CHILDREN’S CHAMPIONS

Getting the Best Evidence from Child Complainants in Sex Abuse Cases: The First Witness Intermediaries in Australia

By Professor Penny Cooper, Chair of The Advocate’s Gateway, Barrister and Academic Associate 39 Essex Chambers, London, senior research fellow Institute for Criminal Policy Research, University of London, and Dr Michelle Mattison, Registered Intermediary (Ministry of Justice UK) and Lecturer, University of Chester, UK.

A NEW APPROACH

In 2011, at the 17th Australian Institute of Judicial Administration Conference in Sydney, Lord Judge (then the Lord Chief Justice of England and Wales) gave a boost to the prospects of witness intermediaries in Australia when he said:

"The use of intermediaries [in England and Wales] has introduced fresh insights into the criminal justice process. There was some opposition. It was said, for example, that intermediaries would interfere with the process of cross-examination. Others suggested that they were expert witnesses or supporters of the witness. They are not. They are independent and neutral...their use is a step which improved the administration of justice and it has done so without a diminution in the entitlement of the defendant to a fair trial."

In April 2016, the Department of Justice (DOJ) New South Wales (NSW) began a three-year pilot of an accredited ‘children’s champion’ (or ‘witness intermediary’) scheme for child complainants in sexual assault cases. The pilot covers cases that go to trial at the Downing Centre, Sydney and at Newcastle District Court. The scheme is closely modelled on, though not identical to, the intermediary scheme in England and Wales which improves communication with and by vulnerable witnesses.

WHAT IS AN INTERMEDIARY?

Just as in England and Wales (and Northern Ireland where there has been a similar scheme since 2013) the witness intermediary in NSW is an officer of the court and has an overriding duty to impartially facilitate communication. The NSW legislation calls this person a ‘children’s champion’ and says they may also be called a ‘witness intermediary’. In practice the term witness intermediary is being used more widely by police and practitioners, many of whom think ‘witness intermediary’ better reflects the impartiality of the role.

Section 88 of the Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (which amends the Criminal Procedure Act 1986) states that the role of children’s champions is to communicate:

"to the witness, questions put to the witness, and... 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."

At first sight this might suggest a role much like an interpreter however, in practice, the intermediary will be facilitating communication with the witness in a way that is very new and very different.
HOW DOES THE INTERMEDIARY ASSIST DURING THE INVESTIGATION?

In summary, under the legislation, a child complainant in particular cases (prescribed sexual offences) is eligible to have the assistance of an intermediary if they are under 16, or if they are over 16 but under 18, and have difficulty communicating. Once the police identify that an intermediary might assist communication with a child complainant, they make a referral to Victims Services. Victims Services will match the request with an accredited intermediary who has the necessary expertise to assess and support the communication of that particular child; this is, based upon factors such as the age of the child, and also, any known communication needs.

Accredited intermediaries on the Victims Services panel are drawn from speech pathology, psychology, social work, and occupational therapy. All accredited intermediaries have been selected for their existing expertise in child communication and have been through rigorous training and assessment (delivered by the authors) to prepare them for the intermediary role. All witness intermediaries work on a part-time, self-employed basis for Victims Services and can be available at short notice if required.

Once the referral is made, an intermediary will contact the officer and take preliminary details about the child, then arrange when and where to meet the officer and the child to conduct an assessment of the child’s communication needs and abilities. Usually the intermediary assessment will take about one hour to conduct and is likely to take place at the Child Abuse Squad offices in the interview room. The interviewing officer should be present to observe the assessment; many officers in other countries have found this practice invaluable for understanding how to improve communication with the child at the interview stage.

One assessment session is usually all that is needed, though where the witness’s needs are complex, more than one session may be needed. The intermediary assessment is not video or audio recorded, though the intermediary will take written notes. The assessment will deliberately steer clear of any discussion related to the evidence about alleged offences. It is essential that the intermediary is always in the presence of a responsible third party (usually a police officer) throughout the assessment; this protects the intermediary from becoming a witness, should any disclosure be made during assessment and ensures there is transparency in the intermediary role.

