Giving the Vulnerable a Voice in the Criminal Justice System: The Use of Intermediaries With Individuals With Intellectual Disability

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People with intellectual disability (ID) are significantly over-represented at all levels of the criminal justice system. Disability in intellectual or adaptive functioning can disadvantage their participation in legal proceedings, particularly when faced with complex questioning strategies during investigative interviews and a trial. Currently available supports, such as the provision of a support person, are welcome, but there is a need for more active measures. We draw attention to the Witness Intermediary Scheme in England and Wales, whereby Registered Intermediaries serve to ensure that communication with vulnerable witnesses is as “complete, accurate and coherent as possible.” After briefly outlining this scheme, we explore the currently available supports for individuals with ID involved in the Australian criminal justice system. We then argue that the implementation of such a scheme within Australian jurisdictions is necessary to facilitate vulnerable witnesses’ access to justice.

Key words: access to justice; criminal justice system; intellectual disability; registered intermediary; vulnerable witness.

Definition and Prevalence of Intellectual Disability

Section 306M(1) of the Criminal Procedure Act 1986 (NSW) (“the Act”) defines a vulnerable person as a child or cognitively impaired person. Cognitive impairment under s. 306M (2) of the Act includes an intellectual disability (ID). According to the Diagnostic and Statistical Manual of Mental Disorders–5 (DSM-5; American Psychiatric Association, 2012), ID is defined as:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

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The causes of ID are varied and include brain injury or infection before, during or after birth, growth or nutrition problems, genetic causes or exposure to toxins (e.g. drugs or alcohol) during the developmental period. Many cases of ID are of unknown cause (NSW Council for Intellectual Disability, 2011). Individuals diagnosed with ID may experience a range of difficulties affecting cognition (e.g. communication, concentration, learning and memory, abstract thinking, planning or problem solving), social adaptive function (e.g. maintaining eye contact, interpersonal skills, regulation of behaviour) and/or academic ability (e.g. trouble with reading, writing or understanding information) (Intellectual Disability Rights Service, 2009). The degree of impairment and the extent to which it impacts upon their lives (i.e. the level of disability) varies across individuals and is also dependent on a number of variables such as the individual’s social supports, coping skills and the specific demands of any particular situation. According to data from the Australian Institute of Health and Welfare, the prevalence of ID in the general population has been shown to be about 2.2% in NSW and 2.5% nationally (NSW Law Reform Commission, 2012).

### ID Within the Criminal Justice System

Several studies have demonstrated that people with ID are significantly over-represented at all levels of the criminal justice system, as defendants (Baldry, Dowse, & Clarence, 2011; Vanny, Levy, Greenberg, & Hayes, 2009) and as victims of crime; the latter are the focus of this article. Wilson and Brewer (1992) found that the crime rate for offences such as physical assault, sexual assault and robbery against persons with ID was nearly three times that of their non-disabled counterparts. Alarmingly, Carmody (1991) reported that 50—90% of people with ID will be subjected to sexual assault during their lifetime, with many such cases going unreported by both victims and those who work with them (Johnson, Andrew, & Topp, 1988).

The increased vulnerability of persons with ID to criminal victimisation has been ascribed to several factors, including their high levels of dependence on others for their daily needs, their limitations in cognition and adaptive function, their social and living circumstances, their lack of knowledge of their rights and, for crimes involving sexual assault, their inability to assert their rights (Hayes, 1992). For crimes involving physical assault, compared with non-victims with ID, victims with ID were more likely to demonstrate an inability to regulate their own behaviour or diffuse the situation, which in turn was thought to provoke a reaction from the offender (Nettelbeck & Wilson, 1996; Wilson, Seaman, & Wilson, Seaman, & Wilson, Seaman, & Nettelbeck, 1996). Interestingly, the degree of cognitive impairment (i.e. IQ score) was not related to the likelihood of becoming a victim of physical assault (Wilson, Nettelbeck, Potter, & Perry, 1996).

