

THE WINSTON CHURCHILL MEMORIAL TRUST OF AUSTRALIA

Report by - AMY WATTS – 2013 CHURCHILL FELLOW

To investigate models of Intermediaries for child victim and witnesses in the criminal justice system in England, Ireland, Austria and Norway.

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Signed Amy Watts

Dated 2 January 2014

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1. Introduction

The 2013 Churchill Fellowship was awarded to study the following:

To investigate models of Intermediaries for child victim and witnesses in the criminal justice system in England, Wales, Ireland, Austria and Norway.

I have worked for 22 years in the Office of the Director of Public Prosecutions (ODPP) in NSW. For a greater part of that time I have been involved in the development of legal policy and procedures for the Office and in the drafting of law reform proposals for child and adult victims of sexual assault who are involved in ODPP prosecutions in NSW. New legislative reforms have been introduced over the years that ease the stress for children and adults giving evidence. There does however remain one concern relating to the manner of cross examination directed towards children and vulnerable adults. A person who because of their age, stage of development, intellectual capacity, cognitive impairment or disability is no match in linguistic ability to a forensically trained cross examiner whose role is to discredit their evidence and put a reasonable doubt in the mind of the trier of fact.

My colleagues on the ODPP Sexual Assault Review Committee, both from with the ODPP and outside agencies have reviewed these prosecutions for years and shared my concerns and frustration on the reports submitted to the Committee. Our concerns were always that children and vulnerable people should be allowed to give their evidence in a manner and style appropriate to them. And, when cross examined, to be treated with dignity and respect and in a manner in which is comprehensible to them. I would like to thank these colleagues for their commitment and dedication to improving outcomes for child and adult victims of sexual assault. I would also like to thank them for the respect and support they give to the NSW criminal justice system and for their additional commitment to continue to respect the rights of an accused person and the right to a fair trial.

I would particularly like to acknowledge the work and support of Lee Purches. Lee and I have worked together for many years on submissions for law reform – the social worker and the lawyer working together to try and make a difference.

I am extremely grateful to the Winston Churchill Memorial Trust for granting me a Fellowship to be able to explore other alternatives for these vulnerable people to give evidence. I have returned from the Fellowship in awe of the professional people I met and their dedication and professionalism in working with the more vulnerable people in society. Their commitment to human rights, the rights of the child and respect for the law, showed that it is possible to have a balanced and fair system for all who have to cross paths with any

criminal justice system. I thank them all for giving up their valuable time to share their knowledge and insights with me.

I also want to thank Philip, who supported me though the whole Fellowship, carried my bags, drove me to appointments and waited for me while I was at meetings. I thank Alice for her support in looking after home and animals while we were away. I would also like to thank Liz, one couldn't wish for a more loving or supportive sister!

2. Executive Summary

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The Fellowship was awarded to:

To investigate models of Intermediaries for child victim and witnesses in the criminal justice system in England, Ireland, Austria and Norway.

As I wanted to examine the issues of how rural and remotely located children are provided services it was recommended I visit Iceland. Northern Ireland was also recommended because of their commencement of a pilot Registered Intermediary Scheme. As a consequence the Churchill Trust gave permission to extend the Fellowship to Northern Ireland and Iceland.

The people that I met in the United Kingdom who were involved in the establishment, training, evaluation and provision of registered intermediary services were the most committed and dedicated collegial group of people. They demonstrated that it is possible to bring about legal change that can benefit the most vulnerable people in society in a legal system where it is crucial that the rights of an accused person to a fair trial is preserved and respected. The Scheme has been accepted by the criminal justice system to the point that the highest court in England has upheld the right of a child or vulnerable adult victim to use an intermediary to give evidence and not be subjected to the use of suggestive or leading questions in cross examination.

In Austria, Norway and Iceland, police, legal professionals and those providing psycho-social support demonstrated that child victims and vulnerable adults could be questioned in a respectful manner, mindful of their rights. The common form of questioning involved a narrative followed by clarifying questions from the judge, defence, prosecution and the victim's lawyer. They showed that a determination as to the facts could be made without an adversarial cross examination and without the need to bring the child or vulnerable person

back for further questioning. Respect for human rights and the rights of child were uppermost in their treatment of victims, witnesses and accused people.

This is the message I intend to convey in all the submissions for reform to the NSW Department of Attorney General and Justice, the NSW Law Society and in the various presentations given to criminal justice and other agencies.

3. Programme

It became apparent as correspondence was being entered into with prospective interviewees that Wales was not participating in the Registered Intermediary scheme to the extent England and Northern Ireland are. In addition academics in Norway recommended a visit to Iceland to investigate models of support for child victims and witnesses in rural and remote communities. Following further investigation and discussion with the Trust, approval was given to include Northern Ireland and Iceland in the study.

As a consequence the following countries and cities formed the itinerary. Vienna was excluded from the final itinerary as contact could not be made with the relevant agencies in that city.

- United Kingdom
Belfast, London, Brighton, Leeds, Huddlesfield.
- Ireland
Dublin
- Austria
Innsbruck
- Norway
Oslo
- Iceland
Reykjavik

The following agencies and professionals were consulted during the course of the study:

Ireland

- European Regional Conference for the International Society for the Prevention of Child Abuse and Neglect,
Dublin.
- Raymond Briscoe
Senior Solicitor,
DPP Dublin.

Northern Ireland

- Norma Dempster,
Victims and Witnesses Branch,
Department of Justice,
Northern Ireland.
- Fiona Donnelly,
Barrister, Lecturer,
Queens' University
Belfast.
- Inspector Garry Smyth
Police Service of Northern Ireland,
Criminal Justice Department.
- Dilys Barr
Registered Intermediary.

England

- Dr. Kevin Smith BA (Hons),
MA, PhD, CPsychol
National Vulnerable Witness Adviser
London.
- Jason Connolly
Vulnerable and Intimidated Witnesses Section,
Justice Reform Portfolio,
London.
- Professor Penny Cooper
Kingston Law School,
Kingston University,
London.
- David Wurtzel
Barrister,
The City Law School,
Gray's Inn Campus,
London.
- Joyce Plotnikoff and Richard Woolfson
Lexicon Limited,
Hitchen.
- Ruth Marchant,
Registered Intermediary, Triangle,
Brighton.

- Rosemary Wyatt,
Registered Intermediary,
Leeds.
- Lucy Conn
Registered Intermediary,
Leeds.
- Jennifer Beaumont
Registered Intermediary,
Huddlesfield.
- Jan Jones
Registered Intermediary
Kingston (interviewed in Sydney)

Austria

- Professor Verena Murschetz,
Department of Criminal Law, Procedure and Criminology,
University of Innsbruck.
- Renate Noetzold,
Prosecutor,
Innsbruck.
- Judge Markus Neyer
Innsbruck.

- Esther Jennings,
Psycho-Social Support NGO,
Innsbruck.
- Dr. Hubert Stanglechner
Defence Lawyer,
Innsbruck.

Norway

- Professor Anniker Melinder
Director of Cognitive Developmental Research Unit,
Department of Psychology,
University of Oslo.
- Miriam Sinkerud
PhD Candidate,
University of Oslo.
- Unni Solutvedt
PhD Candidate,
University of Oslo.
- Inger Lise Brøste
Police Training College,
Oslo.
- Astrid Johanne Pettersen
Director,
Statens Barnehus (Children's House),
Oslo.

Iceland

- Thorbjorg Sveinsdóttir,
Forensic Interviewer,
Barnahus/Children's House,
Reykjavik.
- Kristjan Ingi Kristjansson
Detective Chief Inspector,
Reykjavik Metropolitan Police
- Hulda Elsa Björgvinsdóttir
Íkissaksóknari / Director of Public Prosecutions,
Reykjavik.

