

A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales

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Abstract

This article considers the legislation, case law and practice in relation to intermediaries for vulnerable suspects and defendants. The role of the intermediary for suspects and defendants (“the defendant intermediary” for short) is compared with and distinguished from the roles of witness intermediary and appropriate adult. The authors conclude that the availability of intermediaries is vital for the fair treatment of vulnerable suspects and defendants as well as for victims’ access to justice. However, current defendant intermediary eligibility criteria as well as finding and funding arrangements lack clarity and consistency. The authors call for a review of the definition of who is “vulnerable” and therefore eligible, the inclusion of the role of the intermediary in “PACE” Codes and the creation of a scheme that would provide matched, trained, regulated intermediaries for vulnerable suspects and defendants.

Introduction

The role of the intermediary is to facilitate communication with vulnerable witnesses. Intermediaries provide impartial assistance to police officers, lawyers and courts with the aim of ensuring complete, accurate and coherent communication with the vulnerable witness.¹

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¹ See generally *The Registered Intermediary Procedural Guidance Manual*, February 2012, London: Ministry of Justice.

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Although sometimes mentioned in the same breath as language interpreters,² intermediaries have a role which goes beyond that of translation.³ The intermediary aims to ensure that the true meaning of questions and answers is conveyed. They are not the passive conduit for questions; instead they assume an active role in the communication process. They assess the communications needs and abilities of the vulnerable witness and advise police and the court how best to communicate with the witness in terms of vocabulary, pace, physical environment, use of communications aids (if necessary), etc.

Having first advised others how best to communicate with the witness, when present at police interview or at court during questioning of the vulnerable witness, the intermediary will intervene as and when required, for example if the question is too complicated for the witness to comprehend or the answer is unintelligible to the questioner. An intermediary intervention during the witness's evidence is not analogous to an objection in law and so the jury remains in court during the process of the intermediary addressing the intervention to the judge who decides whether or not to uphold it. The judge retains control of the questioning throughout.⁴

The nature and frequency of the intermediary interventions is a function of how skilfully the advocate is able to adapt their questioning technique in accordance with the "ground rules" which must be discussed between judge, counsel and the intermediary before the evidence begins.⁵ The result has been that since 2004 many vulnerable witnesses for whom traditional cross-examination would have been confusing or even meaningless have, with the assistance of an intermediary, been able to give evidence. The intermediary has assessed their needs, explained in detail to the judge and the advocates the most appropriate means of communicating with them and the judge has set and enforced "ground rules". In addition, the fact of the vulnerable witness's presence at the trial, ready to give evidence, has undoubtedly led to some defendants deciding to plead guilty "at the door of the court".

The Ministry of Justice provides trained and accredited "Registered Intermediaries" for vulnerable witnesses, both prosecution and defence. However, the defendant does not have access to the scheme of Registered Intermediaries because the legislation currently in force does not cover defendant intermediaries. Where intermediaries act for defendants they do so as non-registered intermediaries under common law provision that is complicated and patchy.

What's in force?

Before considering the legal situation in respect of defendant intermediaries it is necessary, by way of context, to meet its "statutory" relative, the law on witness

²For instance *SH* [2003] EWCA Crim 1208, s.29 (1) Youth Justice and Criminal Evidence Act 1999, s.104 Coroners and Justice Act 2009 and *Fairness in Courts and Tribunals — a summary of the Equal Treatment Bench book*, (2010), Judicial Studies Board, Pt 10, available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/jsb_fairness_in_courts_tribunals2_web.pdf, [Accessed October 23, 2012].

³For a discussion about the difference between interpreting and conveying true meaning see R. Morris, "The Moral Dilemmas of Court Interpreting" (1995) 1 *The Translator* 25–26.

⁴*The Registered Intermediary Procedural Guidance Manual*, February 2012, London: Ministry of Justice, p.27.

⁵Criminal Procedure Rules 2012, rr.29.3, 29.10. The Application for a Special Measures Direction form, at Part F states that "'Ground rules' for questioning must be discussed between the court, the advocates and the intermediary before the witness gives evidence, to establish (a) how questions should be put to help the witness understand them and (b) how the proposed intermediary will alert the court if the witness has not understood, or needs a break." <http://www.justice.gov.uk/courts/procedure-rules/criminal/formspage>, accessed 2 September 2012.

intermediaries. Intermediaries for vulnerable witnesses were created by the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act):

“A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (‘an intermediary’).”⁶

An intermediary’s “function” is to communicate to a vulnerable witness “any questions put to the witness”, and communicate back the replies and to “explain such questions or answers so far as necessary to enable them to be understood”⁷ by the witness or questioner.

Under s.16(1)(a),⁸ the witness is eligible for an intermediary:

- “(a) if under the age of [18] at the time of the hearing; or
 - (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).
- (2) The circumstances falling within this subsection are—
- (a) that the witness—
 - (i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
 - (b) that the witness has a physical disability or is suffering from a physical disorder.”

After piloting⁹ the use of trained and accredited Registered Intermediaries (RIs), the Ministry of Justice rolled out the Witness Intermediary Scheme (WIS) in 2007. Under the scheme RIs have supported over 5,000 vulnerable witnesses in criminal investigations and trials.¹⁰ The RIs assist communication: (i) between the police and the witness, particularly in the ABE¹¹ interview which later may be admitted as the witness’s examination in chief; (ii) between the Witness Service and the witness during the witness’s court familiarisation visit; and (iii) between the advocate, the judge and the witness when the witness is giving evidence at trial.¹²

Since only witnesses “other than the accused” are eligible¹³ for the support of an intermediary, the defendant is specifically excluded from the ambit of s.29 of

⁶ Criminal Evidence Act 1999 (1999 Act) s.29(1).

⁷ 1999 Act s.29(2).

⁸ The 1999 Act, as amended in June 2011 by s.98 of the Coroners and Justice Act 2009 increasing the age limit from 17.

⁹ See the evaluation report: J. Plotnikoff and R. Woolfson, *The “Go-Between”: evaluation of intermediary pathfinder projects* (2007), Lexicon Ltd, available at: http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf [Accessed October 23, 2012].

¹⁰ *The Registered Intermediary Procedural Guidance Manual*, February 2012, London: Ministry of Justice, p.3.

¹¹ *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures*, (2011), London: MoJ. In particular see ‘Intermediaries’, paras 2.194–2.200.

¹² For a history of the first 10 years of the WIS see P. Cooper and D. Wurtzel, “Sometimes it’s better to go second: Ten years of Registered Intermediaries in England and Wales and how Northern Ireland could benefit”, presented at the Criminal Bar Association, Annual Conference, *Victims and Vulnerable Witnesses in the Criminal Process*, Belfast, Saturday May 12, 2012, (forthcoming).