In view of their cognitive and other limitations, people with ID are expected to be more vulnerable than those without ID when they come into contact with the criminal justice system (Gudjonsson & Clare, 1995). For example, they may have difficulty understanding their rights, and may have difficulties coping with a police interview, with giving evidence, with understanding court proceedings and with decision-making tasks (Cederborg, Danielsson, La Rooy, & Lamb, 2009, Kebbell, Hatton, & Johnson, 2004, Murphy & Clare, 2006). Research has indicated that individuals with ID are more suggestible and more likely to acquiesce than their counterparts of average intelligence (Gudjonsson & Clare, 1995; Kebbell & Hatton, 1999) due to their cognitive limitations, the effects of social desirability and the uncertainty and pressures of the interview (Gudjonsson & Henry, 2003). Cross-examination techniques have been shown to result in memory distortion in persons with ID.
(Kebbell et al., 2004), with repetition and option posing causing persons with ID to change their responses; this in turn detracts from their usefulness and credibility as witnesses. Similarly, relevant answers may not be given because the vulnerable witness does not fully comprehend the questions put to them, and may not readily seek clarification (Cossins, 2009).

However, when interviewed in a non-leading manner, using open or free recall questions, people with ID can make reliable witnesses (Kebbell, Hatton, Johnson, & O’Kelly, 2001; Temes & Yuille, 2008). Furthermore, studies have shown that although people with ID do tend to provide less information regarding events they have personally experienced compared with people without ID, the accuracy of what they do provide is no different (Gudjonsson & Gunn, 1982; Perlman, Ericson, Esses, & Isaacs, 1994). Hence, in order to facilitate their reliability as a witness (or defendant), questions should be short and succinct (i.e. not multi-component), phrased in plain everyday language and be open rather than closed ended (e.g. “tell me what happened” rather than “did you answer the phone?”) and double negatives or rapid-fire questions should be avoided (Intellectual Disability Rights Service, 2009). These findings have led to the development and implementation of various supports for vulnerable persons involved in the criminal justice system.

Currently Available Supports for Vulnerable Adults Involved in the Australian Criminal Justice System


1. Familiarisation with and explanation of the legal process and court procedures;
2. Giving of evidence from behind a screen or via closed circuit television;
3. Monitoring of their respective cases with the provision of relevant updates and debriefing;
4. Attendance and support during meetings with legal representatives;
5. Planning and evaluation for special needs and support in preparation for court (including the use of electronic communication aids);
6. Provision of court companion support; and
7. Referral to counselling services.

As part of their training, police, lawyers and members of the judiciary have increasingly been given guidelines as to how to recognise individuals with ID to enable the effective implementation of the available supports (NSW Law Reform Commission, 1996). Furthermore, where police suspect an individual has an ID they are required, in most Australian jurisdictions, to conduct interviews in the presence of an independent third person (a family member, friend or independent person), whose role is to facilitate communication during the interview process, provide emotional support and ensure that the person with ID understands his or her rights and the caution (Villamanta Disability Rights Legal Service, 2012). For some vulnerable adult witnesses interviews may also be conducted by specially trained police officers, recorded and then used as evidence-in-chief in court (A. Watts, Office of the Department of Public Prosecutions, personal communication, March 28, 2013). However, research has shown that it is not uncommon for an individual’s communication skills to be overestimated (Baldry et al., 2011; NSW Law Reform Commission, 2012), and it is perhaps unrealistic to expect already time-poor police officers, lawyers and judges to become experts in the communication needs of those with ID.
Equal Rights

The barriers faced by individuals with ID as a result of their disability represent significant problems within the criminal justice system and impact upon the rights of persons with ID (Australian Human Rights Commission, 2013). The Convention on the Rights of Persons with Disabilities (CRPD) was entered into force on 3 May 2008. Article 13 of the CRPD requires

that persons with disabilities have the right to recognition everywhere as persons before the law, and; enjoy legal capacity on an equal basis with others in all aspects of life, and; take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Despite this, some 6 years after the CRPD came into force, concerns continue to be raised that many people with disability in Australia are not receiving appropriate supports, adjustments or aids to enable them to participate in the criminal justice system. Negative attitudes and assumptions about people with disability have also proven to be problematic and often result in them being viewed as unreliable, not credible or not capable of giving evidence or participating in legal proceedings (Australian Human Rights Commission, 2013). A recent example of this was demonstrated in a South Australian matter, where the case against a man accused of sexually abusing children with ID was dropped because the children were held to be unreliable witnesses (http://www.abc.net.au/worldtoday/content/2012/s3665812.htm).