4. Background

The countries studied for the Fellowship have different criminal justice systems based on the Adversarial (common law) model (Ireland, Northern Ireland and England) and the “akkusatorisch” models of Austria¹, and inquisitorial models of Norway and Iceland. It has always been regarded by the proponents of the adversarial system that the two systems are mutually exclusive. For some time however, a number of academics and legal practitioners have advocated the adoption of some aspects of the civil processes in the inquisitorial jurisdictions to criminal trials in Australia and New Zealand in matters that relate to child witnesses, vulnerable witnesses and sexual assault victims², particularly in relation to the process of cross examination at trial.

In Australia criminal trials involving sexual offence allegations involving child victims and witnesses are conducted according to the various Criminal Codes, criminal procedure rules and legislation and Evidence Acts. With the exception of Western Australia (which has provisions for the pre recording of children’s evidence at trial³) few modifications are made for the reception of children’s evidence into the court proceedings. Provisions are generally available to use remote witness facilities for children to give evidence, support people, electronically recorded statements which can be played as their evidence in chief, closed courts and the child’s wishes are to be taken into account.⁴ The rules of evidence however continue to apply to child witnesses as they do to adult witnesses. That is, the child witness’s evidence is to be tested by the process of cross examination.

One of the underpinning notions of the use of cross examination is that ‘persistent questioning’ and challenging of a witness’s account of events during cross-examination “will expose the fact that a witness is lying or does not remember events accurately”⁵. This technique is commonly applied to children, often with little adaptation for the age, developmental stage, particular vulnerability or linguistic style of the child. Typical techniques used during cross examination include suggestive or leading questions, tag questions, multiple questions and repetitive questions. The aim of the cross examiner is to

¹ V Murschetz, *Child Witnesses in Austria*, “Children and Cross Examination” edited by JR Spencer and ME Lamb 2012, p.131.

² Report of the National Child Sex Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, March 2010; *The Experiences Of Child Complainants Of Sexual Abuse In The Criminal Justice System*, Dr Christine Eastwood, Prof Wendy Patton 2002; From “Real Rape” to Real Justice: *Prosecuting Rape in New Zealand*, Edited by E McDonald and Y Tinsley, 2012.

³ Evidence Act 1906 (WA), sections 106I And 106K.

⁴ Criminal Procedure Act 1986 NSW Chapter 6, Part 5 Division 1, Part 6.

⁵ Victorian Law Reform Commission 2004, p. 295 quoted in *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* Dr Judy Cashmore and Lily Trimbole 2005.

control the questioning of the witness in order to not necessarily ascertain the truth but to discredit the witness's testimony or to cast doubt on the veracity of the evidence given.

An analysis of court transcripts has shown that this process of cross examination often leads to the child witness agreeing to propositions put to them, becoming confused and tired, distressed, silent, and frightened. It also leads to forensically unsafe and unreliable evidence for a jury to base their verdict on the facts presented.

It is for this reason that many law reform proposals have been put forward in relation to the use of Intermediaries to assist children to give their evidence in court⁶ or that there should be greater control over the cross examination of children in court.⁷

⁶ Alternative Models for Prosecuting Child Sex Offences in Australia, March 2010 Court-Appointed Intermediaries in Child Sexual Assault Trials Recommendation 4.5; Submission of DPP to NSW Legislative Council SCLAJ Report on Child Sexual Assault Prosecutions 2002

⁷ An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot Dr Judy Cashmore and Lily Trimbole 2005. Seen and heard: priority for children in the legal process (ALRC Report 84 1997) Recommendation 110;

5. Registered Intermediaries in England and Wales

Registered Intermediaries have been facilitating communication with children and vulnerable witnesses in the criminal justice system in England and Wales since 2004 when the Witness Intermediary Scheme (the Scheme) was first introduced as a pilot project. The Scheme was extended nationally in 2008.

The legislation allowing the use of Intermediaries is contained within section 29 **Youth Justice and Criminal Evidence Act 1999** – Special Measures.

29 Examination of witness through Intermediary.

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

(2) 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, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

(3) Any examination of the witness in pursuance of subsection (1) must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which—

(a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the Intermediary, and

(b) (except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness...

To be eligible to use the Scheme the following legislative provision of the **Youth Justice and Criminal Evidence 1999 Act** apply:

16 (1) A witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section

(a) if under the age of 17 [now 18] at the time of the hearing;

or

(b) if the court considers that the quality of evidence given by the witness is likely

to be diminished by reason or any circumstances falling within subsection (2)

(2) The circumstances falling within this subsection are

(a) that the witness

(i) suffers from mental disorder within the meaning of the Mental Health Act 1983;

or

(ii) otherwise has a significant impairment of intelligence and social functioning;

(b) that the witness has a physical disability or is suffering from a physical disorder

The Scheme is administered by Ministry of Justice (MoJ) and is funded equally by the Ministry, the Crown Prosecution Service (CPS) and Police. There are currently approximately 76 active Registered Intermediaries in England and Wales. The Registered Intermediaries are a composite profession of speech and language therapists, psychologists, social workers, nurses, teachers and occupational therapists. The Registered Intermediaries are officers of the courts and a registered profession with the professional requirements that any other profession may have. This consists of a Code of Ethics, a Code of Practice, Continuing Professional Development requirements, membership of the Intermediary Registration Board and membership of their own professional organisation. They are overseen by the MoJ and a Governance Board.

Recruitment is rigorous and involves a competency based application form with a competency based interview and exam. Training is provided by Professor Penny Cooper and David Wurtzel over a 5 day period involving 4 days practice training and 1 day of examinations. Training involves role plays with a mock trial using a real judge, criminal procedures, report writing and court experience. Intermediaries are recorded during their cross examination. Based on feedback from the participants the training has now been revised and is now split into 2 halves –a component of distance learning, case studies and multiple choices. Professor Cooper and Mr Wurtzel co wrote the Intermediary Procedural Guidance Manual (MoJ, 2012).

Registered Intermediaries as a registered professional have to bring their own assessment tools and their own expertise from their nominated fields. As officers of the courts they are required to be independent and unbiased. They provide their own insurance and must have the ability to travel 2 hours from home. They attend Registered Intermediary regional support groups and MoJ conferences. They have to be prepared to mentor other newer Intermediaries and assist in training police, CPS and defence lawyers.

An evaluation of the Scheme was carried out by Joyce Plotnikoff and Richard Woolfson⁸ in preparation for the national rollout. A number of recommendations were made including:

- *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, 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.⁹*

A number of resources, practice directions and CPS Guidelines have since been developed to assist practitioners both legal and non legal with the use of Intermediaries.¹⁰

There are established procedures for police in relation to the use of an Intermediary at the interview stage. Where Police feel that an Intermediary may be of benefit in the interview

⁸ The “Go-Between: Evaluation of the Intermediary Special Measure, London, Ministry of Justice. J Plotnikoff and R Woolfson 2007;

⁹ Ibid p.85

¹⁰ The Advocates Gateway: www.theadvocatesgateway.org; CPS Guidelines on Prosecuting Cases of CSA (October) www.cps.gov.uk/legal/a_to_c/child_sexual_abuse/; Criminal Practice Directions (October) www.judiciary.gov.uk/JCO%2FDocuments%2FPractice+Directions%2FConsolidated-criminal%2Fcriminal-practice-directions-2013.pdf.

stage (where the victim/witness is a child or the adult may have a cognitive impairment or physical impairment that affects communication), the Police make a request for service to the Matching Service which is located within the National Crime Agency and headed by Dr Kevin Smith. Dr Smith advocates Police plan for interviews, develop strategies for the interviews and for working with the Registered Intermediaries. The matching service then undertakes some skill matching and Intermediary availability. The Registered Intermediary then liaises with police and a plan is put in place for the Intermediaries assessment and interview. The Registered Intermediary in the presence of the police officer conducts an assessment of the witness and may make other inquiries as is necessary (contact teachers, health worker etc). The Registered Intermediary will then write a brief report on the communication needs for the police interview. The Registered Intermediary can also assist at the police interview if necessary.