¹³ 1999 Act s.16(1).

the 1999 Act. Section 33BA inserted in the 1999 Act, should it be brought into force,¹⁴ will provide for the availability for a defendant intermediary in limited circumstances. It is possible that the Ministry of Justice would extend the availability of RIs to defendants should this section come into force.

In s.33BA the function of the intermediary is described in the same terms as it is for witnesses.¹⁵ The section allows for “examination of the accused to be conducted through an interpreter or other person approved by the court for the purposes of this section (‘an intermediary’).”¹⁶

The vulnerable defendant’s eligibility criteria for an intermediary differ from the eligibility criteria for the vulnerable witness. Section 33BA repeats the criteria set out in s.47 of the Police and Justice Act 2006 which allows a defendant to give evidence by live link. For the defendant it must be “necessary in order to ensure that the accused receives a fair trial”¹⁷ and:

- “(5) 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.
- (6) 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 Act 1983) or otherwise has a significant impairment of intelligence and social function, and
 - (b) the accused is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court.”¹⁸

It has been rightly noted that this if brought into force this would create

“eligibility gaps between child witnesses and child defendants on the one hand, and between child defendants and vulnerable adult defendants on the other, which the Government has not plausibly justified, and which are susceptible to challenge under the equality of arms principle in ECHR art.6.”¹⁹

Crucially the wording “examination of the accused” in s.33BA means that assistance from an intermediary during the other parts of the trial process such as conferences with the defence solicitor and counsel, taking a proof of evidence, any hearing prior to the trial (including the Pleas and Case Management Hearing) which the defendant has to attend, etc. is not covered. Section 33BA would only apply if and

¹⁴ There are no immediate plans: “Whilst legislation in the Coroners and Justice Act 2009 has extended and given statutory backing to the availability of intermediaries to certain vulnerable defendants with communication needs to assist them in giving oral evidence in court, the implementation of this provision has been deferred by Ministers.” Email from the MoJ to the first author, April 24, 2012.

¹⁵ 1999 Act s.33BA(4) sets out the function of the defendant intermediary and it directly mirrors the function of witness intermediary as set out in s.29(2) of the 1999 Act.

¹⁶ 1999 Act s.33BA(3), inserted by s.104 Coroners and Justice Act 2009.

¹⁷ 1999 Act s.33BA(2)(b) as amended by s.104 Coroners and Justice Act 2009.

¹⁸ 1999 Act s.33BA as amended by s.104 Coroners and Justice Act.

¹⁹ L. Hoyano, ‘Coroners and Justice Act 2009: (3) Special Measures Directions Take Two: Entrenching Unequal Access to Justice?’ [2010] Crim L.R. 345, 366.

when the defendant chose to give evidence. Such a stark limitation appears to be unjustifiable since if the defendant needs an intermediary to participate in the giving of evidence then he probably requires one to participate in the rest of the proceedings, including communicating effectively with his legal advisers.

Of course a vulnerable suspect might be accompanied by an “appropriate adult” at the police station but, as is discussed below, the appropriate adult role is significantly different from that of the intermediary such that the presence of an appropriate adult does not obviate the need for an intermediary. The safeguards of an intermediary and of an appropriate adult are not the same.

Judges mind the legal gap

The common law currently takes care of the gap that might otherwise be covered by defendant intermediary legislation. In order to deal with a case justly and treat the prosecution and defence fairly,²⁰ to allow defendants to effectively participate in the trial, and to achieve a fair trial judges use their inherent powers to permit intermediaries for vulnerable defendants.

In *H*²¹ the defendant’s solicitors made an application before the trial for permission for him to give his evidence by means of pre-recorded video and with an intermediary during his cross-examination.²² There was expert evidence from a psychologist that the defendant had an IQ of 51 and that he would have difficulty understanding and answering questions and generally following the trial process. The trial judge did not permit the use of the pre-recorded video but allowed the defendant to “be accompanied by a supporter who could effectively act as an interpreter in the dock through the trial.”²³

The Court of Appeal concluded that it had no jurisdiction to hear an appeal against the refusal of a “live link direction” but approved the trial judge’s decision to permit what was referred to as the equivalent of an interpreter (what today would be called an intermediary):

“Thus if either counsel or the judge are having difficulty in putting questions to the defendant, because he is failing to understand their choice of language, a person with understanding of his problems may be in a position where they can act as interpreter to make clear by putting into language which he will understand the nature of the question that he is being asked.”²⁴

As awareness grew, the practice of using intermediaries for defendants began to establish itself. In 2008, in a group of articles in the magazine of the South Eastern Circuit,²⁵ two judges, two intermediaries and a barrister describe how intermediaries can assist and had assisted a vulnerable defendant to have a fair trial. By this time, where necessary for a fair trial, judges were permitting defendant intermediaries for the whole trial, not just for the defendant’s evidence.

²⁰ As required by the Criminal Procedure Rules (Oct 2011), “The overriding objective”, para.1.1.

²¹ *SH* [2003] EWCA Crim 1208.

²² *SH* [2003] EWCA Crim 1208 at [2].

²³ *SH* [2003] EWCA Crim 1208 at [4] and [5].

²⁴ *SH* [2003] EWCA Crim 1208 at [25].

²⁵ D. Wurtzel (ed.), “Intermediaries for Defendants” (Autumn 2008), *The Circuiteer*, the Magazine of the South Eastern Circuit, 6–10.

The issue came before the Divisional Court in the case of *C v Sevenoaks Youth Court*.²⁶ The defendant C was a 12-year-old boy with complex mental health issues. The court held that

“when trying a young child, and most particularly a child such as ‘C’ who is only 12 with learning and behavioural difficulties, notwithstanding the absence of any express statutory power, the Youth Court has a duty under the inherent powers and under the Criminal Procedure Rules to take such steps as are necessary to ensure that he has a fair trial, not just during the proceedings, but beforehand as he and his lawyers prepare for the trial.”²⁷

The principle was reiterated in *R. (on the application of AS) v Great Yarmouth Youth Court*.²⁸ Magistrates had seen no reason to allow the use of an intermediary for a defendant with Attention Deficit Hyperactivity Disorder (ADHD) who would struggle with complex vocabulary which would cause him to

“feel frustrated and, for example, not to answer questions that are being asked of him, but to concentrate on those previously asked and so perhaps to appear not to be engaging properly with proper questions.”²⁹

Mitting J. concluded that

“[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.”³⁰

He quashed the decision to refuse to allow the defendant a registered intermediary and directed that that decision be taken afresh by the court.

