

# The 'Go-Between': evaluation of intermediary pathfinder projects

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## Executive summary

The Youth Justice and Criminal Evidence Act 1999 made available a range of special measures to help vulnerable and intimidated witnesses give their best evidence. These include giving evidence by TV link or being screened from the defendant in court; video-recorded evidence-in-chief; removal of wigs and gowns; clearing the public gallery; and aids to communication. The special measures are available to prosecution and defence witnesses but not defendants.

Section 29 of the Act made available the use of an intermediary to three categories of vulnerable witness: those under 17; adults whose quality of evidence is likely to be affected by a mental disorder or impairment of intelligence and social functioning or who have a physical disorder or disability. Following assessment of the witness, the intermediary's role at investigative interview and trial is to enable 'complete, coherent and accurate' communication to take place. Intermediaries are approved for use by the court and are allowed to explain questions and answers to the witness, but not to change the substance or meaning of evidence. The role may assist questioners to test the witness's evidence but intermediaries cannot provide an opinion on whether the witness is truthful.

Six pathfinder projects implemented the intermediary special measure between February 2004 and June 2005: Merseyside, West Midlands, Thames Valley, South Wales, Norfolk and Devon and Cornwall. These were the subject of an evaluation which took place between March 2004 and March 2006 with the aim of establishing a model for national implementation.

### Key points

- 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. There were a number of reported emerging benefits, including the potential to: assist in bringing offenders to justice; increase access to justice; contribute to cost savings; assist in identifying witness needs; and inform appropriate interviewing and questioning techniques.
- By the end of the evaluation, the register comprised 76 intermediaries and 206 requests for an intermediary had been received (including from 12 non-pathfinder areas). Over 70 per cent of appointments were made within 24 hours of the request.
- Implementation suffered initially from insufficient national and local leadership across criminal justice organisations. It is essential that the scheme is supported locally by Local Criminal Justice Board (LCJB) members and appointed contacts in criminal justice agencies. 'Witness initiative overload' was also a concern across areas, which wanted more effective co-ordination from the centre to marshal local resources most appropriately.
- Few problems were encountered with recruitment, although when matching intermediaries to witness need (a process that worked well), some gaps in the range of skills in the intermediary pool were identified.
- Adults accounted for 61 per cent of appointments and children 39 per cent; where grounds were provided, and taking into account witnesses eligible on several grounds, most appointments (57%) concerned witnesses with significant impairment of intelligence and social functioning, followed by 35 per cent suffering from a physical disability or disorder. Only 14 per cent were considered eligible due to age alone, even though children are the largest potential eligible group.
- The first 140 appointments were tracked and 102 had been completed by the end of the evaluation: 73 ended without a suspect being charged or cautioned; two ended with an offender being cautioned; and 27 ended after a suspect had been charged. It was not possible to state what influence, if any, intermediaries had on case outcomes. However,

criminal justice participants considered that, in their opinion, at least half of the trial cases would not have reached the trial stage without the intermediary's involvement.

- In qualitative interviews, practitioners stated their belief that intermediaries' contribution at the investigative interview was greatest where they had adequate time for witness assessment and for assisting the police in planning. Contributions at trial were linked by respondents to pre-trial planning and agreed ground rules governing questioning by advocates and the intermediary role.
- The number of requests for intermediaries was lower than expected. Challenges to wider use of intermediaries included: poor levels of awareness; misinterpretation of eligibility criteria (particularly in relation to young witnesses); overestimating advocates' competence; and underestimating the extent of communication difficulties.
- The evaluation concluded that the intermediary scheme should be rolled out nationally over a two-year transitional period, with completion of roll-out by the end of the first year. Case costs should be borne centrally for both years. In order to achieve this, a five-point agenda for roll-out and associated recommendations are set out.

## Key findings

### *Implementation of the intermediary special measure*

Implementation suffered initially from insufficient national and local leadership across criminal justice organisations. It was found to be essential that the scheme was supported locally by both LCJB members and appointed contacts in each criminal justice agency. 'Witness initiative overload' was also a concern across areas, which wanted more effective co-ordination from the centre to marshal local resources most appropriately.

Areas differed markedly in their approach and the activities undertaken to promote the scheme; by the end of 2005, awareness varied between criminal justice agencies and external organisations. However, for all organisations, at least 80 per cent of survey respondents reported having heard of the scheme by means that included attending relevant training or launch events, reading guidance and via colleagues.

Some local groups developed procedures independently that were duplicative of one another or gathered information similar to that already collected centrally. There was thus a need for the Office for Criminal Justice Reform (OCJR) to assist local areas in streamlining their monitoring procedures to facilitate greater consistency and avoid duplicative development effort.

### *Recruitment of intermediaries*

The OCJR funded recruitment and training of intermediaries, maintained the register of intermediaries and responded to requests by appointing intermediaries with appropriate skills and availability. By the end of the evaluation, 76 intermediaries had been recruited, trained and registered through two recruitment exercises. A third exercise was underway. Although most appointed were speech and language therapists, other disciplines included psychology, occupational therapy, health and education. Few difficulties were encountered in recruiting well-qualified candidates. However, when responding to requests for appointment, some problems were experienced in identifying the specific skills needed. These issues were being addressed at the end of the evaluation, through the third recruitment round and in redesign of the skills information held on the register.

### *Intermediary appointments*

By the end of February 2006, a total of 206 requests for an intermediary had been recorded. Analysis

of the first 140 appointments (February 2004 - November 2005) showed that 124 (89%) requests had been made by the police. Twelve non-pathfinder areas accounted for 17 per cent of appointments. The percentage of total applications from each of the six pathfinder areas ranged from 41 per cent in one area to 6 per cent or less in three others. Low rates were not simply due to the length of time the scheme had been implemented in the areas concerned.

Adults accounted for 61 per cent of appointments and children for 39 per cent; they were divided almost equally by gender. Information from criminal justice personnel indicated that 128 (91%) were White British and 12 (9%) were non-White. All but two of the 140 appointments were for prosecution witnesses; two were for defendants.

The ground(s) of eligibility for witnesses were as follows (several were eligible under more than one category):

- 57 per cent had significant impairment of intelligence and social functioning;
- 35 per cent had a physical disability or disorder;
- 14 per cent were eligible on the basis of age alone (under 17);
- nine per cent suffered from a mental disorder.

Nineteen per cent of witnesses lived in care homes or assisted living at the time of the offence. Of 109 witnesses for whom offence information was available, 54 per cent witnessed sexual offences, 25 per cent physical assaults, 19 per cent theft deception or burglary, and the remaining two per cent abduction and an attempted murder.

The number of requests for intermediaries was not stable when the evaluation ended and practitioners considered that many eligible witnesses were not being identified. This made it impossible to forecast with precision the eventual demand or number of intermediaries that will be required to meet it. It would not be feasible to remedy any shortfall quickly as the lead time from advertising to the availability of registered intermediaries is six to nine months.

There is a tension between recruiting an intermediary pool with an adequate spread in terms of geography and skill base and the possibility that, if the pool is too large, many intermediaries will not be used, jeopardising the skills acquired in training and confidence levels. By September 2005, 44 per cent of the pool had not had an appointment despite being registered for a year or more. This had fallen to 16 per cent by March 2006.

Although there were initial concerns about delayed intermediary appointments when a speedy police interview was necessary, by the end of the evaluation over 70 per cent of appointments were made within 24 hours of the request.

#### *Outcome of cases*

By the end of February 2006, 38 of the first 140 appointments were still ongoing; 102 had been completed. Almost three-quarters ended without entering the court process (after intermediary assessment but without police interview, or following an interview assisted by an intermediary where either the case or the witness's evidence was not proceeded with). Of the 102 completed appointments:

- two ended with offenders being cautioned;
- 27 ended after a suspect was charged (one of these was for a defendant; in another, the intermediary appointment was made post interview but the prosecution did not apply for use

of the intermediary at trial);

- 73 ended without a suspect being charged or cautioned (including one appointment for a defendant).

It was not possible to conclude what impact, if any, intermediaries had on these case outcomes.

### Emerging benefits

Feedback from witnesses and carers in trial cases was uniformly enthusiastic. Carers felt that intermediaries not only facilitated communication but also helped witnesses cope with the stress of giving evidence. Appreciation of the role was also almost unanimous across the judiciary and other criminal justice personnel in pathfinder cases.

A range of other benefits from intermediary use were identified.

- *Potential assistance in bringing offenders to justice:* 13 cases (involving 15 witnesses for whom an intermediary was appointed) ended in a conviction, five after trial. Of the 29 appointments where a suspect was charged or cautioned, 15 (13 cases) ended in a conviction and two in a caution. Of the remaining appointments, nine (six cases) ended in an acquittal. A further case was for a defendant where the prosecution was dropped before trial, one resulted in a hung jury and one was where an appointment for an intermediary was not followed through to trial. It is not possible to say whether intermediaries affected case outcomes.
- *Increasing access to justice:* participants estimated that, in their opinion, at least half of the 12 trial cases would not have reached trial without the involvement of the intermediary. Although the number of cases reaching court was low and the impact on case outcomes is unknown, this does provide an indication of the value criminal justice practitioners perceived intermediaries to have.
- *Potential cost savings:* participants felt that intermediaries facilitated more efficient use of police time by flagging at an early stage those cases where it was not feasible for the police to interview the witness or, following interview, by informing a decision not to prosecute. It was felt that intermediary use also had the potential to save court time by keeping witnesses focused, reducing the time that might otherwise have been needed to question them.
- *Benefits at the investigative stage:* participants in the research reported that there were a number of benefits during investigations: these included identifying that the witness's comprehension level was lower than it appeared; assisting in efficient planning of interviews; assisting witnesses at identification procedures; and helping inform CPS decisions about witness suggestibility, ability to cope with cross-examination and how the witness should give evidence. In addition, in one instance, a victim interview facilitated by an intermediary revealed that the suspect in custody was not the assailant, thus assisting with the delivery of justice in this case.
- *Benefits at trial:* participants also reported benefits during the trial stage: these included facilitating communication in a neutral way, through informative reports and appropriate interventions; and ensuring that witnesses understood everything said to them, including explanations and instructions.
- *Other reported potential uses:* these included facilitating victim personal statements for witnesses or relatives of victims of murder and manslaughter; pre-trial witness interviews by

prosecutors; and non-criminal proceedings (public law care proceedings and Care Standards Tribunal hearings).

- *Addressing wider criminal justice objectives:* it was felt that intermediary use had the potential to impact on mainstream criminal justice objectives, particularly in relation to witness satisfaction, public confidence (provided scheme achievements are publicised) and delivery of the enhanced service set out in the Code of Practice for Victims of Crime.

## Challenges

Despite these perceived benefits, the evaluation highlighted challenges to wider use of this special measure. These include:

- *Difficulty in identifying eligible witnesses:* many participants in pathfinder areas considered that the number of referrals received during the evaluation were low and not a reliable guide to potential demand. This view is reinforced by studies indicating low identification of witness vulnerability by criminal justice organisations – e.g. Burton *et al.* (2006) and Cooper and Roberts (2006). Of those witnesses for whom an intermediary was appointed, 24 per cent had already given a witness statement, suggesting that eligibility was missed at the point of interview. None of the 16 witnesses assisted by an intermediary at trial had the benefit of an intermediary at the initial investigative interview. Witnesses under 17 are the biggest eligible category but only four (aged between six and ten years) were identified whose eligibility rested solely on age. Sixteen out of 18 witnesses aged five and under were identified by just one area. These findings indicate a significant gulf between legislative intent and receptivity of criminal justice practitioners to the automatic eligibility of witnesses under 17.
- *Misunderstanding of the intermediary role:* while those with direct experience of intermediaries were almost all very positive, some others encountered pre-judged or misunderstood the intermediary role. These views appeared to result from: rejecting 'best evidence' as a desirable criminal justice objective; misinterpreting the legislation by applying it to only the most extreme examples of eligibility; overestimating advocates' competence in this area; and underestimating the prevalence of miscommunication with vulnerable witnesses.
- *Lack of planning:* intermediaries and police officers felt that the intermediary's contribution at investigative interview was most valuable where there was time to plan beforehand. Where witnesses were assessed for the first time on the day of interview (as happened for almost 50 per cent), intermediaries felt pressured. In cases with little or no pre-trial discussion with the intermediary, post-trial interviews with intermediaries and practitioners indicated that they felt that lack of planning diminished the intermediary's ability to facilitate communication at trial. Despite some examples of good practice, there was little evidence of effective pre-trial management or timetabling. Common problems included lack of reference at court to intermediary guidance; trials conducted without agreed ground rules for the advocates and intermediary; intermediaries who failed to intervene as soon as a potential miscommunication problem occurred; frequent malfunctions of live TV link technology; and failure to identify poor quality video-recorded evidence-in-chief.
- *Lack of appropriate intervention in questioning:* where advocates were unable to simplify questions, as advised in the intermediary's report on the witness, the need for intermediaries to intervene increased. The intermediary's relatively narrow remit to intervene in inappropriate questioning is confined to facilitating communication. Judges and prosecutors have wider responsibilities, for example in respect of questioning that is oppressive or repetitive. It was therefore concerning that some judges and prosecutors said they would be less likely to intervene in inappropriate questioning where an intermediary was present. Effective use of intermediaries will require others in the criminal justice process to re-

examine and adapt their approach to vulnerable witnesses.

- *The scope of the measure:* there were concerns about excluding vulnerable defendants from eligibility for special measures. There was also widespread reservation about devolving responsibility for payment of intermediary case costs to local areas, at least before a realistic level of need was identified and benefits were appreciated. It was anticipated that potential difficulties with funding the scheme at a local level would result in intermediaries being denied to many eligible witnesses and restricted to only the most extreme cases.

## Recommendations

The intermediary is a new professional role. It was executed in a conservative manner, well within parameters of procedural guidance; any effectiveness of intermediaries' contribution is likely to increase with experience. Participants involved in this research felt that the measure has the potential to contribute to achievement of mainstream criminal justice objectives and that the potential benefits justified roll-out to other areas. The evaluation validated the approach taken to recruitment, highlighted the contribution of the role in investigative interview and at court and revealed demand for the scheme beyond the pathfinder areas. However, by the end of the evaluation, it was not possible to forecast with confidence the eventual demand. In addition, insufficient information had emerged to propose a strategy to improve identification of eligible witnesses and challenge cultural resistance to the scheme. While the evaluation did not result in the hoped for level of detail on these matters, the findings support production of an agenda for roll-out and associated issues to be addressed.

### *The agenda for implementing national roll-out*

It is recommended that the OCJR take forward the intermediary scheme by proceeding with a two-year transitional phase, with national roll-out completed no later than the end of the first year and individual case costs borne centrally at least until the end of the second year. This timetable acknowledges that recognition of eligible witnesses and acceptance of the need for intermediaries takes time and requires significant cultural change. By the end of the transitional phase, assuming identification of eligible witnesses has improved significantly, the OCJR will be better able to assess whether costs can be delegated without jeopardising access to the measure across the full range of witnesses envisaged by the legislation.

It is recommended that in proceeding to national roll-out, central management of the scheme should be strengthened. A five-point agenda for roll-out is proposed to avoid the implementation pitfalls encountered during the pathfinder projects. Some functions – recruitment and training, obtaining feedback and monitoring intermediary activities, and matching witness needs to the skills of registered intermediaries – should remain as centralised functions, as these are considered key to criminal justice confidence in the scheme.

#### **The five-point agenda** covers:

1. Providing central guidance and allocating clear local responsibility for implementation;
2. Highlighting links between implementation of the special measure and other initiatives;
3. Raising awareness among the criminal justice community and tackling 'mindset' obstacles to intermediary use;
4. Identifying eligible witnesses at the earliest opportunity;
5. Improving pre-trial planning and ensuring that ground rules for intermediary use are discussed

before trial.

More specifically, it is recommended that the following issues are addressed:

- promoting acceptance of the special measure by building on links with other witness initiatives and criminal justice system objectives;
- providing LCJBs with at least six months' notice of roll-out and a model action plan and support for local implementation;
- addressing cultural as well as factual issues in raising awareness of the scheme by:
  - giving a clear message about the scope of eligibility (highlighting in particular the automatic eligibility of those under 17);
  - continuing to distinguish the intermediary role from that of others (such as supporters, expert witnesses and interpreters);
  - discussing with the legal profession organisations how the intermediary role, eligibility of defence witnesses and recognition of causes of miscommunication can be raised in training;
  - reporting findings about the types and prevalence of miscommunications experienced by witnesses when being questioned;
  - ensuring that the identification of communication needs among witnesses from minority ethnic groups and those using languages other than English is addressed;
  - promoting early identification of eligible witnesses prior to interview, and encouraging the development of safety-net procedures across criminal justice organisations to assist in identifying those overlooked during the investigation;
- updating the case checklist in light of experience with trial cases and working with LCJBs, CPS, HM Courts Service, police and court representatives to ensure the checklist and guidance are received by members of the judiciary and practitioners;
- liaising with the senior judiciary and Judicial Studies Board to develop a guide to good practice on case management of intermediary trials, including a template for ground rules to be agreed in advance of trial and appointment of a designated judge for the intermediary special measure at each court to act as a point of reference for colleagues on the bench and in magistrates' courts;
- obtaining feedback from intermediaries and courts so that case management and practice issues can be identified during the transitional phase;
- considering the options for future management of the scheme.

## Conclusion

The pathfinder projects indicated positive contributions of the intermediary special measure in providing vulnerable witnesses with access to justice and to furthering the government's objectives for the criminal justice system. The pool of registered intermediaries is a precious resource. They have been valuable ambassadors in the pathfinder areas and have contributed to the success of the scheme.

However, the evaluation revealed operational difficulties and cultural resistance among some in the

criminal justice system. It will require positive action to meet these challenges and to help ensure that meritorious cases proceed and witnesses are given a voice. If the intermediary special measure can be made to work well for witnesses with communication needs, this will assist in raising standards for all witnesses and the justice system as a whole will benefit.

**Methodological note:**

A range of techniques were employed in meeting the study objectives. One hundred and sixty nine interviews were conducted (with police officers, CPS personnel, advocates, judges, intermediaries, witnesses and parents or carers) in relation to all 89 appointments ending during the evaluation and in which an intermediary was actively involved. A further 30 interviews related to management of pathfinder projects. Other techniques included two surveys of intermediaries (in 2004, 29 respondents, a response rate of 64 per cent, and in 2006, 56 respondents, a response rate of 74 per cent); a survey of criminal justice personnel and external organisations (67 respondents, a response rate of 30 per cent); observation of court hearings, training and launch events; and examination of recruitment and financial records, prosecution files and intermediary reports. The first 140 appointments of an intermediary were also tracked. This exercise recorded the types of cases in which an intermediary was appointed, the stages of the criminal justice process that they reached and the nature of intermediaries' involvement. Information was provided to OCJR on indicative costs but a cost-benefit analysis was beyond the scope of the study.

The study approach drew on perceptions concerning the operation of the intermediary special measure in six pathfinder areas. The study was not designed to evaluate the impact of intermediaries on case outcomes.

# 1. Introduction

Of all legislative provisions intended to assist vulnerable witnesses, the intermediary special measure has the greatest potential to help those with a communication need to give best evidence. Its introduction is the latest in a series of reforms which began with the Criminal Justice Act 1988, which provided that, in certain cases, a young witness could give evidence through a TV link from outside the courtroom. The Criminal Justice Act 1991 went further, by making a videotaped interview with a young witness admissible as evidence-in-chief in limited types of cases. However, this took forward only part of the body of recommendations made by an advisory group chaired by Judge Thomas Pigot QC (Home Office, 1989).

In 1997, the Home Office set up an interdepartmental working group to examine the treatment of vulnerable and intimidated witnesses in the criminal justice system. The recommendations in its report 'Speaking Up for Justice' (Home Office, 1998) requiring legislation were addressed in the Youth Justice and Criminal Evidence Act 1999. This made available a range of special measures aimed at helping a wider group of vulnerable and intimidated witnesses give their best evidence. These include allowing witnesses to give evidence outside the courtroom by TV link or to be screened from the defendant in court; video-recorded evidence-in-chief; removal of wigs and gowns; closing the public gallery; and the provision of aids to communication. Section 19 set out factors to be considered by the court in considering a special measures application. If the witness is eligible, the court must determine whether any of the measures would be likely to improve the quality of the witness's evidence. If so, the court must then decide which of those measures, or combination of measures, would be likely to maximise the quality of the evidence. In arriving at its decision, the court must take account of the witness's own views and the possibility that the measure might inhibit the evidence being tested effectively.

The intermediary provision (section 29) is the final special measure to be implemented from the 1999 Act.<sup>1</sup> The concept is simple: to ensure witnesses understand the questions put to them and that their answers are understood. The use of an intermediary should be considered as part of the broader consideration of special measures. Early identification of potential need is vital. Both prosecution and defence witnesses are eligible.<sup>2</sup>

The idea of an child examiner who relayed all the lawyers' questions to young witnesses while their evidence was videotaped before trial was first proposed by an academic commentator on the bill which became the Criminal Justice Act 1988 (Williams, 1987). The concept of the interlocutor was then put forward in the Pigot report, which recommended "that the court should have discretion to order exceptionally 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" (Home Office, 1989). A study of the needs of victims with learning disabilities' (Sanders *et al*, 1997) recognised that the pool of potentially eligible witnesses should be broadened, and concluded that "intermediary questioners [should] 'translate' the questions of defence and prosecution lawyers".<sup>3</sup> 'Speaking Up for Justice' (Home Office, 1998) recommended that "Courts should have the statutory power to require the use of means to assist the witness communicate; whether through an interpreter, a communication aid or technique, or communicator or intermediary where this would assist the witness to give their best evidence at both any pre-trial hearing and the trial itself, provided that the evidence communicated can be independently verified".

The model of the interlocutor proposed by Pigot, that of relaying questions to children through a third

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<sup>1</sup> Introduced into the Crown Court in July 2002. The Government announced in July 2004 that it would not implement a further special measure, to visually record the pre-trial cross-examination of some young witnesses.

<sup>2</sup> The legislation excludes defendants, although the judiciary has inherent discretion to grant a special measures direction in respect of a vulnerable defendant with a communication need: see the decisions of the House of Lords in *R v Camberwell Green Youth Court* [2005] UKHL 4, and the European Court of Human Rights in *SC v UK* ([2004] ECHR 263, [2005] FCR 347 (ECtHR)).

<sup>3</sup> The use of a social worker to translate the words at interview of an adult with severe learning difficulties was accepted by the Court of Appeal in *R v Duffy* [1999] QB 919.

party, was not taken forward in the 1999 Act.<sup>4</sup> Its approach was also broader, extending threshold eligibility from 'exceptional' use with children to all children under 17 at the time of the hearing, people with a mental disorder or learning disability and people with a physical disability or physical disorder where the quality of their evidence would be improved by special measures.

Section 29 provides for witnesses to be questioned through an interpreter or other person approved by the court (an intermediary). The function of the intermediary is to communicate:

- to the witness, questions put to the witness;
- to any persons 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.

The Code of Practice for Intermediaries (2005) goes to the heart of the role:

- Their primary responsibility is to enable complete, coherent and accurate communication to take place between the witness and the court.
- They must not change the content of what is being said or attempt to improve or elaborate what has been said.
- They must intervene only to seek clarification from the court or to draw the court's attention to any difficulty the witness may be experiencing in understanding what is being said or that may be distressing the witness.

## Policy framework

The intermediary special measure is of central relevance to mainstream criminal justice objectives:

*"We will put victims and witnesses at the heart of the CJS ... We will support and inform them, and empower both victims and witnesses to give their best evidence in the most secure environment possible".*  
(Justice for All, 2002)

*"The simple truth is that without intermediaries we would not be able to offer justice to some of the most vulnerable people in our society".*  
(Baroness Scotland, 2004)

The scheme contributes to three of the five strategic objectives set by the National Criminal Justice Board in 2004 to be met by the criminal justice system by 2007/08, i.e. in respect of public confidence, that the system is effective and serves all communities fairly; that victims and witnesses receive a consistently high standard of service from all criminal justice agencies; and that more offences are brought to justice through a more modern and efficient justice process. Effective implementation will contribute to the delivery of all seven priorities set by the National Criminal Justice Board for LCJBs in order to increase victim and witness satisfaction with the criminal justice system. These cover basic minimum standards which victims and witnesses should be able to expect, including identifying and meeting the needs of vulnerable witnesses and improving the experience of going to court (2004). It will also impact on the Department for Constitutional Affairs' mission statement to improve public confidence in the criminal justice system and ensure that evidence given in court is of the highest possible quality (2005). (Appendix 3 lists other criminal justice initiatives and projects with which the intermediary scheme has a significant inter-relationship.)

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<sup>4</sup> The Pigot model has, however, been adopted in South Africa. Intermediaries are routinely used for witnesses under 18 if the court believes that giving conventional testimony would expose the witness to 'undue mental stress or suffering': Section 170A Criminal Law Procedure Act 1977 as amended by the Criminal Law Amendment Act 135, 1991.

## The evaluation

The Office for Criminal Justice Reform (OCJR) took forward implementation of the special measure in six pathfinder areas: Merseyside, West Midlands, Thames Valley, South Wales (Cardiff Crown Court and its feeder magistrates' courts only), Norfolk and Devon and Cornwall (Plymouth Crown Court and Plymouth magistrates' court only); appointments of an intermediary were also made when requested by non-pathfinder areas. Pathfinder areas went live between February 2004 and June 2005 (see table 4.1 below). The evaluation was carried out between March 2004 and March 2006. The overall aim was to establish a model for national implementation of the use of intermediaries. There were also a number of subsidiary aims:

- to assess the operation of pathfinder projects;
- to establish the effectiveness of processes for the selection, recruitment, training and monitoring of intermediaries;
- to examine the effectiveness of management and use of the intermediary register, including attrition rates where an intermediary is used and identification of eligible witnesses who 'slip through the net';
- to assess how the intermediary provision impacts on practice, including what happens in court, and describe the use of other special measures;
- to assess the effectiveness of arrangements for identifying and supporting vulnerable witnesses who need intermediaries;
- to identify the benefits and any barriers to national roll-out.

## Methodology

A variety of techniques were employed in meeting the study objectives. These included:

- interviews with 35 intermediaries<sup>5</sup> and 134 other participants in cases which were finished. These included police officers, Crown Prosecution Service (CPS) personnel, advocates and solicitors, judges and magistrates, social workers, court staff, Witness Service supporters, Witness Care Unit officers, witnesses and the parent or carer of witnesses in cases to which an intermediary was assigned. (For more detail on respondents, please see Appendix 2);
- 30 interviews in relation to implementation and administration of the pathfinder projects;
- two surveys of intermediaries: in 2004 (29 responses were received, representing 64 per cent of those on the register at that time) and in 2006 (56 responses were received, a response rate of 74 per cent);
- a survey of criminal justice personnel and external organisations at the end of 2005 in five of the six pathfinder areas. (Of 227 questionnaires administered, 67 were received, an overall response rate of 30%. This ranged from 23% and 28% respectively for the CPS and police (n=23 and 14), 35% (n=25) for external organisations to 100% for HM Courts Service (n=5));
- attendance at meetings of committees involved in the operation of the intermediary scheme and observation of court hearings<sup>6</sup>, training sessions and launch events;
- documentary analysis, including examination of guidance; recruitment records (for the

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<sup>5</sup> Discussions were also held with many other intermediaries whose cases were still pending when the evaluation ended.

<sup>6</sup> A total of 11 days of proceedings were observed in nine of the 12 intermediary trial cases. It was not possible to observe two of the three youth court trials.

second round only), financial records; prosecution files; and intermediary reports prepared in relation to investigative interviews or trials;

- tracking the first 140 intermediary appointments.

The research team also responded to queries from intermediaries and provided advice to the OCJR on a range of issues. Information was provided to the OCJR on illustrative costs, but it was not possible to conduct a detailed cost benefit analysis of the intermediary special measure. A range of recommendations on procedural and practice issues were addressed to the OCJR and other criminal justice agencies (see Appendix 1).

### Methodological problems

The evaluation encountered two areas of difficulty. The first concerned the aim to obtain the views of approximately 50 witnesses with experience of intermediaries. However, most intermediary appointments did not progress past assessment or investigative interview and police officers did not feel it was appropriate to approach witnesses in these cases. Research requests were therefore confined to cases reaching trial. Police enabled face-to-face contacts with a witness or a telephone interview with the witness's carer in nine of the 12 trials that took place.

The second methodological problem concerned the project objective to study the unmet needs of witnesses with communication difficulties who 'slip through the net' (i.e. those who are never identified as needing an intermediary, as well as those where an application to use an intermediary is rejected by the court). No court rejected an application in a pathfinder case. The evaluation was unable to identify the number of potentially eligible witnesses in pathfinder areas, or those where the measure was considered but was not pursued. Police officers concluded that there was no feasible way to identify these cases. However, the evaluation identified the proportion of witnesses where applications for an intermediary were made post interview. In addition, the survey of criminal justice practitioners and external organisations identified recent 'missed' cases which, in the view of the respondent, would have benefited from the appointment of an intermediary.

### Structure of the report

Chapter 2 addresses the evaluation objective of assessing the operation of the pathfinder projects and provides an overview of how the scheme operated in pathfinder areas during the evaluation. The objective of establishing the effectiveness of the selection, recruitment and training of the pool of registered intermediaries is dealt with in chapter 3. Chapter 4 addresses the objective of examining management and use of the register of intermediaries. It also deals with the objective to study attrition, by documenting the stage intermediary cases reached in the criminal justice process.

Three chapters address evaluation objectives about the use of intermediaries and their impact: Chapter 5 covers work performed by intermediaries at the assessment and interview stages; chapter 6 examines the advance planning needed when an intermediary is appointed for trial and chapter 7 describes how intermediaries were used in trial cases. The objectives of examining benefits and barriers to wider use of intermediaries are dealt with in chapter 8. The final chapter considers the overall objective, to establish a model for national roll-out, and sets out recommendations for the operation and management of the scheme during a two-year transitional period. This chapter also draws on the lessons of the pathfinder projects in compiling recommendations aimed at improving implementation of the special measure.

Appendices cover the following issues: additional recommendations on procedure and practice issues; the list of case participants interviewed; initiatives relevant to implementation of the intermediary special measure; the profile of pathfinder trials; aids to communication; intermediary reports; support of witnesses for whom an intermediary is appointed; and a sample jury instruction.

## 2. Overview

The evaluation objective to assess the operation of the pathfinder projects is addressed in this chapter. It sets the scene for the rest of the report with an overview of the implementation of the intermediary scheme in pathfinder areas and its governance over the two year evaluation period. The chapter concludes with a survey providing a snapshot of levels of awareness among criminal justice agencies and external organisations at the end of the study. The survey identified witnesses whom respondents considered would have benefited from appointment of an intermediary (identification of witnesses with unmet communication needs was also an evaluation objective).

### Intermediary scheme chronology

The implementation of the intermediary special measure presented a unique challenge as it required:

- central management of an operational activity – appointment of intermediaries – in addition to organisation of their recruitment and training, alongside the conventional governance task of producing policy guidance;
- local initiatives in the pathfinder areas to raise awareness of witness eligibility.

The intermediary scheme had a long preparatory phase, beginning with the development of draft guidance (Sauve Bell Associates, 2000, 2002), re-issued following a period of consultation and workshops. The second phase included development of a competency framework of knowledge and skills for both the intermediary and those using them, a training needs analysis and a feasibility study of an accreditation scheme for intermediaries.

The start of the pathfinder projects was delayed to allow time for training the first tranche of intermediaries. The first area (Merseyside) began in February 2004. West Midlands (with a two-stage roll-out) and Thames Valley had also gone live by the end of 2004. The remaining three areas began in 2005: Norfolk, South Wales (Cardiff Crown Court and its feeder magistrates' courts only<sup>7</sup>) and, finally, Devon and Cornwall (Plymouth Crown Court and Plymouth magistrates' court only) in June. The evaluation, which ended in March 2006, therefore did not include a full year of operation for all six areas.

Responsibility for the project in each pathfinder area lay with a designated police officer (who ensured that guidance was incorporated into force orders) and a CPS prosecutor. There were particular difficulties where police forces had de-centralised training. Thames Valley, for example, managed training centrally and was better able to incorporate intermediary awareness into existing training regimes, whereas West Midlands had devolved training to each of its 21 Operational Command Units (OCUs). The police project liaison had encouraged OCU trainers to include sessions on intermediaries but only some had done so.

Designated police and CPS representatives were not supported effectively by multi-agency groups after the projects went live. In its early stages, there was little evidence of ownership of the project by managers or commitment elsewhere in the criminal justice system. By the end of 2004, the special measure risked being marginalised. At a local level, it was taking a back seat to other witness initiatives instead of being seen as integral to them. This meant that there was a need for:

- closer involvement of Local Criminal Justice Boards (LCJBs);
- greater strategic oversight and leadership of the scheme centrally;
- additional resources for the central government secretariat.

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<sup>7</sup> The South Wales pathfinder project was extended to Swansea in February 2006.

All three issues were addressed. Meetings of the project Steering Committee were convened and chaired at a senior level. In April 2005, an action plan was developed for raising awareness in pathfinder areas. Leads from all six areas were brought together for the first time at a Home Office meeting in November 2004 and LCJB representatives were also invited. In June 2005, the secretariat sought appointment of formally nominated Board champions and agency leads.

In August 2005, the Association of Chief Police Officers wrote to Chief Constables in pathfinder areas requesting that the profile of the project be raised. Also in August, a communications strategy and plan were developed, responding to poor use of previous intermediary leaflets which had not reached criminal justice practitioners or witnesses. New booklets, CDs and posters formed part of a project 're-launch' in October 2005.