Where a matter is proceeding to court and where an Intermediary is not already involved and the CPS believe that the best available evidence would be elicited from the victim/witness with the assistance of the Intermediary a request will be made to the matching service. The CPS are then required to make an application to the court arguing that the quality of evidence given by the witness is likely to be diminished due to their age, mental health or impairment and will benefit from the use of an Intermediary.

Youth Justice and Criminal Evidence 1999 Act

Special measures directions:

S19 (1) This section applies where in any criminal proceedings—

(a) a party to the proceedings makes an application for the court to give a direction under this section in relation to a witness in the proceedings other than the accused, or

(b) the court of its own motion raises the issue whether such a direction should be given.

(2) Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17, the court must then—

(a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and

(b) if so—

(i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and

(ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.

(3) In determining for the purposes of this Chapter whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular—

(a) any views expressed by the witness; and

(b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.

(4) A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.

The Registered Intermediary will then make an assessment and write a report for the Court as to the means of achieving the best available evidence. If the application is contested by the defence the Intermediary will be required to give evidence and to be cross examined. Upon the Court ruling that an Intermediary can be used a ground rules hearing is held, either in Court or in Chambers.¹¹ At this hearing the communication techniques will be discussed and rules established as to the form and type of questions to be asked. For example in approximately 75% of matters Registered Intermediaries have informed the court that the use of suggestive or leading questions by counsel will lead to unsafe and unreliable evidence being elicited from the victim/witness.¹² The Registered Intermediary must be able to provide a reason/s for this recommendation. The Registered Intermediary will then assist counsel, if asked, to formulate questions in the format that has been advised. Registered Intermediaries can also provide assistance with communication aids and tools, focussing witnesses on questions and answers, intervening where appropriate to ask the judge for the questions to be rephrased etc. They are not at court to perform the role of an expert witness, interpreter, victim advocate or witness support person. Their role is to be independent, unbiased and neutral and to assist the Court receive complete and accurate communication from the witness.¹³

Recent legislative change has led to the extension of the Scheme to vulnerable defendants. Up until this change the judge had a discretion to appoint an Intermediary for an accused person. Some Intermediaries were being appointed who did not have the professional skills and background nor the specific training that had been provided to the Registered Intermediaries. These Intermediaries had no Board of Governance, no professional skills requirements, had differential pay scales, no registration requirements etc.

¹¹ At the Crown Court, or where a trial takes place in the magistrates' court or the Youth Court, before the trial commences there must be a 'ground rules' hearing – see footnote 8 – between the Registered Intermediary, the judge (or magistrates) and the advocates together, to discuss the Registered Intermediary's involvement in respect of a witness or of a defendant who is being assisted throughout the trial. This is essential for good trial management. The requirement appears in the guidance to the judiciary on the JSB Intranet and in the guidance to barristers which can be found on <http://www.barcouncil.org.uk/guidance/SpecMeasuresGuidance/>. It further appears in the Notes for Guidance in the Application for a Special Measures Direction, Part F: 'Judicial Studies Board and Bar Council guidance requires that, before the witness gives evidence, the court, the advocates and the Registered Intermediary should discuss "ground rules" for the conduct of the questioning'. The Registered Intermediary Procedural Guidance Manual, Ministry of Justice 2012.

¹² Discussion with Penny Cooper and David Wurtzel.

¹³ Plotnikoff and Woolfson in Children and Cross Examination Time to Change the Rules Edited by JR Spencer and ME Lamb 2012 p32.

Since 2004 the service has been used 6500 times. A number of case studies illustrate the benefits of the use of this Scheme:

1. A Registered Intermediary recently facilitated an interview with a person with 39 multiple personalities. The Police were not sure as to what strategies to employ. Her advice to Police was to not put pressure on the witness, use her name, don't let her fiddle, to keep the focus back on herself so that she could control herself. In other words they needed to put the locus of control back onto the witness. She advised they prepare the witness for the interview, use her name regularly, (every 5-6 minutes). If the strategies did not work then at least they tried;¹⁴
2. A 19 year old Down Syndrome young man was a witness to hate crime. His mother was concerned as to how he would communicate in court as he could really understand only about 40 % of what was communicated to him. His mother translated for the police interview then a request for service was made. The young man used CCTV to give evidence at trial and the Registered Intermediary at trial used hand gestures to communicate questions to him and to interpret his responses. This witness would not have been able to give evidence at court without this assistance.¹⁵
3. The services of a Registered Intermediary was requested by a trial judge in respect of a witness for whom the indictment had been severed when it appeared from her police interview that she would not be able to give intelligible evidence. The judge directed that she be re-interviewed with the assistance of an intermediary. The victim gave evidence at trial with the assistance of an intermediary. The results at trial were mixed. The trials involving her two siblings resulted in acquittals while the trial involving the cognitively impaired victim resulted in a conviction.
4. A 4 year child with severe behavioural problems, including a propensity to violence was referred to a Registered Intermediary. The Police asked for assistance with interviewing the child. The Registered Intermediary established ground rules with the child, in particular that he would not hurt her physically while she was speaking to him. In return the child was able to use whatever language he wished. Reviewing the transcript of the interview later, the child had sworn at the Registered Intermediary more than 100 times. The Registered Intermediary and the Police however were able to complete the interview with the child.¹⁶
5. A child, with the assistance of the Registered Intermediary asked the court officer to put a cushion over his face when she had to talk about the sexual assaults in court. This allowed the child not to be embarrassed when giving evidence.¹⁷
6. R v IA & Ors [2013] EWCA Crim 1308 – This was an unsuccessful appeal against conviction in a case where a deaf complainant, was assisted at interview and trial by a

¹⁴ Jennifer Beaumont Registered Intermediary.

¹⁵ Jennifer Beaumont Registered Intermediary.

¹⁶ Ruth Marchant Registered Intermediary, Triangle.

¹⁷ Ruth Marchant Registered Intermediary, Triangle.

a deaf Registered Intermediary. The Court of Appeal rejected any challenge to the work done by the RI. It criticised the length and style of cross-examination, which ‘could have been much simpler and did not need to turn over every stone’. The Court commented that counsel ‘failed sufficiently to adapt their questions in order to take account of RB’s difficulties in communication’.¹⁸

7. R v F [2013] EWCA Crim 424 – This was an appeal against a judge’s ruling that the complainant who had used an intermediary, was not a competent witness. The Court said that it did ‘not underestimate the difficulties of questioning vulnerable witnesses. It requires not only training, flexibility and sensitivity, but also time and patience.’ The ‘shortcomings’ of the process designed to test the complainant’s competency were noted.¹⁹

In the words of Lord Chief Judge the system of Registered Intermediaries in most instances are now well established and accepted practice within the English and Welsh courts:

As you will all appreciate, the use of Intermediaries is now established. As is so often the case with change, there was much misunderstanding about Intermediaries and their functions, and indeed it is not too exaggerated to say that much suspicion about them was engendered. Intermediaries do not interfere with the process of cross-examination. They are not supporters of the witness. They are neutral and independent, offering assistance to the court and responsible to the court. Their presence is designed to assist the judge and the advocates and the witness to ensure that they all understand each other. Take a simple little word like “fib”. We all think we know what it means. But do we all think it means the same thing? Does it apply to any kind of lie, the deliberate malevolent lie and what is sometimes described as the “white lie”, the little lie told to avoid causing umbrage and offence, or does it apply only to the deliberate falsehood? Or is it just a refined middle class word, quite meaningless to many children? If you are not all using the same word, with the same comprehension of its true meaning, misunderstanding and therefore a false impression of what it is that the child witness is seeking to convey, or agree with, is inevitable. Intermediaries perform a valuable function which it is not open to the judge to perform without, at any rate, giving the appearance, if the judge acts entirely on his or her own initiative, of partiality.²⁰

Advocates of the Scheme however do have suggestions and recommendations for improvements to the Scheme. These recommendations include:

- A legislative basis for the Ground Rules hearings;
- Appointment of an official advisor to the Registered Intermediaries;
- Central resourcing of the Scheme;

¹⁸ Quoted on The Advocates Gateway.

