries for suspect interviews and no standard police guidance in NSW for police conducting witness interviews with an intermediary. A lack

of such guidance may hinder the extent that an intermediary can be used effectively by the police and understanding of how their skills can be applied appropriately while operating under interview requirements that differ between victims, witness and suspect handling.

The intermediary role seeks to improve communication and participation of vulnerable witnesses and defendants, but there are of course many issues which affect communication and participation which are outside the role's sphere of influence. For example, an intermediary cannot mitigate the delay between an investigative interview taking place and a witness being cross-examined in court, delays during a trial or failures of video. Nevertheless

within the confines of their role, intermediaries appear to have been a catalyst for a positive court culture shift. In England and Wales, the Lord Chief Justice said in 2017:

The courts are greatly indebted to intermediaries and to those, particularly through their research, who have laid the groundwork for this development of the procedural law by the courts in a manner that has been so beneficial.⁹⁴

The intermediary role is relatively well established in England and Wales and in Northern Ireland. Awareness of the role is no doubt growing

although some ten years after the scheme was first piloted in England and Wales, research⁹⁵ found that ‘the role is not well understood and other professionals do not adequately engage with them and consider their advice.’ That said, unregistered intermediaries (operating outside the scope of the MOJ Registered Intermediary Scheme) are now being used in England and Wales, for example in the family courts. In one case one very senior judge commented that a fair hearing in a family case would not have been possible without the intermediary.⁹⁶

In New South Wales the role exists as part of pilot which will operate from 31 March 2016 until 31 March 2019 (or such later date as is prescribed by the regulations). An independent evaluation of NSW witness intermediary scheme has been commissioned by the Department of Justice (NSW).

Initial anecdotal feedback is positive. One Senior Counsel said this:

[When defence counsel] saw the use of a witness intermediary and how they can actually assist defence as well in getting a clear question and answer back from the child, they have really embraced, in my experience, the whole pilot scheme itself including the use of the witness intermediaries, once it has been made clear to them that they are impartial and they are not a tool for the prosecution.⁹⁷

Discussion and conclusion

It appears that the intermediary role continues to garner the support of police, judges and lawyers. One study in England and Wales sought feedback from judges, lawyers and intermediaries and reported that the

scheme was overall highly successful.⁹⁸ Similar research has yet to be conducted in Northern Ireland and New South Wales but clearly there is scope for it. The intermediary role has been described as a ‘radical scheme’ but one which overall meets with a positive response from judges and advocates in England and Wales.⁹⁹ Another study of intermediaries in England and Wales concluded that the role had become an integral part of the criminal justice system.¹⁰⁰ Other jurisdictions beyond Northern Ireland and New South Wales, Australia, have also shown interest in the English intermediary model. In Victoria in Australia the Judicial College of Victoria in its Disability Access Bench Book states that the court may appoint an ‘intermediary’ assist during the questioning of a vulnerable witness notwithstanding the fact that there is currently no statutory scheme in Victoria. The role of an intermediary is described as one which can ‘assist the court to monitor whether the questions are developmentally appropriate and to monitor whether the witness is becoming fatigued.’¹⁰¹ The English intermediary guidance¹⁰² is specifically referred to in the Bench Book.

The Australian state of Tasmania has recently consulted on the use of witness intermediaries and the question of whether the introduction of such a process would require legislative support.¹⁰³ At the time of writing the Tasmanian Law Reform Institute is in the process of finalising its report and recommendations.¹⁰⁴

In New Zealand, the English intermediary model, amongst others, was considered in a 2011 study involving mock cross-examination.¹⁰⁵

Ultimately the report rejected the English intermediary model in favour of an alternative, however more recently it appears that New Zealand courts have started using 'communication assistants' as per the English intermediary model.¹⁰⁶ In addition, New Zealand appears to be introducing the ground rules hearing approach,¹⁰⁷ as a judicial case management tool when witnesses are vulnerable. Even more recently interest in the English intermediary model has also been shown by the International Criminal Court in The Hague.¹⁰⁸

The intermediary a role is entirely publicly funded. It is a role which aims to support communication by and with vulnerable people. Evidence from surveys and interviews with intermediaries and those who have experience of them, suggests that this aim is being achieved and that the intermediary plays a highly-valued role in the justice system. The role is also designed to facilitate more effective police investigations and enhanced communication at trial but how and whether the role achieves this has been subjected to limited scientific study.

It is striking how little research has been conducted into the completeness, accuracy and coherence of the evidence intermediaries facilitate. There is huge potential for intermediary schemes to be used more widely in the pursuit of access to justice for vulnerable people in forensic investigations and hearings. However, justification for the ensuing costs may prove to be elusive without the backing of a substantial body of scientific research demonstrating a positive impact on the quality of a vulnerable person's evidence.

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- 2 Home Office. Report of the Advisory Group on Video Evidence. London: Home Office 1989. Note the Chairman of the Advisory Group was His Honour Judge Thomas Pigot, QC, hence the report became known as 'The Pigot Report' or 'Pigot' for short.
- 3 Home Office. Report of the Advisory Group on Video Evidence. London: Home Office 1989, Summary of Recommendations, para 6.
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- 5 Home Office. Speaking up for Justice. London: Home Office June 1998. The report was subtitled the 'Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System'.
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- 8 Ibid, 58.
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- 12 Cooper P. and Wurtzel D. Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales. (2014) 65(1) *NILQ*, 39.
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²¹ Under s16, witnesses are eligible for ss 23–30 special measures if they are under 18 at the time of the hearing or the quality of if their evidence is likely to be diminished by reason of a mental disorder or a significant impairment of their intelligence and social functioning or if they have a physical disability or physical disorder. In short, under section 17, witnesses are eligible for the special measures in ss 23–28 assistance on the grounds of fear or distress.

²² See Chapter 1 of the Youth Justice and Criminal Evidence Act 1999, as amended by section 102, Coroners and Justice Act 2009.

²³ Courts and Tribunals Judiciary/ Judicial College, Equal Treatment Bench Book ('ETBB), 2013, <https://www.judiciary.gov.uk/publications/equal-treatment-bench-book/> (accessed 22 January 2017).

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²⁵ Ibid.

²⁶ See generally, Cooper P. and Wurtzel D. Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales. (2014) 65(1) *NILQ*.

²⁷ Criminal Procedure Rules 2015, as amended April 2016 and October 2016, 3.9(7)(a).

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²⁹ Ibid.

³⁰ Plotnikoff J and Woolfson R. *The Go-Between: Evaluation of intermediary pathfinder projects*. (2007) London, England: NSPCC/ The Nuffield Foundation.

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'(i) Where the accused is aged under 18 when the application is made, the condition is that the accused's ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by the accused's level of intellectual ability or social functioning

(ii) Where the accused has attained the age of 18 when the application is made, the conditions are that (a) the accused suffers from a mental disorder (within the meaning of the Mental Health (Northern Ireland) Order 1986) or otherwise has a significant impairment of intelligence and social functioning; and (b) the accused is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court.'

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