Arguably the ruling should refer to an “intermediary”, not a “registered intermediary” because the MoJ’s WIS of *registered* intermediaries was established for witnesses, not defendants. The provision of registered intermediaries for defendants has never been part of the WIS’s remit because the 1999 Act specifically excludes defendants. Understandably this gap in provision has led to confusion; at first blush it seems illogical that registered intermediaries are not also available for vulnerable defendants but that is in fact the position. Any person appointed as a defendant intermediary will be *non-registered* as there is no scheme of registered intermediaries to cover defendants.

This gap is all the more significant when one considers that in certain cases, the provision of an intermediary might make the difference between a defendant’s fitness to plead and stand trial or not. Where an issue arises as to a defendant’s fitness to plead, an intermediary is one of the potential adjustments that ought to be considered by the examining expert.³¹ The Law Commission’s *Unfitness to Plead* consultation included a thorough review of the link between fitness to plead

²⁶ *R. (on the application of C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); [2010] 1 All E.R. 735.

²⁷ *Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); [2010] 1 All E.R. 735 at [17].

²⁸ *R. (on the application of AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin); [2012] Crim. L.R. 478.

²⁹ *Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin) at [4].

³⁰ *Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin) at [6].

³¹ K. Rix, *Expert Psychiatric Evidence* (London: The Royal College of Psychiatrists, 2011), p.77.

and special measures.³² It considered in detail the case law³³ relating to the defendant's right to participate effectively in the trial, concluding that there is a

“broader principle—namely 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.”³⁴

The principle that for the defendant with communication difficulties, consideration must be given to adjustments to allow the defendant fully to participate is surely beyond doubt. In *Walls*,³⁵ though no one raised the point of the use of an intermediary, the Court of Appeal confirmed that this and other measures should be considered where there is psychological or psychiatric evidence as to the defendant's limitations.

Where a vulnerable defendant needs an intermediary to understand the language of court, it is directly comparable to the non-English speaking defendant who needs an interpreter to follow the language of the proceedings. In the latter case the absence of an interpreter would constitute a violation of the defendant's right to a fair hearing pursuant to art.6 of the European Convention on Human Rights.³⁶ It follows that in the former case, the absence of an intermediary would be an art.6 violation.

Thankfully judges, as guardians of procedural fairness, are bound to step in and can permit defendant intermediaries. However, the defendant intermediary eligibility criteria, the paucity of use of intermediaries for suspects and the absence of Registered Intermediaries for defendants are still open to challenge.

Criteria for defendant eligibility

In the absence of statutory criteria for determining the eligibility of a defendant for an intermediary the judges must apply The Consolidated Criminal Practice Direction of October 2011. In Pt III.30 concerning “Treatment of Vulnerable Defendants”, the overriding principle³⁷ is:

“A defendant may be young and immature or may have a mental disorder within the meaning of the Mental Health Act 1983 or some other significant impairment of intelligence and social function such as to inhibit his understanding of and participation in the proceedings...All possible steps should be taken to assist a vulnerable defendant to understand and participate

³² Law Commission, *Unfitness to Plead Consultation Paper* (2010) Law Com. No.197, Pt 4 “The Role of Special Measures”, pp.79–90.

³³ Including *SC v United Kingdom* (60958/00) (2005) 40 E.H.R.R. 10 (p.266).

³⁴ Law Commission, *Unfitness to Plead Consultation Paper* (2010) Law Com. No.197, Pt 2 “The Existing Law”, p.48.

³⁵ *Walls* [2011] EWCA Crim 443; [2011] 2 Cr. App. R. 6 (p.61) in particular at [37(ii)] even though “No one raised the question of the court appointing an intermediary in the exercise of the court's powers clearly set out by Openshaw J. in *R (C) v Sevenoaks Youth Court* [2009] EWCA Crim 3088.”

³⁶ See *Cascani v United Kingdom* (32771/96) [2002] ECHR 630 citing *Lee Kun* [1916] 1 K.B. 337; (1916) 11 Cr. App. R. 293 and *Kunnath v Mauritius* [1993] 1 W.L.R. 1315.

³⁷ The Consolidated Criminal Practice Direction of October 2011, Pt III: Further Practice Directions Applying in The Crown Court And Magistrates' Courts — Criminal Procedure Rules, III.30, TREATMENT OF VULNERABLE DEFENDANTS available at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part3#id6328221> [Accessed October 23, 2012].

in those proceedings. The ordinary trial process should, so far as necessary, be adapted to meet those ends.”³⁸

This wording, part borrowed from s.16 (1) of the 1999 Act for vulnerable witnesses, does not go as far as s.16(1)(b) which says that the court must consider “that the quality of evidence given by the witness is likely to be diminished” as a result and “references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy”.³⁹

As the Practice Direction has borrowed only part of the wording of s.16, its eligibility test is relatively simple. Nevertheless there are problems with the test. Since the direction applies only to those who are under 18 or adults who suffer from a mental disorder within the meaning of the Mental Health Act 1983 or who have any other significant impairment of intelligence and social function, some vulnerable adults may not fit within its ambit:

“[A]n adult with reduced cognitive functioning, for example, with an IQ of 78, or an adult who takes prescribed medication for pain relief, may also have impaired cognitive functioning but may not be so easily categorised for the purposes of making an application to the court for special measures.”⁴⁰

In the context of the criminal justice system, *The Bradley Report* found: “There is a lack of consensus in defining the boundaries between learning disability, borderline learning disability and learning difficulty”.⁴¹ In the same year *No One Knows* found that

“the reality is that many individuals who appear before the courts do not have a single or clearly delineated form of intellectual or psychological difficulty. Mental illness and learning disability (or learning difficulty) may co-exist; or defendants may be cognitively impaired because of the effects of acute mental health problems and/or substance abuse, rather than a pre-existing learning disability or difficulty.”⁴²

It is suggested that the eligibility test for witnesses and defendants should be aligned and that it would be better for judges and practitioners were there to be a single, simplified test covering those “under 18 and adults whose communication is significantly impaired by physical, psychiatric, psychological or other limitations”.

In practice defence counsel, usually without specialist training for working with vulnerable defendants or witnesses,⁴³ will make applications based on the best

³⁸ The Consolidated Criminal Practice Direction of October 2011, Pt III: Further Practice Directions Applying in The Crown Court And Magistrates’ Courts — Criminal Procedure Rules, III.30, TREATMENT OF VULNERABLE DEFENDANTS available at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part3#id6328221> [Accessed October 23, 2012].

³⁹ 1999 Act s.16(5).

⁴⁰ B. O’Mahony, K. Smith and B. Milne, “The early identification of vulnerable witnesses prior to an investigative interview” (2011) 13 *The British Journal of Forensic Practice* 114, 115.

⁴¹ K. Bradley, *The Bradley Report Lord Bradley’s review of people with mental health problems or learning disabilities in the criminal justice system* (London: Department of Health, 2009), Executive Summary, p.4, available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_098699.pdf.