Taken together, the extant supports for people with ID involved in the criminal justice system, although welcome, fall well short of averting the current problems and difficulties. In particular, the communication needs of each person will differ and questioning should be modified to suit the needs of the individual. Several countries have introduced promising approaches to this significant problem, for example the Witness Intermediary Scheme in England and Wales, which is discussed further below.

The Intermediary Special Measure in England and Wales

In England and Wales, a major step forward for the rights of persons with ID in the criminal justice system has been the introduction of the Witness Intermediary Scheme, through which the intermediary special measure is facilitated by the provision of a Registered Intermediary (RI). This measure is one of the special measures created by Part II of the Youth Justice and Criminal Evidence Act 1999 (UK). Cognitive, physical or other impairments are not viewed as unsurmountable obstacles. Rather, these are assessed by RIs, who are registered professional communication specialists specifically trained to advise on how such barriers can be circumvented within the criminal justice system. The role of the RI is to ensure that communication with vulnerable witnesses is as “complete, accurate and coherent as possible” during police interview and the trial process (Cooper, 2012, p. 2).

To make an application for the intermediary special measure, two conditions must be satisfied (s. 16, Youth Justice and Criminal Evidence Act 1999). The prosecution or defence witness must be:

- “vulnerable”: i.e. under 18 at the time of the hearing (s. 16(1)(a)); or suffering from a mental disorder within the meaning of the Mental Health Act 1983 (UK) or otherwise has a significant impairment of intelligence and social functioning; or has a physical disability or physical disorder (s. 16(2)); and
- someone falling within s. 16(2) whose evidence is likely to be diminished in quality (s. 16(1)(b)) in terms of completeness, coherence (ability to give answers which address the questions put to the witness and can be understood both individually and collectively) and accuracy (s. 16(5)).
Section 29(2) states that the function of an intermediary is to communicate:

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

Training, Role and Process

The significant roles and responsibilities faced by RIs are reflected in expert specialised training; RIs are professional communication specialists (e.g. speech therapists, occupational therapists, psychologists, social workers) who are selected, trained and accredited by the United Kingdom (UK) Ministry of Justice. As part of their training course with the Ministry of Justice, they receive instruction on the court proceedings and the rules of evidence and they are assessed on their knowledge and function of the intermediary role within the criminal justice system. Their primary responsibility is to the court; that is, they are impartial, they are not an advocate for either side nor are they an expert witness. They are required to comply with their Code of Conduct (Crown Prosecution Service, 2012; O’Mahony, 2010).

Unlike the present situation in some Australian jurisdictions, where a vulnerable witness’ communication difficulties may prevent their evidence from being heard, in England and Wales the situation is vastly different. The process begins by a police officer or legal practitioner identifying that the witness has communication needs. A referral is then made to the Witness Intermediary Scheme matching service, which assigns a suitable RI according to specialism, availability and geographical location. There follows an evaluation of the identified vulnerable witness’ communication needs and level of understanding by the RI. Based on their findings, the RI provides a written report that outlines their recommendations and “ground rules” for communication with the witness, which is relayed to the police and the court in order to help achieve the best evidence from the vulnerable witness during the investigation and at trial (O’Mahony, 2010) (see Figure 1).

Importantly, the RI takes an active role to facilitate communication during police interviews and in the courtroom. Prior to trial, a “ground rules hearing” must be held between the judge, prosecution and defence counsel and the RI in order to discuss the latter’s recommendations and reach an agreement on suitable methods of questioning and communication during the trial, including the use of communication aids (e.g. symbol books or electronic devices) where necessary (part F.1, Application for a Special Measures Direction). During police interview and in the courtroom “the intermediary will facilitate communication between counsel and the witness and must intervene when necessary if complex questions are asked or if the agreed ‘ground rules’ are not adhered to” (O’Mahony, 2010, p. 234).