¹⁹ Quoted on The Advocates Gateway.

²⁰ The Evidence of Child Victims: the Next Stage” Law Reform Committee Lecture 21st November 2013.

- Inclusion of defendants in the Registered Intermediary Scheme (at the initial stages not latter, as is now occurring);
- For new Intermediaries, more follow up on reports and mentoring;
- Debriefing of children after the process;
- Some Registered Intermediaries would like common assessment tools;
- Registered Intermediaries being allowed to review initial competencies to allow for upgrading of skills or skills and expertise not taken into account initially;
- Remuneration be reviewed (currently £36 per hour with a reduced rate for travelling time);
- The CPS should be more proactive in requesting the use of Registered Intermediaries;
- More acceptance of the use of Registered Intermediaries by judicial officers.

6. Registered Intermediary Pilot in Northern Ireland

The legislation permitting the use of Registered Intermediaries for vulnerable persons is found within Articles 17 and 21 BA **Criminal Evidence (Northern Ireland) Order 1999** (Article 21BA was inserted by s12 of the Justice Act (NI) 2011). Following a commitment in the Bridging the Gap Report²¹, a victims and witnesses of crime strategy, in 2010 a special measures consultation was held by the Department of Justice. The Law Society and the Bar Association of NI did not submit any submissions on the effectiveness of special measures however the Office of the Lord Chief Justice was supportive of the measures.

In December 2011 a briefing to the Judiciary on the use of Intermediaries was undertaken by the Department of Justice. The Judiciary indicated its support subject to the intermediary measure being available to both witnesses and defendants. This was based on the principle of equality of arms. There are historical, political and defence cultural and legal factors peculiar to Northern Ireland (NI) that informed this decision.

The Registered Intermediaries Scheme (the Pilot) commenced on 13 May 2013 and will operate for approximately 18 months after which it is anticipated it will be extended to courts other than the Crown Court in Belfast. The Scheme is available in matters that are triable on indictment ie serious offences.²² To date (11 September 2013) there have been 17 requests for the use of Registered Intermediaries with none of those requests for a Registered Intermediary for a defendant. All are police requests with the exception of 5 from the Public Prosecution Service (PPS). A Registered Intermediary has recently been used at court and the judge commented that the use of the Registered Intermediary was helpful.²³

The Department of Justice is funding the pilot, including defendants, and further funding will be negotiated with other agencies after the Pilot concludes. In Northern Ireland where a Registered Intermediary is used outside the scope of the Pilot, the appropriate end-user (i.e. police, PPS or private solicitor) will pay for the Registered Intermediary.

As all the requests have been for victims there is a need to ensure that defendants also received intermediary assistance. In Northern Ireland, the Pilot is available to victims, witnesses, suspects and defendants so the issue of un-registered Intermediaries does not arise as it has in England and Wales. The legislation has been commenced in respect of defendants and Registered Intermediaries are only to assist the defendant when he/she is giving oral evidence, they are not to support the defendant for the duration of his trial.

²¹ Bridging the gap between needs and service delivery 2007-2012 Criminal Justice System Northern Ireland.

²² <http://www.dojni.gov.uk/registered-intermediary-schemes>.

²³ Email from Norma Dempster 3 December 2103.

For the Pilot 10 Registered Intermediaries have been selected competitively from 158 applicants who were subsequently screened out to approximately 60 interviewees. 6 have a speech and language therapy background and 4 have a social work background. The issue of qualifications were of interest to the judiciary as Registered Intermediaries would be carrying out formal assessments on vulnerable people.

It has been identified that more briefing needs to be done for the legal profession as they are not fully informed as to the operation of the Pilot and its purpose. It is anticipated that briefings will take place the Bar Association, the Law Society, the Judicial Committee, law students and the Criminal Bar Association. Academics working in the area of advocacy require awareness to be raised about the Pilot and how Intermediaries can be utilised.

The Pilot has been able to draw heavily on the experience of the Scheme in England and Wales, the recruitment and training, the registration of the new profession, policies and procedures, manuals, information brochures etc. For the terms of the Pilot, Norma Dempster is the coordinator and central point for the Registered Intermediaries (a position that some Registered Intermediaries in England have recommended would be of assistance to them). The Coordinator also provides the matching service when a request is received from Police or the PPS. Training has been provided for the Registered Intermediaries by Penny Cooper and David Wurtzel with input from some Registered Intermediaries from England. The Coordinator is also currently checking the Registered Intermediaries reports in the initial stages of the Pilot.

The role of the Registered Intermediary in Northern Ireland, as in England and Wales is as follows:

- The Registered Intermediary has a duty to the court;
- The Registered Intermediary has to give a declaration as contained within Crown Court Amendment Rules 2013, Last Schedule. Declaration has to be made at start of interview and at the start of court proceedings;
- The Registered Intermediary is to be impartial and neutral;
- The Registered Intermediary is to be available to children under 16 years and for people with significant communication problems;
- The Registered Intermediary is to be available to accused people;
- The Registered Intermediary is limited to their own area of expertise.

While there has been no Evaluation as of yet of the Pilot several issues were identified that will need addressing or resolving:

- There has to be a proper assessment at the crime scene to identify the vulnerability of victims, witnesses and accused;
- They question whether a vulnerable accused should have Registered Intermediary with them at all stages of the criminal prosecution process – interviews, charging, instructions to defence, court hearings. The legislation however restricts Registered Intermediaries to when the accused gives evidence only;
- There is some judicial reluctance to hold ground rules hearings;
- There is some judicial reluctance to use Registered Intermediaries;
- The issue of legal professional privilege arises when the Registered Intermediary is working with defence and accused;
- There is an impact of Registered Intermediaries on advocacy and the traditional cross examination rules (ie the use of suggestive and leading questions);
- Concern that their use will impact on rights of the accused;
- What about the lying child? How can the child be cross examined properly when a Registered Intermediary is being used. ²⁴
- Cost (it is anticipated that a Registered Intermediary will cost on average £1200 per matter, based on costing provided by the Scheme in England and Wales).

The participants in the Pilot have clearly identified the benefits of the Pilot so far:

- NI police are planning interview strategies before commencing interviews;
- Police are getting more disclosures with assistance of Registered Intermediaries;
- The training provided by Penny Cooper and David Wurtzel is providing an excellent grounding for Registered Intermediaries in relation to their role and functions and the importance of impartiality and lack of bias;
- The importance of the Coordinator is apparent;
- The importance of networking as support for Registered Intermediaries.

In addition, police have developed a checklist to assist police in the identification of people who may require the assistance of a Registered Intermediary. Police also are requesting Registered Intermediaries assistance when they are not eliciting disclosures in interviews with children in child abuse cases or where it becomes apparent that the witness has a communication difficulty.

²⁴ This issue was addressed in R v Barker [2010] EWCA Crim 4 a landmark English case which addressed the issues of cross examination of young children.

It would appear that NI intends to introduce the Scheme at the conclusion of the Pilot. The Coordinator and the participants are greatly assisted by the experiences of England and Wales and there is regular communication between various parties of the Pilot and the Scheme in England and Wales.

7. Intermediaries in Ireland

The Republic of Ireland has had legislation since 1992 that permits the use of Intermediaries for child witnesses in courts:

Criminal Evidence Act 1992 - s14 Evidence through intermediary.

14.—(1) Where—

(a) a person is accused of an offence to which this Part applies, and

(b) a person under 17 (now 18) years of age is giving, or is to give, evidence through a live television link,

the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

(2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

(3) An intermediary referred to in *subsection (1)* shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.

The difficulty with this legislation is that the definition of who could use the provisions was limited and did not include a physical disability or brain injury. There were no procedures put in place in relation to the legislation such as pre-trial hearings, ground rules hearings etc. As a consequence the legislation has never been utilised.