⁴² J. Jacobson and J. Talbot, *No One Knows: Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (2009) Prison Reform Trust, p.7 <http://www.prisonreformtrust.org.uk/Portals/0/Documents/vulnerable%20defendants%20in%20the%20criminal%20courts.pdf> [Accessed October 23, 2012].

⁴³ *Raising the Bar* (London: Advocacy Training Council, 2011). See in particular recommendation 13, available at: <http://www.advocacytrainingcouncil.org/images/word/raising%20the%20bar.pdf> [Accessed October 23 2012] and also a project aimed at supplying “toolkits” and other material to assist advocates in cases with a vulnerable witness or vulnerable defendant: <http://blogs.city.ac.uk/advocategateway/> [Accessed October 23, 2012].

available information about the defendant's communication needs. In some but not all cases this will be a report from an expert psychiatrist or a psychologist. The application for the use of an intermediary may be for throughout the trial and not merely while the defendant is giving evidence.

Is one application for an intermediary determined consistently with another? It is impossible to say. There are no statutory criteria for defendant intermediaries and what is found in the 2011 practice direction differs from the statutory criteria for witness intermediaries. No decision of a circuit judge creates binding precedent and few are reported.⁴⁴

Police suspects, intermediaries and appropriate adults

Whilst judges are minding the defendant intermediary gap at trials, scant regard has been paid to the use, or rather lack of use, of intermediaries for suspects at the police station. As yet the Court of Appeal has not had to deal with the suspect intermediary issue though there is much case law regarding the use of "appropriate adults" for mentally vulnerable suspects and the safeguards provided for them by the Police and Criminal Evidence Act 1984 (PACE) in Code C, Practice for the Detention Treatment and Questioning of Persons by Police Officers.⁴⁵

There is no published research regarding the use of intermediaries at the police station though there have been numerous studies of vulnerable suspects. Research published in 1998 found no evidence to support the hypothesis that "psychologically vulnerable suspects are particularly likely to confess"⁴⁶ though research into witnesses with Autism Spectrum Disorder suggests they might be more susceptible to report erroneous detail suggested to them in leading questions.⁴⁷ Judges in the Court of Appeal in Northern Ireland recently recognised that "[t]here is now a considerable body of evidence to suggest that mentally handicapped young people are likely to be more vulnerable in police interviews because they may be suggestible".⁴⁸ Further research is required to gain a greater understanding about the most appropriate interview techniques for vulnerable suspects.⁴⁹ The current position has been summarised as "[p]sychological vulnerabilities are best construed as potential 'risk factors' rather than definitive markers of unreliability."⁵⁰

No doubt a major challenge that faces the police when dealing with a vulnerable suspect is identifying the fact of the vulnerability in the first place. Even trained clinicians have found this to be "an extremely difficult task" in the hurly burly of a police station.⁵¹ If the suspect's vulnerability is known or suspected they should

⁴⁴ The reported Divisional Court decisions concerned a refusal to allow an intermediary in fairly stark circumstances in the youth courts.

⁴⁵ Note also many mirror provisions in Code H which applies to those who are detained in relation to suspected terrorist offences.

⁴⁶ J. Pearse, G. Gudjonsson, I. Clare and S. Rutter, "Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession" (1998) 8 *Journal of Community & Applied Social Psychology* 1.

⁴⁷ K. Maras and D. Bowler, "Eyewitness Testimony in Autism Spectrum Disorder: A Review" (2012) *J Autism Dev Disord*.

⁴⁸ *Brown* [2012] NICA 14 at [54].

⁴⁹ B. O'Mahony, B. Milne and T. Grant, "To challenge, or not to challenge? Best practice when interviewing vulnerable suspects" (2012) *Policing: A Journal of Policy and Practice* 1. Maras & Bowler also call for more research in order to increase quality and accuracy of interviews with witnesses with ASD. See fn.37, above.

⁵⁰ G.H. Gudjonsson, "Psychological vulnerabilities during police interviews. Why are they important?" (2010) 15 *Legal and Criminological Psychology* 161.

⁵¹ Pearse, Gudjonsson, Clare and Rutter, "Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession" (1998) 8 *Journal of Community & Applied Social Psychology* 1, 13, 16.

be treated as such and inter alia an “appropriate adult” should be appointed for the suspect.⁵² Code C describes the custody officer’s obligations to obtain assistance for mentally disordered or otherwise vulnerable detainees.

Paragraph 1.7 of the Code sets out what “appropriate adult” means.⁵³ It could be a relative or social worker for instance but, unlike an intermediary, it need not be someone who specialises in communication with vulnerable people let alone the specific communication needs of a particular suspect. If an appropriate adult is present at the vulnerable suspect’s interview, the police should inform the appropriate adult that “they are not expected to act simply as an observer” and that their role is to “advise the person being interviewed”, “observe whether the interview is being conducted properly and fairly” and “facilitate communication with the person being interviewed”.⁵⁴ The appropriate adult’s duty to give advice and assistance⁵⁵ includes considering whether the suspect requires legal advice from a solicitor.⁵⁶ This clearly contrasts with the role of the intermediary whose job it is to remain neutral and advise on communication *with* the vulnerable person rather than advise the vulnerable person of their rights. Though Code C includes provision of “appropriate adults” and “interpreters” and was very recently revised, there is no mention of intermediaries.⁵⁷

Code C suggests overlap between the role of intermediary and that of the appropriate adult since part of the role of the appropriate adult is to “facilitate communication with the person being interviewed”. However, unlike intermediaries, appropriate adults are not required to have specialist skills in assessing and advising on the communication needs of a vulnerable detainee with for instance a mental disorder or Autism Spectrum Disorder (ASD). Since “[n]either appropriate adults nor solicitors are routinely skilled in facilitating communication between police officer and vulnerable suspects”⁵⁸ the presence of an appropriate adult and/or a solicitor does not minimise or neutralise the need for an intermediary.

On several occasions the Court of Appeal has considered an appeal against conviction based, at least in part, on the absence of an appropriate adult for a vulnerable suspect. The appellant in *W*⁵⁹ was a 20-year-old with a history of special needs and ADHD. The main ground of appeal was that

“[t]he judge erred in failing to exclude the appellant’s interview on the basis that it was unreliable under section 76(2)(b) of the Police and Criminal

⁵² Code C, Code of Practice for the Detention Treatment and Questioning of Persons by Police Officers, issued pursuant to The Police and Criminal Evidence Act 1984 (PACE). See <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-c-2012?view=Binary> [Accessed October 23, 2012]. This latest version of the Code applies to people in police detention after 00:00 on July 10, 2012, notwithstanding that their period of detention may have commenced before that time. (The previous updated version of the Code applied to those in police detention after midnight on January 31, 2008).