Pathfinder areas had differed in their efforts to raise awareness with the local judiciary (a few judges had attended launch events but there was no systematic effort across areas to ensure all judges and magistrates were aware of the initiative). In November 2005, Sir Igor Judge, President of the Queen's Bench Division, wrote to all resident judges to introduce the new materials. A judicial liaison contact – Sir Brian Leveson - was also appointed. LCJB workshops, organised and attended by the secretariat, took place between September 2005 and January 2006. Although meetings drew in more senior officers and a greater breadth of organisations, there remained some difficulty in getting pathfinder areas to allocate project responsibility at the appropriate level across all appropriate organisations. By November 2005 when five meetings had been held, only one area had identified named project representatives for the courts and Witness Service, and none had identified named representatives for local solicitors or the Bar. However, some LCJB subgroups had been nominated to monitor implementation of the scheme.

As part of the October 2005 re-launch, the secretariat asked pathfinder areas to produce an action plan and report to LCJBs on raising awareness of the scheme, monitoring usage, identifying gaps and barriers to effective use, taking action and flagging issues to the Board and OCJR as appropriate. By March 2006, action plans and local monitoring frameworks were still in development. Areas differed markedly in their approach and the activities undertaken.<sup>8</sup> Some local groups were developing procedures independently that were duplicative of one another or gathering information similar to that already collected centrally. While some local tailoring of data collection procedures was desirable, the overall impression was that effort could have been reduced with greater central coordination of the basic requirements. Review of initial action plans indicated that development of local monitoring procedures needed to be streamlined and harmonised across areas; agreed local monitoring arrangements could be incorporated in the template for national roll-out. These and other issues were scheduled for discussion at the second meeting of pathfinder area representatives at the end of March 2006.

The OCJR had initially intended to delegate management of the register of intermediaries to pathfinder areas which would appoint and pay for intermediaries directly. Copies of the register were provided to two areas. One wished to hold a copy in case of out-of-hours calls but never used it; the other placed the register on the force Intranet but one officer reported that it was impossible to navigate and it did not appear that there were any further attempts to access the register locally. It was decided to retain central management of the register for the rest of the pathfinder projects.

At the close of the evaluation, members of the project Steering Committee and secretariat had begun to address issues for roll-out. However, pathfinder areas collectively were still in transition to full adoption of the intermediary scheme.

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<sup>8</sup> Merseyside held an event for 100 delegates in November 2005 with the aim of identifying barriers to implementation, establishing local governance procedures and developing an action plan.

## Governance

The initial management structure for the pathfinder project suggested by Sauve Bell Associates contained seven bodies ('Intermediary Registration Board', Home Office, 2003). This was found to be overly complex and some crucial components did not meet regularly. In the first three pathfinder areas to go live, criminal justice personnel commented on the lack of input from relevant organisations and agencies, which left them feeling unsupported from the centre by their own organisations. In the absence of an active steering group, there was a risk that the Intermediary Registration Board Assessment Committee (the group that had met most frequently since the evaluation began but which had no criminal justice representation) would be drawn into criminal justice policy areas.

In 2005, a revised and simplified governance structure was created. It consisted of:

- the inter-agency project Steering Committee, chaired by the Senior Responsible Officer in the OCJR. It monitors progress against project objectives. Membership includes criminal justice organisations, representatives of the Judicial Studies Board and defence community and bodies working with vulnerable witnesses;
- the Intermediary Registration Board (IRB) Assessment Committee, chaired by Professor Karen Bryan.<sup>9</sup> It oversees selection of candidates for registration. Representatives have expertise in all fields relevant to potential referral to the intermediary scheme including psychology, occupational therapy, social work, child protection and speech and language therapy. Health and social care organisations and the Department of Health are also represented. The committee reports to the Steering Committee;
- the IRB Standards Committee, chaired by Robert Hutley (barrister and former Justices' Chief Executive) sets standards for intermediary conduct and oversees complaints. Membership includes nominated members of the Assessment Committee, health professionals and an independent academic representative. It reports to the Steering Committee.

The Assessment Committee made an essential contribution to project development. Its initial remit was more extensive than its members had envisaged, in part because of a lack of resources or requisite knowledge within the project secretariat (located within the Better Trials Unit in the OCJR). Committee members carried out work that could not otherwise be accommodated.<sup>10</sup>

The Standards Committee developed complaints procedures as part of its responsibilities. It has dealt with one complaint about a registered intermediary. The circumstances highlighted the need for effective communication between the intermediary and police officer in planning the assessment and whether the assessment and interview should be conducted on different days.

Professional complaints about intermediaries are disclosable within the criminal justice process. In January 2006, the committee decided that intermediaries should be asked to declare whether there were any complaints against them at the point of recruitment and that the Code of Conduct should be changed to notify the secretariat of any pending as well as upheld complaints.<sup>11</sup> A form of words was needed to cover those intermediaries not subject to a regulatory body.<sup>12</sup>

Although the Assessment and Standards Committee operated separately, towards the end of the

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<sup>9</sup> Director of Research, European Institute of Health and Medical Sciences, University of Surrey.

<sup>10</sup> Issues on its agenda at the end of the evaluation included oversight of software development to support the matching process between intermediary skills and witness needs; re-assessment and continuing professional development for intermediaries; the third recruitment exercise; and further explanatory materials for witnesses.

<sup>11</sup> One registered intermediary who had been the subject of a professional disciplinary process resigned when this came to the attention of the Assessment Committee.

<sup>12</sup> Issues on its agenda at the end of the evaluation included notification of professional complaints from the Allied Health Professions Council; the development of feedback forms to record satisfaction (or otherwise) with the use of the intermediary; the development of an 'easy read' version of the complaints procedure; and making the complaints procedure available online.

evaluation they held overlapping meetings. It was felt there was scope to review their respective terms of reference with the possibility of amalgamation, although the Standards Committee would continue to deal independently with any complaints. The evaluation considered this approach was justified, given the need to make best use of the time of those members who sat on both groups.

All committees were supported by the secretariat. Since 2005, it has provided committee meetings with a rolling list of actions and an updated project risk register: members confirmed that these procedures, along with the revised committee structure, facilitated more effective monitoring of the project. The evaluation considered that these structures and procedures would remain appropriate for the transition to national roll-out. The representation of organisations and skills on the various committees was also sufficiently broad to meet the needs of the project during the evaluation and beyond. The committees expected to keep their membership requirements under review.

## Snapshot of awareness of the intermediary scheme

At the end of 2005, a survey was conducted to assess levels of awareness about the project, both within criminal justice organisations and externally. Pathfinder areas were asked to identify contacts for survey in the police and CPS and also in non-criminal justice organisations they had consulted on vulnerable witness issues. Five of the six areas provided lists. A total of 67 responses to the survey was received.

The exercise of requesting contact names revealed some weaknesses of approach to awareness raising. Although lists were available for those who had previously attended 'launch' events, several areas did not have a list to hand of relevant external agencies, suggesting that information about the intermediary exercise had not been disseminated systematically and reference had not been made to lists of consultees compiled by LCJBs and Crime Reduction Partnerships. While the police could always identify child protection social services representatives, knowledge of mental health services was weaker and one area did not provide a single contact in adult protection.

As intermediary project liaisons either provided lists of names or forwarded the surveys themselves, it might have been anticipated that all recipients would have at least some knowledge of the intermediary scheme. This was the true only for the small group of HM Courts Service respondents:

**Table 2.1** Survey respondents who had heard of the intermediary scheme

Organisation of respondent	No. of respondents	Those who had heard of the intermediary scheme	
		No.	%
CPS	14	13	93
Police	23	22	96
External organisations	25	20	80
HMCS	5	5	100
Total	67	60	90

Although 93 per cent of CPS respondents knew of the scheme, comments from the CPS in two pathfinder areas indicated local awareness was generally low:

*"I am very interested in the scheme but I have not heard very much about how it is working here, which concerns me"*  
(CPS respondent)

*"I am a Witness Care Unit Manager from the CPS. My team are fully aware of the role of the*

*intermediary but have experienced resistance from lawyers and caseworkers when they have suggested an intermediary may be of use. I feel that this is due to a lack of awareness of the role of the intermediary. When a presentation was arranged for [the police liaison] to talk about Intermediaries all lawyers and caseworkers were invited and none came, it was just WCU staff present”.*

There were respondents from external organisations across each of the five pathfinder areas who were unfamiliar with the intermediary special measure, for example:

*“I have close links with local authorities through the Adult Protection Co-ordinators Regional Group and I have never heard of the scheme”.*

(Adult protection, multi-agency partnership board)

Some commented on the initial poor level of publicity at the start of the pathfinder projects which was remedied with the distribution of new materials in November 2005. For some, however, this had raised new concerns about whether intermediary resources could meet potential demand.

The 40 respondents from criminal justice agencies and 21 from external agencies who were aware of the scheme were asked some further questions about how they had heard about it. Percentages in the following two tables are of 40 (for criminal justice agency responses) and 21 (for external organisation responses) respectively. Given the small numbers, these findings are only indicative but it appeared that training events, word of mouth and print materials were more effective at raising awareness than launch events. It is also notable that respondents from external organisations were more likely to report familiarity with intermediary booklets than were their counterparts in the police and CPS with official policy guidance.

**Table 2.2** How respondents had heard of the intermediary scheme

Method	Criminal justice agencies (n=40)		External organisations (n=21)	
	No.	%	No.	%
Attended a training event at which intermediaries were discussed	22	55	9	43
Heard about it from colleagues	20	50	11	52
Read guidance from ACPO/CPS or (for other organisations) received print material about the scheme	18	45	15	71
Attended a launch event	12	30	8	38

In addition to the sources of information listed above, six police respondents (27% of police officers who were aware of the scheme) had read a briefing about it on the force Intranet.

The survey was conducted in December 2005, soon after a major effort across pathfinder areas in October 2005 to publicise the project. West Midlands, for example, reported directing ‘What’s my story?’ to all frontline police staff by name (approximately 4,000 copies); to ‘all appropriate’ CPS staff (approximately 250 copies); as well as to Witness Services, Victim Support, courts, probation and youth offending teams. Respondents to the survey who had heard of the scheme were asked whether they had received a range of materials<sup>13</sup> explaining the intermediary role. The responses in the following table (again only indicative because of the small number of responses) showed a small

<sup>13</sup> Leaflets are available free through Prolog on 0870 241 4680. Guidance is available on [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk).

improvement in familiarity with 2005 leaflets over those distributed in 2004. Those who said they had received materials came from all five areas that responded to the survey.<sup>14</sup>

**Table 2.3** Respondents who had received material about the intermediary scheme

Material	Criminal justice agencies (n=40)		External organisations (n=21)	
	No.	%	No.	%
Leaflets 'Intermediaries: a voice for vulnerable witnesses' (2004)/ 'Helping witnesses communicate' (2004)	19	48	7	33
Folder 'Intermediaries: giving a voice to vulnerable witnesses' (2005)	19	48	9	43
Posters 'What's my story' / 'What's her story' (2005)	9	23	4	19
Booklet 'What's my story' (2005)	18	45	11	52
CD 'A voice for vulnerable witnesses', enclosed with 'What's my story?' (2005)	10	25	5	24
CD 'Sally can dance', enclosed with 'What's my story?' (2005)	6	15	4	19

The table suggests that recipients were twice as likely to have noted receipt of print materials than the CDs that formed part of the information pack. Discussions with practitioners in pathfinder areas provided positive feedback about the quality of material but some concerns remained about relying on materials to ensure the messages were taken on board. For example, while commending the 'power and impact' of the CDs, a local CPS pathfinder area representative said: "Despite the approach of individually targeting staff with personal copies... [there is concern] that staff will not find time to read the material or watch the CDs and subsequently knowledge of the scheme will not be raised sufficiently".

## Conclusion

The project experienced initial implementation difficulties, including initial problems with leadership. The end of the evaluation saw the project on a more secure footing in terms of central management and governance, and with the start of planning for national roll-out. Pathfinder project liaisons worked hard to 'spread the word' and pockets of good practice were identified. Nevertheless, by the end of the evaluation period, feedback from pathfinder areas through interviews and surveys indicated that levels of awareness remained patchy, indicating that the scheme had not been sufficiently well integrated into the work of criminal justice organisations

<sup>14</sup> The secretariat pointed out that although it dispatched materials in mid-late October 2005 to central contacts who distributed them locally, by December 2005, not all materials may have reached their intended audience.

### 3. Building and managing the register of intermediaries

The evaluation objectives to establish the effectiveness of recruitment and management of the intermediary register are addressed in this chapter. It discusses the size of the register and the characteristics of registrants, as well as selection, training, support and monitoring. The chapter concludes with feedback from a survey of intermediaries in 2006.

#### Size of the register

As of March 2006, the register consisted of 76 trained intermediaries. Eighty-one candidates were initially recommended to be put forward for training, but:

- two candidates withdrew before training;
- one had been accepted for training but had not yet attended a training course.

Of the 78 candidates who had undergone training and become registered as intermediaries, two resigned.

The first recruitment exercise in 2003 aimed to register a pool of 60 intermediaries. This target was based on information provided to the secretariat by four police forces which estimated numbers of potentially eligible witnesses. (Initial procedural guidance had recommended that different intermediaries be used at interview and at trial, a presumption later reversed.) The first exercise resulted in the recruitment of 43 registered intermediaries.

In 2004, the Assessment Committee concluded that a second recruitment exercise was necessary, particularly in light of the limited availability of intermediaries to accept appointments in some pathfinder areas. The target for the second round was 20. Thirty-six were put forward for training, (including the single candidate yet to receive training). A third recruitment exercise was underway when the evaluation ended in 2006; 350 applications had been received – a considerable increase on the two earlier exercises.

It would not be possible to recruit quickly in response to any sudden upsurge in requests for intermediaries because the total lead time, from advertising to the availability of registered intermediaries, is around six to nine months. There is a tension between recruiting a pool with an adequate spread in terms of geography and skill base and the possibility that, if the pool is too large, many intermediaries may not be used even in the medium term. This was recognised by Assessment Committee members after the second round:

*“It is a difficult balance. You need wide experience and a geographical spread but some may drop out if they are not used – they will lose confidence. With professionals these days aware of professional standards, they may feel they can’t deliver. It may be better to have fewer in the pool and use them more”.*

Concerns about intermediaries dropping out have not been borne out, although the 2006 survey indicated that some had thought about resigning. However, fears that many intermediaries would not be used quickly enough proved correct. By September 2005, due to a lower than anticipated level of requests for appointments, 34 intermediaries (44% of the pool) had not received an appointment despite having been registered for a year or longer. This jeopardised the skills acquired in training and confidence levels. By March 2006, this number was down to 12 (16%). Intermediaries in the 2006 survey who had not yet had an appointment were critical of this situation<sup>15</sup>:

*“The longer it gets between my training course in October 2004 and the time I may be*

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<sup>15</sup> The secretariat pointed out that this was largely due to the geographical location of intermediaries and their availability to take on appointments.

*needed to stand up in court for the first time, the less I feel that I could actually do it”.*

Intermediaries who had had only one or two appointments, or who had not had one that proceeded past their assessment of the witness were also critical:

*“I am feeling de-skilled because of the time that has elapsed since training. Because of gaps between referrals, I find I need to revisit all the paperwork to re-familiarise myself with procedures and expectations”.*

## Characteristics of registered intermediaries

### Personal information

As of March, 2006 there were 76 registered intermediaries. All but six were female. Dates of birth were provided on application forms but the secretariat did not collate an age profile of the pool. (Although this information is not needed in making intermediary appointments, it is important in monitoring characteristics of pool members.) Age was captured as part of the survey of intermediaries. Ages of the 56 intermediaries responding to the January 2006 survey were as follows:

**Table 3.1** Age of respondents

Age range	Number	%
18-30	6	11
31-45	25	45
46-60	23	41
61 and over	2	4
Total	56	100

The secretariat made efforts to increase the number of black and minority ethnic intermediaries but this proved difficult, perhaps reflecting the composition of targeted professions. In the 2006 survey of registered intermediaries, 51 respondents (91%) were White British. Two (4%) were of Indian ethnicity and one was Black Caribbean. Two respondents did not indicate their ethnic background.<sup>16</sup> Ethnicity was requested on intermediary application forms on a voluntary basis for monitoring purposes and candidates were advised that the information provided would be treated in confidence. However, the secretariat did not maintain a record of the ethnicity of intermediaries and was therefore unable to monitor the profile of those on the register. Although intermediaries are not employees of the Office of Criminal Justice Reform, it is suggested that monitoring the ethnicity of the pool is consistent with the spirit of section 95, Criminal Justice Act 1991, which requires publication of statistics in relation to black and minority ethnic groups and the criminal justice system.<sup>17</sup>

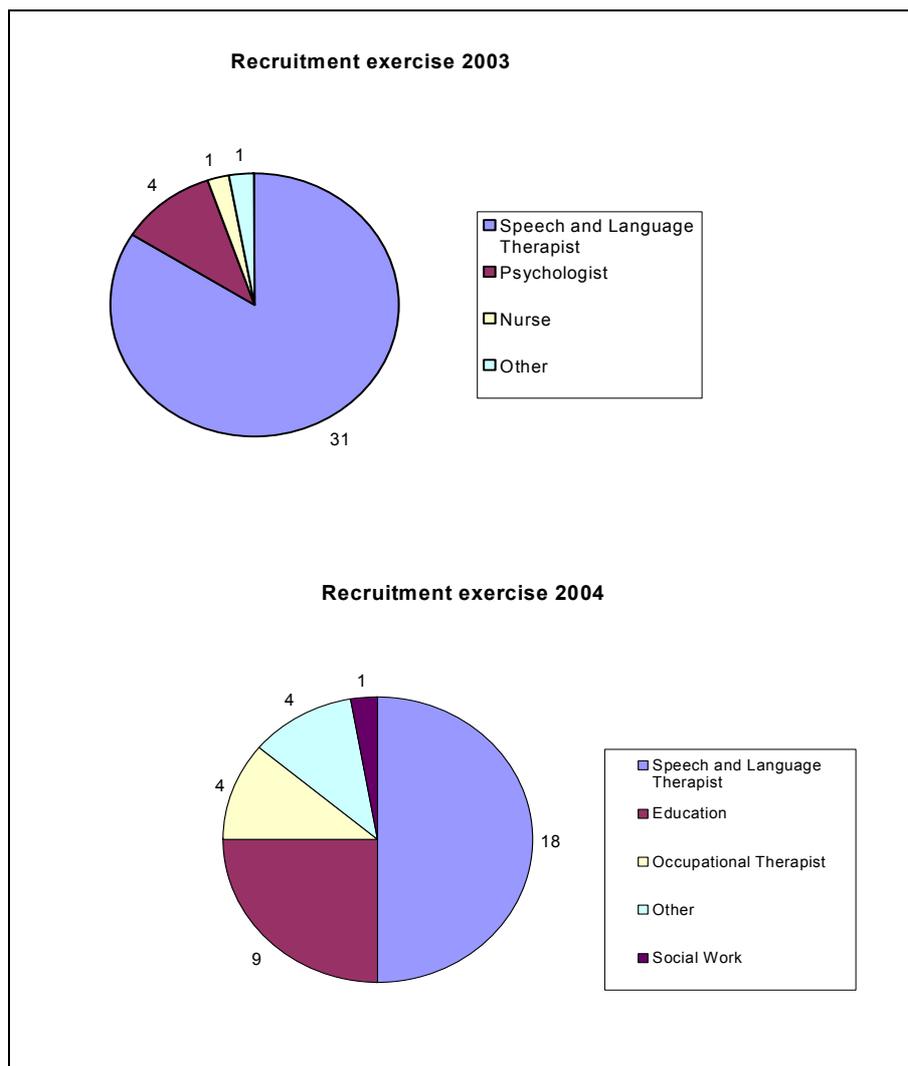
<sup>16</sup> Information about the ethnic background of applicants in the first round was not available for evaluation. Some candidates in the second round elected not to provide information about ethnicity. Overall, 14 per cent of candidates indicated they were not 'White British'.

<sup>17</sup> 'Race and the Criminal Justice System: An overview to the complete statistics 2004-2005' (Criminal Justice System, March 2006). In the Foreword, the Secretary of State for Constitutional Affairs, Home Secretary and Attorney General state that it is "essential... for all those organisations responsible for delivering criminal justice to make sure that they promote equality [and] do not discriminate against anyone because of their race".

## Professional background

In September 2005, the secretariat provided the Intermediary Registration Board Assessment Committee with the following analysis of the professional backgrounds<sup>18</sup> of intermediaries added to the register as a result of each of the two recruitment exercises that had taken place. (The figures exclude two intermediaries who resigned and three for whom the secretariat had recorded no professional background details.) The majority of those registered after each recruitment round were speech and language therapists, but the proportion was lower in the second exercise due to targeted efforts to increase applications from a wider range of backgrounds.

**Figure 3.1** Background of intermediaries recruited to the register



'Other' included a children's guardian (Children and Family Court Advisory and Support Service); a former police officer; a support worker for deaf people, the manager of an organisation for deaf people; and a play therapist.

Given the weighting towards speech and language therapists, some intermediaries with other types of background were concerned that there might be a perception of a 'two-tier' pool in which the contribution of non speech and language therapists would not be valued as highly. However, comments from criminal justice practitioners were equally positive about intermediaries irrespective

<sup>18</sup> Some registered intermediaries were retired when they were recruited and some have since retired.

of professional background.

### Criminal Records Bureau status

Applicants for the pool were requested to state whether they had a current Criminal Records Bureau check, when this was done and whether it was a standard or enhanced check. In the 2006 survey, only 39 of the 56 respondents (70%) could recall the date of a recent Criminal Records Bureau check undertaken for their own work. Enhanced checks in their capacity as registered intermediaries were begun towards the end of the evaluation.

### Recruitment

The revised list of skills for the third round of recruitment was as follows:

- communication with young children;
- aphasia/ dysphasia;
- dysarthria/ dyspraxia;
- neurological and other progressive disorders;
- autistic spectrum disorders;
- attention Deficit and Hyperactivity Disorder;
- brain and/ or head injury;
- deafness/ hearing impairment;
- mental health problems/ dementia;
- learning disability (distinguishing mild, moderate and severe);
- physical disability;
- fluency difficulties;
- language delay/ disorder;
- voice disorders including laryngectomy;
- selective/ elective mutism.

The list was set out in application forms. Candidates were invited to indicate their areas of expertise; if appointed, the information was transferred to the register and was used in matching intermediary skills with witness need. For the first recruitment round, over 30 skills were listed; this had been refined to 17 for the third round.

Sifting of applications and interviewing were carried out by panels under the direction of the Assessment Committee. Members had appropriate expertise in the requisite specialism and were experienced interviewers. In the third recruitment round, changes were made to reduce inconsistencies between panels and improve the audit trail of scores and decisions (a scoring system and critical sift mark that successful candidates had to meet or exceed was agreed). A criminal justice representative from either the CPS, police or the Bar was added to each interview panel. On one occasion in the second round, a registered intermediary had replaced a panel member and the other panel member had found it helpful to sit with someone who had gone through intermediary

training.

### Ensuring an even-handed approach

The Assessment Committee anticipated that registered intermediaries would be drawn principally from health-related professions, and in particular speech and language therapists. This had indeed happened but it was important that the approach to selection and the recruitment criteria did not discriminate against those with different areas of expertise. Following the second recruitment exercise, the definition of 'assessment skills' to be demonstrated by applicants was broadened to cover being able to weigh information about the witness's communication needs from all relevant sources, but not necessarily conducting a 'formal' assessment of 'receptive and expressive communication difficulties' (a skill mostly confined to speech and language therapists). It was also recommended that greater emphasis be given to written skills, given the crucial importance of intermediary reports.

Some candidates were put forward for training in the second round despite being described as 'borderline' at interview because they were nervous or lacked confidence. However, the value of the special measure may stand or fall on intermediaries' ability to think 'on their feet' in investigative interview or at court. They must be sufficiently flexible to operate under criminal justice constraints in sub-optimal clinical conditions and need to be sufficiently robust to go from training into their first case. The competency of 'establishing credibility with the criminal justice system' was amended to include the qualities of confidence and assertiveness.

Case studies were prepared in the second round for each of three specialist panel categories. These were the subject of a scored presentation. The studies included:

- a child with moderate learning and communication difficulties who 'communicates by using a combination of Makaton signing<sup>19</sup> and speech at a 2 information carrying word level' (with no further explanation given of these technical terms);
- an adult 'with mild learning difficulties and a severe expressive speech disorder who... has a communication picture book and makes some use of Makaton signs'.

The case study was an important element of the interview. However, some panel members thought that inclusion of technical terms, without explanations, was unlikely to have been understood by candidates who were not speech and language therapists (although candidates were advised that their lack of understanding did not count against them).

Standard questions were developed for all candidates at interview. However, panel members gave the evaluators somewhat different answers as to the meaning of some questions, what answer was looked for and how this was scored. It was suggested that, for the third recruitment round, case studies and questions should assess on an even footing those from differing professional backgrounds; written 'model' answers be prepared to each question, agreed by panel members, to assist in scoring responses; and, to ensure a common understanding among sift and interview panels about what constitutes compliance, written guidance (with examples) should be developed relating to each core competency.

### Candidates with disabilities

An intermediary may have "skills to overcome specific communication problems, such as those caused by deafness".<sup>20</sup> Application forms invited candidates to indicate if they had a disability and if

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<sup>19</sup> 'Makaton' is a language system of signs and symbols used with speech, gesture facial expression, eye contact and body language, for people with learning difficulties.

<sup>20</sup> Para. 124, Explanatory Notes accompanying the Youth Justice and Criminal Evidence 1999 Act.

so, of what type.<sup>21</sup> In the second round, six applications were received from candidates describing themselves as having a disability (4%); two were invited for interview (3%); and one was accepted for training (3%). The secretariat confirmed that eligibility depended only on meeting core competency requirements, as intermediaries could act in relay with other types of communication facilitator.

## Remuneration

Rules on remuneration were produced in September 2004, almost a year after the first recruitment exercise. It says a great deal for the commitment of intermediaries that they were willing to apply without knowing the pay arrangements. The first review is likely to be in autumn 2006. Following national rollout remuneration rates will be reviewed regularly and benchmarked against other professional service providers. Guidance was issued in October 2006 to clarify that intermediaries are responsible for their own professional indemnity insurance and should go through their professional bodies in the first instance.

## Training of intermediaries

Initial training courses were conducted in 2003 and 2004. The courses, organised for groups of around 10 participants, were delivered in London, Birmingham and Bristol.<sup>22</sup> The group size worked well. Each course lasted five days, beginning with three days in class addressing the criminal justice system, interviewing, report-writing and courtroom skills (involving a video-recorded role play with an actor as witness). The fourth day consisted of visits to a police interview suite and a Crown Court.<sup>23</sup> The course concluded on the fifth day with a written multiple choice test and videotaped role play of cross-examination by a barrister, again using an actor as witness. Candidates had to pass both assessments before they could become fully registered intermediaries. During the role play, intermediaries were assessed and scored by a former judge.<sup>24</sup> Feedback forms indicated that the training was well prepared and well delivered. Participants were particularly positive about role play exercises:

*“The opportunity to be videoed and receive feedback was invaluable (although extremely nerve-racking). I feel I have grown in confidence”.*

It was a significant challenge that courses had to be designed and delivered before there was clear evidence about how the intermediary scheme would operate in practice. By the time further training is conducted in the second half of 2006, it will be possible to draw on case experience to focus the content and revise the written guidance.

Three one-day refresher training days were held in the early part of 2006; a fourth was planned. These were targeted primarily at intermediaries who had not had an appointment but any intermediary could attend. Sessions included discussion of a planning meeting between a police officer and intermediary; a role play of an investigative interview with a police officer and actor as the witness; and a visit to a Crown Court where intermediaries took part in a role play over the TV link. Again, feedback was very positive and those who had not experienced the TV link found the mock trial particularly helpful.

In the 2006 survey of intermediaries, five out of 56 (9%) reported attending police training. Courses, run by three forces, lasted between two and six days and were described as very helpful. Intermediaries said they had been given insight into the requirements and constraints of the investigative interview under ‘Achieving Best Evidence’ guidance. One said:

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<sup>21</sup> The intermediary position was not included in the Guaranteed Interview Scheme, as defined by the Disability Discrimination Act 1995.

<sup>22</sup> Days 1, 2, 3 and 5 of courses in London and Bristol were observed as part of the evaluation.

<sup>23</sup> The training specification also required a familiarisation visit to a magistrates’ court but this was not included.

<sup>24</sup> One intermediary felt that the assessors should include someone able to evaluate their communication skills in the role play.

*“After taking part in police training, I was embarrassed to watch the videotape of an investigative interview at which I had previously assisted. Now I understand where the police are coming from – we [as intermediaries] were poles apart. I have learned what not to do in interviews. The way the police operate is very different. When you give them advice, it is important to know the context. They will accept advice better if you know their background”.*

## Further training and Continuing Professional Development

Intermediary respondents to the 2006 survey were invited to suggest the topics that further training should address. Most suggestions fell into two categories.

- The criminal justice system, including roles of participants, police interview techniques, protocols for information sharing, court procedures, legal language and legislative changes.
- Skills required by intermediaries and on developing good practice, including report writing, assisting at identity procedures, transcribing interviews, when and how to intervene during questioning and the use of assessment tools for those intermediaries who are not speech and language therapists.

There were various suggestions for the form training might take. Feedback sessions were in particular demand, involving both intermediaries talking about their cases and participants in these cases from other agencies. Role play was widely advocated as a means of acquiring the skills and confidence to intervene in a courtroom setting. Other techniques mentioned were court observation, visits to police stations and workshops to view and discuss assessment and interview videos (some forces routinely requested consent for these to be used for training purposes).

Intermediaries will be subject to bi-annual re-approval, which will require evidence of having acted as an intermediary at least once in the previous two years; where applicable, continued membership of an appropriate professional body with continuing professional development (CPD) requirements met as required by the regulatory body and/ or holding a responsible post involving the exercise of the required technical skills; and evidence of a range of intermediary-specific CPD. The Assessment Committee has developed a list of options to satisfy the intermediary-specific element. It will choose at random CPD logs from 10 per cent of registered intermediaries to audit each September, beginning in 2006.

## Support arrangements

Many of the 56 respondents to the 2006 survey expressed appreciation for the enjoyment and satisfaction they had derived from the role:

*“I have enjoyed it and look forward to new cases. There have been challenges and it's been a steep learning curve but thoroughly worthwhile, rewarding and excellent personal and professional development. Thank you”.*

*“The recent cases I have had and the willingness from other professionals and organisations to learn about the role have reminded me why I wished to learn it in the first place”.*

However, a pervasive theme involved feelings of isolation and the need for support, discussion and response to queries about the new role. One example from the 2006 survey was as follows:

*“It's a pretty lonely role, and carried out in very 'alien' environments for most of us”.*

## Newsletters

The secretariat had taken a number of steps to support intermediaries. In the early stages of the project, intermediaries were concerned that they were not being kept up-to-date on developments. The secretariat instituted periodic newsletters which provided an update on requests for

intermediaries and appointment numbers and alerted them to policy matters. The newsletters have been well received and towards the end of the evaluation, were sent out more regularly.

### Follow-up helpline from trainers

The training contract included the provision of follow-up assistance from the training body. This mostly took the form of responding to e-mail requests for information, which was later subsumed into support provided by the trainers through the Smart Group.

### Internet Smart Group

Intermediaries wanted a secure mechanism to communicate with one another. The secretariat established the intermediary Smart Group (an Internet site accessible only to members) in May 2005 and placed key intermediary guidance documents on it. The Smart Group e-mail function had been used to:

- exchange experiences (though not, as hoped for, to provide feedback about cases in a systematic way);
- provide advice from the secretariat, the CPS liaison for the pathfinder project and evaluation team;
- discuss the use of communication aids;
- discuss in what circumstances it is appropriate to view the videotaped investigative interview;
- discuss assessment skills, including those in relation to very young children;
- notify intermediaries of places on police training courses.

The Smart Group had been used by 49 (88%) of 56 intermediaries surveyed in 2006:

- 48 (86%) had used the site to read messages;
- 47 (84%) had used it to post questions or comments for other users;
- 19 (34%) had accessed documents through the site.

In respect of the last figure, it was significant that 29 respondents (52%) still wanted to receive on paper those documents such as guidance and newsletters that were available for downloading from the Smart Group site.

### Counselling service

In 2004, the secretariat contracted with ICAS, an independent counselling service provider, to provide 24-hour telephone support to intermediaries “to express the concerns you have during or immediately after a distressing case”. This service was used once in 2005 and once in 2006, although it was unclear whether the concerns for which support was requested related specifically to intermediary duties.

### Intermediary priorities for support

Respondents to the survey were asked to score, on a scale of 1 to 5, the importance of a range of support mechanisms. The following table sets out in descending order the average scores obtained. Networking with other intermediaries was regarded as most important.

**Table 3.2 How respondents rated the importance of support mechanisms**

Mechanism	Average score (out of 5)
Opportunities to exchange views with other intermediaries	4.45
Legal advice about the intermediary scheme	4.23
Further training	4.02
Debriefing after assessment/ interview/ court	3.68
Advice on drafting reports	3.64
Administrative advice (e.g. on completion of invoices)	3.41
Support through the ICAS counselling helpline	2.64

Respondents were also asked what other types of support should be provided. It emerged that intermediaries valued being able to discuss cases; the provision of a 'helpline' was the most common request for additional support:

*"Other professionals do not know about the role. We need someone to chat to and to offer us reassurance".*

*"Opportunities to debrief, by someone who was in court... I didn't want counselling, but I did want some feedback about how everything had gone in court and not just the verdict, but how helpful, or not, my interventions had been".*

Other suggestions for improving support included:

- local support groups;
- support groups of intermediaries with similar skills;
- availability of a BSL interpreter for translating reports and conducting administration;
- providing picture material and access to a picture communication symbol computer package.