In 2012 the European Union issued a Victims Directive (VD). The Directive itself does not make any specific reference to the use of Registered Intermediaries however Articles 20 and 21 in particular are relevant:

20) The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system.

21) Information and advice provided by competent authorities, victim support services and restorative justice services should, as far as possible, be given by means of a range of media and in a manner which can be understood by the victim. Such information and advice should be provided in simple and

accessible language. It should also be ensured that the victim can be understood during proceedings. In this respect, the victim's knowledge of the language used to provide information, age, maturity, intellectual and emotional capacity, literacy and any mental or physical impairment should be taken into account. Particular account should be taken of difficulties in understanding or communicating which may be due to a disability of some kind, such as hearing or speech impediments. Equally, limitations on a victim's ability to communicate information should be taken into account during criminal proceedings.²⁵

The Office of the DPP is aware of the importance of implementing the Victims Directive in full, while it is not directly effective without domestic legislation being in place in the State, victims of crime who are denied a right or rights arising from the VD can bring an action against the applicable State for compensation for the lack of that right being afforded to them.²⁶

The ODPP have obligations under the Charter of Victims Rights. There is legislation enabling victim impact statements. The Office conducts pre-trial meetings with victims and their families as well as liaison with Police and other relevant parties. All these initiatives are measurable tasks on their case management system and are reported on in their Annual Report.

The ODPP is aware through the experiences of the Pilot in Northern Ireland, and the Scheme in England and Wales, of the importance of judicial support for such an initiative. The ODPP is to work with the Department of Justice and Equality on the initiative. Issues central to previous Pilots include responsibility of payment of Registered Intermediaries, the coordination of the Scheme (a central office in Dublin). An additional consideration for the ODPP is the existence of State solicitors who have a franchise from the ODPP to conduct prosecutions in the various States in Ireland.

A further measure that the ODPP has to consider is the use of electronically recorded statements for children. In Ireland there are legislative restrictions on further questioning by the prosecution after the initial playing of the electronically recorded statement. There is no ability to ask further questions in chief. This issue will need to be subject to reform if the registered intermediary scheme is to be introduced and for the ODPP to meet their obligations.

In February 2010 the Joint Oireachtas (Parliamentary) Committee on the Constitutional Amendment on Children published its third and final report which recommended important changes to Article 42 of the Constitution.

²⁵ Directive 2012/29/ Eu of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

²⁶ Raymond Briscoe 18 September 2013.

Article 42 of the Constitution is proposed to be amended as follows:

...

2. The State guarantees in its laws to recognise and vindicate the rights of all children as individuals including:

- i) The right of the child to such protection and care as is necessary for his or her safety and welfare;
- ii) The right of the child to an education;
- iii) The right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity.²⁷

This amendment, when passed, would also have consequences in relation for the need for the criminal justice system to consider the use of Intermediaries for child victims and witnesses when giving evidence in court.

²⁷ Irish Criminal Bar Association: The Potential Impact of a Constitutional Amendment on the Child within the Criminal Justice System.

8. Austria

Austria while having an inquisitorial system of criminal justice has features of the adversarial system which as referred to earlier is called the “akkusatorisch” (accusatorial) system. The roles of the judge, prosecutor, police, victim and victim’s lawyer differ to that in the adversarial system. It is worthwhile explaining the prosecution system to understand how matters with child victims are dealt.

In Austria becoming a judge is a career choice that students make upon leaving university. Currently they can make a choice to become a trial judge or a pre-trial judge. A pre-trial judge is a detention and investigation judge. The pre-trial judge has the power to question witnesses (contradictory). A trial judge depending on the seriousness of a matter will hear either a minor case alone, or with two lay assessors (including offences such as sexual assault) or with the jury with the more serious criminal matters (murder offences against the State etc).²⁸

The prosecution service, as in Australia, is independent of the police and the judiciary. However the Justice Minister is entitled to give prosecutors directions as to policy and prosecution decisions in individual cases.²⁹ Unlike Australia however, there is no government funded legal aid or public defender for accused people in Austria. Where an accused has no financial means to pay for a lawyer, a private lawyer is required to provide to provide free legal representation. A nominal payment is via an annual lump sum payment into the lawyer’s pension fund.

In 2001 the European Commission on Justice issued general minimum standards to address the rights and needs of victims in criminal proceedings – the Council Framework Decision on the standing of victims in criminal procedure. It established basic rights for victims of crime within the EU. The Member States had to adapt their legislation in line with the requirements of the Framework Decision by 2006. Implementation reports published in 2004 however concluded that this EU legislation had not been effective in achieving minimum standards for victims across the EU. In 2011, the Commission put forward a legislative package to strengthen the legal framework on victims' rights including a proposal for a directly binding and effectively enforceable Directive establishing minimum standards on the rights, support and protection of victims of crime.³⁰ The amendments to the criminal procedures rules in Austria in 2008 were a response to the initial calls for reforms. The procedures described

²⁸ From “Real Rape to Real Justice” Prosecuting Rape in New Zealand edited by E McDonald and Y Tinsley p. 460.

²⁹ Ibid p. 453

³⁰ European Commission on Justice: http://ec.europa.eu/justice/criminal/victims/rights/index_en.htm

below have been in place for child and adult victims of sexual offences since the amendments in 2008.

Where an allegation is made of serious criminality against a child, the police conduct an investigation and interview the child victim. With oversight by the prosecution the police then compile a “dossier”. There are no specific rules as to how statements are taken only that the information contained within them is relevant. The police may have conducted 2 interviews with the victim as the prosecution have requested further interviews. Police will then write a report for the prosecution and the dossier is then filed in court. The pre-trial judge takes control over the proceedings.

The pre-trial judge has the discretion to appoint a forensic expert interviewer to conduct the contradictory with the child but the pre-trial judge in Innsbruck prefers to conduct the questioning herself. There is no specific training provided to judges in relation to questioning children although there are seminars, continuing legal education and so on that are available to judges. There is judicial reluctance to use experts to conduct the questioning based on prior experience. One example given was that the expert spent a lot of time in rapport building and the child tired before the narrative and questioning could begin. The pre-trial judge and the trial judge believed they were more able to get the information they required from the child themselves. There is also a view that there are not enough experts in Austria to provide that role in the contradictory.

A child victim has psycho-social support before the contradictory and will receive court preparation and support during the process. The child will also have met their legal representative and have received some court preparation from the lawyer. The contradictory with the child takes place in a child-friendly room. If the child has a cognitive impairment then an intermediary can be employed to assist in the questioning process.

It is mandatory for a child victim of sexual assault under the age of 14 years to be questioned in a remote room. The pre-trial judge sits with the child while the defence, prosecutor, child’s lawyer and perhaps the psycho-social support person watch on the live link. The pre-trial judge asks the child for a narrative then asks the child questions to clarify anything the child raised. The pre-trial judge has read the file and all the statements. The pre-trial judge is looking for any contradictions and needs to clarify those inconsistencies. The pre-trial judge then rejoins the defence, the prosecutor and the victim’s legal representative and asks if there are any further questions. The pre-trial judge has the discretion to ask further questions but will refuse to ask any questions that are considered repetitive, leading, confusing or beyond the level of the child’s understanding. On completion of the contradictory the child is then returned to their carers. The child is not required to attend any further proceedings or to attend the trial. The pre-trial judge does not make a finding as a result of the contradictory, but concludes any other questioning of witnesses. The dossier is then returned to the prosecutor for the prosecutor to make the decision as to whether charges are laid and the matter is to go to trial.

If the matter goes to trial the trial judge (judge with 2 lay people or a jury) will read the transcript of the interview (they rarely watch the recording) and the victim will not be required.