⁵³ “The appropriate adult” means in the case of a juvenile, “(i) the parent, guardian or, if the juvenile is in the care of a local authority or voluntary organisation, a person representing that authority or organisation; (ii) a social worker of a local authority; (iii) failing these, some other responsible adult aged 18 or over who is not a police officer or employed by the police” or in the case of a person who is mentally disordered or mentally vulnerable, “(i) a relative, guardian or other person responsible for their care or custody; (ii) someone experienced in dealing with mentally disordered or mentally”.

⁵⁴ Code C, para. 11.17.

⁵⁵ Also stated at Code C, para. 3.18. .

⁵⁶ Code C, para. 6.5.

⁵⁷ See <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/revisions-pace-codes/> now in force [Accessed October 23, 2012].

⁵⁸ B. O’Mahoney, “Appropriate Action” (2009) *Police Review* 22, 23.

⁵⁹ *W* [2010] ECA Crim 2799.

Evidence Act 1984 because the appellant was interviewed without the presence of an appropriate adult.”⁶⁰

The Court of Appeal thought the appellant was “plainly and admittedly within the definition of vulnerable people within the code” and it had “no reason whatever to think that had the police been in possession of this evidence at the time, they would not have hesitated in waiting for an appropriate adult before proceeding.” Quashing the conviction the court stressed this was a fact specific decision. There are other examples of appeals where the facts relied on include the absence of an appropriate adult.⁶¹ Such decisions, at the very least, point to the possibility that in certain circumstances when an intermediary ought to have been present but was not, their absence might render the confession unreliable and the conviction unsafe. This might also result in an injustice to the victim in that particular case since “having grounds for doubting the safety of a conviction is a very different thing from concluding that a defendant is necessarily innocent”.⁶²

The lack of a reference in Code C to an intermediary is unlikely to be fatal to a ground of appeal based on the absence of an intermediary at the vulnerable suspect’s interview. In *Brown* the Northern Ireland Court of Appeal heard four appeals referred by the Criminal Cases Review Commission. The appellants, each of whom was 15 or 16 years old at the time, were suspects in the early 1970s when the test of admissibility was changed to a question solely of whether it had been obtained “by torture or inhuman or degrading treatment”. None of the then youths had access to a solicitor or were accompanied by a parent or independent person in interview when they made their admissions. Citing Lord Bingham in *King*,⁶³ the court said:

“In looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy.”⁶⁴

⁶⁰ *W* [2010] ECA Crim 2799 at [8].

⁶¹ In *Foster* [2003] EWCA Crim 178 the appellant’s 1986 conviction for murder was referred to the Court of Appeal by the Criminal Cases Review Commission (CCRC). As a suspect he was interviewed on 10 occasions in total. There was no appropriate adult present at all though in the tenth and final interview, conducted for the purposes of confirming his admissions, a social worker and solicitor were present. The social worker had “no specialist experience or training in dealing with mentally handicapped adults” (at [48]). The appellant, who was “highly suggestible”, exhibited “special knowledge” of the circumstances of the murder and made a further confession of guilt in evidence at trial. Notably this judgment is less than ten years old but contains language which now seems much more than a decade out of date: the appellant is described as “on the borderline of being mentally defective” (at [2]) and from a family where “most or all of whom were as or more inadequate”. The Court of Appeal dismissed the appeal though the facts suggest a case that today would be ripe for the use of an intermediary. *Steel* [2003] EWCA Crim 1640, also a referral by the CCRC, the appellant’s murder conviction in 1979 depended essentially on his confession in police interview at a time before the Code C safeguards had been “built into the process” (at [76]). Fresh evidence concluded that the appellant had an IQ of 65 and was abnormally suggestible. The appeal was allowed. In *L; R* [2011] EWCA Crim 649 the police had been unaware that one of the suspects had ASD which resulted in him having verbally based communication problems and meant he could be “suggestible, particularly when under pressure and when required to respond to complex statements or questions” (at [13]). The trial judge had admitted the appellant’s admission in police interview when there had been no appropriate adult or solicitor present. The convictions were quashed. Again it is stressed that these are fact specific decisions.

⁶² *Hussain* [2005] EWCA Crim 31 at [54], echoing the observations of Lord Bingham in *King* [2000] 2 Cr. App. R. 391; [2000] Crim. L.R. 835.

⁶³ *King* [2000] 2 Cr. App. R. 391; [2000] Crim. L.R. 835. The successful appellant at the time of his detention was aged 16, (but 42 at the time of the appeal) “confessed” to the murder of his 23-month-old brother. Safeguards relating to an independent adult, legal advice and the caution, had not been adequate.

⁶⁴ *Brown* [2012] NICA 14 at [22].

Drawing analogies with appropriate adult case law, if a vulnerable defendant makes what appears to be an admission or confession in circumstances where it could be shown that an intermediary should have been providing assistance to make the interview fair, it is possible that the Court of Appeal will quash the subsequent conviction. The Court of Appeal will consider the overall circumstances in which the admission or confession was obtained. The absence of an intermediary making the interview less than ideal is unlikely to be, of itself, enough. The appellant is likely to need expert evidence to support the contention that the absence of an intermediary led to questions and/or answers that were not properly understood and resulted in a misleading response/s or “admission” being wrongly admitted into evidence.

Apart from possibly leading to unfairness and quashed convictions, the absence of an intermediary might represent a significant missed opportunity in the police investigation. More effective police questioning made possible through the assistance of a defendant intermediary might lead to the earlier identification of the true offender as well as to more timely guilty pleas. Defendant intermediaries could result in overall cost savings. However, police officers would be forgiven for not automatically considering intermediaries for vulnerable suspects because “Code C” makes no mention of them.

Funding a defendant intermediary

In 2008 H.H. Judge Michael Lawson QC noted extra-judicially that he had presided over two cases where the defendant needed an intermediary he had ordered costs out of central funds and in another “happily” the LSC had been persuaded to grant funding as an alternative to the prospect of the defendant being found unfit to plead.⁶⁵

The court in *Sevenoaks* expressly disallowed the payment of the intermediary out of central funds in the absence of specific statutory power. It is within the knowledge of the authors through conversations with the MoJ and counsel in the respective cases, that when the first request for a defendant intermediary were made in 2006–07, the MoJ did meet the cost. Quite soon however, the responsibility shifted to the defence. The practice arose of making orders for costs out of central funds for what were not necessarily “modest” costs.