One suggestion in the survey included the appointment of 'mentors' who would be available for consultation. It had initially been anticipated that peer supervision and support would be available through a network of intermediaries, managed through the secretariat. This proposal did not get off the ground, in part because rates of requests for intermediary appointments were initially so slow. Towards the end of the evaluation, some intermediaries had begun to gain considerable experience in the role, making appointment of mentors more feasible.

### Liaison with the criminal justice system

Of 47 intermediaries who had accepted an appointment, 17 (36%) had experienced difficulties in liaising with criminal justice personnel. Some reported a problem with more than one agency. The organisations involved were as follows:

**Table 3.3** Organisations with which intermediaries had experienced difficulties

Organisation	Number of intermediaries reporting problems	
	(n=47)	%
Police	9	19
CPS	5	11
Barristers/ advocates	5	11
Witness Care Units	2	4
Courts	1	2
Witness Service	2	4
No problem encountered	30	64

In response to a question specifically about being updated about case progress, 13 intermediaries (28%) reported that the police had failed to keep them informed about whether a case was proceeding to court; the same number had felt unsure about the role of criminal justice personnel with whom they had contact.

Twenty-one intermediaries (38%) had delivered training about their role (including to the police and multi-agency events attended by magistrates and judiciary). The secretariat supported these activities but intermediaries felt that more could be done, by providing a standard presentation and helping exchange good practice about what worked well during such training experiences. Seven intermediaries (13%) had attended local awareness-raising activities. One intermediary had been invited to attend meetings of the LCJB victims and witnesses subcommittee. In a different area, the police intended to explore the use of an intermediary in a consultative capacity to offer advice and raise awareness.

## Employers

In the 2006 survey, of 56 respondents:

- 36 (64%) worked as an intermediary on their own time; eight (14%) did so as part of their job (for which their employer could submit an invoice) and 11 (20%) did a combination of both (one did not answer);
- 37 (66%) were in employment. Of these, eight (22%) reported having had difficulty in getting their employer's consent to taking time off for intermediary duties; 23 (62%) said their employer did not regard their intermediary role as professional development for their 'day job'.

Some commented on the difficulties in reconciling their intermediary duties with the demands of their other work:

*"It is a dilemma for my work environment... which is absolutely ruthless about how our time is spent – this is what we are up against. My employer sees my intermediary work as personal development so I have to use my lunch hour and mobile phone to do anything. I don't like it being covert. My time has to be taken as annual leave".*

It was left to intermediaries who were registered after the first two recruitment rounds to negotiate release time if they wished to undertake duties during their normal hours of employment.<sup>25</sup> Following reported difficulties, guidance for employers was then produced.

In an effort to address problems concerning employed intermediaries in future, application forms for the third recruitment round included information for employers (where applicable) and a line manager's declaration. This required confirmation that the Employer's Guidance document had been seen and understood; that the candidate possessed the necessary skills to act as a registered intermediary; that the manager was willing to release the candidate to perform these duties during office hours where operational requirements permit; that the manager would agree with the candidate a suitable means of accommodating their intermediary role with their professional duties; and that the Intermediary Registration Board would be notified if it was no longer possible to release the candidate from their professional duties.

### Time demands of intermediary duties

Nine intermediaries who responded to the survey (16%) had not had an appointment during their time on the register. The remaining 47 (84%) had accepted between one and 13 appointments each: 33 of these (70% of the 47) had been appointed between one and three times. In all, respondents had accepted 160 appointments.

For 26 intermediaries (46% of the 56 responding), intermediary duties had occupied as much of their time as they expected; 22 (39%) said they had spent less time than expected as an intermediary and for seven (13%), intermediary duties had made greater than expected time demands.

Thirty-eight intermediaries in the survey (68%) had turned down an appointment in 2005. The number of appointments declined ranged from one to 10 with an average of 2.7. Shortness of notice was the main reason for declining an appointment (see chapter 4).

**Table 3.4** Appointments turned down in 2005

Reason for turning down appointment	Appointments declined		No. of intermediaries who declined appointments
	No.	%	
Unavailable in the time frame	68	67	32
Distance too far	9	9	6
Skills not an appropriate match to the witness	25	25	15
Total	102	100	38

Uncertainty about the potential demand was preventing one respondent from freeing up more time to act as an intermediary:

*"if the workload was more predictable I would certainly be considering reducing time with my employer, but at the moment I am unsure what to do".*

<sup>25</sup> One intermediary had developed a written undertaking with her employer.

Most intermediaries intended to continue in the role: 49 respondents (88%) said they expected still to be taking appointments at the end of 2006 and 46 (82%) expected to be doing so at the end of 2007. Only one respondent was sure that they would cease intermediary work during 2006 and one more was certain to do so during 2007.

In respect of their caseload, 30 respondents (54%) were willing to act in one to five cases during 2006, 16 (29%) set a maximum of six to ten cases and eight respondents (14%) were willing to take on more than ten cases throughout the year (two respondents did not answer this question). Assuming these percentages reflect the acceptable loading for the entire pool of 76 intermediaries, an estimate can be made of the total number of annual appointments that could be accommodated without further recruitment.

**Table 3.5** Estimated number of appointments that existing pool can accept annually

Number of intermediaries	Average number of appointments each will accept	Total number of appointments
54% of 76 intermediaries = 41.04	3	123
29% of 76 intermediaries = 22.04	8	176
14% of 76 intermediaries = 10.64	10	106
Entire pool		405

Intermediaries were also asked about their ability to take on more than one appointment simultaneously. Nineteen respondents (34%) were only willing to act in a single case at any one time; 24 (43%) would accept appointments to two or three cases simultaneously; and ten (18%) would accept more than three appointments at the same time (three did not provide a figure). It is therefore important that the police and CPS notify intermediaries when cases are not going to proceed, so that they can accept new appointments.

### Reviewing parameters of the intermediary role

Two issues arose concerning potential conflicts in carrying out the intermediary role. The first concerned the intermediary's impartiality. In a case in which there was a decision not to prosecute following the intermediary's assessment, the intermediary was asked by the police to give an 'expert opinion' as to the validity of what the witness had said in light of information from other sources. The secretariat confirmed that it is never appropriate for an intermediary to provide such an opinion.

The second issue concerned what intermediaries should do if they identified that the witness had unmet health or welfare needs. The secretariat obtained advice from the Health Professions Council indicating that health professionals acting as intermediaries have a continuing duty of care. However, guidance was still needed about the position of intermediary reports in respect of this continuing duty of care: in one case, an intermediary provided her assessment report to the witness's carer to enable the parent to follow up the witness's need for speech therapy.

Intermediaries operate on their own, without supervision. They must build effective working relationships with criminal justice practitioners while maintaining their independence. The evaluation provided opportunities to review intermediary activities, monitor how they were used at interview or court and to highlight any issues or concerns raised by intermediaries, criminal justice professionals or others about the role. The ways in which intermediaries were used were still evolving at the end of the evaluation. The Standards Committee has discussed ways in which ongoing feedback may be obtained to collect both positive and any negative comments. Ongoing monitoring is important, given the need to build criminal justice and public confidence in the neutrality and fairness of this new professional role.

## Conclusion

Intermediary recruitment and training worked well, with no shortage of suitable candidates for the pathfinder phase. Most in the pool were speech and language therapists: it was important that selection criteria assessed on an even footing those from differing professional backgrounds. Confidence and assertiveness in 'establishing credibility with the criminal justice system' emerged as key qualities to be added to the initial list of qualities sought in registered intermediaries. Many of those in employment indicated that it was hard to obtain release to undertake appointments; the role often had to be undertaken outside of work hours. Intermediaries who had taken cases expressed satisfaction with the work. There was a need to maintain as short a time as possible between training and appointments and address concern about intermediaries' feelings of isolation. Ways of providing more support were being explored.

## 4. How the register of intermediaries was used

This chapter addresses the evaluation objectives to describe how intermediaries were used, the effectiveness of the register and case attrition (the stage at which cases drop out of the criminal justice system). The chapter draws on:

- an analysis of the first 140 intermediary appointments between February 2004 and November 2005, using information from referral pro formas, intermediaries and criminal justice practitioners about case status;
- a snapshot of appointments made in the eight month period up to the end of February 2006 during which all six pathfinder areas were operational;
- information from 56 intermediaries responding to the January 2006 survey who had accepted a total of 160 appointments.

### Sources of requests for an intermediary appointment

The secretariat dealt with requests to appoint an intermediary to carry out an assessment. It did not attempt to determine eligibility because it was not in a position to assess the condition of the witness. There were, however, times when it advised a practitioner that a witness seemed unlikely to meet the criteria for eligibility of an intermediary appointment, but it was up to the caller to decide whether or not to make a request.

Of the first 140 intermediary appointments:

- 124 (89%) were requested by the police (including one for a defendant);
- 12 (9%) by the CPS<sup>26</sup>;
- 3 (2%) by a Witness Care Unit;
- 1 (1%) by a defence solicitor.

Two cases concerning three of these 140 witnesses were already in the court process when the pathfinder projects began: their need for an intermediary was first identified by the Witness Service at the witness's familiarisation visit to the court. For a fourth witness, eligibility for a registered intermediary was identified by a judge who had already conducted an intermediary trial.

Information was available about the source of 120 police requests. Of these:

- 71 (57%) came from specialist units (child protection, child protection and sexual crimes, public protection, community safety, family support and family crime units);
- 17 (14%) came through vulnerable persons officers who were usually the liaison for the referral though not the officer in charge of the case;
- 32 requests (26%) came from CID, crime reduction units, a burglary team, a criminal justice unit and uniform patrol police officers.

It was possible to identify at least 15 'repeat' users among the specialist teams and vulnerable persons officers. Most were from Thames Valley, which had the highest overall number of appointments: one child protection team was the source of eight appointments.

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<sup>26</sup> Burton *et al* (2006) reported poor CPS performance in respect of identifying young witnesses eligible for the TV link, referring them for re-interview on video where they had given written statements or meeting vulnerable witnesses.

The following table shows the number of witnesses for whom an intermediary was appointed by pathfinder area:

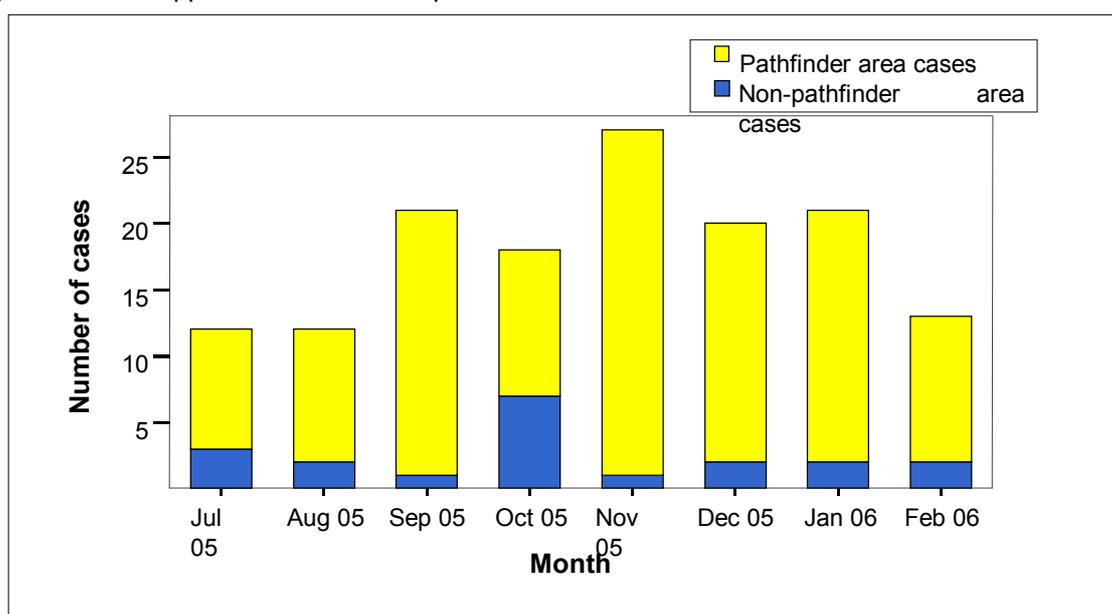
**Table 4.1** Witnesses in each area for whom an intermediary was appointed

	Witnesses		Project start date in this area
	No.	%	
Merseyside	20	14	23.2.04
West Midlands	20	14	13.9.04
Thames Valley	57	41	1.10.04
South Wales (Swansea)	3	2	1.2.05
Norfolk	7	5	1.2.05
Devon and Cornwall (Plymouth)	9	6	20.6.05
Non-pathfinder areas	24	17	
Total	140	100	

Requests resulting in an appointment were received from 12 non-pathfinder areas: four police forces in these areas made more than one request.

By the end of February 2006 the number of recorded requests for appointment had risen to 206. The following chart shows the pattern of appointments since all six pathfinder areas went live, distinguishing the proportion coming from non-pathfinder areas. The peak in November 2005 followed publication of new materials about intermediaries and the 're-launch' of the project in pathfinder areas during October 2005 (no materials were distributed in non-pathfinder areas).

**Figure 4.1** Appointments since all pathfinder areas went live



The secretariat did not record 'as standard practice' those calls not resulting in the appointment of an intermediary or where it was unable to provide an intermediary in time. Of five calls known to the evaluation team in which no intermediary was appointed, two involved witnesses who declined to be assisted by an intermediary.

## Profile of those for whom an intermediary was appointed

The person requesting the appointment of an intermediary is required to complete a pro forma which provides basic information about the individual in respect of whom the request was made (referred to below as the subject). All but two of the first 140 individuals were prosecution witnesses; two were defendants. Although defendants are excluded from eligibility under the legislation (section 16(1), Youth Justice and Criminal Evidence Act 1999), the secretariat was prepared to appoint an intermediary with the proviso that use at court would be possible only with approval of the judge using his or her inherent discretion (section 19(6)). No requests or enquiries were received about defence witnesses, who are eligible under the legislation.

Appointments were almost equally divided by gender: 69 (49%) were for female subjects and 71 (51%) were for males.

Eighty-six individuals (61%) were adults:

- 12 were aged 17-21;
- 19 were aged 22-40;
- 21 were aged 41-60;
- 8 were aged 61-80;
- 5 were aged 80 or over (the eldest was 91);
- for 21, their age was not given.

In addition, 54 subjects (39%) were aged under 17:

- 18 were aged between 3 and 5 (all but 2 of these were identified by 1 pathfinder area);
- 13 were aged between 6 and 7;
- 13 were aged between 8 and 12;
- 10 were aged between 13 and 16.

Applications for appointment of an intermediary for 34 young witnesses were based on age in combination with other factors. For 20, the application was based on age alone: nearly all of these were very young.

The police are required to record ethnicity of victims<sup>27</sup>, witnesses and defendants but this information was not requested on the pro forma so no profile can be provided. Although it is preferable to provide estimates based on self-reporting rather than observation, information from criminal justice personnel indicated that 128 subjects (91%) were White British and 12 (9%) were non-White.

Background information about witnesses highlighted that many had multiple vulnerabilities. The pro forma indicated that 26 subjects (19%) lived in care homes or assisted living at the time of the

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<sup>27</sup> The British Crime Survey 2004/05 indicates, for example, that people from mixed ethnic groups face significantly higher risks of victimisation than all other ethnic backgrounds: Criminal Justice System, 2006.

offence. The pro forma did not initially record information about status and offences but it appeared that 129 (93%) of the 138 witnesses for whom an intermediary was appointed were complainants.

Information about the type of offence involved in the investigation was available for 109 witnesses:

- 59 (54%) involved sexual offences;
- 27 (25%) were physical assaults;
- 21 (19%) involved theft, deception or burglary;
- 2 (2%) were involved in an abduction and an attempted murder.

Several appointments involved a group of vulnerable witnesses: a total of 38 witnesses were accounted for by 14 investigations. The largest group in a single investigation involved five witnesses for whom two intermediaries were appointed.

The pro forma did not require officers to specify the category of eligibility under the legislation (this was added in November 2005). However, it was usually possible to ascertain the ground(s) of eligibility for the 138 witnesses from the information provided.

**Table 4.2** Ground(s) of witness eligibility

	Age only	Significant impairment of intelligence and social functioning	Physical disability or disorder	Mental disorder
Merseyside	1	16	7	2
Thames Valley	15	27	14	4
West Midlands	-	14	7	2
South Wales	-	3	1	-
Norfolk	1	6	4	-
Devon and Cornwall	3	4	1	1
Non-pathfinder areas	-	9	14	3
Total	20	79	48	12
% (n=138)	14	57	35	9

Some witnesses are double-counted in this table as they were eligible under more than one legislative category.

Of 79 witnesses falling into the category of 'significant impairment of intelligence and social functioning', 23 (29% of the 79 and 17% of all witnesses for whom the basis of their eligibility was known) were described as having 'severe' learning difficulties and 17 (22% of the 79 and 12% of all witnesses) had some form of autism.

Physical disabilities (several of which were linked to impairment of intelligence and social

functioning) listed on referral forms included chromosome disorders; cerebral palsy; Lesch-Nyhan syndrome<sup>28</sup>; stroke; 'locked in' syndrome<sup>29</sup>; cleft palate; Williams syndrome<sup>30</sup>; epilepsy; and communication difficulties resulting from brain injuries, MRSA<sup>31</sup> and encephalitis. Eight witnesses (6%) were reported as having some degree of hearing impairment. Three witnesses (2%) had suffered severe brain injuries as a result of an assault.

Mental disorders included dementia; personality disorder; depression; schizophrenia; and bipolar mood disorder (manic depressive illness).

Twenty-five witnesses (18%) were described as having little or no speech. Four (3%) were Makaton users; three (2%) used 'dynamite', 'Bliss' or other communication boards; and one (1%) used a voice output device.

Three young witnesses (2%) had Attention Deficit Hyperactive Disorder.

One of the two defendants for whom an assessment was requested had speech difficulties due to a brain injury. The other had Asperger's Syndrome (a form of autism) and Attention Deficit Hyperactive Disorder.

Intermediaries who assessed witnesses found that all appeared to be eligible under the legislative criteria.

### How quickly intermediary appointments were made

During the first year of the pathfinder projects, the secretariat did not keep a systematic record of the number of calls it made to intermediaries before an appointment was confirmed. Where information was available, it was clear that several appointments took weeks to arrange. In March 2005, the secretariat began to log the date when the intermediary was appointed and the number of pool members contacted per appointment. Appointments were then made more quickly, although the secretariat did not publish a target time for this activity in case it raised unrealistic expectations, given that there were limitations on intermediary availability beyond its control. Information about how long it took to appoint an intermediary was available for 87 cases between March and November 2005.

**Table 4.3** Length of time to appoint an intermediary

Timing of appointment	No. of appointments	%
Same day as request	30	34
Day following request	32	37
Within 2-4 days	25	29
Five or more days later	5	6
Total	87	100

Over 70 per cent of intermediary appointments were therefore made within 24 hours of the request

<sup>28</sup> An enzyme deficiency disorder resulting in poor muscle control and moderate learning difficulties.

<sup>29</sup> A neurological disorder characterized by paralysis of all muscles except those controlling eye movement.

<sup>30</sup> A genetic disorder characterized by mild to moderate learning difficulties and other factors.

<sup>31</sup> Bacterial infection occurring most frequently in those with already weakened immune systems.

being received. Of the 30 appointments made on the same day as the request, 16 (53% of the 30) required more than one call before an intermediary was identified who could accept the referral. (In the 2006 survey of intermediaries, 32 had declined 68 appointments – 67% of all those turned down – because they could not respond within the desired time frame).

Seventy-six appointments (87%) took between one to three calls to secure an intermediary; nine appointments took four calls; one took six attempts (a request from a non-pilot area for an intermediary to assist at a pre-arranged interview which was re-scheduled to accommodate the intermediary eventually appointed); and one took eight. In that case, the police had a suspect in custody and requested the presence of an intermediary the same day. The intermediary appointed lived a long way from the area; the interview was rescheduled and took place, after her assessment, the following week.

Intermediaries responding to the 2006 survey indicated the timing of their first meeting with the witness in relation to 130 appointments. Witnesses were seen within 48 hours of appointment 20 per cent of the time and within a week for 78 per cent of appointments:

**Table 4.4** Intermediary reports of timing of first assessment meeting with witness

Witnesses seen:	Number	%
Within 24 hours of intermediary being appointed	12	9
24-48 hours after intermediary was appointed	14	11
48-72 hours after intermediary was appointed	34	26
Between three and seven days after intermediary was appointed	42	32
Over seven days after intermediary was appointed	28	22
Total	130	100

At the stage when the police requested the appointment of an intermediary, they had not yet conducted an investigative interview with the witness in 105 of the 140 appointments that were tracked during the evaluation. Only seven (7%) of these were initially identified as urgent (the pro forma did not initially ask for this information but was amended to record whether a request was 'urgent' in November 2005). An intermediary was appointed for four witnesses in time to assist at interview; in a fifth case, the intermediary assisted the witness at an identification parade. When the witness did not identify a suspect, this investigation did not proceed to interview. In the two remaining (separate) cases, interviews of a young witness with learning difficulties proceeded without the intermediary, although in both cases an intermediary was appointed to assist the witness at trial.

In the early stages of the project, the time taken to appoint an intermediary led some police officers to conclude that this special measure was inappropriate where speed to interview was important. In contrast, only one officer in the second year of the evaluation expressed particular dissatisfaction with the speed of response. This concerned the case previously described in which it had not been possible to provide an intermediary to attend on the same day as the call when a suspect was in custody; the interview was re-scheduled when the intermediary could attend. In at least one case, however, the intermediary was able to assess and assist at interview while a suspect was in custody.<sup>32</sup> When officers mentioned delays, these were not attributed to the time to appoint an intermediary but to the difficulties of coordinating the schedules of police officers (and sometimes

<sup>32</sup> The witness had been at the police station for eight hours before the assessment. The intermediary was able to supplement her assessment post-interview by speaking to the witness's care team.

social workers) and intermediaries and in obtaining a police interviewer who was 'Achieving Best Evidence' trained.<sup>33</sup> An interview with a stroke patient being dealt with by one force had been delayed for several months due to trained officers being detailed elsewhere.

Although at the end of the evaluation the secretariat was able to respond quickly to most requests for an intermediary, the belief may persist among many in pathfinder areas that they will be unsuccessful in asking for an intermediary at short notice. As noted above, the secretariat did not routinely record calls where it was unable to provide an intermediary in time to accommodate the police investigative timetable. However, it considered that urgent requests were a low proportion of the total. Discussions with the police in pathfinder areas confirmed that extreme urgency was relatively rare. Nevertheless, it remains possible that requests were not made for some witnesses at the interview stage not because eligibility was overlooked but because officers felt there was not enough time to obtain an intermediary.

In December 2005, the secretariat gave the following snapshot of problems in making appointments:

- some intermediaries were too busy at work to take on an appointment;
- it was taking longer to find intermediaries for the Thames Valley pathfinder area, which had experienced the biggest increase in requests;
- many intermediaries did not want to take on more than one case at a time<sup>34</sup>, a problem made worse when police officers failed to notify intermediaries that a case was not proceeding<sup>35</sup>;
- some intermediaries did not return calls or took a long time to do so. (Conversely, some intermediaries wanted the secretariat to 'stand them down' if someone else accepted the appointment).

The secretariat also reported problems in identifying specific skills. In some instances, this was due to gaps in the range of skills of intermediaries in the pool (addressed in prioritisation criteria for the 2006 recruitment exercise); in others, the problem lay in the way register information was organised (addressed in a planned redesign of the register):

- Some intermediaries were recorded on the register as having a particular skill but when called, it emerged that either they should not have been so designated or the need was for more specialist skills than the intermediary possessed. The upgrade of the register – underway at the end of the evaluation – will distinguish whether intermediaries are 'competent' or 'specialist' in a specific skill.
- Some intermediaries were classified as working with 'children' as a general category, when in reality they worked only with either very young children or with adolescents. This will be remedied on the upgraded register. (The recruitment round in early 2006 asked intermediaries to distinguish whether their work was with under fives, five to 13 year-olds, 13 to 19 year-olds or those over 19).
- There was difficulty identifying intermediaries with Makaton skills (to be distinguished on the new register). The 2006 recruitment round invited candidates to state their level of attainment if they used British Sign Language, Makaton or any other augmentative or alternative communication system.

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<sup>33</sup> This may not be simply lack of numbers of trained officers. Several areas told us that although sufficient officers received training, video interview experience tended to be confined to a small group. Eventually, they reported that other trained but inexperienced officers become unwilling to conduct a video interview.

<sup>34</sup> In the 2006 survey, 19 intermediaries (34%) were only willing to act in a single case at any one time.

<sup>35</sup> In the 2006 survey, 13 intermediaries (28%) said the police had failed to keep them informed about whether a case was proceeding to court.

## Hours of access to the register

The secretariat is generally available to field calls during normal office hours, backed up by an answering machine. Officers expressed frustration when no-one was available to answer the phone during the day, but the position improved considerably over time and such instances had become rare by the end of the evaluation.

Officers and managers across the pathfinder areas agreed that case demands did not require access to the register on a 24-hour basis (in any event, most intermediaries would not be able to respond in the middle of the night). Indeed, good practice for interviews with vulnerable witnesses requires some degree of advance planning and consultation wherever possible. Pathfinder areas suggested that access to the register be provided during the hours of 8am to 8pm on Mondays to Fridays (accommodating two police shifts) and 9am to 12 noon on Saturdays.

## Matching the skills of the intermediary to the needs of the witness

When the secretariat received a request for the appointment of an intermediary, it used the information on the pro forma (often in combination with a phone discussion with the officer or other person making the referral) to identify intermediaries whose skills most closely matched the needs of the witness. Members of the Assessment Committee offered to provide advice on this but were seldom referred to as intermediaries themselves could assist in determining whether they were the appropriate choice. However, if central management of the register is delegated by the OCJR to a third party, access to such external advice may be useful. The survey indicated that 15 intermediaries had turned down 25 requests for appointment (25% of all the offers declined) on the grounds that their skills were not an appropriate match. These appointments were turned down on the basis of the information provided to the intermediary during telephone discussions.

The secretariat also needed to consider the distance of the intermediary from the source of the request. In the January 2006 survey, 56 intermediaries had travelled an average (one-way) distance of 50 miles (ranging between four and 200 miles). In the survey, a total of nine requests for appointment had been turned down because of distance.

No intermediary asked, after meeting the witness, for someone else to be appointed with a more appropriate skill set. However, at the close of their work three intermediaries queried in retrospect whether they had had appropriate skills for the witness. In one case where the intermediary questioned her suitability for a witness with a mental health problem, the prosecution barrister declined to apply for the intermediary to be appointed, noting that the background of the intermediary may have been a contributing factor (this case is discussed further in chapter 8).

There was one instance in which a witness (described on the police referral pro forma as 'very culturally isolated') expressed a preference for an intermediary who was black. The secretariat was unable to comply with that request.

## Work undertaken by intermediaries

At the end of February 2006, out of the first 140 intermediary appointments logged on the OCJR's case tracker, 38 (27%) were still open:

- in 26 (68% of appointments still open) an intermediary assessment of the witness or assistance at interview was ongoing;
- 12 (32%) related to cases that were scheduled for trial. In three of these cases, the special measures application for use of an intermediary had been granted.

Of the 102 appointments that were closed (73% of all appointments):

- 2 (2% of closed appointments) ended with offenders being cautioned;

- a further 72 appointments for a witness and one for a defendant (in all, 72% of closed appointments) ended without charge or without further involvement of the witness for whom the intermediary was appointed;
- one appointment was made post interview but the prosecution did not apply for use of the intermediary at trial;
- an additional 25 appointments for a witness and one for a defendant (in all, 25% of closed appointments) ended after a suspect had been charged.

### Intermediary appointments ending without court process

Two intermediary appointments ended after the intermediary assisted at the investigative interview and the offender was cautioned. The following table gives a breakdown by outcome of the remaining 73 appointments that ended either without a suspect being charged or without further involvement of the witness:

**Table 4.5** Intermediary appointments ending pre-charge and without caution

How appointment ended	Appointments	
	No.	%
Without the intermediary conducting an assessment or assisting at interview	13	18
After assessment but without investigative interview	30	41
After intermediary assisted at interview but police/ CPS decided not to proceed with case or proceeded without the evidence of the witness	29	40
Police requested intermediary for defendant but solicitor declined to use	1	1
Total	73	100

The 13 cases that ended without involvement of the intermediary included instances of witnesses who did not show up for interview or decided not to make a complaint; one who died; police decisions that no crime had been committed; and one where the witness could not identify the suspect. However, in one magistrates' court case, failures of communication acknowledged by the police and CPS resulted in the witness (a child with learning difficulties who had already been interviewed) giving evidence without seeing the intermediary who had been appointed to assist her. The police officer requested an intermediary appointment and passed her details to the CPS to follow up the assessment, rather than arranging it himself. The intermediary did not call to find out what had happened to the case. At the CPS, no-one picked up on the officer's request which was on an MG20 form for routine communication instead of an MG2 to flag special needs. The child was unable to answer questions at court and the defendant was acquitted.

Procedural guidance states that "It is presumed that interviews using an intermediary will be video-recorded" for transparency (section 3.5.5, 2005).<sup>36</sup> All but one investigative interview at which an intermediary was present was visually recorded<sup>37</sup>: in the exception, an intermediary assisted a witness with mobility problems to give a statement to a civilian statement taker in the witness's home.

<sup>36</sup> Where the recording is not admissible, it must be converted into a written statement for court.

<sup>37</sup> In the trial cases, written statements were taken from three witnesses under the age of 17 who were not assisted by an intermediary at investigative interview.

### Intermediary appointments ending after a suspect was charged

Twenty-six appointments for a witness and one for a defendant ended after a suspect had been charged. The case in which an intermediary appointment on behalf of a defendant was approved by a judge ended when the prosecution was discontinued. One appointment for a witness was made post interview but the prosecution decided not to apply for use of the intermediary at trial. The other 25 witnesses were involved in 20 cases, the outcomes of which are set out in the following table. It is not possible to say whether use of the intermediary affected the outcome:

**Table 4.6** Intermediary appointments ending at court

How appointment ended	No. of witnesses	No. of cases
Crown Court conviction (after trial)	2	2
Crown Court conviction (guilty plea)	7	7
Crown Court (offence taken into consideration when defendant sentenced on another matter)	1	1
Crown Court (acquittal by jury)	6*	3
Crown Court (judge-directed acquittal)	1	1
Crown Court (trial ending in a hung jury followed by a retrial without witness/ intermediary)	1	1
Magistrates' court conviction (after trial)	1	1
Magistrates' court acquittal (after trial)	1	1
Youth court conviction (after trial)	4	2
Youth court acquittal (after trial)	1	1
Total	25	20

\*This includes a trial with three witnesses for whom an intermediary was appointed; only two of the witnesses gave evidence.

Information about the 12 cases involving 16 witnesses in which intermediaries were used at trial is set out in chapter 7. In six of the seven guilty plea cases, the special measure application for the intermediary had been granted. In four cases, the guilty plea was entered on the day of trial (the witness and intermediary were already in the TV link room in one case) and in a fifth the plea was entered on the eve of trial.

### Intermediary appointment for a defendant

An intermediary was requested for two defendants. In one case, the intermediary was appointed for a juvenile defendant at the request of the police but the defence solicitor declined this. (It is unrealistic to expect defence solicitors to use special measures arranged through the police, emphasising the need for awareness to be raised with the defence community directly.) In the other, the intermediary was requested post-interview by the defence solicitor of an adult with communication difficulties due to a brain injury. An application for the use of an intermediary at court was approved by the trial judge.

This case highlighted the need for further guidance (including what aspects of intermediary usage the Legal Services Commission will pay for, for example, the presence of a defence representative at the

intermediary's assessment of the witness). The boundary of the intermediary's role was unclear and as a result, she was unable to respond to a request to assist at a pre-trial conference with the defence barrister which would have involved discussion of the defence case. There was uncertainty as to who should accompany the intermediary during assessment, whether the solicitor would be paid for this and where the assessment should take place. The solicitor's office was less suitable than the client's home but did not involve travel time for the solicitor or the solicitor's clerk.

The judge ordered that the intermediary be given case details in order to finalise communication materials. On the day of trial, the defendant was fined and bound over to keep the peace. The defence solicitor said the intermediary was excellent and would use one again in similar circumstances.

## Use of an unregistered intermediary

When a registered intermediary is not available, an unregistered person may be nominated, normally a professional in the field of facilitating communication with vulnerable people (section 3.8.1, Procedural guidance, 2005). In "a very few special cases" it is possible that witness communication can only be facilitated by a relative, carer or friend who must "understand the nature of the role they are about to perform" (section 3.8.4). The secretariat logged three calls in relation to an unregistered intermediary (the low numbers may, however, indicate that officers were unfamiliar with the need to notify the secretariat). All three unregistered intermediaries appeared appropriate choices: a mental health principal social worker with language skills, a teacher with Makaton skills who knew the child in question and a principal clinical psychologist who had previously assessed the witness.