The child is never cross examined by the defence. There are some criticism of this procedure by the defence. Defence counsel argue that they have no rights in the criminal justice system. They have difficulty in establishing the truth as no examination of victims are allowed. Questions that are put to the judge by the defence are not always asked. Defendants are allowed to attend the contradictory but are not allowed to ask the victim any questions. Before the reforms of 2008, defendants were not allowed to attend the hearing. Until recently if the defendant did not get a lawyer for the contradictory the defence had to face a situation where it didn't have a chance to participate in the questioning. The Pre-trial judge took the initiative and started writing to defendants informing them of the need to engage a lawyer. It is now standard practice for the Ministry of Justice to now inform defendants of this need to employ a lawyer. Now according to the judiciary, there is no excuse not to have a lawyer. Another issue for defence is that they are not given the permission to test competency of the child victim or to get an expert opinion as to the reliability or otherwise of child' evidence.

The view of the all parties interviewed agreed that the process described above however did not cause any further harm or distress to the victim, both adult or child. They based this on the fact that victims do not generally show distress in the contradictory process.

9. Norway

Norway's criminal justice system contains inquisitorial elements particularly where the trial process is concerned. Other aspects of the system differ however when it comes to investigating and prosecuting matters involving child victims and witnesses and vulnerable adult victims.

Until 1926 Norway's criminal justice system contained elements very similar to Australia's adversarial system. Children gave their statements to police, then again at a preliminary judicial hearing (similar to NSW's current committal process) and then again at the main hearing and even the appeal process.³¹ The children were questioned at all stages of this process. Reforms commenced in 1926 in response to community concerns about the treatment of children in this process. Judicial questioning was introduced, children were to be questioned outside the courtroom process and notes and transcripts were produced of the interviews. The reforms applied to children under the age of 16 and the legislation prescribed the methods of interviewing. There were modifications to the legislation that came into effect in 1986 which included lowering the age for investigations under judicial supervision to 14 years of age, repeated interviews were to be avoided except in the cases of children who became distracted and the interviews were to be taped.³²

As a result of a well-publicised multiple victim/multiple perpetrator matter in 1992 further reforms were made in relation to the forensic interview. Forensic police interviewers who had received specialised training were to conduct the interviews and new regulations were introduced in the way interviews were to be conducted.³³ In 2008 the upper age for the forensic interviewing of children was raised from 14 years to 16 years. Until recently it was regarded that the child should only be interviewed once but there is growing research that shows that an extended forensic interview ie a second interview, may be beneficial for children as the process of disclosure can take time for children.³⁴

³¹ T. Myklebust in *Children and Cross Examination Time to Change the Rules* Edited by JR Spencer and ME Lamb 2012 p. 154.

³² *Ibid* 154 -155.

³³ *Ibid* 156.

³⁴ Discussion with Inger Lise Brøste, Police Training College Oslo, October 2013; Chris Newlin, Executive Director, The National Children's Advocacy Centre, Alabama, USA, Joint Investigation Response Team Managers Conference, Sydney, 31 July 2013.

Currently in Norway police forensic interviewers of children and mentally impaired adults are trained using the NICHD Protocol.³⁵ To qualify for the course a police officer is required to have a minimum 3 years' experience as a detective and a post graduate qualification. Basic training in interview technique is provided and then specific interview modules are undertaken. After 2 weeks in the course the police go back to their stations and conduct 3 interviews with children (not under 6 years of age) in a one off incident (non-violent) under supervision. The interview will then be analysed with supervision and feedback provided. The trainee returns to the college after 2 weeks for further training in relation to children, the law and investigation. The trainee then returns to police district, with a following exam and oral interview. In 2014 training will start in relation to interviewing children under 6 years.

Research is currently being conducted at the University of Oslo in relation to children's memory and interviewing techniques that assist police and the courts in relation to children's memory and recall. In one study the children are aged between 4 and 14 years and children's recall is being measured based on psychological theory of memory. Two measures are being used:

1. the interview is conducted in what could be regarded as a typical police setting;
2. the interview is a cognitive interview.³⁶

Comparisons are also being made between the recall ability of the younger children vs the older children. Concurrent research is being conducted into the quality of police interviews with children. A random selection of approximately 300 interviews from the last ten years is being examined.³⁷ Research is also being carried out at the University in relation to the effects of trauma on memory. Findings to date show acutely removed children (in stress) remember more peripheral information and recall after 1 week is more accurate than recall after 3 months.³⁸

a. Barnehus

The first Barnehus (Children's House) was established in Norway in November 2007 and there are now a total of 10 in Norway, geographically spread from North to South of the country. The idea for the Barnehus came from Iceland and both models are based on the Children's Advocacy Centers in the USA. There are 3 ministries with joint responsibility for the Barnehus – Ministry of Equity and Social Inclusion, the Ministry of Health and Care Services, and the Ministry of Police and Public Security. The Barnehus vision states that through active coordination the Barnehus will provide a safe environment, health care and

³⁵ National Institute of Child Health and Human Development (NICHD) Investigative Interview Protocol - Lamb et al. 2007.

³⁶ Discussion with Miriam Sinkerud, PhD Candidate, Psychology Department, University of Oslo, October 2013.

³⁷ Ibid

³⁸ Discussion with Unni Sulutvedt, PhD Candidate, Psychology Department, University of Oslo October 2013.

legal protection for abused children. The Code on Criminal Procedure Section 239 dictates that children up to the age of 16 should be interviewed in a neutral (out of court) setting. Interviews are regulated by the Guidelines on Forensic Interviews and Observation.³⁹

All children and mentally impaired adults in Norway, where there has been an allegation of physical or sexual abuse or exposure to domestic violence are taken to the Barnehus. The primary age for children is 3 to 16 years of age and 18 years in some cases.⁴⁰

The Barnehus provides medical examinations, forensic and witness interviews, counseling and support for carer/s and children, short term therapy and /or transfer to local support services, skills development and guidance for professional staff and networking, coordination and consultation.⁴¹

The Barnehus in Oslo opened in September 2009 and is situated in the central business district and housed in a multi storied building. The Barnehus is clearly signposted at its entrance and is located over 2 levels within the building. The Barnehus has interview rooms, a room where medical examinations are conducted, live linked conference and interview rooms, a cafeteria and offices for counselors, clinicians, a technician and administrative staff.

Where there is an allegation of abuse for a child or a mentally impaired adult, the child (up to the age of 15 years) is brought to the Barnehus, by police or by a carer. Upon arrival the child is greeted by a clinician and a discussion is had with the child and carer as to what to expect from the ensuing process. The child is then prepared for the interview – they are told who will be listening to the interview, where the interview will be conducted and what will happen afterwards. If a forensic medical examination is conducted, it will be conducted at the Barnehus in a specially equipped room by doctors or nurses from the Social Pediatrics Unit of Oslo University Hospital. If a child is in need of immediate medical attention, where there are injuries or cause for concern the child will be taken straight to the hospital.⁴² The forensic interview is conducted by the trained police officer who will sit in a room with a live link to the conference room (court hearing). In attendance in the conference room is a judge, the prosecutor, the defence lawyer (if appropriate and will not impact on the investigation), the child's lawyer and a psychologist from the Barnehus who is present to assess the child's mental health as the interview progresses. The entire process is recorded. The police officer will ask the child for a narrative and then follow with clarifying questions. When the police officer feels the interview is complete the child is given a break while the police officer consults with the judge and other participants. The judge after discussion with the other

³⁹ The Children's House Oslo.
<http://www.statensbarnehus.no/barnehus/oslo/english/?lang=nb>

⁴⁰ Eirin Baugsto; Anne-Lise Farstad; European Implementation of the Barnahus Model – Evaluation of the Norwegian Barnahus/CAC Model 2012; ISPCAN European Regional Conference, Dublin, 17 September 2013.

⁴¹ Ibid.