Since November 2009 the question of who pays for the services of the defendant’s intermediary costs has been a difficult one. Though some requests are still made to the MoJ⁶⁶ the response includes the statement:

“Provision of non-registered intermediaries is not the responsibility of the WIS, the Ministry of Justice or the NPIA [now Serious Organised Crime Agency], therefore it will be the responsibility of the defence lawyer in conjunction with the court to make the necessary arrangements for their appointment.”⁶⁷

⁶⁵ Wurtzel, “Intermediaries for Defendants” (Autumn 2008), *The Circuiteer*, the Magazine of the South Eastern Circuit, 6, 7.

⁶⁶ “Over the 12 month period April 2011 — March 2012 an average of 3 requests per month were received for the services of a Registered Intermediary.” Email to the first author from the MoJ, April 24, 2012.

⁶⁷ Email to the first author from the MoJ, April 24, 2012.

Between June 2011 and May 2012, the Legal Services Commission (LSC) received 203 applications for prior authority for a defendant intermediary. The month-by-month figures suggest the number of applications is increasing over time.⁶⁸ Two hundred and three applications in one year, or a little over twenty per month on average taking Mar-May 2012, is a tiny proportion of the total number of suspects and defendants in England and Wales for that period. Of the 203 applications

“147 [requests for prior authority to fund a defendant intermediary] were granted, 31 were rejected for requesting intermediaries for court appearances (paid for by HMCTS), and 25 were rejected requesting more information.”⁶⁹

The LSC has no published guidance in relation to intermediaries in criminal matters but has confirmed⁷⁰ the position to be:

“The LSC have an agreement with the Ministry of Justice (MoJ) and Her Majesty’s Court and Tribunal Service (HMCTS) regarding the funding of an intermediary in Crime matters. In publicly funded Crime matters the LSC will bear the cost of an intermediary’s initial conference with the client/solicitors whilst HMCTS will pay for an intermediary’s attendance at trial. Prior authority can be sought in the usual manner for the fees of an intermediary for the initial work with the client and any conferences prior to the trial. The LSC will authorise costs at the MoJ 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 also be claimed if applicable. Prior authority cannot be granted for an intermediary to attend court. Costs for the intermediary to attend court should be submitted to HMCTS in the same manner as any other person attending court to assist a witness, such as an Interpreter.”

Finding a defendant intermediary

In *Cox*, a case that also turns on its own specific facts, the trial judge had directed that an intermediary should be made available to assist the defendant who had complex difficulties including alcohol dependency, personality disorder and a learning disability, but no appropriate intermediary could be found.⁷¹ The Court of Appeal noted

“[i]n the context of a defendant with communication problems, when every sensible step taken to identify an available intermediary has been unsuccessful, the next stage is not for the proceedings to be stayed, which in a case like the present would represent a gross unfairness to the complainant, but for the

⁶⁸ Anecdotal reports from judges also suggest that applications for defendant intermediaries are increasing.

⁶⁹ FOI response letter from the LSC to the first author, July 24, 2012. The letter also stated: “Of the 203 applications, 62 were at the Magistrates level, 139 at the Crown Court and 2 were Prison Law matters.”

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⁷¹ *Cox* [2012] EWCA Crim 549; [2012] 2 Cr. App. R. 6 (p.63) at [9].

judge to make an informed assessment of whether the absence of an intermediary would make the proposed trial an unfair trial.”⁷²

The Court of Appeal concluded that, notwithstanding the absence of an intermediary, the trial judge had ensured there were sufficient adaptations and had “conducted the proceedings with appropriate and necessary caution”. The appeal was dismissed. It is worth noting that this was not a decision about whether a defendant should have an intermediary (a judge had already ruled that he should) but whether he had had a fair trial despite not having had one and indeed whether he had become unfit to plead. It was another fact specific case.

Until February 2011, defence solicitors were able to access the matching service via the MoJ in order to find an RI whose skills were suitable for the defendant’s needs as long as doing so did not impact on their provision for vulnerable witnesses. However, due to increased demand for witness intermediaries “there is no longer spare capacity to fulfil requests for defendants”.⁷³ The MoJ was also, as they have explained to the authors, mindful that the MoJ is primarily obliged to fulfil its statutory duties and defendant intermediaries are outside the current statutory scheme.

Those trying to assist prosecution witnesses begin by trying to ascertain what the communication needs of the witness are, based on reports if they exist and on what those who know the witness have told them. They submit this to the WIS matching service which does its best to find a Registered Intermediary with appropriate experience and skills. Whether or not the RI does possess the right skills will only be confirmed during the assessment. A defence solicitor trying to help a defendant does not have the advantage of an experienced matching service or access to the register of intermediaries. They must seek an intermediary elsewhere.⁷⁴

The advice from the MoJ is that “defence solicitors should liaise with the local court in accordance with guidance provided to HMCTS at an operational level regarding the engagement of intermediaries for vulnerable defendants”.⁷⁵ The Prison Reform Trust points out that the guidance for HMCTS staff “which, hitherto, has not been routinely available for defence lawyers and others concerned with the provision of intermediaries for defendants” is “helpful in that it provides detailed information about when and how a non-registered intermediary can be obtained for a vulnerable defendant”.⁷⁶ However, in May 2012 when the Prison Reform Trust carried out a check, it found that only three of the organisations listed “might be able to assist in providing a non-registered intermediary and none of them routinely did so.”⁷⁷

In the meantime private organisations are routinely providing intermediaries for defendants. For instance both Communicourt and Triangle⁷⁸ recruit people with

⁷² Cox [2012] EWCA Crim 549; [2012] 2 Cr. App. R. 6 (p.63) at [30].

⁷³ Email to the first author from the MoJ, April 24, 2012.

⁷⁴ *The Registered Intermediary Procedural Guidance Manual*, February 2012, London: Ministry of Justice, p.8, para.1.19.

⁷⁵ Email to the first author from the MoJ, June 20, 2012.

⁷⁶ J. Talbot, *Fair Access to Justice? Support for vulnerable defendants in the criminal courts* (London: Prison Reform Trust, 2012), p.15. Note also another variation on the definition of vulnerable in the HMCTS guidance as it is described in the briefing document at p.10. Vulnerable includes a defendant who is “young and overly immature”.

⁷⁷ J. Talbot, *Fair Access to Justice? Support for vulnerable defendants in the criminal courts* (London: Prison Reform Trust, 2012), p.16.

⁷⁸ See <http://www.communicourt.co.uk/> and <http://www.triangle.org.uk/> [Accessed October 23, 2012].

an appropriate background as defendant intermediaries and provide induction, training and support as well as a matching service for clients seeking an intermediary through their organisation.⁷⁹

At Leeds Crown Court, in a judgment explaining the background to a declined request for a defendant intermediary, the Recorder of Leeds issued special guidance for future applications for a defendant intermediary. The court will now expect any request to have been identified by and raised at the PCMH⁸⁰ and if an intermediary is to be used it will be the court which attempts to find an appropriate one following the HMCTS guidance.⁸¹ It remains to be seen if this guidance will work in practice given the Prison Reform Trust's finding that the organisations listed in HMCTS (unpublished) guidance don't actually routinely provide the names of people to act as intermediaries.