Two unregistered intermediaries commented on the videotape and booklet 'Being an intermediary: Guidance for Unregistered Intermediaries' (required to be given to them by Procedural guidance, section 3.8.3, 2005). Both felt that the booklet was useful although unnecessarily detailed, for example on abbreviations to be used in note-taking; the videotape was 'off-putting'; and the materials were unsuitable for a non-professional even though the video's emphasis seemed to be for carers rather than professionals. They thought that a demonstration or role play of the intermediary role on the video would have been more helpful than 'talking heads'. One concluded that the materials were not useful without the ability to speak to a registered intermediary: "I had no confidence to handle it. It is worrying if you work in a professional role and you are not clear about what to do".

Although not specifically mentioned in guidance, in March 2004 the Assessment Committee indicated that unregistered intermediaries should be given a mentor. The secretariat named an intermediary to act as a mentor in the social worker's case. The social worker was led to believe that a trained intermediary would be present at the assessment but was not given the name of someone to contact. No-one contacted her. There is a need for follow-through in this situation to ensure that a registered intermediary provides advice when an unregistered intermediary is used.

## Conclusion

Most requests for an intermediary came from police specialist units or vulnerable persons officers; most concerned a white adult with learning difficulties who was a complainant in a sexual offence. Of the appointments of an intermediary in completed cases, almost three-quarters ended without entering the court process. Most of these ended after assessment or following assessment or interview, i.e. where there was a prosecution decision that no offender could be charged or that the case would proceed without the witness's evidence. The secretariat was able to make appointments more quickly towards the end of the evaluation. Its matching of witness needs to intermediary skills worked well. Only three calls had been logged concerning use of an unregistered intermediary. No application made for an intermediary at court was refused.

## 5. The impact of the intermediary at assessment and interview

The evaluation objective to assess the impact of the intermediary on practice is explored in this chapter in respect of the assessment and investigative interview. It draws on interviews with intermediaries, police officers and prosecutors and on the 2006 survey of intermediaries.

### Planning the assessment

An intermediary assessment informs criminal justice decision-making where:

- the police plan to interview the witness;
- the police are unclear whether the witness is able to be interviewed;
- the CPS must take a view about the witness's ability to give evidence if the case proceeds;
- the witness is required to give evidence at court.

When planning the assessment, the intermediary began with the information on a pro forma sent (usually by the police) to the secretariat requesting the appointment of the intermediary and describing the witness's communication abilities and difficulties; method of communication; and levels of understanding. Intermediaries also needed to consider:

- whether information about the witness could be obtained from other sources;
- what information they should know about the alleged offence.

At the request of one intermediary, a 'best interests' meeting was convened to determine whether it was in the witness's best interest to be assessed, where the intermediary felt that an adult witness could not make this decision.

### Information from sources other than the witness

Where time permitted, intermediaries often obtained information about the witness from other sources, although this could be difficult and time-consuming for intermediaries in full-time employment. In the 2006 survey:

- of the 44 intermediaries who had conducted assessments, 35 (80%) had sought information about 55 witnesses from formal sources such as schools or health authorities (not just from family members);
- of these 35, 29 (83%) reported that, in at least one instance, the information had been easily obtained; 11 (31%) had experienced difficulty in obtaining information; and four (11%) had, on at least one occasion, been unable to obtain the information sought. (Difficulties were experienced with social services, health departments, schools - particularly over holidays - and police officers.)

In a trial case, the intermediary was unsuccessful in obtaining access to previous reports about the child, including reports for court:

*"I came up against the amount of time involved. How much time could I spend tracking down more information about the witness? I had to make calls during breaks at work. I was concerned that my assessment would be invalidated if he had been assessed recently and the conclusions would be different. The defence lawyer said he had profound hearing loss in*

*one ear but I was told it was in both ears. The judge had reports referring to him soiling himself but I had none of this information”.*

Draft guidance to facilitate requests for information from third parties was prepared by the secretariat in March 2006.<sup>38</sup> Some difficulties relating to information-sharing remained:

- it was unclear whether a trial intermediary whose appointment was requested by the prosecution had a right to see reports obtained by the defence. In one case, the defence criticised the intermediary’s view of the witness which was contradicted by medical reports to which she had not had access;
- opportunities were not taken for improved case planning through Early Special Measures meetings.<sup>39</sup> Only one intermediary had attended such a meeting.

### Information about the alleged offence

As a general principle, intermediaries were not given details of the alleged offence or the suspect prior to interview because of the risk of contaminating the witness’s evidence. Intermediaries sometimes had to forestall officers (and others) from giving them offence-related information. However, intermediaries may need certain case information in order to fulfil their role:

- if the offence is sexual, in order to check the witness’s vocabulary for parts of the body and to consider whether a visual aid is needed;
- what to avoid, so as not to ask for information inappropriately and to recognise if the witness starts to talk about the alleged offence during the assessment;
- specific or idiosyncratic words and names to assist in interpreting speech (two intermediaries observed that, for hard to understand witnesses, the evidence could all come down to “two or three sounds”). Intermediaries are likely to need more time in familiarising themselves with the speech of such witnesses.

### Whether the intermediary should watch a previous videotaped interview

The police and CPS must consider whether an intermediary who is to assist at interview should watch any previous videotaped interview to assist in assessing the witness’s communication needs. Some intermediaries reported that the police, CPS or Witness Service<sup>40</sup> did not want them to see the video interview. However:

- In the 2006 survey, 13 intermediaries had acted at an interview with a witness who had been interviewed previously. Four (31%) had watched all or part of the visual recording of the first investigative interview with six (27%) of the 22 witnesses whose first interview was conducted without an intermediary.
- Nine of the 12 trial intermediaries had seen all or just the rapport-building part of the video interview.

Reasons in favour of watching a witness’s video interview included assisting with memory refreshing<sup>41</sup> (some needed the intermediary’s assistance in understanding or focusing on the video when they saw it for this purpose) and helping intermediaries familiarise themselves with the

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<sup>38</sup> This included consent forms to be signed by the witness or a person authorised to give consent on their behalf. It advised intermediaries always to check with the police first and to request only information with direct relevance to assessment and the intermediary role.

<sup>39</sup> Burton *et al* (2006) reported that no such meetings were held in cases in their sample.

<sup>40</sup> The Witness Service sometimes coordinates arrangements for witnesses to see their video before trial.

<sup>41</sup> ‘Achieving Best Evidence in Criminal Proceedings’ states that all witnesses are entitled to see their statement for the purpose of refreshing.

witness's speech and abilities.

In all three trials where this issue was addressed by the court, judges thought it would be helpful for intermediaries to watch the entire video interview. As guidance favours the same intermediary acting at interview and trial, there is no prohibition on the intermediary knowing what the witness said at interview. Intermediaries who watched the video interview pre-trial found it to be helpful in 'tuning in' to the witness's communication style and identifying potential problems in questioning. Those with the opportunity to see interviews in which they themselves were present also found this helped inform their practice.

## Intermediary assessment of the witness

For the criminal justice process to respond appropriately to vulnerable witnesses, "difficulties which a potential witness may encounter must be assessed rather than assumed" (Sanders *et al*, 1997). The intermediary's assessment is crucial as a means to inform practitioners.

### Number of sessions

Respondents to the intermediary survey referred to 123 witnesses assessed by 44 intermediaries. While 80 per cent of witnesses were only assessed once, others were the subject of multiple assessments (in a case of historic abuse in a care home 20 years previously, the intermediary and the police met the witness on eight occasions). The details were as follows:

**Table 5.1** Witness assessments

Number of assessment sessions:	Witnesses assessed	
	No.	%
One	99	80
Two or three	18	15
More than three	6	5
Total	123	100

There was sometimes a tension between the wish of the intermediary to assess fully and the need of the police to conduct the interview quickly. Assessments requiring more than one session were agreed with the police: as one officer commented, "We resisted speed in order to obtain a better interview". The evaluation was aware of only one instance in which a police officer concluded that the time for assessment (two appointments plus time to prepare communication aids for the interview) had not been worthwhile, because the delay involved may have jeopardised the recall at interview of a witness with short-term memory problems.

### Timing and location

Intermediaries needed to be flexible in adapting to police requirements which could require compromises to be made with the intermediary's preferred professional practice. In the 2006 survey of intermediaries, 21 (48%) of the 44 who had assessed a witness had done so on the same day as the investigative interview. A total of 40 witnesses were involved (49% of those interviewed with the help of an intermediary). In researcher interviews with 25 intermediaries who had assisted at the investigative interview:

- 11 (44%) who assessed the witness before the day of the interview said that they had had enough time for the assessment;

- in contrast, 14 (56%) required to assess the witness on the same day as the investigative interview had felt under pressure.

Problems experienced by those who felt under pressure included not having enough time for the assessment (which sometimes consisted of little more than 'getting to know' the witness) or to plan with the police their role at interview. There were knock-on problems for witnesses with limited concentration or who were easily tired. However, scheduling both events on the same day was sometimes unavoidable. The urgency was less often for criminal justice reasons (for example, because a suspect was in custody) than because of the difficulty of coordinating availability of an appropriately trained interviewer (and sometimes a social worker), booking the video suite and securing an intermediary (many of whom had 'day jobs' and may have had to travel long distances).

Even where interviews and assessments were conducted on the same day, police officers were still very positive about the intermediary's contribution. On the other hand, intermediaries in these cases were concerned that the maximum benefit of their presence had not been achieved, particularly where there had been little time to plan. One said:

*"They wanted me to go straight into the interview because they had booked the room. I didn't even to speak to the officer alone beforehand. We chatted with the witness (fortunately her communication skills were good) then went ahead".*

Nevertheless, even short assessments could prove useful. In a case in which the intermediary had only about 20 minutes to assess a child and 30 minutes to help plan the interview, she suggested how the child should be questioned; that the assessment and interview take place in the same room, to minimise disruption; that everyone sat on cushions on the floor; and how toys could integrate breaks into the interview, having checked that the witness could play and listen simultaneously. Despite the brevity of the assessment, the police felt the intermediary's suggestions had significantly improved the interview.

Assessments of a witness's communication abilities are best conducted in a familiar location where the witness feels comfortable. Intermediaries reported that most were conducted in the witness's home, school or care facility. Some had been conducted on police premises<sup>42</sup>, often where the investigative interview was conducted later the same day. Intermediaries sometimes felt facilities were unsuitable and may need to question these beforehand or adapt them (for example, by re-arranging seating).

### Accompanying the intermediary

Intermediaries should be able to provide evidence of their professional identity but are not expected to see witnesses on their own. Procedural guidance requires that the initial meeting between the witness and intermediary is conducted with a responsible third party present (an officer or other nominated person able, if necessary, to give an independent account of what happened) and the intermediary must not be left alone with the witness (section 3.9.7, 2005). Although the guidance refers to the 'initial' meeting, the principle holds true for all contacts with the witness. The guidance was reinforced midway through the evaluation in light of early indications that some intermediaries were assessing witnesses on their own or had difficulty in getting a police officer to accompany them. Police officers were sometimes unaware of the requirement that the intermediary be accompanied. In the 2006 survey, intermediaries reported who was present at 109 of the 123 witness assessments they conducted:

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<sup>42</sup> These are usually not police stations but separate premises used for interviews with vulnerable witnesses.

**Table 5.2** Who else was present at witness assessments

	Witnesses to whom this applied	
	No.	%
A police officer who later conducted the interview	69	63
Another police representative	19	17
Intermediary without a police officer	21	19
Total	109	100

Although 19 per cent of witness assessments had been conducted without an officer present, intermediaries reported that where no officer was available, they were often accompanied by a relative or carer.

The presence of a police officer at the assessment had resource implications. However, ten out of 11 officers who conducted an investigative interview having observed the assessment said that there were concrete benefits: “It helped me get information that I would not otherwise have done”; “It was invaluable”; “It was very positive to see how she kept him focused”. The eleventh officer said that it had been useful to observe the assessment but as the child had communicated well, the intermediary’s contribution had been minimal. Procedural guidance was amended to reflect that at the assessment, “The presence of the person who will conduct the investigative interview of the witness may assist both intermediary and interviewer in planning their respective roles at interview” (section 3.9.7, 2005).

### Recording the assessment

There is no requirement that assessments be visually recorded and it may be counter-productive to do so when the intermediary is trying to build rapport with the witness. In the 2006 survey, however, nine intermediaries (20% of those who had conducted an assessment) reported that their assessment of 12 witnesses (10% of those assessed) had been videotaped. This was done mostly where the assessment and interview both took place in the police interview suite. The police did not always appear to have a specific reason for recording the assessment. The only case in which a specific reason was given involved a witness who could only communicate by blinking. Both assessment and interview were visually recorded in her hospital room. The assessment was recorded for reasons of transparency and to demonstrate the methods used by the intermediary in communicating with the witness (spelling out words by identifying groups of letters, narrowing down to individual letters).

In a case of a multi-session assessment not attended by the officer in charge of the case, one intermediary reported sending a note to the officer after each session to keep him updated.

### Assessment tools

In the 2006 survey, formal assessment tools or systems (e.g. British Picture Vocabulary Scale) were used by 23 intermediaries in assessing 54 witnesses (44% of witnesses assessed). All 23 were speech and language therapists (74% of the 31 speech and language therapists who had conducted an assessment).

The use of aids to communication is discussed in Appendix 5.

## The intermediary's role at the investigative interview

In the 2006 survey, 25 intermediaries had assisted at a first interview with 60 witnesses (73% of those interviewed) and 13 had assisted at the second interview of 22 witnesses who had already been interviewed (27% of those interviewed).

By common consent, the intermediary contribution to the investigative interview was most useful where the interviewing officer and intermediary had discussed the implications beforehand. For example, several intermediaries had assisted the police in formulating the most appropriate way to test the witness's understanding of truth and lies.<sup>43</sup> 'Achieving Best Evidence in Criminal Proceedings' emphasises that the examples chosen must concern lies (an intent to deceive) not merely incorrect statements (section 2.102).<sup>44</sup> Intermediaries observed that the example provided in 'Achieving Best Evidence' was too long for many vulnerable witnesses who had often lost the point by the time the question was finished.

Intermediary responsibilities during the interview include monitoring questions and answers, to ensure clear understanding on both sides, and alerting the interviewer if the witness needs a break. Of 25 intermediaries who were interviewed for the evaluation and who had assisted at a first or second interview, 18 (72%) had intervened very little or not at all in questioning. Police trainers with experience in monitoring investigative interviews advised that it is difficult and unusual for a second interviewer to intervene in the lead officer's questions: intervention by a third party observer is therefore particularly awkward and requires careful planning.

Eleven intermediaries (44%) were comfortable with their interventions or said they had not intervened much or at all because there had been an opportunity beforehand to discuss the approach and type of questions with the interviewer. Fourteen intermediaries (56%) felt that there had been insufficient clarity about their role at interview and with hindsight thought that they should have intervened more:

*"With hindsight, I should have said more to slow things down, but I was conscious of being on their territory".*

*"The questions were not worded simply enough. I asked if there was a way to word things differently but the police insisted on a narrative. They might have got more if the witness had been approached in a different way. I am not sure they always understood what he was saying (always difficult when he was under pressure) and I didn't like to butt in".*

It was somewhat easier for intermediaries to signal the need for a break than to intervene about questions. However, intermediaries may be reticent to indicate the need for a break for themselves (something that was also a problem at court). In one case involving a particularly laborious method of communication with the witness, the intermediary said she had had nothing to eat or drink between 10am and 3pm.

Several intermediaries indicated that facilitating interviews with young witnesses, usually involving an alleged sexual offence, presented a particular challenge. Eight out of ten child protection officers who had used an intermediary at interview acknowledged that intermediaries brought additional expertise:

*"We do assessments before the investigative interview but not in this detail. Ours is only to see if they can talk and take part in the interview. Sitting in on the intermediary's assessment helped me in planning for court".*

However, two child protection officers were unsure about the benefits of an intermediary at interview for children as opposed to adults, at least in part because of the perceived need to interview children quickly. One said:

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<sup>43</sup> An illustrated 'story board' can provide stimuli for assessing understanding of truth and lies: Lyon 2002.

<sup>44</sup> Police trainers advise that officers often ask witnesses merely to distinguish 'right and wrong', which is inadequate for the purpose.

*“Using an intermediary for children is making a lot more work for us”.*

Twelve intermediaries were interviewed who had assisted at investigative interviews with witnesses aged five and under. While acknowledging the skill of most child protection officers, they saw opportunities to improve such interviews by focusing more on the developmental stage and abilities of the child. In the case of a three year-old, the intermediary said the child would not settle in the interview:

*“I could have settled the child with a song but they said ‘You can’t do that in the interview room’. The officer insisted that X sat on the settee. X got off and went behind it. In the end, I sat X on my knee. I asked again if I could have ten minutes to settle X but they said ‘No, we have to get on’. The minute X got stressed, X went off the topic. The officer kept going back to the beginning”.*

The police officer in this case said that the intermediary was “invaluable” but concluded that the child was too young to interview. The intermediary thought that problems of the child’s behaviour could have been overcome with a more flexible approach.

The dynamics were even more complex where a police officer interviewed jointly with a social worker (use of inter-disciplinary joint interviews varied across pathfinder areas). In one joint interview, the intermediary was not in the interview suite but was asked to watch on a monitor. She met the six year-old witness on the day of the interview. The police officer described the intermediary’s role as “positive and helpful” but felt that three people in the video suite would have been “too much” for the child. There was no opportunity for the intermediary to consult during the interview itself (sometimes the interviewer comes out to discuss any points to be clarified with the observer).

In another joint police and social worker interview, this time involving an adult witness, the intermediary said:

*“It had been agreed ahead of time that the police interviewer would sometimes need to repeat what this witness said. The problem was that, of the three people in the room, the social worker understood her best, with me second. The officer struggled the most. Clarifications were not always made as we had different perceptions of what utterances were unintelligible or not. I felt that when I repeated what she said, I interrupted the flow as she turned to look at me and that distracted her”.*

Fifteen of the 25 intermediaries (60%) who were interviewed for the evaluation and who had assisted at an investigative interview reported taking part in post-interview discussions. These sometimes covered the witness’s ability to give evidence if the case went to court but acted more generally as a debrief about the interview. These opportunities were considered helpful.

## Conclusion

The evaluation illustrated key contributions made by intermediaries, through their assessments, to the planning and conduct of witness interviews. Interviewing officers found it beneficial in planning the interview and adapting their questioning to observe the assessment. There was a tension between the police’s desire for a speedy interview and the time needed by the intermediary to assess the witness and contribute to planning the interview. In practice, intermediaries seldom intervened at interview. This was either because advance planning took account of their recommendations and made interventions unnecessary, or because they felt uncomfortable about intervening when there had been no opportunity to discuss their role beforehand. The greatest benefits from the use of intermediaries occurred where they had time to assess the witness and discuss their findings and their role in the interview with the officers (and, where relevant, the social worker) concerned.



## 6. The impact of the intermediary special measure on pre-trial planning

This chapter addresses the evaluation objective of assessing how the intermediary provision impacts on 'what happens at court' by examining the implications for pre-trial planning (the next chapter deals with the trial itself). It examines pre-trial case management issues in individual intermediary cases and highlights some technology problems which hindered effective use of intermediaries and best evidence from vulnerable witnesses. The issues raised are relevant to implementation of the Criminal Case Management Framework, which provides guidance to operational practitioners on how cases 'might be managed most effectively and efficiently' (Department for Constitutional Affairs, 2005) to ensure that cases are trial ready and witnesses' time is not wasted.

### Access to guidance

Effective use of intermediaries relies on compliance with procedural guidance and the case checklist (a summary of guidance developed after the first two trials, listing issues to be considered by each category of case participant, including the judiciary).<sup>45</sup> Members of the judiciary and advocates in these trials rarely had timely access to this advice.<sup>46</sup>

The project secretariat forwarded case checklists to police officers who had requested appointment of intermediaries, asking that these be forwarded to the CPS and then by the CPS to the defence and court.<sup>47</sup> This chain of communication proved ineffective. Some judges reported receiving the guidance or checklist only at the last moment and not having time to review it. At the end of the evaluation, no proven solution had been found to ensure that all trial participants routinely received the guidance and checklist.

### Early identification of the need for an intermediary

Identification of the need for an intermediary was delayed in all trial cases. No witness was assisted by an intermediary at the original investigative interview (the preferred practice) mostly due to poor police awareness of the scheme, according to police officers interviewed for the evaluation. Requests for appointment of an intermediary were made between six months and two weeks before trial<sup>48</sup>: some apparently early requests were in fact made close to a trial date that was adjourned. Eligibility was identified by the CPS in most cases. Two trial cases were originally considered ineligible: one by the CPS lawyer (who thought that only non-verbal witnesses were eligible) and the other by a Witness Care Unit (which advised that hearing-impaired witnesses were not eligible).

The trial intermediary assisted at a second investigative interview in two cases (in one, at the direction of the trial judge). Retrospective court approval is required to use a recording involving an intermediary as evidence-in-chief: in both cases, the court granted the application for these recordings to be used at trial. Case participants concluded that using the same intermediary at interview and trial facilitated communication. Initial guidance had indicated that, as a starting point, a different intermediary be used at interview and trial. In June 2005, the project Steering Committee introduced a presumption that the same intermediary will be used at both stages (Procedural guidance, section 3.7.3, 2005). It acknowledged that continuity is paramount in helping vulnerable witnesses give their best evidence.

### Timely applications for the intermediary special measure

All 12 intermediary applications were for prosecution witnesses (one was made jointly with the

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<sup>45</sup> The checklist was incorporated into the guidance manual in November 2005.

<sup>46</sup> Lack of information about this special measure was also reported in trials in which guilty pleas were entered late.

<sup>47</sup> The Intermediary Procedural Manual, containing the case checklist, was sent to all Crown Court managers in December 2005.

<sup>48</sup> Four were appointed within five weeks of the trial date.

defence). At least six were made out of time (i.e. not within 28 days of service of the prosecution case) and two were not made on the appropriate form. Three were made on the eve or day of trial.<sup>49</sup> Most were made after applications for other special measures, contrary to procedural guidance (section 3.10.01, 2005). Intermediary reports should be available in time to support the application. In nine trials in which formal reports were prepared, they pre-dated the application but it was not possible to establish whether they were submitted at the same time.

The defence challenged three applications on the grounds that no intermediary was used at the investigative interview and that advocates could take account of advice in intermediary reports to ask short and simple questions. In these cases, judges accepted that being questioned at court was more stressful than at interview and all applications were granted. (For the only instance in which a judge indicated that an application for an intermediary, if made, would have been refused, see chapter 3.)

## Intermediary reports

Procedural Guidelines (section 3.9.11, 3.10.5, 2005) anticipate that the intermediary will be asked to prepare a briefing note for the court identifying specific issues to be considered (see Appendix 6). The submission of a written report ensures that relevant information reaches the judge: in two early trials, intermediaries did not prepare formal reports and the information they provided to the CPS and advocates was not put before the judge. Comments about reports from 12 intermediaries in ten trials in which reports were before the court were, without exception, extremely positive:

*“Without the intermediary, we would not have had the benefit of the report. It tied both sides down to the propositions and I could refer to it in my summing up”.* (judge)

*“The intermediary report was very helpful for planning purposes. Because I had advance notice, I could intervene when questions were too complex”.* (district judge)

*“I found the report invaluable while preparing my cross-examination, and without the report a difficult task would have been made worse”.* (defence barrister)

Reports were considered most useful where they gave concrete examples about the types of questions likely to be problematic, helping judges to monitor the suitability of questions.

## Planning for the preparation and support of the witness

The intermediary is not a witness supporter but has a key role in advising supporters about communicating with the witness and assisting them to do so. Feedback from intermediaries who acted at trial, the Witness Service and witnesses' carers indicated that witnesses with communication needs were likely to need more intensive preparation for court than the norm, but as yet, there is no systematic method for providing this. In some criminal justice areas, however, the CPS has sponsored local seminars on 'witness profiling' to provide in-depth preparation for court of witnesses with a learning disability or difficulty. Study cases showed benefits for all involved where intermediaries accompanied witnesses on familiarisation visits to the court (see Appendix 7).

## Pre-trial hearings to agree ground rules

Judges and advocates agreed that trial judges should be assigned in time to conduct a directions hearing attended by trial advocates and the intermediary. Of the seven Crown Court trials, three trial judges were assigned between three weeks to several months beforehand, but four were only allocated a week to two days before trial.

As agreements at these hearings are binding on the parties, it is desirable for the intermediary to be

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<sup>49</sup> In one case, this was despite a deadline some months earlier. Burton et al (2006) confirmed that special measures applications were routinely late.

present (Procedural guidance, section 3.10.7, 2005).<sup>50</sup> In all three trials where the judge was allocated weeks in advance, the trial judge scheduled a pre-trial hearing attended by the intermediary. One such hearing, held the week before the trial, was considered by participants to be particularly effective. The intermediaries informally discussed their role with the advocates which dispelled concerns that would otherwise have been raised in court. At the hearing, the defence objection to the application was withdrawn. The judge set the following ground rules: when the advocate asked a question, the intermediary would say when there was a problem; the advocate would then rephrase; if the intermediary said there was still a problem, the intermediary would be entitled, with the judge's authority, to put "the substance of the question" in a simpler way; and the intermediary would intervene in answers only on request.

In two of the lower court cases, the intermediary attended a pre-trial review conducted by a district judge. In the remaining cases, there was either no discussion about the intermediary role at court (so that, for example, intermediary recommendations about the pace of questions were not put to the judge) or the intermediary was not present when the judge and advocates discussed the intermediary role, even though in one case the intermediary was present but was not called into court.<sup>51</sup> Where discussions with the intermediary were left until the day of trial, these were often not helpful for planning purposes and were inevitably the cause of delay to the start of witness testimony.

In all cases, the intermediary should be given an extract of the court's decision in respect of the application, including details of how the court wishes the intermediary to perform their role (Procedural guidance, section 3.11.2, 2005). No intermediary received a copy of court directions in any pathfinder trial.

### Timetabling the witness's evidence

Fifteen of the 16 witnesses giving evidence at trial were described by intermediaries as having a limited concentration span.<sup>52</sup> Courts generally scheduled an early start to witness evidence and often discussed the need for breaks, but such plans were seldom adhered to.

The judge described above who set detailed ground rules for witness questioning was also the only one to timetable evidence aimed at each witness completing his or her testimony in a single day, taking account of the known length of videotaped evidence and the estimated length of cross-examination. He anticipated the number and length of breaks that might be needed during evidence-in-chief, cross-examination and over lunchtime.<sup>53</sup> He also took account of the needs of the individual witnesses in deciding with the prosecution the order in which they would be called.

Witness evidence began as scheduled in only one of the 12 trials. There were a number of problems related to delays, including:

- A witness who was confined to a wheelchair waiting two hours before the start of his video interview. The prosecution barrister said "We knew that he tired easily. I am appalled that he waited so long".
- A five year-old waiting for almost two hours while the judge dealt with another matter. The intermediary felt that "She was about to lose her concentration altogether and struggled to watch her video. She was upset and went under the table".

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<sup>50</sup> There were no pre-trial meetings between the CPS/ advocate and the intermediary (other than at court), or a pre-trial meeting between the CPS and the witness.

<sup>51</sup> CPS Policy Division advised the authors that intermediaries are entitled to be in court when directions are discussed.

<sup>52</sup> Standard 14 of the 2005 Witness Charter consultation states that young witnesses in the Crown Court should, wherever possible, attend court on the morning of the second day of trial to reduce the chance of being kept waiting and allow them to testify while they are fresh.

<sup>53</sup> The importance of considering the whole timetable in light of witness needs was shown in the scheduling of a pending trial which would have resulted in the cross-examination of a boy with Attention Deficit and Hyperactivity Disorder beginning at his lowest point in respect of his medication, until this was pointed out by the intermediary.

- The day before trial, the early testimony of an adult witness with severe learning difficulties being rescheduled to accommodate legal argument about another matter. The witness waited 45 minutes before seeing his videotaped interview and cross-examination was not completed until the second day. The judge said there should have been an early start.
- The evidence of a young child was listed for 'not before 10.30 am'. Other matters in the judge's list were not disposed of until 11am. (The listing officer would not guarantee no other matters would be listed, even though a child was involved.) The child's evidence was further delayed by third party disclosure made by the prosecution that day, as well as technological difficulties. This child was in the TV link room for about an hour before his videotape was shown. When cross-examination began after lunch, he said he could not remember what he said on the videotape.
- Almost an hour's delay being caused by discussions in court when a witness with learning difficulties asked that the advocates wear their gowns. The judge had directed that wigs and gowns would not be worn but no-one had asked for the witness's views.

Breaks were not always taken as scheduled. It was unclear where responsibility lay for monitoring time. One intermediary's report said that a young witness needed breaks "at least every 20 minutes", but there were instances where questioning went on for longer than this. The intermediary felt that she could not look at her watch. The judge acknowledged not taking breaks as originally planned. He had based his decision on advice to judges from a psychiatrist that it is better to get questioning over with, although he said this advice related to adult rape victims. He emphasised that it was therefore important for intermediaries to explain the reasons why a witness may need a break.

Several trial intermediaries mentioned the effort of concentration to monitor the witness's comprehension over a period of time. One intermediary felt she "got something wrong" at one point during cross-examination and that it was hard for her to concentrate because the witness was talking over the barristers. It was the evaluation team's observation at court that intermediaries who are tiring should be entitled to ask for a break for themselves, as is the position for interpreters.<sup>54</sup>

## Planning for the use of courtroom technology

Many vulnerable witnesses giving evidence by TV link are unwilling to testify any other way (Hamlyn *et al*, 2004; Plotnikoff and Woolfson, 2004 and 2007). However, in many intermediary trials, technological problems proved a significant obstacle to best evidence.

As noted above, trials varied as to whether there was discussion of ground rules, including how the intermediary would signal to the court.<sup>55</sup> Some intermediaries did not realise that the judge might not be watching the TV link all the time. Conversely, judges had not appreciated that intermediaries in the TV link room could not see the judge when the advocate was questioning the witness (a problem highlighted by intermediaries in seven of the 11 TV link trials).

There is a challenge in using the TV link to provide reassurance to the witness yet enabling the intermediary to operate effectively. Only one trial (before a district judge in the magistrates' court) took place with the witness and intermediary in court, behind a screen. Being in court made it easier for the intermediary to 'catch the judge's eye' without necessarily having to speak. One judge in a TV link trial thought that lack of eye contact with intermediaries may inhibit judges from recognising a problem and added:

*"I didn't even think about the intermediary not being able to see me – judges should be*

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<sup>54</sup> "It should not be assumed that an interpreter can continue without regular breaks and the court should facilitate the opportunity to indicate the need for a break": Judicial Studies Board Equal Treatment Bench Book, 2005.

<sup>55</sup> Procedural guidance invites the court to agree how the intermediary will flag concerns such as tiredness, distress, lack of understanding on the part of the witness and factors hindering effective communication (section 3.10.6, 2005) and requires intermediaries to address the judge or magistrate unless directed to do otherwise (section 3.11.3).

*prompted to think about this. You are straining to listen, watch that the jury is OK and that the defendant is not being shown on the TV link. It is difficult for the judge when you are juggling a lot of things”.*

There was often no satisfactory way for the person accompanying the witness and intermediary to signal a problem to the court without leaving the room. Some TV link rooms had no phone and in others the phone was not working.<sup>56</sup> Two intermediaries reported instances in which ushers had to leave the TV link room to go the courtroom because there was no other way to communicate.

One judge was better able to monitor the witness and intermediary because the use of a real-time computer-aided transcript relieved the judge from taking a detailed note. Although computer-aided transcription was not used in other trials, some judges acknowledged missing signs that the witnesses were becoming distressed or tired and agreed that it would be preferable not to have to take a detailed note when the intermediary was used.

Positioning on the TV link screen and control of the ‘picture in picture’ facility was frequently problematic:

- Positions were usually checked at the start of testimony but not after breaks. Sometimes the seating of the intermediary had changed slightly so that she was not fully visible.
- It was not always clear that the intermediary should be on screen. In a case where there was no court discussion with the intermediary about her role, she thought she would be on screen but in fact was not visible in court. This affected her ability to signal to the judge.
- Some witnesses did not have a clear view of the questioner. One advocate read his papers with his head down, so that witnesses could not lip-read. Five advocates came too close to the camera so that only part of their face could be seen. In one case, the advocate changed chairs, enabling a full view of his face, only on the second day of trial. In another case, the witness said that what he could see on the TV link screen was “Top of head. No mouth”.
- An intermediary reported that the court’s inability to turn off the ‘picture-in-picture’ facility<sup>57</sup> meant that it sometimes obscured the questioner’s face. In another case, the intermediary said this was a problem when the videotape was played. The young witness could not hear the soundtrack and said the live picture-in-picture of the child and herself was obscuring his face on the video interview.

### Implications for technology procurement and TV link room design

The TV link equipment used in most courtrooms dates back to the implementation of TV links at the start of the 1990s.<sup>58</sup> The installation of plasma screens, offering a larger picture and better definition, began with the introduction of video links to prisons. However, the prison TV link configuration is not ideally suited to use for witness testimony: advocates dislike wall-mounted cameras as they have to look up to question the witness then down to read their papers; there is no separate judge’s monitor with an overview of the TV link room; the ‘picture in picture’ facility must be on all screens or none; the judge must let everyone in court have the overview of the TV link room (which judges do not wish to do) or forego being able to monitor activity there; and the position of wall-mounted screens for prison video link purposes is not always comfortable for juries.

