Ministry of JUSTICE

Research Summary I

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

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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.

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- 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 mis-communication 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.

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