It should be noted that other measures may also be put into place, such as giving evidence in a separate room, video evidence-in-chief, the use of screens to block the witness from the view of the accused, exclusion of the press or public from court, or the removal of wigs and gowns to reduce formality (Cooke & Davies, 2001).

Evaluation of and Support for the Witness Intermediary Scheme

The establishment of the Witness Intermediary Scheme in England and Wales has been extremely positive, with an evolving evidence base attending to the positive benefits.

The Witness Intermediary Scheme was first implemented as a pilot project in 2004 in six areas in England and Wales. Following a successful evaluation, it was rolled out nationally in June 2007. Referrals to the
scheme have markedly increased over time. According to Ministry of Justice figures (J. Connolly, Ministry of Justice, personal communication, July 12, 2013), there have been over 6000 requests for RIs since inception, with an average referral rate of 120 per month in 2013 (for all types of vulnerable witnesses). As of August 2013, there are 102 RIs on the register, with 77 classed as active (J. Connolly, Ministry of Justice, personal communication, October 7, 2013).

Figure 2 shows the number of requests for RIs over a 6-month period in 2013, with a significant proportion of requests made for those with ID (known as learning disability in the UK).

In 2007, Plotnikoff and Woolfson conducted an evaluation of RI services and found that there continued to be some confusion over the role of intermediaries amongst legal practitioners (with some mistaking them for expert witnesses, witness supporters or
interpreters). Plotnikoff and Woolfson (2011) further noted that “even where RI recommendations are accepted at the ground rules hearing, some advocates find it difficult or seem unwilling to adapt their questioning to ensure it is appropriate to the communication needs of the witness” (p. 8). Findings from a 2011 survey (Cooper, 2012) have also indicated that in many cases, RIs were not being involved early enough in the legal process (i.e. at the start of police investigations), with some vulnerable witnesses being left uncertain only days before the trial as to whether any special measures will be implemented. Despite these challenges, the overall evaluation of RI services found that “almost all those who encountered the work of intermediaries in pathfinder cases expressed a positive opinion of their experience” (Plotnikoff & Woolfson, 2007, p. iv), with most criminal justice professionals accepting that RIs are impartial, with their duty being to the court. The authors further advised that intermediaries had extended their role to other areas such as offender identification processes. For a more detailed discussion regarding the RI scheme in England and Wales, see Woodward, Hepner, & Stewart (2014).

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It is clear that the problem of individuals with ID within legal proceedings has been recognised in parts of the United Kingdom where the use of RIs has consequently been adopted as a provision to facilitate access to justice and parity. However, correspondence with various organisations has revealed that similar systems have yet to be adopted for vulnerable adult witnesses in any Australian jurisdiction.1

Although there are provisions in New South Wales for a vulnerable person to have a supportive person (e.g. parent, guardian, relative, friend or support person) present while they are giving evidence (e.g. s. 306ZK or s. 294C, NSW Criminal Procedure Act 1986), acting even as an interpreter (e.g. ss. 306ZK (3b) NSW Criminal Procedure Act 1986), it would have to be clarified as to what the supportive person would be doing and whether or not they could actively intervene to assist with communication issues (A.  

Figure 2. Monthly comparison of requests for matching service received by witness vulnerability (J. Connolly, MoJ, personal communication, February 02, 2014).
Watts, Office of the Director of Public Prosecutions, personal communication, January 31, 2014). Furthermore, the objectivity and impartiality of a supportive person that is known to the vulnerable person may be called into question, and it also seems unlikely that such a supportive person would have sufficient training and/or expertise to reliably facilitate communication within the context of a police interview or trial to the degree that an RI can.