Procedural guidance invites the court to agree “the best live link facilities to maximise quality, lines of sight and ease of signalling” (2005, section 3.10.6). The first two trials indicated strongly that, despite

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<sup>56</sup> In a Crown Court outside the pathfinder areas, the usher or Witness Service volunteer accompanying the witness in the TV link room uses a red or orange card to signal to the judge.

<sup>57</sup> A smaller picture in a corner of the main picture, showing the view from a different camera: for example, the overview of the TV link room or the picture of the questioner when the main picture shows the witness.

<sup>58</sup> HM Courts Service is rolling out updated TV link equipment, but some courts were still purchasing old ‘small screen’ TV link monitors or non-standard equipment (e.g. requiring the speaker to press a button before speaking) towards the end of this study.

some disadvantages, the 'best' live facilities were plasma screens. Larger screens provided a greater sense of immediacy and a better view of interactions between the witness and intermediary, including the use of any communication device. As a result of these cases, a recommendation was added to the case checklist advising that TV link cases should use equipment with plasma monitors. Some Crown, magistrates' and youth courts were not equipped with plasma equipment; others attempted to list intermediary cases for plasma screen courts unsuccessfully. Only two of the 11 TV link trials were conducted using plasma screens. Both of these trials resulted in a conviction, although it is not possible to say whether this had any bearing on the outcome.

Inadequate planning, poor overall reliability<sup>59</sup> of equipment and, on occasion, court staff who were unfamiliar with the technology caused a number of problems:

- TV link sound systems caused problems in at least four cases. Examples included a witness with hearing aids who sat forward to hear the questioner but could then only be seen partially on the TV link - the judge kept telling him to 'sit back'; two cases in which those in the TV link room could not hear the video and those in court could not turn off the sound of the child talking in the TV link room<sup>60</sup>; equipment which necessitated those speaking on the TV link to press a button; and delays resulting from sound feedback which distressed witnesses with hearing aids.
- Failure of equipment caused delays in at least six cases and moves of either courtroom or TV link room in three cases.
- When plasma screens failed in one case, equivalent equipment in another court was not in use but the trial was moved to a court with old equipment. The witness's evidence was not completed. On the second day she was too distressed to continue and there was a judge-directed acquittal.

The judge listed the trial for a court with plasma screens and ordered that the TV link room should be shown to an eight year-old witness on his familiarisation visit. The intermediary report had explained that any change would be unsettling for him. The trial took place with old equipment and a different TV link room from the one he saw. The listing officer said no undertaking could be made about the facilities to be used. Other problems were caused by the small size of TV link rooms, most of which were not purpose built and were routinely used only by a witness and one other person. In these trials, the intermediary and witness were usually accompanied by an usher and sometimes also by a witness supporter. Some intermediaries described being 'wedged in'; one judge described the room as 'closet sized, very crowded and uncomfortable'. A problem in relation to this occurred in a trial where the TV link room door was left open because of lack of space. People talking outside distracted the witness at a crucial point in his testimony; he faltered and failed to 'come up to proof'. A trial with witnesses in wheelchairs had difficulty in finding a suitable TV link room: larger rooms did not always link to a courtroom with plasma screens. Lack of space in TV link rooms at two magistrates' courts meant relatives accompanying young witnesses being seated alongside the TV screen and camera, in direct eye contact with the witness (considered highly undesirable).

### Planning the use of visually recorded evidence-in-chief and transcripts

The technical quality of videotaped evidence-in-chief is crucial to best evidence. Quality (particularly sound quality) of recordings in these trials was often poor. Sometimes there was a delay while adjustments were made, usually without much improvement. At four of the seven jury trials, the evaluators saw jurors visibly straining to hear. Some problems may have been due to incompatibility of police and court equipment but if so, it was evident from comments made that tapes had not been

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<sup>59</sup> Young witnesses interviewed in two studies have also reported frequent problems with sound or picture quality of TV link equipment. Technology problems have sometimes delayed the start of their testimony (Plotnikoff & Woolfson, 2004 and 2007).

<sup>60</sup> In one case, the child was moved to the police room off the public concourse to watch his video, passing the defendant's family. This room had bare walls, benches and no window. His viewing of the video was interrupted by the court tannoy and policemen coming in.

checked on court equipment until moments before they were played at trial. Those in court seemed unclear about where responsibility lay for these quality checks in advance of trial.

One case highlights the importance of the intermediary making sure the recording is accessible not just to the court but to the witness. No intermediary was used at the investigative interview with a seven-year old. The first trial judge was “taken back” at the quality of the video. The trial was adjourned and the same video presented at the re-scheduled trial seven months later. On the eve of trial, a different judge asked the intermediary to view the video interview. The intermediary realised that the video would be inaccessible to the boy: the interviewer was off-screen, the camera angle was too high, visual and sound quality was poor and the boy’s face was indistinct. As a result, he would be unable to lip-read from the tape.

The judge therefore agreed that the intermediary could read to the boy from the transcript. As soon as the video was played, the judge stopped it because he could not see the TV link room on his screen. He told the intermediary that the video would be played without her reading the transcript. After the trial, the intermediary said:

*“[The witness] got nothing from watching the video interview. It was unfair to say he would ‘have to make the best of it’. An intermediary should have been involved in helping him refresh his memory. If I had seen the video earlier, I would definitely have recommended doing the interview again with an intermediary, or at least that subtitles be put on the video”.*

In four of the seven Crown Court trials, the transcript was put before the jury when they watched the video interview; judges thought this was helpful to jurors, particularly where sound quality was poor. In a case where this was not done, the judge was critical.

The CPS Transcription Unit marked some transcripts noting that “difficulty was experienced in hearing and/ or understanding the witness”. Two judges referred to problems caused by transcripts which made witnesses seem more coherent than they really are were. One trial judge (who then adjourned the trial) queried why the prosecution had not alerted him to the poor quality of the video, especially as the transcript suggested “clear and coherent” answers. In a different case, the trial judge said that he did not routinely watch videos pre-trial but relied on the accuracy of the transcript:

*“In this case the transcript was misleading – what was transcribed was only the social worker’s repetition of the answers, not what the witnesses said themselves. It is important that the transcript give the actual words of the witness”.*

In the survey of intermediaries, three had transcribed interviews of four witnesses (5% of witnesses interviewed with the help of an intermediary) at which they had assisted.<sup>61</sup> One was a trial in which the judge asked for the witness to be re-interviewed with the intermediary, who was then directed to prepare the transcript. The transcript distinguished what was said by witness and intermediary. The defence had the tape and transcript reviewed and was satisfied. The judge said: “This may have been expensive<sup>62</sup> but was worth every penny” because the extra exposure to the witness’s communication style meant that the intermediary was able to tell the judge and advocates “what to look out for”. The prosecution advocate said that a transcript which has not been agreed and prepared with the assistance of the intermediary “is likely to cause problems”.

## Conclusion

Effective intermediary use was heavily dependent on advance planning and the judiciary’s setting of ground rules, to ensure a common understanding of how advocates would tailor their questions to the needs of the witness and how the intermediary would flag communication problems to the court. Although examples of good practice were identified, the overall quality of pre-trial planning in most

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<sup>61</sup> One involved a transcript prepared for public law care proceedings, described in more detail in chapter 4.

<sup>62</sup> The preparation of the transcript took seven hours. The intermediary’s time for this, as for other tasks, was paid for by the Office for Criminal Justice Reform.

trials was poor. Use of an intermediary was only one factor in enabling a vulnerable witness to give best evidence. This objective was undermined by inadequate case preparation; long delays pre-trial; and failure to give the witness a 'clean start' because listing over-rode the needs of vulnerable witnesses. Such problems were compounded by inadequate or unreliable court technology.

Even where plans were good, there was little follow through. Where a multiplicity of things went wrong, there seemed to be a 'culture of despair' in which there was no mechanism for feeding back lessons to be learned so as to avoid similar problems in future cases. Obtaining feedback about intermediary trials would give an indicator of the success of case management in improving planning in vulnerable witness cases. The evaluation identified implications of the intermediary special measure for procurement of court technology and design of TV link rooms or (where court facilities were inappropriate) use of more suitable alternative accommodation for vulnerable witnesses equipped with remote links.

## 7. The impact of the intermediary at trial

This chapter addresses the evaluation objective of assessing how the intermediary provision impacts on what happens in court. It describes the first twelve trials, conducted in four pathfinder areas, to use an intermediary.

### Profile of trial cases

Twelve trials took place involving 12 registered intermediaries and 16 witnesses; two intermediaries were appointed for more than one witness at trial and two acted in two trials (see Appendix 4). In these trials:

- 9 of the 16 witnesses who gave evidence were male;
- 5 were adults (eligible principally on the basis of learning difficulties);
- 11 were children. Three were five year-olds. Eight were eligible as a result of their age in combination with other conditions (principally learning difficulties);
- 12 of the 16 witnesses were victims;
- 7 were Crown Court trials. Four took place in the youth court and one in magistrates' court (four of these were conducted by district judges and one by a lay bench);
- 5 trials ended in a conviction and one in a retrial;
- communication aids were agreed in two trials but were used in only one, where the adult witness routinely used a picture book for communication (see Appendix 5);
- each of the 16 witnesses received a pre-trial familiarisation visit to court (see Appendix 7).

Members of the judiciary considered that the involvement of the intermediary had not been a contributory factor to the outcome where trials ended in acquittal. Their views about the benefits of using an intermediary are discussed below and in the next chapter.

### The intermediary declaration

Prior to acting as an intermediary at the investigative interview or at trial, the intermediary makes a declaration that they will “well and faithfully communicate questions and answers and make true explanation of all matters and things as shall be required of me according to the best of my skill and understanding”.<sup>63</sup> Practice varied in Crown Court and magistrates' and youth courts as to whether the declaration was made in court or the TV link room. Practice also varied as to whether the intermediary was then asked to describe their experience and training. Intermediaries had not always anticipated this or thought through what information would be most helpful to the court (and jury).

### Telling the jury about the intermediary role and the witness's communication needs

The Judicial Studies Board advises that section 32 of the Youth Justice and Criminal Evidence Act 1999 puts a duty on the judge to warn the jury that a special measures direction does not prejudice

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<sup>63</sup> From Rule 2, Crown Court (Special Measures Directions and Directions Prohibiting Cross-examination) (Amendment) Rules 2004.

the accused.<sup>64</sup> The wording of a proposed jury direction is provided on the Board's website to ensure that judges give this warning in a consistent manner.<sup>65</sup>

Telling Crown Court juries about the witness's communication needs and the role of the intermediary did not happen uniformly. In most trials, the prosecutor described the nature of the witness's communication problem and referred to the intermediary role; judges also made some explanation just before the witness gave evidence. In one trial, however, no explanation was given either in the prosecution opening statement or in the judge's remarks to the jury before the witness gave evidence. Some judges thought that a model jury instruction would be useful. A High Court judge suggested that the following be explained:

- the right of witnesses who are disadvantaged in some way to give evidence and be understood in the same way as those who are not in that position;
- the reasons why an intermediary has been appointed for the witness in question;
- the intermediary's role and qualifications;
- the witness's use of an intermediary should not prejudice the defendant in any way.

## The intermediary and questions

Procedural guidance indicates that intermediaries:

- will communicate questions as accurately as possible, in a way that facilitates the witness's understanding;
- will seek clarification from the court (relating to matters of understanding and comprehension, not legal issues or purpose) of any questions that they have not understood before putting the question to the witness;
- will not anticipate the intention of the questioner;
- will not alter the precise nature or thrust of questions in the first instance but will offer an alternative form if required to facilitate understanding (section 3.11.3, 2005).

In addition, the intermediary has a responsibility to alert the court to concerns such as tiredness and distress (Procedural guidance, section 3.10.6, 2005).

In the view of the evaluator who observed pathfinder trials, advocates' ability to modify their style of questioning varied widely. Some adapted their questions in light of information in intermediary reports. Three defence barristers were particularly careful to speak slowly, mostly use short questions, follow a chronological order and 'signpost' a change of subject. Some problematic approaches persisted despite interventions by the intermediary and sometimes by the judge or magistrates. Nearly all intermediary interventions concerning questions were seen as appropriate. However, views of appropriateness were closely linked to the ability of advocates to take account of intermediary guidance. Where advocates did not modify their questioning style the rate of intermediary interventions tended to increase, in a few instances exposing the intermediary to comments from advocates that they had intervened too often. Some prosecution advocates, however, thought that intermediaries had not intervened enough.

Problems were caused by questions that were routinely too long and complex or jumped around in time. Another pervasive problem, flagged by intermediaries but largely unrecognised by judges and

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<sup>64</sup> Section 4.4.4, Equal Treatment Bench Book, Judicial Studies Board (2005).

<sup>65</sup> [www.jsboard.co.uk/criminal\\_jaw/cbb/mf\\_04.htm](http://www.jsboard.co.uk/criminal_jaw/cbb/mf_04.htm); see also Archbold (2003) 8-52, p. 1071 *et seq.*; Blackstone (2003) D22.21, p. 1605 *et seq.*

lawyers in interview, occurred where lawyers spoke too quickly and did not leave time for witnesses to process answers. After one such case, when a witness with a speech processing difficulty was asked what message he would like to send defence counsel, the reply was "Slow down, slow down". One of the best-paced cross-examinations (as observed by the evaluation) took place where the defendant's use of an interpreter necessitated pauses between questions. This also accommodated the vulnerable witness's needs.

Some witnesses turned to the intermediary to indicate non-comprehension (this had often been an instruction from the judge at the start of cross-examination). Very occasionally, an intermediary asked the witness if he or she had understood the question. However, most intermediary interventions took the form of flagging the nature of the problem to the judge:

*Defence barrister:* When you went to speak to the police ladies, do you know why you went to speak to them?

*Intermediary:* Your Honour, L finds it difficult to understand 'Why' questions.

*Judge:* Defence counsel will re-phrase the question.

*Defence barrister:* You remember going to the police station?

As noted in the previous chapter, judges and advocates said that it helped if intermediaries' reports described types of questions which the witness might find difficult. For example, a defence barrister asked a witness whether the money he received weekly was more or less than a certain sum. The judge referred to the report to emphasise that the witness was likely to have difficulty with comparative questions.

### Intermediary re-phrasing of questions

After flagging up problematic questions, some intermediaries asked if they should re-phrase the question themselves. This was almost always agreed to, though in a few instances the questioner asked to put the question again themselves. (As noted in the previous chapter, only one judge had specifically addressed this in ground rules.) Examples of re-phrasing by the intermediary included the following:

*Defence barrister:* One time, the once, a different time from the second incident?

*Intermediary:* How many times have you been to B's house?

*Prosecution barrister:* It was about 1pm. What was the weather condition? Was it sunny, rainy, foggy, what was the situation, what was it like?

*Intermediary:* What was the weather like?

Three barristers (two for the defence) and a judge were unhappy about specific instances of re-phrasing. In the first such trial, when the defence barrister was struggling to be understood the judge took over questioning the witness. However, the judge's language was not much simpler and the intermediary assisted in re-phrasing his questions.

The second trial in which re-phrasing difficulties arose took place in the youth court. Many intermediary interventions in that case could have been avoided if intermediary reports had been distributed before the morning of trial and if both advocates had taken on board its guidance about three hearing-impaired witnesses and had familiarised themselves with unconventional TV link equipment. Because the prosecution barrister failed to raise his head to look at the camera, the

intermediary had to relay questions<sup>66</sup> which hearing-impaired witnesses might otherwise have been able to lip-read. His questions were also long and complex. It would also have helped if ground rules had been set for the intermediary and advocates and greater control had been exercised by the court when problems arose. Eventual requests by the chair of the bench that questions be made simpler were not successful. Afterwards, the prosecutor said:

*“I felt the intermediary was essential in light of the witnesses’ need but I was concerned about her interventions. She was not deliberately re-interpreting but she was interpolating her own words which sometimes resulted in a different meaning. We wanted to hear the witness and not the intermediary”.*

The magistrates said that the intermediary was helpful and did well in the circumstances: the problems were with the prosecutor whose questions they described as ‘rambling’. However, they considered that interventions by intermediaries could “lead to a danger of advocates losing the flow and of misinterpretation”.

### Timeliness of interventions

Intermediary interventions depended not only on the level of witness understanding and the skills of the questioner but also on the confidence of the intermediary. Some intermediaries intervened immediately when problems occurred while others were much more reticent to do so. In one case, questions asked by the defence advocate and judge concerned whether the witness saw the defendant on the way ‘to’ or ‘from’ a location. These questions also jumped around in time and were confusing. The intermediary did not flag that the witness had a problem with ‘to’ and ‘from’ questions until the second day of testimony. The prosecution advocate (who did not intervene himself) thought that an earlier intervention on this point would have helped. He nevertheless felt that the case “would have been impossible without the intermediary”.

### The intermediary and answers

Procedural guidance requires intermediaries to:

- communicate accurately the witness’s answers to questions to the court;
- communicate the witness’s reply as given, however irrelevant or illogical. It is up to the court to seek clarification from the intermediary as to possible reasons for the response and if the question could be re-phrased to permit a more logical or relevant response;
- not alter the witness’s answers for the purpose of shielding or protecting them (section 3.11.3, 2005).

Intermediary interventions about answers were rarely the subject of advance discussion. Only one judge had considered the communication abilities of witnesses in the case and set a ground rule that the intermediary was not expected to clarify an answer (other than one not clearly articulated) without invitation. Intermediaries were less likely to intervene in respect of answers than they did with questions, unless there was a problem of witness intelligibility. Four witnesses had speech that was unintelligible to those unfamiliar with them. Intermediaries repeated most of their answers for the sake of clarity and this was welcomed by the judge and counsel. However, in another case where there was no pre-trial discussion with the intermediary the judge thought that the intermediary should have done more:

*“The intermediary should have done more to repeat the answers. The answers were just about intelligible and she only did it if they were very bad – it should have been every response”.*

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<sup>66</sup> There were no videos of the investigative interviews so the witnesses gave their evidence-in-chief live.

There were other cases in which witnesses spoke quickly or mumbled. Intermediaries usually repeated answers for these witnesses when it appeared necessary to do so but some commented on the absence of guidance about this. One said “I didn’t know how much I should have automatically repeated the answers”. It helped where the witness was able to indicate a problem with what he was trying to say.

In one case, at a crucial point the intermediary failed to repeat the answer of a very young witness (confirming the charge against the defendant) which she mistakenly thought had been heard over the TV link. The answer was not heard by the court. The police officer said:

*“That’s why the intermediary was there: the most crucial evidence was lost. It is the most important learning point – intermediaries have got to say what they hear”.*

Intermediaries rarely queried answers which suggested that the witness had not understood the question. The sensitivity of intervening at this point was demonstrated in a youth court trial with a five year-old witness.<sup>67</sup> The intermediary asked if a question could be broken up when she suspected, from the answer, that the witness had not understood it. The defence barrister found the intermediary role helpful but queried this specific intervention:

*I would not have minded if she had intervened to say the question was too long or complicated but I suspect she thought the question was OK. The intermediary must not interpose their sense of what ‘doesn’t fit’ on answers apparently inconsistent with the evidence-in-chief by dressing it up as ‘The witness did not understand the question’. I was OK about this instance but it is a very fine line. An inconsistency may go to the heart of the defence case. It is the role of prosecution counsel to re-examine if there are inconsistencies in the child’s evidence. There is also a concern that an intermediary’s intervention after the child has answered could be a prompt to the child that he/ she has ‘got it wrong’”.*

The youth court legal adviser and prosecution barrister in that case said that the intermediary’s intervention was correct because it was apparent the witness had not understood the question. With hindsight, the prosecutor thought she should have intervened herself because the defence barrister’s questions were too long.

## Evidence from the intermediary

Intermediaries are not expert witnesses and are not expected to give evidence in criminal trials. In the intermediary survey, four out of 56 (7%) had been asked by the police to give a witness statement (opening the possibility of being asked to give evidence) in relation to seven witnesses interviewed with their help. One intermediary was asked to testify by the prosecution about her role at interview. The defence solicitor would have wanted to question her if she had not been called. She was not the intermediary who accompanied the young witness at trial. The defence challenged the intermediary’s actions in a number of respects<sup>68</sup> including her lack of familiarity with ‘Achieving Best Evidence’, (guidance for investigative interviewers).<sup>69</sup> Her independence was challenged and the defence criticised her for not challenging questions asked by the officer. However, the intermediary is not a joint interviewer; the role is confined to facilitating communication.

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<sup>67</sup> The youth court did not give permission to observe this trial so the evaluators have no note of the contentious question. It did not, however, affect the outcome: the trial ended in a conviction.

<sup>68</sup> The police and CPS, however, thought that the interview facilitated by the intermediary was good, and much better than the earlier one conducted without her assistance.

<sup>69</sup> Initial intermediary training focused on their role at court and not on the police interview. Since then, about half of the panel of registered intermediaries have received refresher training about their role at the investigative interview with police input. Some have attended police investigative interview training and commented how helpful this was in explaining ‘Achieving Best Evidence’ constraints on the intermediary role.

## How intermediaries felt about their role at court

Perhaps not surprisingly, intermediaries described their court experience as stressful. (Two intermediaries who were cross-examined about their role at interview, one in a youth court trial and the other in contested care proceedings, found the process gruelling). Intermediaries who received little guidance from the bench found it hard to operate effectively. The view most commonly expressed by intermediaries, with hindsight, is that they should perhaps have intervened more in questioning, for example:

*“On reflection, perhaps the line of questioning by the defence barrister was a little difficult for X and may have been confusing for him. However, by the time I had realised this, we were onto the next question”.*

*“The judge said ‘Just tell me if the question is wrong’ but I don’t think I intervened enough to begin with, though I ended up repeating and then re-phrasing questions. I was concerned not to cloud the issue. The defence advocate’s questions were so complicated, I could scarcely remember them. I didn’t ask her to simplify – before court I had asked her to ask only one question at a time and she said she would, but she didn’t”.*

Intermediaries also experienced difficulties in slowing down the pace of questions:

*“I said ‘ask questions slowly’ and give them time to answer. The defence barrister jumped in too quickly because X needed more time to reply. He asked several questions all at once but it was hard to disentangle what was the question. I sent a message with the usher asking him to slow down but he didn’t do it. The two attempts I made to rectify this were not successful and as a raw newcomer to the procedures of court it was difficult to know how to do this – I am not too sure the lawyers would have appreciated me interrupting at every question”.*

Intermediaries often felt isolated in their case work, a feeling exacerbated by the frequent failure to consult them about their availability for trial dates or court familiarisation visits, or to warn them about the possibility that trial testimony might run over more than one day. They welcomed the opportunity to discuss experiences as part of the evaluation but felt anxious about not receiving criminal justice feedback:

*“I would have liked feedback from barristers and the judge to find out if my interventions were useful or not. It was very hard to walk away from court without a kind of ‘closure”.*

## Conclusion

Intermediary interventions in relation to questions were generally infrequent and were rare in relation to answers, unless there was a problem of intelligibility. Nearly all interventions were seen as appropriate. Some judges and practitioners felt that the intermediary could have intervened more. The ability of advocates to tailor their questions and style to the needs of the witness, as set out by the intermediary, varied widely. Experience in trial cases underlined the importance of agreeing before trial what is expected of the advocates in light of the intermediary’s report and how the intermediary’s role will be carried out in relation to flagging problematic questions, re-phrasing, repeating or querying answers indicating that a miscommunication has occurred and signalling the need for breaks. There was a need to develop a standard approach as to when and by whom juries should be informed about the intermediary and the witness’s communication needs.

## 8. Benefits and challenges of the intermediary special measure

The evaluation objectives of identifying the benefits and any barriers to wider use of the special measure are addressed in this chapter. It draws on the views of those with experience of intermediary cases; opinions expressed by judges and other practitioners who had no direct experience of intermediaries but who discussed the special measure at launch events and elsewhere; and responses to a survey of criminal justice and external organisations.

Benefits to the use of intermediaries included:

- bringing offenders to justice;
- increasing access to justice;
- potential cost savings at the investigative stage and at trial;
- assisting the investigation and trial by facilitating questioning, reducing witness stress and obtaining witness views about a guilty plea;
- benefits in other proceedings.

Challenges to wider use of the intermediary special measure included:

- poor planning and case management, making intermediary use less effective than it should be (described in chapter 6);
- practitioner failure to identify eligible witnesses;
- cultural issues including overly narrow interpretation of eligibility criteria; misunderstanding the underlying objectives and the intermediary role; and underestimating the extent of communication difficulties;
- concern about legislative exclusion of defendants from special measures;
- local absorption of costs.

### Bringing offenders to justice

Out of 20 cases with an intermediary appointment ending at court (see Table 4.6), 13 (involving 15 witnesses) ended in a conviction, five after trial (chapter 7 contains more information about cases that went to trial). Six defendants received custodial sentences, two more were awaiting sentence and another was detained under a Mental Health Act restriction order. Six cases ended in an acquittal. In one case the jury could not reach a verdict. Two further cases ended in a caution. In another case with a severely injured victim, an intermediary was used to assist in the taking of a short statement. This identified someone other than the person in police custody as the assailant.

### Increasing access to justice

Access to justice for victims increased. Participants estimated that, in their view, at least half of the 12 trial cases would not have reached trial without the involvement of the intermediary:

*“We could not have got the evidence out without the intermediary”.*

(prosecution advocate)

*“We didn’t have any negative views about using an intermediary. To the contrary – without an intermediary this case might not have got to court at all”.*

(defence solicitor)

In a case that had been in the court process before the pathfinder project began, the indictment had been severed in respect of an adult witness with mild learning difficulties and speech difficulties because it was thought she could not give evidence. When the special measure became available, the count involving her was again added to the indictment. She testified with the assistance of an intermediary. The defendant was convicted of rape and given a ten-year sentence in respect of offences against her, although he was acquitted in relation to other complainants. In another case, a guilty plea was entered on the eve of trial in a rape case that would not have been prosecuted without use of an intermediary. The defendant was sentenced to eight years imprisonment. The police officer said that, before the pathfinder project, the witness (a child with severe learning difficulties) would not even have been interviewed. The CPS prosecutor said:

*“Without the intermediary, we would not have had a case. Justice was done, thanks to the intermediary scheme”.*

## Potential cost savings

Intermediaries assisted in making more efficient use of police and prosecution time and saving wasted costs by flagging at an early stage those cases where it was not feasible to interview the witness or, following interview, where it was decided that it was not possible to prosecute. Use of an intermediary also had the potential to save court time. Many judges, lawyers<sup>70</sup> and others (such as police officers, CPS personnel and supporters) commented that the presence of the intermediary helped witnesses to focus on responding to questions. Although it might have been anticipated that proceedings would be slower with a witness with communication problems, intermediaries were seen as saving court time and recouping expense (one judge noted time saved in questioning that would otherwise not have been possible because the advocates were not very experienced).

## Benefits at investigation and trial

### Investigative interview

Of 56 police officers interviewed by researchers, 51 (91%) were positive<sup>71</sup> about their experience with intermediaries: these included 17 of the 20 commenting on the use of intermediaries at interview and 22 of the 24 in cases that ended after the intermediary’s assessment where it was decided not to interview the witness. Several were based in units that were ‘repeat users’. Many saw potential for wider use:

*“The intermediary was superb from start to finish and made a massive difference to the victim’s attitude and behaviour and the way that the interview was conducted. There are a lot of opportunities for the police to learn from intermediaries”.*

*“Using the intermediary was a huge learning curve for me. We should make more use of them. The interview was arranged within 24 hours yet everything flowed effectively”.*

*“Before the assessment we could not say whether the witness understood anything or not. We would never have got anything in a standard interview. I can’t express how much it aided us. I made sure all the other sergeants around here know”.*

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<sup>70</sup> This observation was made by 11 out of 12 members of the judiciary and three out of 24 advocates.

<sup>71</sup> I.e. had no criticism of any aspect of the use of an intermediary.

Feedback from all 14 CPS interviewees was also positive<sup>72</sup>:

*“The intermediary’s assistance with the witness was invaluable. I have learned to open my eyes to other cases to see whether an intermediary would help achieve best evidence. This case was a learning experience for us all”.*

*“This was very new for me and my colleagues. I was happy that officers had the intermediary’s assistance. There is a considerable knowledge gap about what intermediaries can offer. The more we raise awareness, the more acceptance there will be. The prospect of handing over a vulnerable witness to cross-examination can be a reason not to proceed with the case, so intermediaries will help”.*

The police and CPS described the benefits of intermediary use as:

- identifying that witnesses’ comprehension level was much lower than it appeared;
- helping officers to phrase questions so that the witness would understand and obtain ‘best evidence’ the first time round;
- alerting officers to the need for a break which might otherwise have been missed;
- saving time by informing decisions where it was not possible to proceed to interview and assisting in the efficient planning of those interviews that took place;
- helping CPS decisions about witness suggestibility, ability to cope with cross-examination and how the witness should give evidence.

As noted in chapter 4 in respect of completed cases, almost three-quarters of intermediary appointments did not enter the court process, mostly due to a prosecution decision that no offender could be charged or that the case would proceed without the witness’s evidence. Although it was not possible to obtain direct witness feedback in such cases where an intermediary was used, officers reported that even in these circumstances witnesses, families and carers valued the intermediary’s help. For example, in the case of a witness who was profoundly autistic, the intermediary’s assessment contributed to the police decision that the witness could not be interviewed. The officer said:

*“The intermediary was very knowledgeable in her field and was there to try out various methods of communication which sadly were not enough to allow this witness to give his evidence. The family were very grateful that he was allowed an opportunity to be assessed”.*

## Trial

Appreciation of the intermediary role at trial came from many sources:

- the judiciary and lawyers in all trials and some guilty plea cases (seven circuit judges, two district judges, one bench of magistrates, 24 barristers and two solicitors). With one exception, all commended the use of intermediaries in the cases they dealt with;
- police and CPS interviewees in pathfinder cases were unanimously positive<sup>73</sup>;
- 24 of 67 respondents to the 2006 organisational survey (36%, including 7 from non-CJS organisations) who knew of a witness for whom an intermediary had been appointed. All but three considered that the intermediary had been helpful;

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<sup>72</sup> I.e. had no criticism of any aspect of the use of an intermediary.

<sup>73</sup> I.e. had no criticism of any aspect of the use of an intermediary.

- three witnesses and six parents or carers in nine trial cases expressed positive views.<sup>74</sup>

Case participants identified a range of benefits of intermediary use.

### Facilitating questioning

In nine out of 12 trials, feedback was obtained from three witnesses and from six parents or carers. They commended the intermediary's assistance during questioning at court and the difference this made. One witness described the intermediary's job as to 'help me' and said she made it 'easier' to understand questions. It was 'helpful' when the intermediary told the lawyer 'when questions were too difficult'. This witness said she would have liked the intermediary to help like this 'more often'. Another young witness described the intermediary's assistance as 'belting'. Other comments included:

*"She was brilliant. She helped talk for me".*

(14 year-old with learning difficulties whose speech was almost unintelligible)

*"It went very well. The intermediary was invaluable: she was able to get them to rephrase questions. It was very, very positive – I can't thank her enough".*

(carer of adult man with severe learning difficulties and speech impediment)

Most trial participants considered intermediary interventions were appropriate (three advocates and one judge took issue with specific interventions, but nevertheless thought intermediaries were helpful overall - see chapter 7):

*"The intermediary has an important function in the interests of justice. The intermediary can assist counsel to phrase their questions appropriately and if counsel cannot do this, then the intermediary can put the question in a way that is understood. The intermediary did that several times, each time achieving an answer where counsel had failed. That revealed that it is difficult for counsel to comprehend or effect the right approach to such a witness".*

(judge)

*"Overall, the intermediary worked very well. She was strong and intervened when questions became too complex. Her interventions did not come that often but they were invaluable. The intermediary would be very welcome in any court I sat in".*

(judge)

Nearly all trial participants, including defence practitioners, stressed the importance of intermediaries' neutrality in executing their role:

*"The intermediary was particularly helpful and truly independent. I was happy for her to indicate if B did not understand a question. I would felt differently if I had thought the intermediary was protecting the witness. We had discussed this at our pre-trial meeting but the intermediary did not come anywhere near that".*

(defence barrister)

*"I had no concerns at all about the approach or conduct of the intermediary. She was excellent, professional and helpful throughout. At no stage did I feel that she intervened inappropriately or assisted in any way other than to facilitate good communication".* (defence barrister)

### Reducing witness stress

Reducing court-related stress experienced by vulnerable witnesses is likely to assist them to give best evidence. Carers confirmed that the intermediary not only facilitated communication but also helped witnesses cope with the stress of giving evidence:

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<sup>74</sup> I.e. had no criticism of any aspect of the use of an intermediary.

*“The intermediary was brilliant – a diamond. I would recommend this to anyone. My son was very upset about giving evidence. Without her he would not have coped. He cracked up when he got to court – I was surprised he did not cry during his evidence. He said there were some questions that he could not understand but he turned to her and she helped”.*  
(mother of an 11 year-old boy)

*“My five year old was physically sick the night before court. The intermediary helped settle him because he was worried about not being able to answer questions. He knew he could tell her if he didn’t understand”.*  
(mother)

*“The girls were panicking coming up to the trial. The intermediary put them a lot more at ease than they would have been otherwise. She had the right skills. Without her, my daughter would not have coped at all as she said she could not lip-read the prosecutor. We thoroughly recommend the intermediary scheme: it’s incredible”.*  
(father of teenage witnesses with hearing loss)

### Ensuring witnesses understood instructions

The evaluators observed that intermediaries had a vital role in ensuring witnesses understood everything said to them, including ‘rapport-building’, explanations and instructions (for example, about watching the video, being able to request a break, what to do if they did not understand a question and about not speaking to others still waiting to give evidence). Witnesses were sometimes visibly disconcerted by the language used. Courts usually did not check what witnesses understood, for example, when a judge asked a young witness “Do you know who I am?”, and the child nodded. Another judge gave a child a lengthy instruction about not speaking to relatives about his evidence, then said “Is that too complicated?” to which the child said “Yes”. The judge gave no further explanation.