THE INTERMEDIARY ROLE IN THE POLICE INTERVIEW

The intermediary’s role is not to advise on whether the child is telling the truth or not, and they do not make a statement of evidence as their role is not to be a witness in the case. The intermediary is not a second interviewer, nor is it their role to give advice on what to ask, but they can advise the interviewer on how to ask questions in the most understandable way. Their role is to minimise and address potential breakdowns in communication.

After the intermediary’s assessment of the witness’s communication needs and abilities, there will be a planning meeting with the officer. The intermediary will advise on the best way to communicate with the child, such as how to phrase and structure questions, and the use of vocabulary. The intermediary may also advise about the use of communication aids such as models or pens and paper for drawing, if such aids have been tested during assessment and are likely to support communication. Planning and preparation will include an agreed protocol on how the intermediary will intervene if necessary; for example, the officer may wish to agree beforehand a ‘cue’ should the interviewer wish the intermediary to suggest a different word or phrase to assist the child to understand the question. Planning and preparation will also include how the intermediary would introduce communication aids (if appropriate to that child and if required in interview). The likelihood of there being a communication difficulty between the officer and the child during interview is greatly reduced if there has been detailed planning and preparation with the intermediary.

Seated next to the child in the interview suite (as opposed to in the monitoring room), the intermediary will observe first-hand the child’s non-verbal as well as verbal communication. Having the intermediary visible and audible in the interview recording ensures that their role is transparent. On a practical level an intermediary can assist with communication as and when the issue arises rather than attempting to explain through an earpiece. Being in the interview room with the child is standard practice in England and Wales and in Northern Ireland and occurs in thousands of cases each year; there is no evidence to suggest that the child is less likely to disclose with the intermediary in the room. The indications are that the presence of the intermediary leads to better evidence. Indeed, all witness intermediaries in NSW have been trained to facilitate communication while seated beside the child in an interview suite and later beside the child in the TV link room at court, should the matter proceed to trial.
THE INTERMEDIARY AT COURT

In the normal course of events the child’s evidence will stand as their evidence in chief. The witness intermediary can be appointed by the court to facilitate supplementary examination in chief, cross-examination and re-examination at the trial. The particular intermediary who acted at the investigation stage is usually the one who will act at trial. Even if there was no intermediary at the police interview it is still possible (and is frequently the case in England and Wales) that one is appointed for the trial.

The witness intermediary is not the only innovation under this pilot; the Criminal Procedure Amendment (Child Sexual Offence Evidence Evidence Pilot) Act 2015 also introduces pre-recording of cross-examination for prescribed child sexual offences. If appointed, the child complainant would have the witness intermediary seated beside them (as in the police interview) to facilitate questioning, and the child will complete their testimony evidence long before the remainder of the trial takes place.

The witness intermediary role at court brings about a radical change. The intermediary will provide, for the court and the parties, a detailed communication report with recommendations on questioning. The judge will direct the advocates to modify the manner of their questions and advocates should also be directed to check their questions (in terms of phrasing, structure, vocabulary, etc.) with the intermediary before cross-examination even starts. This should ensure that the questions are developmentally appropriate for the child. The intermediary will intervene during cross-examination if the questioning contravenes the judge’s directions or if any other communication issue arises. This in turn should lead to more complete, accurate and coherent evidence from child witnesses.

As the pilot scheme for the use of witness intermediaries starts to make headlines, it seems ‘all eyes’ are turning to NSW. The Royal Commission into Institutional Responses to Child Sexual Abuse held a public hearing in Sydney from Tuesday, 15 March to Thursday 24 March 2016 and inquired into criminal justice issues relating to child sexual abuse in an institutional context. A topic of major interest to the inquiry was the use of witness intermediaries in NSW. The authors gave expert evidence on legal procedure and the use of intermediaries to the Commission for about three hours.

