



## **RCSLT response to extending the use of intermediaries for vulnerable witnesses in Scotland**

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### **INTRODUCTION**

The Royal College of Speech and Language Therapists strongly support the use of intermediaries (and other special measures) to support vulnerable people throughout the criminal justice system. We urge that intermediaries are introduced as a statutory special measure under the 2004 Act (option two).

The evaluation of the pathfinders in England showed that intermediary referral is most commonly invoked where the vulnerable witnesses has communication difficulties. Current policy and practice is unsatisfactory, criminal justice practitioners often underestimate the prevalence of miscommunication with vulnerable witnesses and measures are invoked in an inconsistent manner. There are currently witnesses who do not have a voice, cannot give their evidence and are unable to gain justice. Failure to adopt intermediaries into the criminal justice system would result in unsatisfactory support to people with communication difficulties.

### **Benefits of intermediaries**

There is a range of benefits of introducing intermediaries to the Scottish legislative system. They assist in bringing offenders to justice, they increase access to justice for the witness, they save costs through facilitating efficient use of police time by flagging up at an early stage where it was not feasible for the police to interview the witness, they are of benefit at investigative stage and at trial where they neutrally facilitate communication and enable the witness to give their evidence. Further the use of intermediary's positively impacts on criminal justice objectives in relation to public confidence and witness satisfaction.

### **RCSLT response to the questions posed within the consultation**

**This response was produced following extensive consultation with Scottish speech and language therapists.**

#### **Question 1:**

**a) Do you feel that there are currently barriers to communicating effectively with child or adult vulnerable witness in the Scottish criminal justice system?**

YES

**b) If yes - what do you consider to be the nature and cause of any such barriers?**

The barriers to communicating effectively can be grouped into two main areas, firstly those that are due to the practitioners within the criminal justice system and secondly those that are caused by the inability of the witness to have their voice heard.

### **1. Criminal justice practitioners**

The main barrier to effective witness communication is due to courtroom officials, lawyers and judges lacking of awareness and insight into communication difficulties. Criminal justice practitioners often have an insufficient understanding of communication difficulties, which results in the collapse of cases.

### **2. Communication problems of the vulnerable witness**

The criminal justice system is often inaccessible to vulnerable witnesses. This is for two main reasons. Firstly vulnerable witnesses have communication difficulties and without assistance (from an intermediary) they are unable to tell their story and have their voice heard in court. Secondly witnesses have a lack of contextual knowledge and situational knowledge, which leads to increased anxiety and a decreased ability to communicate effectively.

Vulnerable witnesses can have a one or a number of communication difficulties which necessitate particular communication support provisions, for example vulnerable witnesses with communication difficulties or the preferred terminology - "Communication Support Needs" (CSN) may have difficulties:

- Understanding verbal non verbal or written communication of others
- Understanding complex language and concepts such as the ambiguity or implications of particular questions or answers
- Expressing themselves including difficulties describing past events coherently and feelings.

### **c) How could any such barriers be addressed?**

The RCSLT recommends communication barriers could be overcome by:

1. Taking steps with investigative teams, courtroom officials, lawyers and judges i.e. "criminal justice practitioners" to:
  - Raise awareness of people with CSN and the incidence of communication disability among vulnerable groups
  - Provide training, guidance and models of good practice in respect of providing equitable access for people with CSN throughout the criminal justice system in Scotland.

The RCSLT is developing training for criminal justice practitioners and recommends that this training be provided initially and as part of their ongoing continuous professional development. This training programme package is expected to be available in the spring.

2. Provision of quality Intermediary service to people with CSN as described below.

### **Question 2**

**a) Could better use be made of the court's powers within the current legal framework to help effective communication between a child or adult vulnerable witness and the court?**

YES and NO

**b) If yes, how?**

As RCSLT interpret the consultation document and what it says about current court powers then yes, certainly, better use could be made of these to the extent that the quality, access to and amount of current provision could be improved.

However, RCSLT believe that the potential of equality, fairness and improved outcomes (for witnesses, accused and the criminal justice system overall) offered by statutory provision of is significantly more desirable than simply trying to boost current provision particularly in light of “Pathfinder” experience in England and Wales.

RCSLT believe intermediaries must be introduced by legislation into the criminal justice system to support vulnerable witnesses.

### **Question 3**

**a) Could better use be made of training, guidance and awareness raising in improving communication between the court and child or adult vulnerable witnesses?**

YES

**b) If yes, how?**

**See answer to question 2 c) above**

Training must be compulsory for all criminal justice practitioners.

Training and guidance must focus on the difficulties that vulnerable witnesses have with receptive and expressive language and develop criminal justice practitioners’ skills and ability to deliver equitable access for people with CSN throughout the criminal justice system in Scotland.

**4. What would be the function and remit of an ‘intermediary’ if it were added as a statutory special measure under the Act?**

An intermediary’s role is to help witnesses with communication needs to give their best evidence in criminal investigations and trials by ensuring that witnesses can understand questions and communicate their answers.