### Obtaining witness views about a guilty plea

In one case, the intermediary assisted the prosecution’s consultation with the victim about the acceptability of a guilty plea<sup>75</sup> and helped prepare a victim personal statement at the direction of the sentencing judge. The judge described the intermediary as ‘very helpful’. The prosecution barrister said:

*“When I saw the witness, I had advance knowledge about how to talk to him. We would not have been able to deal with this so fairly without her input. Her involvement was a major factor in the family being content with the decision to accept a plea to a lesser offence”.*

### Benefits in other proceedings

Although use of an intermediary under the Youth Justice and Criminal Evidence Act 1999 relates only to the investigative interview and trial stage of criminal proceedings, intermediaries in pathfinder cases were used in other ways (for example, two assisted at identification procedures) and some other uses were contemplated. One intermediary gave evidence in a county court in public law child protection proceedings.<sup>76</sup> This related to her role at the investigative interview of a young child whose speech was almost unintelligible due to a cleft palate. The quality of the video-recording was poor<sup>77</sup>

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<sup>75</sup> Guidelines on the acceptance of pleas and the prosecutor’s role in the sentencing exercise issued by the Attorney General state: “The views of the victim or the family may assist in informing the prosecutor’s decision as to whether it is in the public interest, as defined by the Code for Crown Prosecutors, to accept or reject the plea. The victim or victim’s family should then be kept informed and decisions explained once they are made at court” (Attorney General, 2005).

<sup>76</sup> In another case, the intermediary needed the permission of a High Court judge to obtain release of a psychologist’s report prepared for the care proceedings). It is good practice for parallel care and criminal proceedings to have joint directions hearings before a single judge.

<sup>77</sup> The intermediary noted that the police equipment produced much poorer sound quality than the mini disks she used to record clients in the course of her employment.

and the child was often not facing the camera, so it was not possible to lip-read what she said. The CPS Transcription Unit marked a number of key passages as 'unintelligible'. The intermediary was asked to annotate the transcript both for criminal proceedings (which did not proceed to court) and for the care case. She was cross-examined about what the police had told her about the alleged offence and the identity of the suspect. In the witness box, the intermediary referred to her contemporaneous notes. Her independence was challenged and she was asked about intermediary training and assessment.

The judge said there was an important message for those responsible for intermediaries because no-one in the care proceedings had initially understood the intermediary role. The police had failed to brief the local authority. He said the intermediary's role turned out to be "absolutely crucial" but the first impression of the intermediary's interpretation of the child's speech at the interview had "looked outrageously leading". However, he concluded:

*"The intermediary was a careful witness, and I was impressed by her professional expertise. I am satisfied on the balance of probability that her interpretation of [the witness's] speech is accurate. I was very impressed with, and helped by, the intermediary".*

The evaluation identified three further potential uses of an intermediary in other types of proceeding: an intermediary assisted the prosecution consult the victim about a guilty plea and helped prepare a victim personal statement. One gave evidence in a county court in public law child protection proceedings. The evaluation identified three further potential uses: assisting care home residents giving evidence to Care Standards Tribunal hearings (Protection of Children and Vulnerable Adults and Care Standards Tribunal Regulations, 2002)<sup>78</sup>; assistance to relatives of victims of murder and manslaughter in making an oral statement to court prior to sentencing, where the relative concerned has relevant communication needs (Criminal Justice System, September 2005)<sup>79</sup>; and facilitating pre-trial witness interviews by prosecutors (Attorney General, 2004).

The remainder of the chapter describes challenges to wider use of the special measure.

## Failure to identify eligible witnesses

Poor awareness of special measures and lack of recognition of those eligible across criminal justice organisations is a fundamental problem (Burton et al, 2006 and Cooper and Roberts, 2006). The incentive to identify eligibility increased with the implementation of the Code of Practice for Victims of Crime in April 2006. This requires delivery of an enhanced service, including a full needs assessment and consideration of special measures for vulnerable witnesses (the same category of witnesses as are eligible for the intermediary special measure). Breaches of the Code can be referred to the service provider and investigated by the Parliamentary Ombudsman.

As in the special measure studies mentioned above, the evaluation encountered poor recognition of eligibility. In cases tracked for this evaluation, of 138 witnesses for whom an intermediary was appointed, 33 (24%) had already given a witness statement by the time the request was made.<sup>80</sup> Cases involving three witnesses were already scheduled for trial when pathfinder initiatives began; a further two were interviewed without an intermediary when it transpired that none was available within the required timeframe. The eligibility of the remaining witnesses appeared to have been missed at the point of interview. None of the 16 witnesses assisted by an intermediary at trial had the benefit of an intermediary at the investigative interview, although the trial intermediary assisted at a second interview in two cases.

Witnesses under 17 are the biggest potential category of eligibility but only four aged between six

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<sup>78</sup> If the Tribunal hears from care home residents, the President (a judge) or nominated chairman "shall appoint for the purpose of the hearing a person with appropriate skills or experience in facilitating the giving of evidence by vulnerable adults".

<sup>79</sup> In a pilot scheme, victims' advocates assist relatives in making an oral statement in court after conviction and before sentence about the impact of the crime on them.

<sup>80</sup> A similar proportion was reported by the 2006 intermediary survey.

and 10 were identified whose eligibility rested solely on age. Sixteen out of 18 witnesses aged five and under were identified by just one pathfinder area. These findings indicate a significant gulf between legislative intent and receptivity of criminal justice practitioners to the automatic eligibility of witnesses under 17.<sup>81</sup>

Twenty-seven out of 67 respondents to the organisational survey (40%, including 11 from external organisations) could think of vulnerable witnesses in the previous three months (a period during which all pathfinder projects were active) who might have benefited from an intermediary at investigative interview: 18 (67%) of these witnesses were adults with a learning disability, nine (33%) had a mental disorder; five had a physical disability or disorder; and ten were aged under 17. Only 10 respondents (15%, including one from an external organisation) recalled a witness in the previous three months who might have benefited from an intermediary at court.

## Misinterpreting eligibility criteria

Section 29 does not prescribe a minimum condition for use of an intermediary. The Act intends that courts will authorise special measures (section 19) if a measure or combination of measures will be likely to maximise the quality of a witness's evidence. Without the measures, the quality is likely to range from unintelligible to intelligible, but of a worse quality than it could be, because of the circumstances that make the witness eligible for help. 'Quality' means more than intelligibility (section 16(5)): it encompasses completeness, coherence and accuracy and being able to address the questions put and give answers that can be understood (both as separate answers and when taken together as a complete statement of the witness's evidence). Consideration of the quality of the witness's evidence, in combination with the objective of 'best evidence', invites practitioners to adopt a broad approach to defining eligibility.

Some confusion among practitioners can be attributed to early messages (since withdrawn) which 'read down' the broad approach of section 29, suggesting that use of intermediaries was confined to cases where witnesses would not otherwise be able to give evidence at all (emphasis added):

*"In practice, [eligible witnesses] would need to demonstrate significant communication difficulty which means evidence **could not be given** without an intermediary". (Home Office conference report, 2003)*

*"The primary responsibility of the intermediary is to enable complete, coherent and accurate communication with vulnerable witnesses who have **profound** communication difficulties ... **who would not be able to give evidence unassisted**". (Intermediaries – a voice for vulnerable witnesses. Frequently asked questions' Home Office, 2003)*

A few prosecutors and police officers therefore believed that the special measure was for someone who could communicate 'only by blinking' or otherwise could not speak. Although no applications for the intermediary special measure were turned down, in one instance an application was actively discouraged (the first intermediary case listed for trial in one pathfinder area), due at least in part to an overly narrow interpretation of the eligibility criteria. The prosecution advocate, who had accepted a returned brief, declined to apply for the intermediary in relation to a witness with a mental disorder<sup>82</sup> on the day of trial. The defence contested the application. In discussion (though without questioning the intermediary) the judge indicated that he would not grant it. The judge and both counsel thought that the special measure was only appropriate where a witness had a 'profound' communication

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<sup>81</sup> A significant proportion of children have vulnerabilities other than age: the Office for National Statistics (2004) reports that one in 10 children in Britain aged five to 16 has a clinically recognisable mental disorder: <http://www.statistics.gov.uk/cci/nugget.asp?id=1229>.

<sup>82</sup> The intermediary questioned whether she was the most appropriate match for the witness's needs as her background was not in mental health and this was a factor in the approach taken at court.

difficulty.<sup>83</sup> The witness quickly broke down and there was a judge-directed acquittal. In their comments on this case, it seemed that the judge and counsel had failed to take into account whether the special measure would improve the quality of evidence ('quality' meaning more than intelligibility). The judge said:

*"The application was not wholly unmeritorious but the dividing line for me is whether the witness could make themselves understood without an intermediary".*

The prosecution advocate said that use of an intermediary was "simply not right for this case". The defence advocate said:

*"I see the need for an intermediary where there is severe mental impairment or a speech impediment that makes answers unintelligible but not otherwise".*

Another aspect of misreading the legislation concerned the tendency to assess children using criteria (physical or mental disability or disorder) applicable to adults. Restricting children's eligibility in this way ignored the possibility that children may have significant communication needs derived from trauma, lack of concentration or challenging behaviour, but no 'medically diagnosed' communication difficulty. Procedural guidance makes clear that "Where children are involved then there must be an automatic initial assessment [by the police or defence] of the nature of their vulnerability due to age" (section 3.2.1, 2005). Only one of the six pathfinder areas made significant numbers of intermediary requests for children, strongly indicating that this "automatic initial assessment" was not taking place. The automatic eligibility of all children was further undermined by references to the eligibility of "young" children (Sauve Bell Associates, 2002) or "very young" children in 'Achieving Best Evidence in Criminal Proceedings' (para 2.39, Home Office et al., 2002). However, the police liaison for the project in one pathfinder area said that it was not force policy to bring cases involving "very young" children: it was not anticipated that intermediary applications would be sought in that force on behalf of any witnesses under 17. In another area, the CPS liaison indicated that the office would not take forward cases with witnesses under six.<sup>84</sup>

Interpretation of the eligibility criteria was revisited in guidance to pathfinder areas issued by the CPS Policy Directorate in February 2005 and by the Association of Chief Police Officers in August 2005 (produced in consultation with the OCJR). Both took the broader approach justified by the legislation, as did the new promotional materials about the special measure issued by the OCJR in October 2005. These emphasised the potential contribution of intermediaries in "improving and maximising the quality of the witness's evidence" and challenged practitioners to consider: "Would the use of an intermediary help the witness give best evidence?"

Pathfinder areas' experience of 'mixed messages' about eligibility is likely to have contributed to lower than anticipated numbers of requests for intermediary appointments. This underlines the importance at national roll-out of promoting a strong and consistent message from the outset. When the shift in message about broader eligibility was disseminated to pathfinder areas in 2005, many welcomed the new approach but some in both senior and front-line roles were uncomfortable with, or even disagreed with, the new interpretation. One agency head responded that "Low intelligence of the victim, or being merely inarticulate, is not in our view enough to engage the intermediary scheme". Overcoming such attitudes remained a challenge at the end of the evaluation period.

## Misunderstanding the underlying objectives and the intermediary role

Although nearly all of those with direct experience of intermediaries at trial were positive about the role in the cases in question, a few had reservations about wider use of intermediaries. Discussions

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<sup>83</sup> There appeared to be two procedural errors in this case: the prosecution took the view that the law did not allow an application for the admission of the video interview as evidence-in-chief as the witness was not a child; and the application was framed in respect of section 17 (intimidation) rather than section 16 (vulnerability).

<sup>84</sup> During debates on the 1999 Act, concerns were expressed that the CPS was unwilling to prosecute cases involving very young children: Hansard, 15 April 1999, cols 442, 446.

at pathfinder launches and other local events revealed similar concerns. Some objections were practical. For example, some officers were concerned about delay in appointing an intermediary (a fear not inevitably borne out in practice - see chapter 4). Others considered the process of filling out a referral form to request an intermediary was 'too much work'. However, a number of objections pre-judged or misunderstood the concept of the vulnerable witness or rejected best evidence as a desirable criminal justice objective. Although voiced by only a minority of those encountered during the evaluation, such attitudes confirmed the need, identified by Burton *et al* (2006), for "significant cultural change":

*"Cases going through now don't need intermediaries. At the end of the day, it is the credibility of the witness that matters to the jury. The more you sanitise the process, the less the jury will be able to assess this. Often it is misunderstandings [of questions] that help jurors realise the witness is telling the truth".*  
(judge)

Some misgivings may have arisen from the assumption that intermediaries would insist on relaying every question, like an interpreter, whereas in practice intermediaries intervened only where miscommunication had occurred or was likely. Others seemed due to failure to distinguish the unique intermediary contribution from the roles of existing criminal justice personnel. The evaluation encountered examples of police child protection officers, social workers, young witness supporters, magistrates' court staff, judges and barristers who seemed defensive about the impact of intermediaries, for example, a manager who was concerned that use of intermediaries would 'de-skill' supporters in her team. In a case where the CPS had requested that a young witness be re-interviewed, this time with an intermediary, the prosecutor commented:

*"The child protection officers were slightly defensive about their skills. I wanted a second interview with an intermediary because the first interview was so poor. The police's first reaction was 'Well, we can just do it again with a more experienced officer, we don't need an intermediary'".<sup>85</sup>*

## Underestimating the extent of communication difficulties among witnesses

Two linked studies analysing court transcripts from 1994-1999 compared lawyers' questioning strategies (Kebbell *et al.*, 2004) and judicial interventions in court cases involving witnesses with learning disabilities and from the general population (O'Kelly *et al.*, 2003). These found no significant differences in how the two groups were treated by judges and lawyers. The researchers noted that, although judges "can have a tremendous impact on lawyers' questioning styles and, consequently, witness accuracy", they did not intervene more frequently where witnesses had a learning disability to ensure the witness could understand the question or prevent oppression of the witness (O'Kelly *et al.*, 2003). Witnesses with learning disabilities were more likely to agree with leading questions than those in the general population and were not questioned in a way that maximised their ability to give accurate evidence. The lack of differences between the treatment of the two groups was described as "surprising, as there is an extensive literature that shows that witnesses with learning disabilities have particular difficulties with a number of question forms and are likely to benefit from having questions simplified" (O'Kelly *et al.*, 2003).<sup>86</sup>

In discussing the intermediary role, Ellison (2002) began by pointing out that "There is a substantial international literature documenting the communication problems children and people with learning disabilities can experience in the courtroom". This is not, however, a body of knowledge familiar to courtroom practitioners. They seemed likely to be receptive to use of an intermediary when confronted with a type of communication difficulty they had not encountered before. However, resistance appeared greater in respect of witnesses dealt with routinely, whose needs may be unrecognised and where deficiencies in practice may not be acknowledged. One barrister's opinion illustrates this perspective:

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<sup>85</sup> The evaluation identified four instances in which an intermediary assisted at the police interviewer's first video interview.

<sup>86</sup> Even where specialist education is provided to judicial officers and prosecution lawyers, it may be unclear what effect this has had on practice: Cashmore and Trimboli, 2005.

*“People underestimate most adults’ ability to understand children’s limitations in answering questions. You simply do not see unreasonable cross-examination of children. I cannot think of a single case. Criminal lawyers are generally very good with children. An intermediary would not make a difference”.*  
(barrister)

*“I would not allow this special measure for a child of five because it would be hard to test their evidence. We do trials with witnesses with minor learning difficulties day-in-day-out”.*  
(judge)

There was a quite common view in this study that the treatment of vulnerable witnesses had improved and that there was therefore no need for intermediaries. One reason given by a district judge for rejecting wider use of intermediaries was that witnesses are told to say if they do not understand the question. Similarly, an intermediary special measures application was opposed on the grounds that advocates could advise the witness to say ‘I don’t understand’ without need for an intermediary (the application was nevertheless granted). Such perceptions failed to take account of vulnerable witnesses who were incapable of identifying questions they did not understand or lacked the confidence to say this.

There was a tendency to overestimate some questioners’ competence and underestimate the prevalence of miscommunication with vulnerable witnesses. ‘Communicative competence’ concerns the abilities of both the witness and questioner (Saywitz, 2002). Applied to witnesses, it includes their ability to detect and cope with misunderstanding in the court context. In a study for the Office for Criminal Reform, 80 per cent of young witnesses reported that they had a problem of some kind in understanding or otherwise dealing with questions put to them, compared with 51 per cent who felt able to tell the court that they had a problem (Plotnikoff & Woolfson, 2007).<sup>87</sup>

‘Communicative competence’ applied to questioners includes their ability to adapt their questions and approach to the needs of the witness.<sup>88</sup> Wide variations in advocacy were observed across 12 intermediary trials, with some barristers well able to accommodate witnesses’ communication difficulties and a few others who were unable to simplify their questions, despite repeated requests. It was encouraging that 17 of 24 trial advocates interviewed saw a need for training in questioning vulnerable witnesses and how to make appropriate use of intermediaries. One who described his own cross-examination as ‘clumsy’ concluded:

*“A defence advocate is naturally suspicious of doing anything like this [speaking to the intermediary before the trial] in case he loses the advantage of surprise. As it was, I ended up being the one who was surprised - by the extreme difficulty the complainant had in understanding what I thought were the simplest questions”.*

However, others took the view that further advocacy training would obviate the need to use intermediaries:

*“I wouldn’t like to see intermediaries used as widely as the legislation says - not for children. The intermediary’s report advised how to break down questions. That’s our job and that of the judge, so one way to get at this is to train lawyers or remind them to do it”.*(defence barrister)

*“You would not have an intermediary for a very young child simply based on age. It has been made clear to us emphatically that they not be used. Advocates need to be taught how to question children better”.*  
(judge)

Some of these beliefs undervalued the unique skills, professional experience and contribution offered

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<sup>87</sup> As a ‘general rule of thumb’, police guidance indicates that young witnesses should be assessed by an intermediary where they seem unlikely to be able to recognise a problematic question or tell the questioner that he or she has not understood (Association of Chief Police Officers and Office for Criminal Justice Reform, 2005).

<sup>88</sup> Problems can be as simple as those caused by the pace of questions that do not permit the witness to process the question and formulate the answer – a pervasive problem for vulnerable witnesses.

by intermediaries, with a few practitioners suggesting that resources be re-allocated to train police officers and others in 'intermediary skills' rather than in using intermediaries. A judge speaking at a launch event expressed similar views:

*We may say we want to hear from the witness directly and hear from the intermediary who could explain the witness's communication problem. You could use the tricks described by [the intermediary speaker] – we don't need intermediaries to do this. The success is not going to be very high".*  
(judge)

### Failure to distinguish responsibilities of the intermediary from those of the judge and prosecutor

In court, the intermediary has a relatively narrow remit to intervene in questioning when comprehension problems occur (including alerting the court if the witness is tired or distressed). Judges have a broader responsibility to intervene if defence cross-examination is inappropriate for these and other reasons, for example if questioning is repetitive or oppressive. Prosecutors also have a responsibility to intervene in respect of prosecution witnesses.<sup>89</sup> A judge in a pathfinder trial noted that:

*"The judge can play his role better because of the intermediary's report. He might well be able to do what might otherwise have been done by the intermediary because of the information in the report and the awareness that this brings".*

Judicial control of questioning was also put forward as a reason why intermediaries were unnecessary:

*"I have not done many cases with a young witness but I would not want to use an intermediary. Their report would be sufficient – you do not need the intermediary in court. Judges will stop you if your questions are too long".*  
(barrister)

Judges are encouraged to intervene in inappropriate cross-examination<sup>90</sup>, but these powers are infrequently exercised (see, for example, Davis *et al*, Home Office 1999), as was mostly the case in this study. Some prosecutors said that intermediaries had not intervened sufficiently in pathfinder trials but did not themselves intervene to alert the judge when problems occurred.

Lack of intervention by judges and lawyers may be due, at least in part, to failure to recognise the breadth of communication problems (see, for example, Flin, 1993, and Myers, Saywitz and Goodman, 1996). In the evaluation of a specialist jurisdiction for child sexual assault matters in New South Wales, the evaluators found that although some specialist education was delivered for judicial officers and prosecutors, children were "still subjected to overly long, complex questioning" and judicial intervention varied across trials (Cashmore and Trimboli, 2005).

In this study, intermediaries, witnesses and carers commonly referred to the pace of questioning being too fast, a problem not recognised by judges and advocates when cases were discussed with them. In the young witness study quoted previously (Plotnikoff and Woolfson, 2007), the number of interventions recalled by young witnesses was much lower than the rate of reported communication problems: only nine per cent of young witnesses reported that the judge or magistrates asked the advocate to simplify language.

The judiciary retain responsibility for control of questioning in all trials, even where an intermediary is used. It was therefore worrying that some judges who conducted pathfinder trials said that the

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<sup>89</sup> It should be noted that an intermediary can be appointed for a defence witness, although this did not happen in the evaluation.

<sup>90</sup> "Judicial vigilance is always necessary" to ensure that language is simple and age-appropriate and that the child is "given full opportunity to answer" (para. 4.4.3, Judicial Studies Board Bench Book, 2004); Standard 29 of the Witness Charter consultation states that the lawyer should object if cross-examination is unreasonable, unfair, offensive or oppressive. The judiciary may also challenge inappropriate cross-examination (Home Office *et al.*, 2005); the Children's Charter consultation says that the prosecution will "ask judges and magistrates to make sure that children can easily understand the questions they are asked" (para. 4.24, CPS, 2005).

presence of the intermediary might make them less likely to intervene than usual, even though aspects of inappropriate questioning (for example, repetitive questions) fall beyond the remit of the intermediary. Judges seldom intervened even where the evaluators considered that advocates had failed to tailor their questions to the level of understanding of the witness.

In addition to complex language, problems experienced by vulnerable witnesses in pathfinder trials included “highly suggestive” leading questions (often questions inviting a series of ‘yes’ or ‘no’ replies) and placing unrealistic demands on their memories (Henderson, 2000).<sup>91</sup> A few intermediary reports flagged the possibility that such questions would produce unreliable evidence<sup>92</sup>, but these types of questions were not the subject of a ‘ground rules’ discussion before trial or of judicial intervention during the trial itself.

Commentators have observed that vulnerable witnesses will not be enabled to give their best evidence without a shift in approach to cross-examination. They have called for a change in culture both through advocacy training and by encouraging more robust judicial intervention (Birch 2000; Temkin, 2000; Ellison, 2001). Recommendations on the need for training the judiciary in child development date back to the Pigot Report in 1989; ‘Victims with Learning Disabilities’ linked its recommendation on intermediaries to the need for better training of judges and lawyers (Sanders *et al*, (1997). ‘Speaking Up for Justice’ (Home Office, 1998) saw such training as a complementary measure, not an alternative to the use of an intermediary. Given the likelihood that, even if introduced, any relevant judicial training is likely to be brief and translated inconsistently into practice, the presence of the intermediary is an essential safeguard to ensure that vulnerable witnesses understand questions, are understood in their turn and that problems of miscommunication do not go unrecognised.

## Exclusion of defendants from legislative eligibility

Article 6 of the European Convention on Human Rights established the principle of ‘equality of arms’ between the prosecution and defence. Section 17(1) of the Youth Justice and Criminal Evidence Act 1999 excludes defendants from eligibility for special measures. This position has been widely criticised, including by Sir Robin Auld (2001). However, the House of Lords has held that courts can use their inherent power to make orders to assist young defendants (R v Camberwell Green Youth Court [2005] UKHL 4). Baroness Hale stated that “if there are steps which the court can take in the exercise of its inherent powers to assist the defendant to give his best quality evidence, the 1999 Act does not exclude this”. The intermediary procedural guidance manual notes that, in light of the decision of the European Court of Human Rights in SC v UK ([2004] ECHR 263, [2005] FCR 347 (ECtHR)), it may be appropriate to consider the use of an intermediary for defendants with communication needs (section 1.12, 2005). Use at court is only possible with approval of the judge using his or her inherent discretion (section 19(6), Youth Justice and Criminal Evidence Act, 1999).

Barristers and judges in three pathfinder trials involving young defendants expressed concern about the imbalance created by the exclusion of defendants from the 1999 Act. In at least two of these cases, the young defendants had special needs.<sup>93</sup> In one, the defence barrister objected to the intermediary special measure application because “of the danger of the playing field being not simply uneven but on a considerable slope”. A district judge who conducted three intermediary trials, two of which involved young defendants, saw no benefits to the use of intermediaries in interview or at court, other than their reports, and feared that implementation would mean that evidence could not be tested effectively:

*“Trials are already unduly complicated with special measures and intermediaries have added*

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<sup>91</sup> For example, in one case the defence was allowed to begin cross-examination of an adult with learning difficulties with questions about a complaint she had made 18 years previously, which she could not recall. This put the witness off balance and distressed her even before questions were reached about the alleged offence.

<sup>92</sup> The potential for cross-examination to produce unreliable testimony from vulnerable witnesses was recognised in ‘Speaking Up for Justice’.

<sup>93</sup> A high proportion of young offenders have speech, language and communication needs (Bryan, 2004).

*another barrier to justice. The defence are entitled to lead in cross-examination. I wouldn't want an intermediary intervening to say 'That's unfair'.<sup>94</sup> The defence want to attack the witness and cannot if they have several layers to go through. If intermediaries are used at court, defendants may say they have not had a fair trial. Their reports could be used without having an intermediary at trial".*

At least one senior prosecutor voiced concerns (not in relation to a specific case) that use of intermediaries was "unfair to defendants": Burton *et al* (2006) cited this as a reason why the police and CPS withheld special measures from young witnesses in young defendant cases.

Three special measures applications were contested on the basis that no intermediary was used at interview but all three were granted by the court. No arguments about fairness in relation to the intermediary were raised during a trial.

## Local absorption of costs

Costs were borne centrally for the pathfinder projects, but the potential transfer to local areas of responsibility for meeting the case costs of intermediaries was also a concern. There was widespread concern that this would result in a policy decision to hold back requests for intermediaries, so that access to the special measure would be denied to some eligible witnesses. The Chief Crown Prosecutor of one area warned that, due to budgetary constraints, the provision would only be used in those extreme cases which could not otherwise proceed without an intermediary being present. Some intermediaries feared that local payment of their fees by the police or CPS, currently dealt with centrally, was likely to compromise their independence in the eyes of defence practitioners.

## Conclusion

The evaluation demonstrated the special measure's potential to increase access to justice for vulnerable people and to improve witness satisfaction in the criminal justice process, with potential knock on benefits for public confidence if the scheme's successes were publicised. Intermediaries also had potential to improve criminal justice professionals' inter-action with vulnerable witnesses, but only where professionals were willing to re-examine and adapt their usual approach. Benefits were identified by almost all those with direct experience of intermediaries at the investigative stage or trial. Others who had not yet encountered intermediaries were unaware of the potential benefits of the special measure. Some expressed views indicating significant barriers to successful wider implementation. Several judges and advocates considered that it was a weakness of the intermediary scheme that the legislation excluded vulnerable defendants. There was a significant challenge for roll-out to ensure that eligible witnesses were identified.

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<sup>94</sup> Challenging the 'fairness' of questions is not within the intermediary's role and there was no indication that this had happened in the trials in which this judge was involved.

## 9. Conclusion and recommendations

The overall aim of the evaluation, to establish a model for national implementation, is addressed in this chapter. It draws on experience during the pathfinder projects, and their status at the end of evaluation, to consider the agenda for rolling out the special measure to the remainder of England and Wales. Measures aimed at ensuring the success of roll-out are described in terms of their impact on local areas and central government. Recommendations relating to the strategy for roll-out are highlighted in boxes.

### Overarching conclusions of the evaluation

Baroness Scotland, speaking at the first intermediary conference in June 2004, expressed the government's commitment to extend the scheme based on experience in the pathfinder exercise. The Attorney General, Lord Goldsmith, addressing the third such conference in June 2006, described this as the most radical of all special measures which would have been worthwhile "even if there had been only one case in which there was value". In fact, the pathfinder exercise identified a range of substantial benefits arising from intermediary use (described in the previous chapter), strongly justifying the decision to proceed to national roll-out. The evaluation reached the following overarching conclusions:

- The intermediary provision was employed appropriately. As used for prosecution witnesses it did not affect the rights of the accused and may assist: in one case, an interview using an intermediary identified the assailant, who was not the person in police custody.
- Intermediary cases demonstrated the potential of the special measure to impact mainstream criminal justice objectives, particularly in relation to witness satisfaction, public confidence (provided scheme achievements are publicised) and delivery of the enhanced service<sup>95</sup>, including a full needs assessment and consideration of special measures, set out in the Code of Practice for Victims of Crime.
- The intermediary is a new professional role. It was executed in pathfinder cases in a conservative manner, well within the parameters set out by the intermediary procedural guidance manual. It is likely that the effectiveness of intermediaries' contribution will increase with experience. As the public face of a scheme to help vulnerable people, intermediaries must have enhanced Criminal Records Bureau checks. They must be well briefed and supported by those managing the intermediary pool and their rates of pay should be regularly reviewed.
- Effective implementation of the special measure requires improvements on the part of criminal justice practitioners in recognising communication difficulties, accommodating witness needs, effective pre-trial planning and advocacy skills. These cannot be achieved simply by disseminating information about the intermediary scheme as much depends on a significant cultural shift in approach. If this is achieved, there would be knock-on benefits for witnesses across the system.

The evaluation therefore concluded that the scheme should proceed to national roll-out to the remaining criminal justice areas over a 12 month period, to begin as soon as possible, with a further 12 months once all the areas are rolled out during which individual case costs continue to be borne centrally (the 'transition phase'). Requests for intermediaries were lower than anticipated: recognition of eligible witnesses and acceptance of the need for intermediaries had a slow learning curve, requiring significant cultural change. By the end of the transitional phase, assuming that identification of eligible witnesses improved significantly, the OCJR would be better able to assess whether costs

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<sup>95</sup> Categories of witness eligible for an enhanced level of service are the same as for the intermediary special measure.

could be delegated without jeopardising access to the special measure by the full range of witnesses envisaged by the legislation, something that would have been a significant risk during the pathfinder exercise.

The evaluation also concluded that recruitment, training and appointment of intermediaries (requiring effective matching of intermediary skills to witness needs) should remain centralised functions. Control of the quality of these processes is key to maintaining the confidence of the criminal justice system in the scheme.

## The steps to national implementation

Over a two year period, evaluation of the intermediary scheme:

- validated the approach taken to recruitment and training, resulting in appointment of a pool of well-qualified intermediaries with a wide range of skills;
- highlighted the extent of the contribution of the intermediary role in investigative interview and at court.
- revealed a level of demand beyond pathfinder areas (17% of intermediary appointments were made in response to requests from 12 police forces that were not pathfinder areas and where the scheme had not been publicised).

At the end of the evaluation, much of the information needed to plan for roll-out was in place. However, gaps in knowledge remained for the following reasons:

- The timetable for phased implementation across six pathfinder areas was delayed and the evaluation therefore did not include a full year of operation for all six areas.
- There was poor awareness of the intermediary special measure across pathfinder areas, coupled with confusion about eligibility criteria and some resistance to the concept. These factors combined to produce low rates of requests for intermediaries. The pattern of requests across pathfinder areas was markedly different. Some areas were still at the beginning of a learning curve at the end of the evaluation period.<sup>96</sup>
- LCJBs were not asked to play an active role in the pathfinder projects until the second year of the evaluation, with the result that local leadership was not engaged and local monitoring did not begin until relatively late.

There were also two aspects of roll-out for which it was not possible to generate information:

- It is not possible to forecast with confidence, from the pathfinder evaluation's figures, what the eventual demand for the services of intermediaries will be.
- Experience in the pathfinder areas revealed considerable difficulties in identifying eligible witnesses, in part through lack of awareness of the special measure and misunderstanding of the eligibility criteria but also due to cultural resistance in which the intermediary concept was seen as inappropriate or unnecessary. The evaluation did not identify strategies which had been demonstrated to tackle all these problems effectively.

While the evaluation did not result in the hoped for level of detail on these matters, the findings support production of an agenda for roll-out and the list of issues to be addressed.

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<sup>96</sup> This is consistent with other research findings about failure to identify eligibility for special measures generally, including those with learning disability and mental disorders: Burton *et al*, 2006; Hamlyn *et al*, 2004.