The real meaning of “non-registered”

At present, intermediaries who assist defendants will always be non-registered in the sense that they are not operating through a regulated scheme. Some people acting as non-registered defendant intermediaries may also act as RIs for witnesses under the MoJWIS. If they do, they will almost certainly bring transferrable skills to the defendant intermediary role. Other defendant intermediaries will not be registered for witnesses and may or may not have training in the workings of the criminal justice system. This is part of the risk that is run when there is no comparable defendant intermediary scheme.

Lawyers who are able to instruct a defendant intermediary who is also, in a separate role, an RI, may regard the fact of their MoJ registration as a “safeguard”.⁸² On account of their other status as an RI they will have been carefully selected by the MoJ for their professional expertise, enhanced CRB checked, trained and assessed. They will be subject to CPD requirements and regularly updated procedural guidance. On the other hand, the MoJRI training is not designed to prepare the intermediary for defendant work. The “quality assurance” aspects of CPD requirements, updated guidance and a complaints procedure do not apply to RI's when they take on defendant work.

Fears about the quality of the work that might be done by some defendant intermediaries have led some RIs to comment

“that using unregulated non-registered intermediaries could affect the good name and credibility that RIs have built up. One RI said that people ‘will be confused, and standards will not be set/ maintained’. Another reported that the issues associated with getting intermediaries for defendants had already led ‘to confusion and anger by some barristers towards the scheme’”.⁸³

⁷⁹ Emails dated July 7, 2012 from Triangle and dated July 11, 2012 from Communicourt to the first author.

⁸⁰ *GP* Unreported July 20, 2012 H.H. Judge Peter Collier QC, Recorder of Leeds, “Guidance for future applications”, para.66.1.

⁸¹ “Guidance for future applications”, para 66.4.

⁸² F. Williams and S. Lambe, “Defendants and the Use of Registered Intermediaries” *Crime Line Updater*, March 27, 2012.

⁸³ P. Cooper, *Tell Me What's Happening 3: Registered Intermediary Survey 2011* (2012) available at: <http://www.city.ac.uk/law/courses/continuing-professional-development/in-house-courses/intermediary-training> [Accessed October 23, 2012].

Whatever their background, each non-registered defendant intermediary will need to agree their role with the defence, for example whether they are needed to attend client conferences. Judges and advocates would be well advised to have a ground rules hearing before the trial begins in order to define the defendant intermediary role in court during the trial.⁸⁴

It is not fanciful to imagine that a case could be derailed if a defendant intermediary, whose role had not been properly defined, were to unwittingly use a controversial method of communication. In *R. (on the application of Pinnington) v Chief Constable of Thames Valley Police*⁸⁵ the Divisional Court noted the grave reservations expressed by Dame Elizabeth Butler-Sloss in *Re D (evidence: facilitated communication)* regarding “facilitated communication”

“a method by which persons with a severe communication impairment are enabled to communicate through supported pointing at objects, pictures, words or letters (in particular, via a board or a computer keyboard). The facilitator may give support physically (to the hand, arm or shoulder) and/or emotionally, in terms of encouragement. There is, however, a serious risk of the content of the communication being affected by the unconscious actions of the facilitator.”⁸⁶

Nor, it is suggested, is it fanciful to imagine the difficulties that could arise if a defendant intermediary failed to understand the impact of legal professional privilege and their duty of confidentiality. There is no direct authority on the point, but it is suggested that under principles of the common law duty of confidentiality and data protection legislation⁸⁷ anything said to a defendant intermediary by the defendant⁸⁸ 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.⁸⁹ It is difficult, if not impossible to imagine how the intermediary could take part in the process without understanding and adhering to the rule of confidentiality. It is, however, debatable whether the intermediary is subject to legal professional privilege; it is interesting to note that PACE Code C states that an appropriate adult “is not subject to legal professional privilege”.⁹⁰

⁸⁴ Ground Rules Hearings are a requirement for witness intermediaries (see Criminal Procedure Rules 2012 r.29.10 and the Application for a Special Measures Direction Form, at Pt F) but there is no equivalent procedural requirement for defendant intermediary use.

⁸⁵ *R. (on the application of Pinnington) v Chief Constable of Thames Valley Police* [2008] EWHC 1870 (Admin). The RI in that case “had two sessions with C in October 2004, at the end of which she concluded that he was unable to communicate sufficiently well to provide any evidence by way of video interview. In her notes about the meetings she described facilitated communication as a red herring, saying that when C wanted to talk it was not difficult to understand him. The matter was not pursued by the police.” (at [43]).

⁸⁶ *Pinnington* [2008] EWHC 1870 (Admin) at [27]. The full citation being *Re D (Evidence: facilitated communication)* [2001] 1 F.L.R. 148.

⁸⁷ It is recognised that this duty is not absolute (see for instance *W v Egdell* [1990] Ch. 359) and that data protection legislation provides a framework, not a barrier, when it comes to information sharing.

⁸⁸ Or suspect, since the intermediary might be acting at the police station.

⁸⁹ The defendant’s Data Protection Act 1998 and ECHR art.8 (respect for private and family life) rights might conceivably be breached by an inappropriate disclosure.

⁹⁰ Code C, note 1E, p.5.

What would be the situation if the defence decide not to apply to use their intermediary? Could she be called to give evidence by the Crown and to disclose her report? Where would a non-registered intermediary obtain advice on what to do? In contrast, RIs have access to advice via their on-line support site.⁹¹

It is submitted that a system should be in place to ensure that all defendant intermediaries have at least basic training in evidence, procedure and ethics so as to reduce the risk of evidence being contaminated by an intermediary as well as adequate support when procedural or ethical issues arise in practice.

The defendant intermediary is not part of the “defence team”. She must be forthright in exploring the defendant’s communication needs and in what she puts into the report. Once the defendant begins to give evidence, the intermediary’s function is the same as for a witness for the defence or the Crown. This includes the duty to make sure that the court has heard everything the defendant/witness has said. Will an intermediary who has not been trained and does not have a code of practice or code of ethics to follow⁹² be a truly independent one?

Achieving Best Evidence advises the police to use “Registered Intermediaries” for witnesses and states that

“[t]he use of an unregistered person as intermediary can only be considered once the options for using a Registered Intermediary have been exhausted.