The intermediary’s role at investigation interview and trials (and at each stage of the legal proceeding including preparatory court visits) is to enable ‘complete coherent and accurate’ communication to take place by neutrally facilitating communication.

**An intermediary’s role includes:**

- Accurately assessing the vulnerable witness’s receptive and expressive communication needs using both formal and informal assessment techniques.
- Using their assessment findings to develop communication strategies, which enable the witness to understand questions put to them and communicate their answers back.
- To write reports on the witness’s communication needs and strategies for managing these needs, which will be used by the court and police officers, and justifying any recommendations and the need for an intermediary if challenged.
- Describe the communication needs of the witness to the criminal justice practitioners (both in written report and ideally witness focussed meetings) and work with them to

enable the witness to participate in the criminal justice process. This can include advice in the structure of questions used and concepts that the witness has difficulty understanding.

- Where necessary, the intermediary actively facilitates communication between the witness and the other parties in the case to overcome a communication breakdown. For example the intermediary;
  - Explains questions and answers to the witness, without changing the substance or meaning of evidence.
  - Assists questioners to test the witnesses' evidence without providing an opinion on whether the witness is truthful, the intermediary.
- Provide an impartial professional source of advice and guidance to criminal justice practitioners dealing with vulnerable witnesses.
- Establishing credibility as an ambassador for the intermediary scheme.

### **5. Should an intermediary be available for the accused?**

YES

### **6. Should an intermediary be available in civil as well as criminal proceedings?**

YES

### **7. How could the costs associated with the use of an intermediary be met?**

Intermediaries should be paid for their work as any other professional. Money should be made available centrally from the government to fund the scheme.

Registered intermediaries should be able to claim travel expenses, subsistence allowance and overnight accommodation, as appropriate, for the period of time they are involved with intermediary duties. A standard hourly fee should be payable for all intermediaries whether employed or self employed. An unsocial hours rate should also be available to cover duties necessarily undertaken early morning or late evening on weekdays, on public holidays or on a Saturday or Sunday.

Employers should be able to claim compensation when they release an employee for intermediary duties or professional and developmental duties. This is when the employee would ordinarily have been working on the days in question and had not taken annual leave, time off in lieu of hours worked, unpaid leave, or equivalent on that days.

### **Question 8**

#### **a) What skills and background would an intermediary need to have?**

The RCSLT recommends that candidates meet a number of intermediary core competencies rather than hail from any particular professional backgrounds.

In England a candidate must provide evidence on how they meet the following six competencies if they wish to apply to become an intermediary – and RCSLT would recommend these also apply in Scotland. Intermediaries should have demonstrable competence to:

1. Establish rapport
2. Assess communication

3. Develop communication strategies
4. Facilitate communication
5. Establish credibility
6. Describe communication needs to others, orally and in writing

***More specifically, intermediaries should have the following skills and abilities and personal qualities and attributes:***

***Skills and abilities***

- Professional skilled in helping children or vulnerable adults (those with mental disorder, learning difficulties or physical disability or disorder) to communicate
- Ability to quickly establish rapport with children or adults with communication needs
- Experience in carrying out formal or informal assessments to accurately and quickly assess a vulnerable person's receptive and expressive communication needs
- Ability to develop strategies to enable people to understand and communicate
- Experience actively facilitating communication between a vulnerable person and another party to overcome a communication breakdown
- Excellent oral and written communication skills
- Experience working with a range of different professionals and ability to tailor information in a way that makes it accessible to all parties
- Experience in writing reports on a vulnerable person's communication needs

***Personal qualities and attributes***

- Professionalism: intermediaries are required to work with a range of different people including vulnerable witnesses, police officers and legal professionals. They must be able to adapt their approach accordingly
- Credibility: intermediaries must be able to establish a credible persona with both criminal justice professionals and vulnerable witnesses
- Approachability: intermediaries must present complex information, both verbally and written, in an easily accessible form to enable criminal justice practitioners to understand a witness's communication needs
- Flexibility: intermediaries can often be required to assess a witness within a matter of days so a flexible approach is required. Intermediary duties can take place at a variety of different locations so willingness to travel is important
- Impartiality: an intermediary is appointed to serve the court and the interest of justice, not the witness or any particular party in the case
- Resilience: intermediaries can be required to act in emotionally challenging cases such as child protection and sexual offences
- Ambassadorial skills: this is a new profession in the criminal justice system so intermediaries must be able to explain their role and present a professional persona.

**b) Would they have to be specifically trained and accredited?**

YES

**9. Please indicate whether you agree, disagree or are unsure about the following statements:**

**a) The individual needs of the witness (child or adult) would need to be assessed in advance and taken into account in deciding whether to appoint an intermediary as a special measure.**

YES AGREE

**b) The individual needs of the witness (child or adult) would be the decisive factor in deciding whether or not to appoint an intermediary as a special measure.**

YES AGREE

**c) The use of an intermediary should be treated as a ‘standard’ special measure for child witnesses if introduced under the Act**

RCSLT recognise and support the identification of all child witnesses as vulnerable. However RCSLT are not supportive of intermediaries acting for a child witness without first assessing that child’s needs, as would be the case if they are regarded as “standard” special measures.