## Estimating the eventual level of demand

In the UK, one percent of people are estimated to have speech, language or communication problems sufficient to affect every day functioning (Bryan, 2004).<sup>97</sup> Between February 2004 and March 2006, the register indicated that there were only 206 requests to the secretariat, nearly all of which resulted in the appointment of an intermediary. In the last eight months of the evaluation, during which all six areas were 'live', numbers of appointments varied from between 10 and 27 per month. It was widely conceded that these figures were not a reliable guide to potential demand. A number of sources reinforced this view:

- Burton *et al* (2006) found that although police identification of child victims of sex offences was appropriate, children witnessing sex offences against an adult, or for children who were victims of, or witnesses to violence, often failed to be identified as vulnerable witnesses.
- Cooper and Roberts (2006) analysed CPS data for 12 months ending March 2004, covering 76.5 per cent of CPS prosecutions. This identified 6,064 vulnerable or intimidated witnesses, of whom 4,508 (74%) were children. However, a study of young witness support schemes (Plotnikoff & Woolfson, 2007) estimated that around 27,000 child witnesses annually are involved in cases set down for trial (many more in cases ending in a guilty plea or discontinuance).<sup>98</sup> If 24 per cent of these witnesses qualified for assessment by an intermediary, this would produce around 6,500 requests for appointment annually. In the support scheme study, 24 per cent of young witnesses for whom information was provided were described variously as having learning difficulties, communication needs, Attention Deficit Hyperactivity Disorder, hearing difficulties, autism, physical difficulties, extreme anxiety or vulnerability due to very young age or the effects of long-term abuse. At the very least, such witnesses would appear to be suitable for assessment by an intermediary.
- In the same study, 80 per cent of young witnesses who gave evidence at trial reported a problem of some kind with the questions that were put to them, compared with 51 per cent who felt able to tell the court if they had a problem (Plotnikoff & Woolfson, 2007). Children's inability to recognise a problematic question or say that he or she has not understood indicates the need for intermediary assessment (Association of Chief Police Officers and Office for Criminal Justice Reform, 2005). This suggests that the evidential quality of around a quarter of young witnesses who give evidence might be improved by the assistance of an intermediary at trial. This could be around 6,000 young witnesses each year.
- The report 'Adult Protection Data Monitoring' includes a statistical analysis of data on protection of vulnerable adult referrals (Action on Elder Abuse, March 2006).<sup>99</sup> Detailed information from nine local authorities concerned 639 referrals for the second half of 2005. Social services were involved in 375 (59%) of the resulting investigations; the police were involved in 198 (31%). In all, 112 (18%) referrals were substantiated; only five (0.8%) resulted in a criminal prosecution, although in 48 cases (8%) the police had taken some form of action. It is difficult to know if the availability of intermediaries would have increased the rate of requests or prosecutions. Scaling up the figures for prosecutions to all 409 local authorities<sup>100</sup> in England and Wales produces an estimate of  $409 \times 5/9 = 227$  eligible witnesses in a 12 month period.

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<sup>97</sup> The Office for National Statistics (2004) reports that one in 10 children in Britain aged five to 16 has a clinically recognisable mental disorder: <http://www.statistics.gov.uk/cci/nugget.asp?id=1229>.

<sup>98</sup> This estimate was based in part on Victim Support's email to the authors that the Witness Service supported over 25,000 witnesses aged 17 and under in 2004/05.

<sup>99</sup> The Department of Health and Home Office set out guidance in 2000 for local authorities on the protection of vulnerable adults from abuse and on the establishment of multi-agency management committees. 'Adult Protection Data Monitoring' records that 145 out of 150 local authorities in England (97%) had set up such committees; 109 local authorities (73%) reported data on 15,089 referrals but as they related to no set time period, the figure is of little use in deducing an annual volume.

<sup>100</sup> The figure of 409 comprises 238 district councils, 34 county councils, 36 metropolitan boroughs, 33 London boroughs and 68 unitary authorities, including 22 in Wales. See <http://www.municipalyearbook.co.uk/index.asp?pageid=139>.

- Accurate estimates of demand are needed in order that an intermediary pool of the appropriate size can be recruited. For the reasons explored in the report, experience during the pathfinder projects did not provide a sufficient basis for making these estimates. At the end of the evaluation period there were 76 registered intermediaries in the pool with an estimated capacity to handle around 400 appointments annually. A further recruitment round was under way.

## The transitional phase

The OCJR initially intended to delegate financial responsibility for the project to local areas as quickly as possible. It decided not to do so during the first year of the evaluation because of the risk that the transfer to local funding would dampen requests for intermediary appointments. Towards the end of the evaluation, tensions emerged in pathfinder areas between encouraging greater use of intermediaries while there were no local cost implications and the position at roll-out, when devolved responsibility for funding was anticipated. Since the end of the evaluation, the OCJR has advised that, although a definitive answer was not available, the default funding position for intermediaries would be likely to reflect the arrangements already employed by criminal justice agencies for meeting the costs of foreign language interpreters.

In light of operational and budgetary uncertainties remaining at the end of the evaluation, a two-year transition is proposed in which the OCJR continues to bear the costs of the intermediary scheme. This would allow the value of the special measure to be demonstrated nationally, along with identification of levels of demand based on need rather than dictated by local budgets.

Roll out to the remaining 36 criminal justice areas should take place during the first year of the transition, giving LCJBs six months notice of the implementation date. Aside from budgetary considerations, the advantages to dissemination and awareness-raising of a single 'go live' date are counterbalanced by risks in terms of demands on central administration and uncertainty about the size of the intermediary register needed to service demand. The register will need to be built up to full strength during the transitional period. At the end of the second year, after a full year of national operation, it will be possible to make a more accurate estimate of the long term level of demand for intermediary services and the size of the register. This in turn will allow informed cost estimates to be made and options for future scheme governance and management of the register to be assessed.

## The agenda for implementing national roll-out

A five-point agenda is proposed for roll-out to avoid implementation pitfalls revealed during the pathfinder projects. The OCJR, through its Intermediary Registration Board secretariat, has responsibilities for these tasks. They also require regional action by LCJBs under the direction of the OCJR. The agenda is aimed at maximising effectiveness of the special measure by:

- providing central guidance in taking this forward and allocating clear responsibility locally for implementation;
- highlighting links between implementation of the intermediary special measure and other initiatives within and outside the criminal justice system;
- raising awareness among the criminal justice community and tackling 'mindset' obstacles to intermediary use;
- identifying eligible witnesses at the earliest opportunity, while also establishing 'safety-net' procedures to ensure identification at a later stage if previously overlooked;
- improving pre-trial planning, ensuring that intermediary guidance is made available to professional participants and that ground rules for use of the intermediary are set before trial.

Recommendations are also made to the OCJR to strengthen the central management of the scheme

for roll-out.

***The OCJR should:***

- ***on an ongoing basis, continue to fund and manage centrally intermediary recruitment and training and the process of matching intermediary skills to witness needs. This will allow control to be exercised over processes that are key to maintaining the confidence of the criminal justice system in the intermediary scheme. It will also facilitate the monitoring of intermediary activities and receipt of criminal justice feedback on intermediary use;***
- ***take forward the intermediary scheme by proceeding with a funded two-year transitional phase, with national roll-out completed no later than the end of the first year. At the end of the second year, the position in respect of national or local funding of individual intermediary case costs should be reassessed.***

### Making the link with other initiatives

'Witness initiative overload' was a concern across pathfinder areas. New victim and witness policies and procedures emerged frequently during this evaluation and areas struggled to keep up and to make sense of the whole picture. For example, one LCJB subcommittee was unable to address the intermediary project until Witness Care Units (themselves requiring several months of lead-in time) were underway. The chair considered that the local delay in introducing intermediaries was a consequence of poor central coordination in joining up related initiatives. Areas wanted demands on them to be more closely managed by the OCJR and centrally integrated in order that local resources could be marshalled most appropriately in response.

OCJR materials and secretariat presentations now emphasise the link between effective implementation of the intermediary special measure and achieving specific high level criminal justice objectives. Practitioners in pathfinder areas emphasised that implementation of the special measure will be most successful where it can be tied closely to efforts on other witness initiatives. As one senior police manager put it, "Intermediaries are only a small part of my job". Asking areas to deal with this as a separate issue will result in the special measure being marginalised and having low priority.

**As reflected in the communication plan, the OCJR should:**

- **promote acceptance of the intermediary special measure by linking it closely to other witness initiatives and criminal justice system objectives;**
- **in preparing for roll-out, continue to build on links:**
  - **with related criminal justice initiatives, including awareness-raising of special measures generally, witness care, case management and training on investigative interviewing;**
  - **across government departments with the Department for Education and Skills and Department of Health to assist in disseminating information to those responsible for child and adult protection, disability, mental health and other relevant groups in the health sector;**
  - **to already established centrally-led training programmes, such as those for the police (CENTREX), CPS, Witness Care Units, HM Courts Service and the Witness Service;**
  - **with the wide range of charities working with vulnerable adults and children.**

### Local responsibility for implementation

Initially, local leadership was placed primarily with a single senior to mid-level person in the police and CPS. There was little ownership of the project by top managers, and poor management commitment elsewhere in the criminal justice system. LCJBs were asked to take responsibility at a relatively late stage.

During the project re-launch in 2005, meetings between Board representatives and the secretariat in the pathfinder areas drew in more senior officers and a greater breadth of organisations than before, but not consistently across areas.

The OCJR should involve Boards in planning for roll-out as early as possible, giving them at least six months' notice and taking account of other resource demands on them. All Boards have subcommittees addressing delivery of the government's victim and witness commitments. Based on experience in pathfinder areas, the work of implementing the intermediary measure should be taken forward by a small team reporting to the relevant subcommittee (it may fit appropriately with an existing group).

The choice of agency leads will be important. One pathfinder area generated by far the most requests for an intermediary appointment. This momentum was largely due to the police champion with strategic lead on vulnerable and intimidated witnesses and responsibility for promoting special measures. She combined the necessary network of contacts with personal enthusiasm about the intermediary scheme. By the end of the project, this area had apparently reached a 'tipping point' where requests were increasing due to officers' positive experiences and word of mouth endorsements.

Local implementation teams should have clear terms of reference. The secretariat should produce a model action plan, as in previous projects, for local teams to follow.<sup>101</sup> Issues to be addressed in the roll-out model include:

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<sup>101</sup> Precedents for Office for Criminal Justice Reform model plans include those for Narrowing the Justice Gap and Satisfaction and Confidence Plans.

- composition of the implementation group (at a minimum, the police, CPS, Witness Care Units, HM Courts Service and Witness Service);
- the identification of lead project champions at a senior level in the police, CPS and HM Courts Service;
- the implementation timetable;
- the training of practitioners at all levels, referring to national training programmes;
- the development of a 'safety-net' strategy to identify eligible witnesses overlooked at the police investigative interview stage;
- a communication plan to raise awareness of the special measure, identifying the range of criminal justice<sup>102</sup> and external<sup>103</sup> organisations to be informed and building on existing lists compiled by LCJBs and Crime Reduction Partnerships.<sup>104</sup> The plan should include measures to raise public awareness, in light of the 'confidence' objective;
- distribution mechanisms for the case checklist and other guidance to intermediary case participants;
- arrangements to monitor usage, obtain feedback on effectiveness<sup>105</sup> and collect and disseminate good practice messages about the special measure.

Some of these issues are discussed further in this chapter. The secretariat should meet with local teams to ensure that there is a clear and shared understanding of what is expected. This approach should create a more accountable and reliable mechanism for ensuring the successful introduction of intermediaries to new areas.

At the end of the evaluation, the development of action plans and local monitoring frameworks as requested by the secretariat were at an early stage in some pathfinder areas. They were due to be discussed at a meeting of the secretariat with pathfinder area liaisons scheduled for the end of March 2006. It was apparent from the significant differences in quality and scope of preliminary action plans that local monitoring procedures in pathfinder areas needed to be streamlined to facilitate a greater degree of uniformity and avoid duplicative effort.

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<sup>102</sup> Including the judiciary, legal profession and other investigators such as the British Transport Police.

<sup>103</sup> Including adult and child protection and other social services, health and mental health organisations and relevant charities.

<sup>104</sup> It was striking that pathfinder area project liaisons had difficulty in putting together lists of relevant external contacts in response to a request for people to be surveyed for the evaluation.

<sup>105</sup> Burton *et al* (2004) found that criminal justice agencies were often not informed of their poor performance in identifying vulnerable and intimidated witnesses due to the absence of good monitoring systems and information-sharing between agencies.

***The OCJR should:***

- ***give Local Criminal Justice Boards at least six months' notice of the roll-out of the intermediary special measure, to allow for planning lead-time and awareness raising;***
- ***provide a model action plan for local implementation;***
- ***provide further support to pathfinder areas in the development of action plans and local monitoring procedures, drawing on this experience in developing the model for roll-out;***
- ***routinely generate area-specific reports on intermediary appointments, using features currently being incorporated in an updated case tracker database, to give feedback to local areas to assist them in monitoring the rate and type of intermediary appointments.***

### Raising awareness and changing the mindset

The evaluation detected a shift in attitude among some criminal justice practitioners who were initially resistant to the concept of intermediaries but whose feedback was positive after experience of their use. However, some of these attitudes continue to present a significant obstacle to successful roll-out. Problems described in the previous chapter included:

- 'reading down' the legislative criteria to apply to only the most extreme examples of eligibility;
- misunderstanding the intermediary role;
- failure to recognise causes of miscommunication or to accept the prevalence of miscommunication in the court process.

Experience in pathfinder cases indicates that effective use of the intermediary requires a shift in approach by those who question the witness. The previous chapter described potential problems for roll-out in relation to some reports of poor judicial control of inappropriate questioning and uneven standards of advocacy (some barristers were reported to be able to accommodate witnesses' communication difficulties but others were unable to simplify questions). Research evaluating the cross-examination of witnesses with learning difficulties emphasises the need for the judiciary to receive guidance from the Judicial Studies Board in "ensuring fair questioning that maximises the likelihood of eliciting accurate evidence and minimises the likelihood of eliciting inaccurate evidence" (O'Kelly *et al.*, 2003). Training for the judiciary and lawyers is recognised as necessary for the successful implementation of special measures, including intermediaries (Sanders *et al.*, 1997; Home Office, 1998; Birch 2000; Temkin, 2000; Ellison, 2001). All other professionals who communicate with children as part of their job are given appropriate training: "It seems surprising that those responsible for eliciting and assessing children's evidence (lawyers and judges) receive no relevant training whatsoever" (Flin, 1993).

The Communication Plan developed in August 2005 triggered the development of new materials<sup>106</sup> which were distributed for a pathfinder project re-launch in October 2005. The plan had not been updated by the end of the evaluation and there were still some gaps, for example in respect of materials for young witnesses and revised materials for unregistered intermediaries.

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<sup>106</sup> The evaluation had reported negligible use of the two original intermediary leaflets. The new brochure, briefing pack and guide were placed on the Home Office website in November 2005.

Awareness-raising exercises with the police and others in the pathfinder areas should address the needs of eligible witnesses from minority ethnic groups. It was not possible for the evaluation to provide a profile of the ethnicity of witnesses for whom intermediaries were requested as this information was not recorded on the pro forma. Nor was it possible to provide a profile of the ethnicity of intermediaries. The secretariat had advertised the intermediary position in media targeting black and minority ethnic communities. Although candidates were invited to provide ethnicity information at the time of recruitment<sup>107</sup>, this information had not been collated. Given the commitment of the criminal justice system to furthering equality and diversity, such information is important. The question whether the secretariat should attempt to meet the needs of a witness requesting appointment of an intermediary of a specific ethnic origin was problematic due to the composition of the intermediary pool; this question was unresolved at the end of the evaluation.

A number of intermediaries observed that communication needs were often masked by language difficulties and suggested that language interpreters receive guidance about the intermediary scheme.

***The OCJR should address cultural as well as factual issues in raising awareness of the intermediary scheme. It should:***

- ***give a clear message about the scope of eligibility, highlighting in particular the automatic eligibility of those under 17;***
- ***continue to explain the differences between the intermediary role and that of others (such as witness supporters, expert witnesses and interpreters) in the criminal justice process;***
- ***discuss with the Law Society and Criminal Bar Association how recognition of causes of miscommunication can be fed into advocacy training. This would help improve identification of communication difficulties and assist advocates in simplifying questions;***
- ***update the Communication Plan (including the list of publications) and refer in briefing materials to findings about the types and prevalence of miscommunications experienced by witnesses when being questioned;***
- ***ensure that the identification of communication needs among witnesses from minority ethnic groups and those using languages other than English is addressed in raising awareness of the intermediary scheme with criminal justice agencies.***

### Identification of eligible witnesses at an early stage and by means of safety-net procedures

Inadequacies in recognising witness vulnerability have been well documented (for example, Burton *et al*, 2006; Cooper and Roberts, 2006). The OCJR and Association of Chief Police Officers issued guidance to the police in pathfinder areas in August 2005, providing advice about the types of witness for whom appointment of an intermediary should be considered (this guidance will need to be re-visited for national roll-out). While police identification of communication needs at an early stage must be a principal objective of roll-out, there must also be safety-net procedures to pick up cases missed at the interview stage. Assigning responsibility for flagging up witness vulnerability is made more difficult by increasing fragmentation of police investigative procedures. Lead responsibility often passes from one officer to another as an investigation develops. Although abuse of a child or vulnerable adult was referred to specialist units, children and vulnerable adults in non-abuse

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<sup>107</sup> Members of the Assessment Committee pointed out that speech and language therapists, who make up most of the intermediary panel, come from a profession that is almost entirely white.

scenarios often fell outside their remit.<sup>108</sup> Video interviews in non-specialist cases may involve an 'Achieving Best Evidence' trained officer whose role is restricted to conducting the interview. Pathfinder areas reported that, in non-specialist unit cases, front-line officers were still confused about eligibility for a video interview (see also Burton *et al*, 2006). As the visual recording was linked to consideration of other special measures, failure to identify vulnerability at this stage often meant that other special measures, including use of an intermediary, were not addressed until later, if at all.

The pathfinder areas stressed the importance of criminal justice personnel in 'gateway' positions (such as police criminal justice units, CPS lawyers at charging desks, Witness Care Units and the Witness Service) in picking up eligibility. It is vital that these roles are recognised and valued: the first attempt of a Witness Service coordinator to flag up an eligible witness was rebuffed as 'not their job', although such interventions were welcomed as the projects progressed. In one pathfinder area, the CPS lead was doubtful about the ability of some staff to pick up eligible witnesses already in the system because many lawyers had not received special measures training.

The pathfinder projects failed to produce a single request for an intermediary on behalf of a defence witness.<sup>109</sup> Opportunities to promote the project through the Law Society Criminal Practitioners' Newsletter and the Public Defender Service<sup>110</sup> had not been taken forward (the OCJR has indicated this will be done at national roll-out). However, presentations about the intermediary special measure had been given to Criminal Bar Association members, and the Inns of Court School of Law (the body responsible for training intermediaries) had begun holding chambers seminars for barristers, involving intermediaries in cross-examination role-play. Questions about the Legal Services Commission's approach to legal aid bills involving an intermediary were unresolved at the end of the evaluation.

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<sup>108</sup> Thus a response officer's report from a complainant could be allocated to a neighbourhood police officer to investigate and take statements in a 'volume crime' case, or to CID for 'serious' or 'major' offences.

<sup>109</sup> One was appointed for a defendant in a case that did not go to trial.

<sup>110</sup> A lawyer from the Service suggested that contact be made with all eight Public Defender Service offices through the Legal Services Commission Central Business Team, with a view to encouraging the identification of eligible defence witnesses.

**The OCJR should:**

- **work with the Association of Chief Police Officers to promote identification of eligible witnesses prior to interview, while encouraging local areas to develop a network of safety-net procedures across criminal justice organisations to assist in identifying those overlooked by the police during the investigative stage;**
- **liaise with the Law Society, Criminal Bar Association and Public Defender Service to raise awareness of the intermediary scheme and encourage the identification of eligible defence witnesses (covered by the 1999 Act) and also eligible defendants (under the inherent jurisdiction of the court) in light of the decisions of the House of Lords in R v Camberwell Green Youth Court (2005) and the European Court of Human Rights in SC v UK (2004);**
- **liaise with legal profession organisations about awareness-raising through training events and the involvement of intermediaries at local chambers seminars. It would be beneficial for trainers or training organisers to seek Continuing Professional Development accreditation from the appropriate body as this is likely to create an added incentive for lawyers to attend;**
- **request that the Legal Services Commission provide guidance on the implications for legal aid claims of defence use of an intermediary.**

**The CPS should:**

- **update its email guidance on intermediary use and the identification of eligible witnesses to harmonise with the formal guidance produced by the Association of Chief Police Officers and OCJR in August, 2005.**

## Pre-trial planning

Most pathfinder trials were characterised by poor pre-trial planning, not confined to planning for intermediary use. Problems resulting in intermediaries not being used as effectively as they might have been included:

- case participants' lack of access to intermediary guidance, including the case checklist<sup>111</sup>;
- inadequate (or no) planning meetings between intermediaries, CPS and advocates;
- little or no pre-trial discussion with the judge or magistrates to establish ground rules for the intermediary and advocates. This resulted in a lack of clarity about the intermediary's role in assisting the witness or what was expected of the advocates in modifying their questions.

Cases were also characterised by problems with court technology and long delays both pre-trial and at trial for vulnerable witnesses, with consequent effects on the quality of their evidence. Listing officers sometimes over-rode the principle of a 'clean start', giving the judge other work before the vulnerable witness's testimony.

Courts did not have the benefit of feedback from intermediaries about what worked well or was problematic: section 3.11.3 of the Intermediary procedural guidance manual requires them to provide

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<sup>111</sup> The case checklist, now in the Intermediary procedural guidance manual (2005), was developed after the first trials to provide an overview of intermediary guidance and planning considerations for each category of practitioner.

a written evaluation of the court process to the court post-trial but only one such instance occurred during the study. At the close of this evaluation, the Intermediary Registration Board Standards Committee was developing draft feedback forms to record satisfaction or otherwise with the use of the intermediary and was exploring mechanisms for the distribution of forms and collection of information.

Members of the judiciary in pathfinder cases highlighted the following good practice to be taken forward in judicial guidance:

- early assignment of the trial judge for continuity of case management;
- ensuring the judge has the guidance, intermediary report and special measures application no later than the plea and case management hearing;
- witness evidence being given a clean start without other work being put in the judge's list beforehand;
- holding a pre-trial meeting to discuss ground rules with trial advocates and the intermediary;
- the availability of an example jury direction<sup>112</sup> to explain the intermediary role and the needs of the witness (tailored to the summary in the intermediary's report) before the prosecution counsel opens the case or before the witness's video is played;
- the trial judge checking with counsel as to whether there was any difficulty with the video interview, with technical problems remedied in advance of the hearing;
- providing the transcript of the video interview (annotated by the intermediary if there are gaps due to unintelligibility) to the jury;
- intervention by the trial judge if a question is not clear due to length or complexity if the intermediary does not do so;
- training and written guidance for judges (particularly those accredited to conduct serious sex offence trials, as over half of the intermediary appointments arose in sexual offence cases) on case management of intermediary trials;
- training for legal advisers sitting with magistrates on the management of pre-trial hearings and trials involving intermediaries.

It would be helpful, at least for a transitional period, if a designated judge for the intermediary special measure was appointed at each court, preferably accredited to conduct both family and serious sex offence cases (as in many pathfinder trials). This judge would not necessarily try intermediary cases but would act as a point of reference for colleagues on the bench and in the magistrates' courts.

Wide distribution of guidance at roll-out and ability to obtain information from the Internet (added in November 2005) should help ensure greater access to information in the future. In the meantime, conducting trials without reference to the guidance will result in less than optimum use of intermediaries. Guidance should be given to all members of the judiciary and to magistrates' courts in pathfinder areas. Alternative approaches to distributing guidance to practitioners should be explored; for example, involving case progression officers<sup>113</sup>, asking intermediaries to attach the case

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<sup>112</sup> Section 32, Youth Justice and Criminal Evidence Act 1999 puts a duty on the judge to warn the jury that a special measures direction does not prejudice the accused: section 4.4.4, Judicial Studies Board Equal Treatment Bench Book (2005).

<sup>113</sup> Lord Justice Scott Baker has emphasised the role of case progression officers in the management of intermediary trials (intermediary conference, June 2005). They could check that participants have the checklist when verifying that an intermediary case is trial ready.

checklist to their report for court; and requiring the CPS to serve the case checklist with the case papers<sup>114</sup> (again, there is a need for safety-net procedures).

It would also be helpful if a template for ground rules could be agreed with the senior judiciary, Judicial Studies Board and the Department for Constitutional Affairs for use in advance of trial. This would clarify responsibilities and expectations for all involved, not just the intermediary. In an individual case, the judge would tailor the ground rules to the communication needs of the witness. The template should address:

- the testing of TV link equipment (plasma screens if possible) and agreement of the positions on screen of the intermediary and witness;
- the sound and visual quality of videotaped evidence to ensure it can be clearly understood by the court and the witness;
- what information will be given to the jury by the judge and prosecution (or defence, if a defence witness) about the witness's communication needs and the intermediary role;
- scheduling the witness's evidence to minimise waiting time, taking account of the witness's concentration span, other factors such as the effect of medication, the length of the videotaped interview and breaks<sup>115</sup>, including the lunch interval (If there is more than one vulnerable witness, the order of these witnesses should be considered);
- anticipating what problems of comprehension may arise, based on the intermediary's report, and how to avoid them;
- how the intermediary will alert the court to a problem, bearing in mind that an intermediary on the TV link room can see the questioner but not the judge;
- what is expected of the intermediary and advocates in respect of problems with questions<sup>116</sup>;
- what is expected of the intermediary and advocates in respect of problems with answers;
- the role of the judge to control questions.

The final point is particularly important. Some judges and advocates indicated that, in the presence of an intermediary, judges (and prosecutors) would be less likely to intervene if questioning was inappropriate for any reason. Others, however, underlined that the judge remains in control of proceedings at all times and the prosecutor retains a responsibility to intervene if questioning of a vulnerable witness is inappropriate. The judge may choose to intervene based on information provided by the intermediary. There remain some types of questioning to be controlled by the judge that do not necessarily fall within the intermediary's remit. These areas of practice should be further explored in case studies for discussion by participants at Judicial Studies Board seminars.

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<sup>114</sup> Discussion with some CPS personnel revealed reluctance to pass guidance onto the defence as it was 'not our job'.

<sup>115</sup> The intermediary, as well as the witness, may need a break (a need acknowledged for interpreters): Judicial Studies Board Equal Treatment Bench Book (2005).

<sup>116</sup> One judge set ground rules that required the intermediary to flag problematic questions; gave the advocate one chance to rephrase; and if the problem persisted, the intermediary could then rephrase the question.

***The OCJR should:***

- ***update the case checklist, developed following the first two trials, in light of experience with subsequent trial cases;***
- ***work with Local Criminal Justice Boards, CPS, HM Courts Service, police and court representatives in pathfinder areas to ensure that members of the judiciary and practitioners in trial cases receive the guidance and checklist;***
- ***together with the Department for Constitutional Affairs, liaise with the senior judiciary and Judicial Studies Board concerning:***
  - ***good practice on case management of intermediary trials;***
  - ***a template for the ground rules to be agreed in advance of trial;***
  - ***case studies for possible discussion at Judicial Studies Board seminars;***
  - ***the appointment of a designated judge for the intermediary special measure at each court to act as a point of reference for colleagues on the bench and in magistrates' courts;***
- ***obtain systematic feedback from intermediaries (guidance already requires them to provide a written evaluation of the court process to the court post-trial) and courts conducting intermediary trials, so that case management and practice issues can be identified during the transitional phase.***

### **Strengthening central management of the intermediary scheme**

The intermediary special measure, combining policy development with day-to-day operational management of a criminal justice activity, presented a unique challenge for the OCJR. The secretariat is to be commended for its contribution to the wide range of work undertaken, encompassing not only the appointment of intermediaries but also production of guidance materials, support of committees, management of the recruitment process and budgetary responsibilities. Development work was also undertaken by members of the Intermediary Registration Board Assessment Committee. The contribution of its chair, members and expertise to the viability of the project was particularly important, as it absorbed some tasks that would otherwise have fallen to the secretariat whose staff did not have the relevant professional backgrounds. Although the OCJR did not resource the secretariat at the start at a level that allowed it to carry through all of its internal and external responsibilities as effectively as it would have wished, resourcing levels were increased in the latter part of the evaluation. In particular, resource constraints prevented the team from adopting a more 'hands-on' approach in pathfinder areas, with the effect that opportunities for areas to benefit from each other's experiences were minimal.

Given the difficulty of servicing the demands of six pathfinder areas, the limited resource levels within the secretariat present a major risk to the success of roll-out. The secretariat has already begun to examine the work involved. Significant input to roll-out will also be needed from the CPS and HM Courts Service. It would be desirable if a small team of criminal justice professionals from the pathfinder areas could be identified to support roll-out by helping brief counterparts in new areas; perhaps some could be seconded to the secretariat on a part-time basis. Even with external assistance, it will still be necessary to consider bolstering the resources of the in-house team.

***The OCJR should:***

- ***continue to identify the tasks and resources needed for roll-out, taking account of staffing of the secretariat; the contribution of the Assessment Committee; CPS, HM Courts Service and other Steering Committee members; and potential input from criminal justice professionals from pathfinder areas;***
- ***consider the options for future management of the intermediary scheme, including contracting out central management of the register for the appointment of intermediaries.***

## Conclusion

Experience during the pathfinder projects has demonstrated the positive contribution of the intermediary special measure in providing vulnerable witnesses with access to justice and to furthering the government's objectives for the criminal justice system. The pool of registered intermediaries is a precious resource. They have been valuable ambassadors in the pathfinder areas and the success of the scheme would not have been possible without their efforts. The burgeoning credibility of the scheme lies in the hands of intermediaries in their every interaction with the criminal justice system.

The evaluation revealed operational difficulties and cultural resistance among some in the criminal justice system. It will require a clear message from Ministers and a strong push from the OCJR to meet these challenges. Without positive action, there is a risk that meritorious cases will not proceed because witnesses were not given a voice. If the intermediary special measure can be made to work well for witnesses with communication needs, standards will be raised for all witnesses and the justice system as a whole will benefit.

# Appendix 1. Good practice points for future implementation

The evaluation identified procedural and practice issues to be addressed concerning intermediary recruitment; management of the register; supporting the pool; training and Continuing Professional Development; and raising awareness. While most of these good practice points are addressed to the OCJR and Intermediary Registration Board Assessment Committee, some are directed at other criminal justice organisations.

## Recruitment

*The OCJR should consider:*

1. synchronising the training of new intermediaries with the roll-out timetable in order to avoid long gaps between intermediary training and assignment to cases. These gaps erode confidence and expose intermediaries to the risk that their knowledge of the criminal justice process will have deteriorated over time. Depending on the approach adopted to roll-out, it may be appropriate to stagger training courses so that intermediaries are brought into the pool in smaller numbers over a longer period.

*The Assessment Committee should consider:*

2. asking candidates at interview to produce evidence of their ability to produce clearly worded reports, as it is not feasible to expect intermediary training courses to improve writing skills;
3. including an experienced intermediary as a non-voting member of interview panels, to enable candidates to ask questions of someone with direct experience of the role and of intermediary training (panel members provide diverse skills and experience but have not practised or been trained as intermediaries);
4. clarifying understanding of what is meant by the core competency categories by producing examples of the skills required to demonstrate how each category would be met.

## Managing the register

*The OCJR should consider:*

5. logging on a simple tally sheet enquiries received that do not result in the appointment of an intermediary, distinguishing approaches that do not result in the submission of a pro forma request for an intermediary from those where it is not possible to appoint an intermediary within the required police time frame;
6. when an intermediary appointment is made, requesting the officer to notify the intermediary immediately if it is decided subsequently not to proceed with the interview or prosecution, freeing the intermediary to take other appointments;
7. establishing a target for the percentage of appointments to be made within 24 hours of a request being received as reports on compliance will assist in building police confidence that appointments can be made quickly;
8. producing an updated profile of information about the pool of registered intermediaries to include:

- age/ date of birth (the age profile may be a factor in turnover);
  - gender;
  - employment status (relevant in estimating the overall proportion of pool members able to respond at short notice to requests for appointment);
  - professional details and membership of professional associations;
  - ethnicity;
  - status of enhanced Criminal Records Bureau checks, in order to flag the dates when checks of pool members need to be updated;
9. including ethnicity information about intermediaries on the register for the purpose of matching, if requested, specific witness needs.

## Supporting registered intermediaries

*The OCJR should consider:*

10. providing guidance about the limited circumstances in which an intermediary may receive offence-related information prior to interview;
11. providing intermediaries with:
  - a letter of authority from the OCJR/ Intermediary Registration Board;
  - a photo identification;
  - Intermediary Registration Board letterhead paper for the front sheet of reports.

*The OCJR and Assessment Committee should consider:*

12. updating guidance on reports to reflect the different types of report and their respective audiences. Sample outlines of 'good practice' reports should be provided;
13. revising the existing lengthy publication 'Being an intermediary: Guidance for unregistered intermediaries' to produce simpler guidance for both professional and non-professional unregistered intermediaries;
14. updating the procedural guidance manual to address the appointment of a registered intermediary as mentor to an unregistered intermediary<sup>117</sup> in circumstances where no registered intermediary is available with the necessary communication skills, explaining what assistance the mentor should offer;
15. periodically requesting feedback from intermediaries about problems in reconciling their duties with their employment, as almost half of those in employment reported difficulties. This feedback may inform decisions about the amount of work that it is reasonable to expect employed intermediaries to undertake;
16. reviewing the rates of remuneration in 2006 and make transparent to the pool of registered

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<sup>117</sup> When a registered intermediary is not available, an unregistered person may be nominated, normally be a professional in the field of facilitating communication with vulnerable people (section 3.8.1, Procedural guidance, 2005). In "a very few special cases" it is possible that witness communication can only be facilitated by a relative, carer or friend who must "understand the nature of the role they are about to perform" (section 3.8.4).

intermediaries the process of benchmarking against other professional service providers;

17. updating the secretariat's 2003 paper on support for intermediaries to include the following elements;
  - advice in planning their work within the criminal justice process;
  - debriefing of intermediaries on request after assessment, interview or court, either through external support or through the intermediary pool;
  - review of draft reports, either through external support or through the intermediary pool;
  - mentoring arrangements (including for unregistered intermediaries);
  - regional meetings;
  - opportunities for those carrying out criminal justice training to exchange good practice.