Interestingly, the jurisdiction of Western Australia currently has provisions for the use of a communicator with child witnesses, whose role it is to explain difficult questions to child complainants and to explain children’s evidence to the court (Richards, 2009; see also Woodward et al., 2014, for a more detailed discussion regarding the implementation of intermediaries for child witnesses). The jurisdictions of Queensland (QLD) and New South Wales (NSW) have previously considered the implementation of intermediaries for children: these arguments are briefly discussed here due to their likely relevance when considering the arguments for and against the use of intermediaries with vulnerable adult witnesses.

When considering the situation in Queensland in 2000, the Law Reform Commission noted that in Western Australia intermediaries had been “rarely used for child witnesses in Western Australian courts...” and in the two cases cited “the mere presence of the Intermediary gave the child sufficient confidence to be able to testify” (Queensland Law Reform Commission, 2000, pp. 43, 44). In addition, a taskforce established by the NSW Attorney-General in 1995 considered, but did not adopt, the Western Australian child communicator provisions. Opponents argued that too many processes would be placed between the witness and the court, and concerns were also raised regarding the possible contamination of the child’s evidence by the intermediary. In addition, it was held that the communication difficulties could be mitigated by other available means (e.g. increased exposure of the judiciary and legal profession to relevant issues regarding child witnesses).

Similarly, the Australian Law Reform Commission, the Human Rights and Equal Opportunity Commission and the Queensland Law Reform Commission argued that the communication difficulties experienced by child witnesses could be mitigated by judges and magistrates exercising better control of proceedings in their court and by having the judiciary and legal practitioners undergo training in appropriate skills for dealing with children. Concerns were also raised regarding the possibility of inaccuracies as a result of questions and answers being reworded by the intermediary and by the addition of another layer of complexity in the courtroom, which “could unduly lengthen and complicate the trial process” (Queensland Bar Association cited in the Queensland Law Reform Commission, 2000, p. 53) and add to the already large number of adults playing a role in the process (Queensland Youth Advocacy Centre cited in the Queensland Law Reform Commission, 2000, p. 53). Others argued that it would be too difficult to change an “entrenched legal culture” and certain child witnesses may be disadvantaged by the lack of a suitable qualified communicator where judges and lawyers had not participated in any communication skills training (Queensland Law Reform Commission, 2000).

Legislation and Law Reform

Despite the lack of intermediary services for adults in Australia, it is interesting to note that the uniform Evidence Acts of the Commonwealth, NSW, Victoria, Tasmania and the ACT impose a duty upon the court to intervene to disallow improper questions (Australian Law Reform Commission, 2009), including questions that are:

- “misleading or confusing; or
- unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate.”

It could be argued that lengthy, complex or leading questions posed to vulnerable witnesses (such as those with ID) may well be considered misleading, confusing or otherwise inappropriate. Interestingly, and despite the legislation, the Australian Law Reform Commission (2009) observed that “the powers of judicial officers to intervene to prevent improper questioning are either ‘exercised sparingly’ or sometimes have no effect on defence counsel questioning” (p. 1).

The Way Forward?

At the time of writing, encouragingly it appears that a number of Australian jurisdictions are considering the issue of intermediaries in the criminal justice system (V. Bahen, Child Witness Service, VIC, personal communication, March 8, 2013). For example, organisations in NSW have demonstrated awareness and increasing interest in the RI scheme (e.g. R. Boxwell, Education Centre Against Violence, personal communication, March 27, 2013; A. Watts, Office of the Director of Public Prosecutions, personal communication, March 28, 2013). Following an extensive review of witness intermediary schemes, both in England and Wales and in other countries (e.g. South Africa, Austria and Norway) the Office of Public Prosecutions in New South Wales has been actively pursuing this cause, and the Department of the Attorney General and Justice has also advised that it is looking into this issue on behalf of vulnerable witnesses (A. Watts, Office of the Director of Public Prosecutions, personal communication, March 28, 2013). Recommendations have also been put forward by the Australian Law Reform Commission (A. Watts, Office of the Director of Public Prosecutions, personal communication, March 28, 2013).