There is a preference for unregistered intermediaries to be professional people rather than family members, friends or associates. In the event that the particular circumstances of the case are such that it appears that only a non-professional person can perform the function of an intermediary, it is important that the witness is assessed by a Registered Intermediary before proceeding, in order to confirm that the role can only be performed by the non-professional.”⁹³

There is no equivalent guidance relating to the suspect or defendant, but even if there were, the “pecking order” of Registered Intermediary, professional, non-professional and in any event an assessment by an a Registered Intermediary cannot apply because there is no such thing as a registered defendant intermediary. In summary, they are all “non-registered”, there are no standards across the board to ensure appropriate matching, training, support, or CRB checking.⁹⁴

In contrast Northern Ireland is preparing to introduce the intermediary special measure⁹⁵ in 2013 under

“pilot intermediary schemes (for witnesses and for defendants) for a specified range of offences in Belfast Crown Court. If the police gauge that the case will be heard in BCC, they will interview the person with intermediary assistance.”⁹⁶

⁹¹ “RIO” is Registered Intermediaries online is a member only site with resources and discussion boards moderated by the MoJ.

⁹² Registered Intermediaries must adhere to a Code of Practice and a Code of Ethics which can be found in their procedural guidance manual now in its the third edition: MoJ, *Registered Intermediary Procedural Guidance Manual*, (London: Ministry of Justice, 2012).

⁹³ *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures* (2011), London: MoJ, para.2.199.

⁹⁴ The MoJ system of regulation only applies to intermediaries while they act as Registered Intermediaries appointed under the WIS for witnesses.

⁹⁵ 1999 Act s.16 is mirrored in art.4 of the Criminal Evidence (Northern Ireland) Order 1999.

⁹⁶ Email from the NI DoJ to the first author, June 21, 2012.

Perhaps Northern Ireland will avoid the complex and problematic bifurcated “system” that has evolved in England and Wales. What lies behind the Northern Ireland move to pilot intermediaries for both witnesses and defendants, was a concern by the judiciary that piloting a scheme just for witnesses would create unfairness to defendants.

The way forward

In 1998 clinical assessment of 160 suspects found that 15 per cent were “vulnerable” though it was said that this was likely to be an underestimate.⁹⁷ In 2010 *The Maguire Report* found that “16% of people placed in custody meet one or more of the assessment criteria for mental disorder”.⁹⁸ Bryan reports “a consensus figure of 50 – 60 % of young people who are involved in offending having speech, language and communication needs is emerging”⁹⁹ and that

“professionals who come into contact with these children and young people, both before and after they reach criminal justice services, need to ensure that the possibility of undiagnosed speech, language and communication difficulties is considered and acted upon.”¹⁰⁰

It is impossible, without research, to know what proportion of vulnerable suspects and defendants require an intermediary for effective communication with police, lawyers and courts. Many vulnerable defendants may be slipping through screening, such as it is, and of those who are identified the criminal justice system professionals may be unaware that an intermediary might be able to assist with communication.

The defendant intermediary legislation, not yet implemented, would only allow for an intermediary during the course of the defendant’s testimony and only in accordance with the statutory criteria. Judges have stepped in to fill the gap and permit defendant intermediaries where they are necessary for a fair trial:

“Ironically, therefore, defendants might be better off now under the flexible ad hoc system of appointments at common law than under the new statutory provisions, not least because of the formidable thresholds which the legislation imposes for access to intermediaries.”¹⁰¹

As things stand there is no standard way of finding an appropriate defendant intermediary and funding arrangements differ for pre-trial and trial.

If the defendant intermediary legislation is implemented and the MoJ provides registered intermediaries for the defendant’s testimony, defence solicitors could be dealing with an even more complicated system; it could require the defence

⁹⁷ Pearse, Gudjonsson, Clare, Rutter, “Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession” (1998) 8 *Journal of Community & Applied Social Psychology* 1, 13.

⁹⁸ M. Maguire, *Not a Marginal Issue: Mental health and the criminal justice system in Northern Ireland* (2010) Northern Ireland: CJINI, 202, 203.

⁹⁹ J. Gregory and K. Bryan, “Speech and language therapy intervention with a group of persistent and prolific young offenders in a non-custodial setting with previously undiagnosed speech, language and communication difficulties” (2011) 46 *International Journal of Language & Communication Disorders* 202.

¹⁰⁰ Gregory and Bryan, “Speech and language therapy intervention with a group of persistent and prolific young offenders in a non-custodial setting with previously undiagnosed speech, language and communication difficulties” (2011) 46 *International Journal of Language & Communication Disorders* 202, 213.

¹⁰¹ *Great Yarmouth Youth Court* [2012] Crim. L.R. 478.

solicitor to liaise with the LSC (for assistance at pre-trial conference/s), HMCTS (for assistance during the trial) and the MoJ (for assistance when the defendant is giving evidence). The three-way knitting together of defendant intermediary coverage might become ludicrously complicated if the intermediary for the defendant testimony is not one and the same as for the other stages. If implemented, the defendant intermediary legislation could give rise to an inchoate system.

On June 26, 2012 the All Party Parliamentary Group for Equality and Access to the Criminal Justice System for Disabled People met to discuss the question of supporting vulnerable defendants in the criminal justice system. Intermediaries were cited as a prime (though not exclusive) example of such support.¹⁰² Lord Bradley pointed out that the previous government accepted his report's 82 recommendations¹⁰³ and the Coalition has too. Lord Bradley also pointed out the huge cost of not supporting defendants at court.

The defendant intermediary role helps create a fairer justice system; without it justice may be denied to victims and defendants. Failing to use defendant intermediaries in appropriate cases runs the risk of mis-communication and ineffective police investigations as well as unreliable admissions, confessions and testimony. *Cox* showed that a trial could fairly take place without an intermediary assisting a witness who was otherwise deemed to be in need of one but again, one should not extract a binding precedent from those facts. The judge's role is demanding enough without also having to act as the intermediary, even if it did work in that instance. The risk remains that a defendant could be left to stand trial where he is in fact not fully able to participate as he should.

It is time to review the definition of "vulnerable" with a view to achieving consistency as between witnesses and defendants and to simplifying its application by practitioners¹⁰⁴ and judges. It is also time to introduce intermediaries as a PACE safeguard and provide police officers, lawyers and courts with a matching scheme underpinned by a register of trained, regulated and supported intermediaries for suspects and defendants at all stages in the trial.

¹⁰² Those attending received a briefing paper, J. Talbot, "Fair Access to Justice? Support of Vulnerable Defendants in the Criminal Courts" (2012), available at: www.prisonreformtrust.org.uk [Accessed October 23, 2012].

¹⁰³ K. Bradley, *The Bradley Report Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system*, (London: Department of Health, 2009).

¹⁰⁴ Social workers, appropriate adults, expert witnesses, police officers, lawyers, etc.