RCSLT would wish to see intermediaries as “standard” special measures for child witnesses with the **additional** requirement of intermediaries to assess the child before committing to being any particular child’s intermediary.

**d) The use of an intermediary should be treated as a ‘further’ special measure for child witnesses if introduced under the Act**

DISAGREE

If “further” is equivalent to “additional” as described in consultation document – see answer to (d) above.

**e) Intermediaries should be available on application to the court for adult vulnerable witnesses**

YES AGREE

**10. What, if any, impact do you consider the use of an intermediary might have on examination and cross-examination of a witness?**

Intermediaries would enable ‘complete coherent and accurate’ communication to take place throughout investigative and criminal justice proceedings. This facilitation would deliver benefits for all stakeholders involved as follows:

**Witness:**

- Ensure better equity of access to justice for all people with CSN (Note: the English experience shows that at least half of cases would not have reached trial stage without the use of intermediaries.
- Increase capacity of people with CSN to give reliable and clear evidence.
- Minimise stress and improve experience of involvement in criminal justice system
- Increase confidence in criminal justice system

**Criminal justice practitioners**

- Secure more and more reliable evidence
- Improve reliability of outcomes of investigations and justice proceedings.
- Improve public confidence in criminal justice system

**The accused**

- Ensure better equity of access to justice.
- Secure more and more reliable evidence
- Improve reliability of outcomes of investigations and justice proceedings.

**11. What, if any, impact do you consider the use of an intermediary might have in enabling the jury (or judge) to make an assessment of the witness's credibility and reliability?**

See above.

In addition to the impact of intermediaries on the stakeholders listed above they would also enable the judge (or jury) to make a more confident, reliable and realistic assessment of the witness evidence, unhindered by communication barriers between the two parties.

People with communication difficulties are often misunderstood and their intellectual capacity tends to be judged by communication ability. Having someone whose role is to clarify communication with the judge and jury could enable the witness to be seen as competent, more reliable and credible.

Jury members often have little experience of people with communication difficulties. Having an intermediary to facilitate communicating the witnesses' account would reduce confusion and errors due to jury members interpreting the evidence inconsistently or underestimating the importance of the evidence.

**12. What would be the advantages and disadvantages of adding the use of an intermediary as a statutory special measure under the Act?****Advantages**

See above – answer to (10)

**Potential disadvantages**

- Costs
- Finding sufficient number of intermediaries with the skills, knowledge and experience and time capacity to meet demand
- Challenges presented by necessary cultural shift within criminal justice system

**13. What are the advantages and disadvantages of working within the current legal framework?****Advantages**

- None of the disadvantages described above.

**Disadvantages**

- None of the advantages described above.
- The current framework does not offer sufficient access to or quality support to vulnerable witnesses.
- The current legal framework does not ensure that the individual who supports the witness has sufficient knowledge, skills or expertise to be able to perform this function.

Further there is no consistency as each individual who supports the witness does it on an ad hoc basis.

- Vulnerable adult witnesses are often not identified and / or given the opportunity to engage with the criminal justice system as non-vulnerable witnesses are. There is no framework to check if witnesses have communication difficulties. Witness may not be able to communicate effectively and therefore be misrepresented in court.

#### **14. Do you have any other views or comments on the use of intermediaries to help witnesses give their evidence?**

Evaluation of “Pathfinders” in England revealed that:

- Over half of cases would not have reached trial stage without the use of intermediaries and
- That intermediary referral is most commonly invoked where the vulnerable witnesses has communication difficulties.

RCSLT primary interest is the interests of people with CSN and therefore RCSLT strongly recommends the introduction an intermediary scheme in Scotland.

Without this measure people with CSN will be unable to enjoy the same human rights as other non-communication disabled people, i.e. fair and equitable treatment in law.

Finally RCSLT have concerns regarding the definition of vulnerable witnesses.

Currently adult witnesses are described as 'vulnerable' on application to the court if there is a significant risk that their evidence will be diminished by mental disorder as defined in the Mental Health (Care and Treatment) (Scotland) Act 2003.

RCSLT are very concerned that 'vulnerable' could be interpreted narrowly and fail to provide support to people with communication difficulties. Witnesses with communication problems may not have “mental disorders” or “learning disabilities” and would not satisfy this test unless they had additional physical complications, which again are not necessarily obvious in the population of people with CSN.

The RCSLT recommends that a wider definition of “vulnerable” is adopted.

We recommend that the definition of vulnerable witness is defined to include children under 17 years of age; adults whose evidence is likely to be affected by a mental disorder or impairment of intelligence and social functioning; or who have a physical disability of disorder or communication disorder.

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***Submitted on behalf of the Royal College of Speech and Language Therapists***

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