## Intermediary training and Continuing Professional Development

*The OCJR and the training contractor should consider including the following in the specification for intermediary training:*

18. input from a police officer with experience of the intermediary scheme. Course input would also be useful from, for example, a CPS caseworker; Witness Service coordinator, and Witness Care Unit officer;
19. maximum opportunity for role play relating to the investigative interview and courtroom proceedings;
20. emphasis on the key role of intermediary reports;
21. in final assessment, scoring candidates separately on their ability to identify problems built into the mock trial test (recognition and flagging up problematic questions);
22. following assessment, giving candidates a copy of their multiple choice test with the answers and feedback on their role play assessment;
23. developing procedures for assessing and scoring candidates who use sign language interpreters;
24. providing packs of materials for intermediaries, including public information leaflets about witnesses and the criminal justice system<sup>118</sup> and a list of relevant websites.<sup>119</sup>

*The OCJR should consider:*

25. asking newly appointed intermediaries to submit their first three reports in draft for review, if time permits;
26. in order to monitor the standard of reports, developing mechanisms (either through external reviewers or experienced members of the intermediary pool) to enable intermediaries to have draft reports reviewed on request;

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<sup>118</sup> For example, 'Witness in Court' (Criminal Justice System, 2003) and 'Working together for justice' (Criminal Justice System, 2004).

<sup>119</sup> Such as [www.cjsonline.gov.uk](http://www.cjsonline.gov.uk).

27. encouraging intermediaries to post a summary of case experiences on the Smart Group;
28. requesting intermediaries to provide a written evaluation of the court process to the court, as required by Procedural guidance section 3.11.3, after discussion with the secretariat;
29. advising intermediaries whether there are any circumstances in which their reports can be made available to witnesses or their carers for health care or other non-criminal justice purposes;
30. exploring opportunities to strengthen intermediary ties with the local criminal justice community through LCJB activities and training, such as sponsoring intermediaries to attend solicitor and Bar Continuing Professional Development events;
31. liaising with police forces in order to allow intermediaries to observe investigative interview training courses and encourage the police and CPS to invite intermediaries to provide input to training courses. (Attendance at and contributing to criminal justice training forms part of intermediary Continuing Professional Development);
32. providing intermediaries with guidance about their possible involvement in a range of activities including:
  - public law care proceedings (including the use of joint directions in care and criminal cases);
  - identification procedures;
  - victim impact statements and victim advocacy;
  - Care Standards Tribunal proceedings.

## Monitoring intermediary activities

*The OCJR, Assessment Committee and Standards Committee should consider:*

33. implementing procedures to monitor and obtain feedback about intermediary activities. This should include requiring intermediaries to share brief reports on practice issues arising from their appointments (particularly important while the role is in development) and inviting feedback from witnesses, carers and supporters and criminal justice practitioners.

## Raising awareness about the intermediary role

*The OCJR should consider:*

34. amending the information sheet 'Frequently Asked Questions' to explain that intermediaries can often be appointed at short notice and that, even where this is not possible, an intermediary may be able to provide telephone advice. A system of 'duty' intermediaries should be piloted for the purpose of providing telephone advice to the police in such circumstances;
35. providing print information to intermediaries to be forwarded to those involved in care proceedings explaining about the role of the intermediary, in light of a care judge's comments that no-one in his case understood the role (it seems likely that intermediaries will be questioned in care proceedings about their role at the investigative interview, given the number of investigations that result in parallel prosecutions and child protection cases).

## Support and preparation for trial of witnesses for whom an intermediary is appointed

*The OCJR and LCJBs should consider:*

36. how a network of services can be developed to make support and pre-trial preparation for witnesses with communication needs available consistently across the country;<sup>120</sup>
37. how to ensure that organisations providing enhanced support<sup>121</sup> are aware that an intermediary is available to assist in communicating with the witness, either directly or by providing advice on communication to the support organisation;
38. including in the communication strategy development of explanatory materials about intermediaries in formats designed to meet the needs of eligible witnesses, in particular young people.

*The CPS should consider:*

39. developing guidance to emphasise the complementary nature of the intermediary scheme and 'witness profiling' and address potential overlaps between the assessment and report of the intermediary and the witness profile prepared by social services.

*HM Courts Service, Witness Care Units and the Witness Service should consider:*

40. at a local level, making available pictures of actual court facilities such as courtrooms (with court staff role-playing and/or empty), separate waiting areas and TV link rooms, to supplement familiarisation visits and help prepare vulnerable witnesses for what they will see at court.

## Recommendations for other criminal justice organisations

*The OCJR should consider discussing the following issues with the Association of Chief Police Officers, in deciding where responsibility lies to take them forward (these may be relevant to revision of 'Achieving Best Evidence guidance', CENTREX training and Association of Chief Police Officers guidance on intermediaries at national roll-out):*

41. encouraging officers to request the appointment of an intermediary even where the conduct of the interview is urgent. Even if an intermediary cannot attend, one may be able to offer advice;
42. ensuring that officers notify the intermediary immediately if it is decided subsequently not to proceed with the interview or prosecution, freeing the intermediary to take other appointments;
43. ensuring that officers inform the secretariat or holder of the register of the use of an unregistered intermediary, so that appropriate information, support and mentoring can be provided;
44. producing guidance on the circumstances in which it is appropriate to video-record the intermediary's assessment of the witness. This should not be done routinely;
45. producing guidance or a checklist on advance planning for an intermediary-assisted interview (drawing on the 'Aids to Communication' section of the guidance manual) which addresses:

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<sup>120</sup> This could build on the similar exercise underway in respect of young witness support services.

<sup>121</sup> Examples include the Witness Service in some areas; local authorities operating the 'witness profiling' scheme promoted by the CPS; and young witness support schemes.

- the role of the intermediary during the interview;
  - how the intermediary will indicate problems of communication or the need for a break;
  - whether the intermediary should be on screen;
  - ways to maximise the quality of the recording of the interview, for example:
    - ▷ whether the intermediary should repeat the responses of witnesses with intelligibility problems;
    - ▷ how the use of communication aids will be shown (whether additional cameras are needed to focus on a computer screen or other device);
    - ▷ whether a personal voice amplifier should be provided for a soft-spoken witness;
    - ▷ ease of access for the witness when seeing the video for the purpose of memory refreshing (if the witness lip-reads, then the face of the questioner should be clearly visible on screen);
46. producing guidance on where responsibility lies for the cost of equipment needed to improve communication with the witness at court;
  47. encouraging the attendance of intermediaries to observe investigative interview training courses and provide input to training courses (attendance at and contributing to criminal justice training forms part of intermediary Continuing Professional Development);
  48. encouraging the invitation of intermediaries to police training which reviews videotapes of investigative interviews using an intermediary. This would assist intermediaries and interviewing officers to discuss ways in which practice could be improved.

*The CPS should consider:*

49. advising the Transcription Unit to distinguish the speech of the intermediary and witness;
50. asking the intermediary to annotate the video interview transcript, or asking the police to re-interview the witness with the assistance of an intermediary, in cases where the Transcription Unit marks parts of the transcript as unintelligible and notes that “difficulty was experienced in hearing and or understanding the witness”;
51. producing guidance about the circumstances in which intermediaries can watch the witness’s video interview in advance of a second interview or the trial;
52. clarifying the position regarding intermediary access to and opportunity to comment on third party medical (or similar) reports on the witness’s communication needs, in light of criticism that an intermediary had not taken such opinions into account in assessing the witness;
53. encouraging the attendance of intermediaries to provide input to training courses. (Attendance at and contributing to criminal justice training forms part of intermediary Continuing Professional Development).

*HM Courts Service should consider:*

54. improving the availability of reliable plasma screen technology for intermediary trials;
55. ensuring that court listing guidance make it clear that, when the court directs that the evidence of a vulnerable witness should have a ‘clean start’ in the morning, the judge should not be given other matters in his list beforehand;

56. clarifying where responsibility lies for payment for use of communication aids at court, such as a microphone for a soft-spoken witness;
57. improving guidance relating to quality checking of TV link equipment, video-DVD playback equipment and compatibility issues before the start of trial;
58. giving judges presiding at intermediary trials in the Crown Court the option of having computer-aided transcription, as an alternative to taking a detailed note during the witness's testimony. This will allow judges to focus on the demeanour of the witness and the interaction between the witness and intermediary.

## Appendix 2. Interviews with case participants

**Table A2. 1** Interviewees by role

Role of interviewee	Number interviewed
Intermediary	35
Police officer	56
CPS lawyer/ caseworker	14
Prosecution advocate	14
Defence advocate	10
Circuit judge	10
District judge	2
Bench of magistrates	3
Defence solicitor	2
Social worker	2
Court staff (court clerk/ listing officer/ usher)	4
Witness Service supporter	6
Witness Care Unit officer	2
Witness	3
Carer	6
Total	169

## Appendix 3. Related initiatives

The intermediary scheme has a significant inter-relationship with many other criminal justice initiatives and projects. These include:

- the Effective Trial Management Programme and the Criminal Case Management Framework;
- identification of vulnerable victims and delivery of enhanced levels of service under the Code of Practice for Victims of Crime (paras. 4.2 and 5.7, Office for Criminal Justice Reform, 2005);
- assessment of witness need under 'No Witness – No Justice' (Inter-Agency Working Group on Witnesses, 2003), the implementation of Witness Care Units and Witness Care Operational Standards;
- improved provisions for young witnesses through recommendations of the Review of Child Evidence (2005) and availability of pre-trial preparation and support<sup>122</sup>;
- court preparation of vulnerable witnesses through witness profiling reports<sup>123</sup>;
- facilitating pre-trial witness interviews by prosecutors (Attorney General, 2004);
- facilitating feedback from vulnerable adult witnesses about their experience through the Witness and Victim Experience Survey;
- improving the quality of TV link and other technical equipment at court, to provide better sound and picture quality (large screens are particularly important to enable the court to assess the interaction between the witness and intermediary);
- implementing the Witness Charter (2005), which includes commitments to give priority to cases involving vulnerable or child witnesses (Standard 13); that the prosecution or defence will ask court staff to provide for the witness's special needs as a result of a disability or medical condition (Standard 25); and that an interpreter will be provided for witnesses with language or communication needs (Standard 27);
- the OCJR's consideration of further rollout of video-recorded evidence-in-chief for vulnerable or intimidated witnesses and its strategy to support intimidated witnesses in the community.

The implementation of the intermediary special measure is relevant to the forthcoming revision or review of key documents and policies including 'Achieving Best Evidence (Home Office, 2002); 'Vulnerable witnesses: A Police Service Guide' (Home Office, 2001); victim personal statements; and the Criminal Procedure Rules Committee's review of Plea and Case Management Hearing forms.

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<sup>122</sup> A strategy for providing young witness support more consistently was set out in a recent study: Plotnikoff & Woolfson, 2007.

<sup>123</sup> Liverpool City Council Investigations Support Unit has a protocol between social services, the police and CPS concerning witnesses with learning difficulties. This sets out standards for preparing the vulnerable witness for court and for preparing the court for the witness. The unit works with the witness over time and alerts the court to his or her needs through a 'profile' report. The CPS has sponsored local seminars on 'witness profiling' in a number of criminal justice areas.

## Appendix 4. Profile of pathfinder trials

Of the 16 witnesses who gave evidence, five were adults whose communication needs and eligibility for the special measure were summarised as follows:

- mild learning difficulties and severe expressive disorder, mostly unintelligible speech, uses picture book and Makaton signs;
- significant impairment of intelligence, level of receptive vocabulary similar to seven to nine year-old, does not read, short attention span;
- severe learning difficulties, use of vocabulary and grammar equivalent to a pre-school child. Stammer and indistinct speech, requires a lot of time to process questions;
- mild learning difficulties;
- moderate learning difficulties, uncontrolled muscle movements. Requires wheelchair and complete bodily care. Speech is difficult to understand and requires additional time to process questions.

The remaining 11 witnesses were children. Three were five year-olds. Eight were eligible as a result of their age in combination with other conditions. Their communication needs covered:

- hearing impairment and lip reading;
- learning difficulties;
- unintelligible speech;
- poor receptive vocabulary, not commensurate with age;
- social interaction problems;
- limited concentration span;
- cerebral palsy;
- intelligibility hampered by anxiety about the court case;
- autism;
- moderately delayed language skills;
- uncontrolled muscle movements;
- Attention Deficit Hyperactivity Disorder.

**Table A4. 1** Trials involving an intermediary

Court	Alleged offence	Case outcome
Crown Court	sexual offence (intra-familial)	Conviction; 10 years custody
Crown Court	sexual offence (neighbour)	Conviction; 18 months custody; 24 months extended supervision; sex offender registration for 10 years
Crown Court	sexual offence (intra-familial)	Retrial (witness not required to testify)
Crown Court	indecent assault (care home)	Acquittal
Crown Court	sexual offence (neighbour)	Judge-directed acquittal when witness was unable to continue on second day
Crown Court	distraction burglary (sheltered accommodation)	Acquittal
Crown Court	sexual offence (intra-familial)	Acquittal
Magistrates' court	common assault (teacher)	Conviction; absolute discharge
Magistrates' court	common assault (domestic violence)	Acquittal
Youth court	sexual offence	Acquittal
Youth court	sexual offence	Conviction
Youth court	common assault	Conviction

It should be noted that Crown Court conviction rates are significantly lower than in the magistrates' or youth court, and sexual offences have a lower conviction rate (and a higher not guilty plea rate) than offences overall. It also cannot be concluded that the use of an intermediary directly impacted on case outcomes.

## Appendix 5. Aids to communication

Section 30, Youth Justice and Criminal Evidence Act 1999 allows for a special measures direction to provide the witness with:

*“such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has or suffers from”.*

In the survey of intermediaries, aids to communication (ranging from pen and paper, simple charts with the alphabet, numbers and the responses ‘Yes’, ‘No’ and ‘? Don’t know’ through to different types of technology<sup>124</sup>) had been used by 27 intermediaries at interviews with 56 witnesses (68% of witnesses interviewed with the help of an intermediary). Where witnesses did not use an aid in daily life, intermediaries developed or tailored aids according to the needs of the individual witness.

Awareness about the potential benefits of using aids was uneven. Intermediaries commented on the absence of basic communication tools in video suites, in particular methods by which witnesses could communicate about parts of the body. (In one case, the court had criticised the police officer’s use of a hand-drawn stick figure to ask a young child to show what had happened to him.) David Jones, consultant child and family psychiatrist, Park Hospital for Children, Oxford, advised the evaluation that asking the witness to show intimate touching on the witness’s own body was likely to be negative and may be abusive (particularly when asked by a person perceived as ‘powerful’, as in interview or at court). He recommended predicting the questions to be explored and planning ahead. Interviewers should use anatomically neutral diagrams of back and front, progressing to anatomically detailed diagrams only if necessary.<sup>125</sup>

In interview, two intermediaries said that the police had declined to use an aid to communication. A helpful ‘Aids to communication paper’, aimed at criminal justice practitioners who come into contact with witnesses, was developed by a member of the Assessment Committee and issued as part of the intermediary procedural guidance manual (2005). Reference to this paper in police training may assist in overcoming police concerns about the use of aids.

### Examples of how aids to communication were used

One intermediary prepared pictures with a maximum of six alternatives for the witness in question.

In another case, a witness with limited speech gave quiet, one-word replies. The intermediary suggested that he typed his responses which were then fuller. Additional investigative interview cameras were set up to record his hands and computer screen. Because he spoke quietly, the intermediary borrowed a personal voice amplifier<sup>126</sup> which was checked to ensure it did not interfere with other equipment. Because the witness’s spelling and grammar were poor, the intermediary read out what she thought he meant on the screen, so that the witness could nod and continue. The officer said that these procedures had worked extremely well and the intermediary had been “fantastically helpful”. Discussions with the CPS beforehand had made sure these procedures were acceptable.

In four cases prepared for court, both sides agreed to give advance notice of the subject matter of questions to facilitate development of aids to communication.<sup>127</sup> In one of these (involving a defendant with communication problems as a result of a brain injury), the intermediary assessed the defendant’s language. The advocates were then asked to list general question topics. The intermediary produced charts of single words and pictures for these topics (for example, clothes,

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<sup>124</sup> Aids used included a file of Rebus symbol pages, produced by an intermediary in conjunction with Widgeit Software. This was demonstrated to the Assessment Committee and was used in training. Legal advice was obtained to balance the images used and location on the page.

<sup>125</sup> Dr Jones advised that, for demonstrative purposes, anatomically neutral dolls were also suitable.

<sup>126</sup> A head apparatus obtained through a communication aid lending library.

<sup>127</sup> Two did not go to trial and two were pending at the end of the evaluation.

colours, times and days) and held a session to familiarise the witness with the charts. She then assessed his ability to use them by asking questions unrelated to the case. The charts were approved for use at trial by the advocates and judge; however, the case did not go to trial.

In the case of a five year-old girl with normal communication, the intermediary proposed that puppets be considered as an aid if communication with her became difficult.<sup>128</sup> The intermediary and child protection officer prepared a written strategy in advance of the interview governing how puppets would be used. Issues covered included:

- reasons for use: the girl was very active, with short attention span. During assessment, it was observed that the use of puppets held her attention. Also, she might find it less threatening to tell her story via a puppet;
- timing of use: if standard questioning proved ineffective, the puppet might be used to help her understand the conversation with the police interviewer at the beginning of the interview and to demonstrate 'truth and lies'. If she was losing interest or was reluctant to speak at the serious part of the interview, the officer might bring in the puppet;
- points to bear in mind: it had to be established that the girl did not see this as a 'pretend' game. The puppet would not be used as a reward for answering questions in a particular way. Where possible, the most serious parts of the interview would be carried out without its use.

A judge agreed to the admissibility of five 'expression faces' used by a young child at interview but the defence criticised the inclusion of only one 'happy' face.<sup>129</sup>

Aids were prepared and agreed for use in two trials but were used in only one, where the adult witness (who had an expressive disorder and mild learning difficulties) routinely used a picture book for communication. The intermediary prepared some additional pictures, for example to indicate rooms in her home, which were agreed by the advocates and judge. There were occasions at trial when the intermediary suggested using the book when not enough time was given to do so. The intermediary's wishes about how the contents of the book should be arranged were not put to the judge.

## Payment

Responsibility for payment for use of aids needed to be clearer. In a Crown Court case, the police officer experienced difficulty in arranging for a microphone to be provided, as recommended by the intermediary for an adult victim with cerebral palsy and quiet speech. The fee to hire the microphone was £550. He said the court manager advised him that the provision of amplification – or anything to do with special measures – was 'not down to the court'.<sup>130</sup> The CPS was also reluctant to pay.

## Key messages

Aids used in the criminal justice process must:

- accommodate the needs of the individual witness;
- accommodate the needs of interview or court. Even where the witness uses the aid routinely, some adaptation is likely to be needed for criminal justice purposes;
- be transparent, providing balanced options in answering questions, not suggest desired

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<sup>128</sup> This case was scheduled for trial after the end of the evaluation but preliminary agreement had been obtained from a judge (not the trial judge) for use of the puppet at trial.

<sup>129</sup> This case had not yet gone to trial when the evaluation ended.

<sup>130</sup> The Witness Charter consultation (2005) includes a commitment that the prosecution or defence will ask court staff to provide for the witness's special needs as a result of a disability or medical condition (Standard 25).

answers or lead the witness;

- be agreed and documented in advance where innovative approaches are proposed; where cost will be incurred, this must be resolved ahead of time.

## Appendix 6. Intermediary reports

It is vital that intermediaries can give a clear written explanation of the nature and implications of the witness's communication needs. This assists police in planning interviews and those at court to plan the way in which the witness's evidence is taken. The evaluation showed that intermediary reports were a highly significant factor in the favourable response of criminal justice practitioners and judges to the intermediary scheme.

The Inns of Court School of Law provided a draft template ('Reporting to court as an intermediary' 2004) for those in training. Of the 44 intermediaries in the 2006 survey who had assessed a witness, 42 had prepared a report but only 35 (83%) had used the template. This may have been due in part to the fact that intermediaries were asked to produce reports that were not just for court but to assist the police plan interviews; document why an interview did not appear feasible; and (post interview) to support prosecution files to the CPS.

**Table A6. 1** Reports prepared by intermediaries

Stage report prepared	Number of witnesses in respect of whom a report was prepared	Number of intermediaries who prepared a report
After assessment but before interview (if any)	51	26
After an investigative interview	52	26
Specifically for trial	29	15

Procedural Guidelines (section 3.9.11, 3.10.5, 2005) anticipate that the intermediary will be asked to prepare a briefing note for the court identifying specific issues to be considered:

- issues relating to the physical and mental well-being of the witness;
- the witness's communication system and the implications for the appearance in court;
- changes in court layout, the positioning of individuals in court and the TV link room;
- technical aids;
- concentration and comfort spans, including how these might vary at different times;
- the witness's communication style;
- approaches to questioning "which would assist the witness to give best evidence".

The report may also address procedures to be agreed by the court about how the intermediary will communicate concerns, including:

- the physical position of the intermediary, witness and court personnel;
- making the communication process transparent to the members of the court;
- how the intermediary can alert the court to issues or concerns such as tiredness, distress, lack of understanding on the part of the witness and factors hindering effective

communication;

- how these issues can be managed when evidence is given by TV link (“the best live link facilities should be used to maximise quality, lines of sight and ease of signalling” section 3.10.6).

### Whether witnesses aged 14 and over understand the oath

In relation to witnesses of 14 and older, intermediaries should advise the court about the witness’s understanding of the words of the oath. Competent witnesses who do not understand the oath may give evidence unsworn.<sup>131</sup> There was often discussion in court about this just before witnesses gave evidence. In one case, the defence advocate insisted that the witness was an adult and “had to take the oath”. In another case, a district judge observed that it was desirable for the prosecutor to meet the witness ahead of time so that he could form a view as to whether the witness should give sworn or unsworn evidence. The judge said it would have been helpful if the witness’s understanding of the oath was addressed in the intermediary’s report.

### Status of reports

Procedural Guidelines distinguish the role of the intermediary from that of the expert witness (section 2.3.8, 2005). In one case, the district judge raised the question of the ‘evidential value’ of the intermediary’s report which observed that the witness “experiences some difficulties with questions that involve more abstract terminology”. In his reasons for acquittal, the district judge described the intermediary report as an agreed document:

*“It does not say and cannot say if [the witness] is telling the truth but it does point out the difficulty she has in telling other people what has happened and a particular difficulty in being able to describe abstract concepts - ideas rather than things. When I asked [if the injury which was the basis of the charge] was on purpose or accident, although she was doing her best, I don’t think she was able to understand the difference or give reliable evidence as to which it was”.*

After the trial, the prosecution queried whether the information in the intermediary’s report should be used to weigh the evidence. While not commenting on the particular case, the CPS Policy Division advised that an intermediary’s report which was not in the form of a ‘section 9’ statement was not admissible evidence at trial. The report was put before the court as a pre-trial issue only, to support the special measures application. Information from an intermediary to the court was there as a guide, to inform and assist and give the court a better understanding of the witness’s communication and other needs.

### Sample review of reports

A sample of 35 reports was examined as part of the evaluation. Quality was variable and a few had not been carefully proof read. Reports ranged from two to 29 pages in length:

- only five (14%) began with a clear statement of purpose.<sup>132</sup> For a further 25 (71%), the purpose could be inferred from the content;
- 21 (60%) included a facesheet. No ‘headed’ facesheet had been provided to pool members. One report was on NHS letterhead;
- six (17%) complied with recommendations on font, spacing and numbering;

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<sup>131</sup> Section 56, Youth Justice and Criminal Evidence Act 1999, states that a witness may not be sworn unless he has reached the age of 14 and “has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath”.

<sup>132</sup> Some notes prepared for the police and not included in this sample did not even identify the intermediary.

- eight (23%) had a contents page (but three of those omitted page numbers);
- 10 (29%) included the intermediary declaration;
- 22 (63%) contained a chronology of events leading to the assessment although this was sometimes embedded in another section such as 'background' or 'introduction'.

Some intermediaries observed that key recommendations were not acted on or 'taken seriously'. It is therefore important for reports to follow the template and begin with a clear summary listing the actions that the intermediary suggests are necessary.

Reports were generally thorough in describing the witness's abilities in respect of comprehension and communication. Eighteen (51%) gave an indication of the witness's developmental age (in one case, the ages quoted in the summary and the body of the report were different).<sup>133</sup> Reports were uneven in providing practical advice. Phrases such as 'keep sentences short and simple', 'avoid double negatives' and 'present one idea at a time' were commonplace. Only 12 reports (34%) contained example questions to assist questioners.

Most reports made explanations accessible to the non-specialist but a few failed to follow the template in avoiding jargon. Some used technical terms to describe the witness's capabilities without giving illustrative examples. Judges in interview were sometimes unclear about the practical implications of the advice given, for example what was meant by the number of desirable 'key' words per sentence, or the need to use sentences with limited 'information' words.

Intermediaries were often concerned about the impact of pre-trial delay on the memory of the witness. They were unsure whether they should express a view in their report, or at hearings, about the impact of adjournments on witness recall. One barrister said it would be helpful if intermediaries expressed a view because otherwise the impact of delay on the witness's memory and ability to communicate might not be taken into consideration in listing the case.

Intermediaries are expected to consider the range of special measures and whether these are likely to improve the witness's evidence or might inhibit evidence being tested effectively. Some reports failed to explain why use of an intermediary would maximise the quality of the evidence or gave an inadequate reason, for instance referring only to a child's age. One defence barrister thought that the report had not fully justified use of the special measure:

*"I was not overly happy with how little explanation the intermediary gave. The recommendations to improve the quality of evidence could, with care, have been fulfilled without the intermediary. I didn't see the connection between her recommendations and the conclusion that an intermediary was needed".*

Many intermediaries wanted to have example reports to look at and were keen for support through a review process, with guidance about what information and judgments from their professional background would be of most use to criminal justice system practitioners. Towards the end of the evaluation, the secretariat and Assessment Committee initiated a process for updating the Inns of Court template and producing guidance on reports required for other purposes. Options were being considered to monitor and support report-writing.

## Key messages

In their reports, intermediaries should:

- follow the Inns of Court template;

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<sup>133</sup> Some intermediaries felt that reference to an equivalent developmental age for a witness with learning difficulties was inappropriate and misleading: however, criminal justice practitioners and judges always found such an indication helpful.

- begin the report with a summary listing the actions that the intermediary considers necessary;
- identify the specific issues to be considered as listed in sections 3.9.11 and 3.10.5 of Procedural Guidelines;
- address procedures to be agreed by the court about how the intermediary will communicate concerns;
- consider the implications of the use of technology on the witness's evidence and the intermediary's role;
- advise the court about whether the witness understands the oath;
- avoid jargon;
- give illustrative examples of the witness's capabilities;
- explain why use of an intermediary would maximise the quality of the witness's evidence.

## Appendix 7. Support of witnesses for whom an intermediary is appointed

Each of the 16 witnesses who gave evidence received a pre-trial familiarisation visit to court<sup>134</sup> though it was not possible to establish how many of the 15 who gave evidence by TV link were permitted to practise on the equipment beforehand. Twelve were juveniles but only three received materials from the Young Witness Pack; it was not clear whether any had seen the young witness video. Eleven witnesses were accompanied at the familiarisation visit by intermediaries, who found this helpful because it gave them the opportunity to see court facilities, build rapport with witnesses, establish their views about special measures and discuss arrangements with the Witness Service. Witnesses and intermediaries spoke positively about the support received from the Witness Service<sup>135</sup> on the day of trial. For example, the care worker for one witness said:

*“The Witness Service was excellent. I don’t think they could have done any more for him. Both the Witness Service and intermediary made the witness feel relaxed and calm”.*

However, Witness Service personnel often felt inadequately prepared to deal with the communication needs of some witnesses. Several said it would have helped to have received advice from the intermediary, perhaps through receipt of relevant parts of their reports.

Although the support provided to these witnesses was appreciated, there was no assessment of whether additional pre-trial preparation commensurate with their needs should have been offered. Nor was there clear responsibility for coordinating support arrangements. For example, no transport was provided to bring witnesses in wheelchairs to court<sup>136</sup>; no hoist was obtained (even though this need was known), therefore their incontinence pads could not be changed for the day they were at court; and there was a failure of communication when a young witness with autism had to use a different TV link room from the one ordered by the court to be shown on his pre-trial visit. Witness Care Units (introduced during the course of this evaluation) have become active in flagging up the need for intermediaries for previously overlooked eligible witnesses. They will doubtless assist in improving coordination but it is not their role to provide additional pre-trial familiarisation. The national Witness Service is available in every criminal court but receives government funding to provide an enhanced service to vulnerable witnesses in fewer than half of all Crown Court centres.<sup>137</sup>

The ‘witness profiling’ model scheme could help address these problems. In 1998, Liverpool City Council Investigations Support Unit established a ‘witness profiling’ protocol between social services, the police and CPS concerning witnesses with a learning disability or difficulty (defined in the protocol as a recognisable intellectual impairment). The protocol sets out standards for preparing the vulnerable witness for court and for preparing the court for the vulnerable witness. The unit works with the witness over time and alerts the court to his or her needs through a ‘profile’ report which goes to the judge and both legal representatives. This report describes the witness’s functional skills, identifies problems and offers solutions or ways to reduce the impact of difficulties. The unit also works closely with the Witness Service.

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<sup>134</sup> The Witness Service confirmed that one five year-old was not identified as a young witness on the List of Witnesses to Attend Court and that they were only told about him the day before trial. The police officer took the witness on a pre-trial visit with the trial intermediary but did not refer him to the Witness Service. The boy did not receive any other preparation for court such as going through Young Witness Pack.

<sup>135</sup> At two Crown Court centres, the Witness Service proved particularly effective in flagging a witness’s need for an intermediary where this had previously gone unrecognised. In some instances where this happened, there was enough time to request an assessment but in at least one case it came to light only the day before the trial when it was too late for a registered intermediary to be appointed.

<sup>136</sup> No transport was offered to witnesses in some other trials.

<sup>137</sup> The enhanced service includes earlier and more frequent contact and home visits. Victim Support National Office explained that some areas provide an enhanced service at both Crown Court and magistrates’ court level, whereas other areas are able to provide the enhanced service at only some of their courts.

The CPS has sponsored local seminars on 'witness profiling' in a number of criminal justice areas. The scheme had originated in Merseyside, the first intermediary pathfinder area, but unfortunately no Merseyside trial case was also the subject of a social worker's 'witness profile'.<sup>138</sup> The evaluation came across some confusion about witness profiling and the role of intermediaries. Guidance from the CPS is needed to emphasise the complementary nature of these services and address potential overlaps between the assessment and report of the intermediary and the witness profile.

The intermediary is not a witness supporter. In most cases, witnesses and intermediaries were accompanied by a member of the Witness Service or an usher. One adult witness with learning difficulties was also accompanied by his care worker. In two cases, young witnesses were accompanied by a relative. The intermediary should not be held responsible for briefing and controlling the behaviour of the supporter: in the case of a young witness, a relative spoke to the child several times during his evidence in the TV link room. The district judge instructed the intermediary to keep her quiet. She tried to do so (there was no usher present) but the relative had not been instructed directly by the judge to remain silent. Intermediaries were often inappropriately treated as having a support role, for example, being asked to remain with witnesses during the lunch hour or while a parent gave evidence, although this was not part of their function and they are not supposed to be alone with the witness.

There were gaps in the range of explanatory materials for vulnerable witnesses and those with communication needs. The first leaflet targeted at witnesses ('Helping witnesses communicate: Guidance for witnesses about the intermediary scheme' 2004) had not reached its target:

- 'Helping witnesses communicate' did not reach any of the witnesses prepared for trial and was not known to most of the police officers contacted during the evaluation. A more simply worded leaflet is to be designed by VOICE UK but effective distribution to witnesses will remain a challenge;
- the series 'Books Beyond Words' includes one entitled 'Going to Court' for people with learning disabilities (1994). This predates the use of special measures for adults. A new booklet is planned which will refer to intermediaries;
- there is no booklet in the Young Witness Pack explaining the intermediary role to children.

On a local basis, it would be helpful if individual courts and the Witness Service collaborated to produce pictures of actual court facilities such as courtrooms (with and without people), separate waiting areas and TV link rooms. One intermediary wished to put together such materials to help remind a witness what she would see at court but was unable to get permission to take photographs in time to assist the witness before the trial.

## Key messages

Support and court preparation of witnesses for whom an intermediary is appointed should include:

- assessment of what pre-trial preparation is commensurate with their needs;
- clear responsibility for coordinating support arrangements, including transport and services relating to the witness's disability;
- at least one pre-trial familiarisation visit to court (and more if needed or if the trial is delayed) in which those giving evidence by TV link practise on the equipment beforehand;
- being accompanied at the familiarisation visit by the intermediary;

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<sup>138</sup> Devon and Cornwall CPS has sponsored a witness profiling project but it was not active in Plymouth, the only part of the area using intermediaries.

- young witnesses being taken through print materials from the Young Witness Pack and shown the young witness video;
- advice to the witness supporter from the intermediary about communicating with the witness;
- consideration of who will provide emotional support to the witness while giving evidence (the intermediary is not a supporter);
- explanatory materials for vulnerable witnesses and those with communication needs about the intermediary scheme;
- pictures of actual court facilities such as courtrooms (with and without people), separate waiting areas and TV link rooms, to help prepare vulnerable witnesses for what they will see at court.

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