The following is a recent example from England and Wales which shows how a witness intermediary can support communication with a complainant at trial, and again at appeal in the unusual event that a complainant is required to give evidence a second time.

THE CASE OF ‘KK’

The defendant had been convicted of a number of sexual offences against KK and was sentenced to nine years’ imprisonment in total, the jury having accepted the evidence of KK who had an IQ of between 55 and 69. Communication with the complainant, KK, had been facilitated by a witness intermediary.

The defendant argued that his convictions were unsafe as a consequence of fresh evidence that KK had retracted her allegation. The Court of Appeal made over 20 ground rules directions regarding the further questioning of KK in the appeal court. KK’s original video-recorded police interview would stand as her evidence in chief, she would give evidence by live link from the Central Criminal Court (known to many as the Old Bailey), questions would be supplied in advance to the parties and to KK’s intermediary, all questions would have a maximum of ‘5 key words’ and all questions would be ‘in everyday language’. The ground rules were set by the court based on the recommendations in the intermediary report.

On the day of the hearing the applicant’s witnesses gave evidence first. Meanwhile KK was at the Central Criminal Court with the Witness Service and the intermediary. KK watched the recording of her interview to refresh her memory. The live-link was checked before she gave evidence. The camera position was concentrated on counsel’s bench but since from the live-link room the witness could also see part of the courtroom, the court usher made sure that ‘reserved’ seating signs were placed on the benches so that during cross-examination there would be no distractions taking place behind counsel. Under cross-examination KK denied that she had ever withdrawn her evidence. The defendant’s application failed.
CONCLUSION

The witness intermediary pilot scheme commenced in New South Wales on 4 April 2016. By 30 September 2016, the Department of Justice had received 300 intermediary referrals from the New South Wales Police Force. In addition, the Department of Justice received referrals for intermediaries for 29 child complainants in 18 matters at the Downing Centre and Newcastle District Court.

Future expansion of the NSW witness intermediary scheme to other witness categories and proceedings will depend on the findings of an independent evaluation of the pilot and of course is subject to adequate resources being available.

For research-informed guidance on interviewing children, using communication aids and intermediaries, go to: theadvocatesgateway.org

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ABOUT THE AUTHORS

Professor Penny Cooper

Penny Cooper, a former practising barrister, became a professor of law in 2009 and is widely published on vulnerability and witness evidence. She created registered intermediary training, devised the ground rules approach and co-founded and chairs The Advocate’s Gateway. Her research resulted in criminal procedure rules for ground rules hearings.

Penny teaches judges, intermediaries, police and legal practitioners and advises government departments/organisations in many jurisdictions. She is an academic associate at 39 Essex Chambers, an honorary visiting professor at City University, London, and a senior research fellow at the Institute for Criminal Policy Research at Birkbeck, University of London.

Dr. Michelle Mattison

Michelle gained her bachelors and master’s degrees in Forensic Psychology at Teesside University, and in 2015 she was awarded her PhD at Lancaster University. Her research interests are in applied cognitive and developmental psychology within forensic settings. Michelle’s PhD explored the use of drawing to support children and young people during investigative interviews, and had a particular focus upon children with autism spectrum condition. Michelle currently lectures at the University of Chester in the UK.

Michelle works directly with children and adults who have complex communication needs, such as autism spectrum disorder, learning disability, and physical disabilities. Michelle is a Registered Intermediary in the UK with the Ministry of Justice. In this capacity, she facilitates communication with vulnerable victims, witnesses and defendants during police interviews and during criminal trial proceedings. Michelle also works for Triangle and also contributes towards national best practice guidance documents.

In March 2016, both Penny and Michelle gave expert evidence in Sydney to the Royal Commission into Institutional Responses to Child Sexual Abuse about intermediary legislation, policy, training and practice.

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