⁴² Discussion with Astrid Johanne Pettersen, Director, Statens Barnehus (Children's House) Oslo, October 2013.

participants may direct more questions to be asked. No leading or suggestive questions are allowed to be asked. The police officer then returns to the interview room to complete the questioning of the child. If the child is over 15 years of age however, the interview will have to take place at the court house. Unless the child makes further disclosures at a later time, the child is not required for further interviews or to give evidence at the trial at a later date.⁴³ There is no need to give evidence in chief or be cross examined at a later time.

Follow up counseling and therapy can be provided for the child and carer at either the Barnehus or a referral to local services can be made.

An evaluation of the Barnehus was conducted in 2012 by NOVA (a research institute under the auspices of the Norwegian Ministry of Education and Research) and the Norwegian Police Academy. The researchers' conclusion is that the Barnehus model is a success in that:

- Children and adults are better taken care of;
- There is a greater degree of coordination and interaction between the professional partners;
- The professional partners comment that the Barnehus staff understand their role well;
- The Barnehus staff are good at their jobs;
- There is better coordination on the legal and treatment side;
- The Barnehus generates new competence in the local support services;
- The children found it a good place to tell their story and how they feel.⁴⁴

The Police expressed satisfaction with the Barnehus model. The children never have to go to Court, and if there is a need for an extended forensic interview then this will be discussed with the judge. The police feel that the children and their carers are well looked after and provided with information about the process. This allows the police to focus on the interview and collecting evidence for the investigation.⁴⁵

There has been some judicial criticism of the process where defence counsel have not been allowed to be present at the forensic interview and it has been held that a defendant should be present or be represented during this process so that questions can be put to the child or mentally impaired adult.⁴⁶

⁴³ Ibid.

⁴⁴ Eirin Baugsto; Anne-Lise Farstad; European Implementation of the Barnahus Model – Evaluation of the Norwegian Barnahus/CAC Model 2012; ISPCAN European Regional Conference, Dublin, 17 September 2013.

⁴⁵ Discussion with Inger Lise Brøste, Police Training College Oslo, October 2013.

⁴⁶ AS v Finland APP no 40156/07 European Court of Human Rights, 28 September 2010.

10. Iceland

Iceland has an inquisitorial criminal justice system where investigations are overseen by judicial officers. There are no juries. Cases are heard by a panel of 3 to 5 judges depending on the seriousness of the case. The defendants are considered innocent until proven guilty. The burden of proof lies with the prosecution.

Iceland carried out the country's first research in 1997 on the incidence of child sexual assault (CSA) in the community. The rates of child sexual abuse were much higher than it was first imagined. This resulted in a public demand for improved strategies in handling of CSA cases. A starting point for the country's response was based on article 3.1 of the United Nations Convention on the Rights of the Child:

Article 3 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

a. Barnahus

Iceland subsequently opened the Reykjavik Barnahus (Children's House) and adopted the Child Advocacy Centres (USA) as its model for its response with a multi agency collaboration comprising Child Protection Services in Reykjavik, Police, Prosecutions, University Hospital – Departments of Pediatrics and Child Psychiatry and the Association of the Directors of Local Services. The Barnahus is available to children under the age of 15 years and provides medical examinations and evaluations, joint investigative interviews, victim therapy, family counselling and support, medical examinations and evaluation and local and national networking. Apart from the forensic interviewers and therapy, all agencies come to the Barnahus to provide the services.⁴⁷ Iceland with a population of only 320 000, has one Barnahus.

Unlike other jurisdictions visited, investigative and explorative interviews (preliminary interviews) for children under 15 years of age where there has been an allegation of child sexual assault, are conducted by forensically trained interviewers, usually psychologists. The forensic interviewers (currently four but being extended to six) receive their training in forensic interviewing in the USA. They are trained in the NICHD protocol. The forensic interviewers publish peer reviewed articles and attend international conferences and training to continually upgrade their skills.⁴⁸

⁴⁷ Bragi Guobrandsson, European Implementation of the Barnahus Model – Where it is being done and is it effective? ISPCAN Conference Dublin, 17 September 2013.

⁴⁸ Discussion with Thorbjorg Sveinsdóttir, Barnahus/Children's House, Reykjavik; October 2013.

The Child Protection Service (CPS) may refer cases to the Barnahus where there is a suspicion that an offence may have been committed. If a disclosure is made the interviewer will terminate the interview and contact police. Generally however matters are referred to the Police who conduct the ground work in relation to whether there has been a disclosure or otherwise. Police will contact a judge who is in charge of the investigation for children. There had previously been issues with some judges' reluctance to use the Barnahus to conduct the court hearing preferring instead to use the remote witness room at the court house. This has generally been resolved and most hearings are now conducted at the Barnahus.

A forensic interview/ court hearing is conducted as soon as possible after disclosure. It can be a few days after disclosure but can also be some 2-3 weeks later. The policy is the interview should take place as close as possible to disclosure. Upon arrival at the Barnahus various processes commence in relation to the interview. The child's lawyer (paid for by the State) will have prepared the child and the carers for the interview and explained the processes to them. The interviewer sits with the child in a room upstairs from the room where the court sits in the Barnahus. There is a live link to the observers who include the judge, the prosecutor, the police, the CPS, the child's lawyer and the defence. The entire process is recorded for a later court hearing. There are three phases to the interview: the interviewer makes an assessment of communication styles of the child to be interviewed; checks that the child has an understanding of concepts to be used; the child is asked for a free narrative of a neutral event so that a rapport can be built and the interviewer can test the stage of development of the child. There is agreement that a long rapport building session can tire a child so they try to keep this phase as short as possible.

The forensic interviewer asks the child for a narrative in relation to the alleged offences. When the child has finished clarifying questions are asked. When the interviewer believes she has asked enough questions the child is given a break and the interviewer returns to the conference room where the court is sitting. The judge may direct that more questions be asked, and will ask the other participants if they have questions to be asked. The judge may or may not permit questions to be asked. If a leading or suggestive question has been requested the forensic interviewer will clarify if that question is to be asked. The forensic interviewer then returns to the child and concludes the questioning. There is no direct cross examination of the child and the child will not then be required for any later hearing in relation to the matter.⁴⁹

In 2010 changes were made to the law that allowed the defence to have access to the child's interview while the investigation was still under way. This was done on the basis that it can take some time to get to court and for an investigation to be completed. It emerged however that in some instances defence lawyers were providing information to accused people and the law reverted to the position that the defence could not have a copy of the interview.

⁴⁹ Ibid.

The forensic interviewer also has a role as a therapist but they do not provide therapy to any child that they have conducted a forensic interview with. The therapist will travel out to the districts to provide therapy. Children however are brought into the Barnahus for the forensic interview.

Of further interest is that children under 3 ½ years of age are not spoken to. Interviews are never conducted with children of that age. These children do come for medicals and support and therapy is offered to the child and the parents.

The prosecution service in Reykjavik believe that the current process for investigation and prosecution of child sexual assault matters is a simple, fair and effective process. They believe the forensic interview process with an expert interviewer is effective in that they are well trained and understand the law. They add that it is the duty of the prosecutor to ensure that the appropriate questions are asked of the child and that no questions should be left unasked. The specialists at the Barnahus are trusted and well respected in the community and the judges now expect that the forensic interviewers will conduct the interviews at the Barnahus. They added that children can be interviewed remotely via live link from remote areas but they believe that it is in the best interests of the child to be brought into Reykjavik so that they can receive the proper support and assistance.⁵⁰

The Police interviewed had the view that they would prefer police to conduct the interviews as police are subject to rules and regulations and have a better understanding of the law. Police receive their basic interviewing techniques at the Police College but receive further forensic interview training abroad and are entitled to choose where they receive this training.⁵¹

Not all matter proceed to charges and trial and the prosecution will only proceed with matters where there is some form of corroboration. This leads to a high conviction rate in CSA matters. At trial the matter will be heard by 3 judges. The child victim is never called to give evidence or be cross examined.