In 2012/2013, work has begun on a proposal to the Victorian Attorney-General regarding the implementation of intermediaries, and in South Australia proposals to the Evidence Act to allow hearsay evidence have been propounded by organisations such as Dignity for Disability (http://www.abc.net.au/worldtoday/content/2012/s3665812.htm) with a disability justice plan including recommendations about the use of a communication facilitator and a proposed amendments bill to be released by the South Australian Attorney-General in the near future.

Summary and Concluding Remarks

The establishment of the Witness Intermediary Scheme in England and Wales has been extremely positive, with an evolving evidence base highlighting the positive benefits. Review of the pertinent literature and survey data indicated that RIs have been successfully implemented and that responses from legal professionals have generally been positive (Plotnikoff & Woolfson, 2011). That is, despite budget cuts throughout the legal system, referral rates have been increasing since inception of the Witness Intermediary Scheme, with a significant proportion of referrals in 2013 being for persons with ID, reflective of an area of need in this population. Importantly, the use of RIs has been documented as facilitating the court process rather than complicating matters and the impartiality of RIs is being increasingly accepted.

Areas that remain to be addressed include ongoing education of legal practitioners regarding the onus of impartiality on part of the RI. In addition, early identification of vulnerable witnesses is vital so as to enable the implementation of RIs, where appropriate, at the earliest possible opportunity (i.e. at the commencement of the investigative process) (Cooper, 2012).

In terms of the Australian criminal justice system, although there are a number of supports available for vulnerable witnesses,
provided by various organisations such as the Witness Assistance Service and Intellectual Disability Rights Service, these do not extend to facilitation of communication during the trial and do not involve specially trained, registered and impartial professionals. At present, aside from their legal advocates or a vigilant judge or magistrate, it would seem that the communication needs of vulnerable witnesses in New South Wales have not yet been as formally addressed as has been achieved in England and Wales. It was of interest to note that many of the representatives who were interviewed for this article thought that an intermediary would significantly and positively impact upon the experience of vulnerable witnesses in the criminal justice system. Many gave anecdotes regarding vulnerable witnesses who simply did not grasp what was going on around them (or happening to them) despite the extant supports.

While support persons are required to be in attendance during investigative processes involving a vulnerable witness, given that the support person is often a family member or friend (or a volunteer independent party), it is unclear whether such a support person would be able to accurately and reliably identify and voice their concerns regarding inappropriate questions in the legal context (e.g. whether they would even be able to identify a leading question themselves). Hence, their capacity to facilitate the communication process in a fair and effective manner is questionable, and of course a family member of friend is unlikely to be able to remain impartial.

Interestingly, the possibility of an intermediary for child witnesses has been considered in the jurisdictions of Queensland and New South Wales in the past, but a number of concerns had been raised regarding the possibility of contamination of the oral evidence and the unnecessary introduction of another layer of complexity to the court process. However, the success of the RI scheme in England and Wales indicates that these concerns are not well founded; the RI is impartial and they are able to simplify issues for the court by facilitating communication.

It had also been argued in Queensland and New South Wales that the judiciary, lawyers and police services should undergo further specialist training on the communication issues experienced by vulnerable witnesses (possibly as has been successfully implemented for front line police officers in managing mental health consumers; NSW Police Force, n.d.). A starting point for such a training programme might be the examination of court and interview transcripts involving vulnerable witnesses (including those with ID); however, the practical hurdles of implementing such a training programme (e.g. financial costs, time-poor legal practitioners and judiciary) would need to be weighed against the gains to be had with adopting the model in England and Wales.

Taken together, the evidence indicates that the implementation of an RI service would afford those who are vulnerable greater opportunity to their legal entitlement to a fair trial and a voice in the criminal justice system. The significant barriers faced by people with ID that exist in Australian jurisdictions deserve immediate action so as to facilitate this vulnerable group’s rights to circumvent their communication difficulties within the criminal justice system. Ongoing lobbying of relevant legal and government organisations will be the next key step in the way forward.

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Note

1. Correspondence with representatives from various organisations (e.g. Child Witness Service Victoria, Court Referral of Eligible Defendants Into Treatment, Office of the
Director of Public Prosecutions, Intellectual Disability Rights Service and Witness Assistance Service).

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