At trial, and in matters where an adult is a victim of sexual assault, cross examination can take place. The nature of the cross examination differs however to that in the adversarial system. Usually evidence is given in an open narrative, then prosecutor begins with questions about specific issues. The defence are then allowed to ask questions but the judge will stop questioning if the judge considers it is not appropriate. There is no threatening or intimidating

⁵⁰ Discussion with Hulda Elsa Björgvinsdóttir, Íkissaksóknari / Director of Public Prosecutions, Reykjavik October 2013.

⁵¹ Discussion with Kristjan Ingi Kristjansson, Detective Chief Inspector, Reykjavik Metropolitan Police.

behaviour allowed, the lawyers cannot talk down to, or try to confuse the witness nor repeat questions or raise their voice. This type of questioning would be considered contempt of court.⁵²

If a child turns 15 between the investigation and the presentation of the indictment there are rules about whether the child has to come to court. The judge has a discretion to recall the child, but this is rare.

⁵² Discussion with Hulda Elsa Björgvinsdóttir, Íkissaksóknari / Director of Public Prosecutions, Reykjavik October 2013.

11. Conclusion

It is of significant interest that jurisdictions that are members of the European Union and come under the European Commission of Justice adopt a rights based language and “best interests of the child” principles in their criminal jurisdictions and prosecutions. This was evident in the Keynote Presentations, papers and workshops presented at the European Regional Conference of the International Society for the Prevention of Child Abuse and Neglect Conference (ISPCAN) that I attended in Dublin as part of the Fellowship.

Ireland is reforming its laws so that it complies with the European Commission of Justice’s Victims Directive 2012, and Austria reformed its laws in line with the European Commission on Justice Directive in 2008. Norway has long had concerns over the rights of the child and Iceland based its reforms on Article 3.1 of the United Nations Convention on the Rights of the Child.

These jurisdictions also have a focus (with perhaps the exception of Austria) on the rights of the accused and fairness in the prosecution of any criminal matters.

It was pointed out to the author on a number of occasions in Norway and Iceland that the process of cross examination in Australia, as described, was a breach of a persons human rights as proclaimed in the Universal Declaration of Human Rights:

Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 6.

Everyone has the right to recognition everywhere as a person before the law.

It was commented that the process of manipulation by lawyers of what children and vulnerable witnesses say in cross examination is abusive and violates these rights. The process confuses the child, uses language and language structure they do not understand and employs suggestive or leading and repetitive questions by adults who are forensically trained in the cross examination/advocacy techniques. It is an unfair playing field.

Australia is a signatory to both the Declaration and the Convention on the Rights of the Child. Numerous Parliamentary Inquiries, Taskforces, Law Reform Commission Reports, both State and Federal, Research Projects, Royal Commissions etc have made recommendations so as to improve access for children and cognitively impaired people to the criminal justice system. Many improvements have been made which include the use of live

links to the courtroom, electronically recorded statements, support people, restrictions on admission of prior sexual experience, recording of evidence at trial and so on. Some recommendations have also touched on the importance of the use of an intermediary when giving evidence so that the child can understand what is happening during the court process.

This Fellowship has demonstrated the rights of the accused can be respected and guaranteed while at the same time extending to children and vulnerable people a process that allows them to understand what is happening in court, allows them to understand the questions being asked of them in a forensically safe way (not suggestive or leading) so that their responses are reliable and understandable. The Fellowship demonstrates that it is not up to the child or vulnerable adult to convince the court as to whether an offence has been committed against them. It is up to the prosecution, the defence and the judge and in some instances a jury to make that determination. A child or a vulnerable adult deserves to be treated with dignity and respect with due consideration as to their human rights during the investigation and court process and be provided with the proper support and counselling afterwards.

It should also be noted that there has been little discussion about conviction rates in relation to the process outlined. The purpose of the Fellowship was not to look at an increase in conviction rates. If anything the Fellowship demonstrates that legal rules determine whether matters are proceeded with or not.

12. Recommendations

1. That Australian criminal jurisdictions adopt “in the best interests of the child” principle of Article 3.1 of the **United Nations Convention on the Rights of the Child** in all matters that involve children as victims or witnesses or accused people.
2. That Australian criminal jurisdictions adopt a human rights based language when dealing with child and adult victims and witnesses in the courts.
3. That Australian criminal jurisdictions give consideration to the introduction of a **Registered Intermediary Scheme** modelled on the Registered Intermediary Scheme in England and Wales;
4. A Coordinator and advisor should be employed to oversee the introduction of the **Registered Intermediary Scheme**.
5. A Steering Committee should be established to oversee the introduction of the Pilot **Registered Intermediary Scheme** including oversight of the coordinator of the Scheme, establishing a requisite skills level required for Intermediaries, training of Intermediaries, judiciary, solicitors and barristers and law students, establishment of a professional body, oversight of culturally appropriate service provision to Aboriginal and Torres Strait Islander and culturally and linguistically diverse children and vulnerable adults, policy and procedure manuals, and secure communication system for the Intermediaries.
6. That any **Registered Intermediary Scheme** introduced be available to child victims and witnesses and child accused on the basis of the fact that they are children;
7. That any **Registered Intermediary Scheme** should be extended to vulnerable adults, including accused people. Vulnerability would have to be established (cognitive impairment, physical impairment, mental health condition etc).
8. Legislation should be introduced prescribing the **Registered Intermediary Scheme** and including provisions for ground rules hearing, assessment reports, qualifications and the establishment of a professional body.
9. That before the introduction of the **Registered Intermediary Scheme** a pilot should be conducted in one metropolitan, one regional and one rural area.
10. Funding for the pilot of the **Registered Intermediary Scheme** should be provided by the relevant State government.
11. An Evaluation should be conducted at the conclusion of the Pilot **Registered Intermediary Scheme**. The Evaluation should include a debriefing of children and adults who use Intermediaries throughout the duration of the Pilot. The Evaluation could also give consideration to the future funding of the **Registered Intermediary Scheme**.
12. Consideration should be given by Australian criminal jurisdictions to amending s41 of the **Uniform Evidence Act** in relation to **Improper questions** to include that the court must disallow any suggestive or leading questions asked of a child or vulnerable

adult (including vulnerable accused) on the basis that any response given by the witness could be considered forensically unsafe due to their age, cognitive or physical impairment.

13. Consideration should be given by Australian criminal jurisdictions that provisions be introduced to allow for the pre-trial recording of a child or vulnerable adult victim or witness's evidence and evidence in chief upon completion of a police investigation and the laying of charges against an accused person. The provisions should include that the child or vulnerable adult should not be required to attend as a witness at any later trial.
14. All Australian States give consideration to the establishment of **Children's Houses** based on the Child Advocacy Centre Models in Europe and the USA. A pilot Children's House should be trialled in one regional and one metropolitan centre.
15. The Australian **Children's Houses** should provide a centre where medical examinations, investigative interviews and therapy could be conducted. Children could also give evidence from via live link to the courts. The Children's House could provide local and national networking and have a community educative role.
16. The Australian **Children's Houses** should provide culturally appropriate services to Aboriginal and Torres Strait Islander children and to other culturally and linguistically diverse children.

Upon returning from the Fellowship I have conducted two information sessions on the findings of the Project. One session has been provided to the NSW ODPP Sexual Assault Review Committee. As a result of this session it has been agreed that the Committee will write to the Attorney General of NSW summarising the findings and recommendations for legislative and procedural change for how criminal matters involving children are to be dealt with. I have been asked to consider submitting my Fellowship findings to the Royal Commission on Institutional Responses to Child Sexual Abuse. I intend to submit an article to the Law Society Journal on the Fellowship and my recommendations. I have also been asked by a number of government and non government agencies involved in the investigation of child sexual and physical assault and in victim and court issues to give a number of presentations on the Fellowship in early 2014. I am also drafting a report on the Fellowship for the Director of Public Prosecutions for his information and dissemination to appropriate criminal justice agencies.

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Conference

ISPCAN European Regional Conference, Dublin, 15-18 September 2013.